In the Missouri Court of Appeals
Western District

EDDIE CLUCK,	)	
Appellant,	)	
v.	)	**WD70792**
	)	**FILED: January 11, 2011**
UNION PACIFIC RAILROAD COMPANY,	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
THE HONORABLE ANN MESLE, JUDGE

BEFORE DIVISION FOUR: LISA WHITE HARDWICK, CHIEF JUDGE, PRESIDING, GARY D. WITT, JUDGE AND JAMES VAN AMBURG, SPECIAL JUDGE

Eddie Cluck filed suit against his employer, Union Pacific Railroad Company, under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51, to recover damages for injuries he suffered when a co-worker's handgun discharged. The jury returned a verdict in favor of Union Pacific, and the circuit court entered judgment accordingly. On appeal, Cluck contends the court erred in instructing the jury, in failing to grant a directed verdict on the issue of liability, and in excluding the deposition testimony of a Union Pacific manager. Because we find instructional error, we reverse and remand for a new trial.

FACTUAL AND PROCEDURAL HISTORY

On January 13, 2004, Cluck, a locomotive engineer, and his fellow Union Pacific employees were transported to Coffeyville, Kansas, where they were to spend the night and then board a train they would crew the next day. Upon arrival at the hotel in Coffeyville, Cluck got out of the van and went to help unload the crew's luggage. He was carrying the bag of a co-worker, Larry Clark, when a handgun inside the bag discharged and a bullet struck Cluck's right knee.

In August 2004, Cluck filed a Petition against Union Pacific, seeking damages under FELA for his gunshot injuries. The petition alleged that Cluck's injuries resulted from Union Pacific's negligence in one or more of the following respects:

> (a) Defendant failed to provide plaintiff with a reasonably safe place to work in that defendant, by and through its agents and employees, allowed a hand gun to [sic] brought on the defendant's property; and to be carried by an unauthorized employee while on company business;
>
> (b) Defendant failed to provide plaintiff with a reasonably safe place to work in that defendant, by and through its agents and employees, allowed a hand gun to be loaded while on defendant's property and while on company business;
>
> (c) Defendant failed to provide plaintiff with a reasonably safe place to work in that defendant's employee failed to properly secure the hand gun;
>
> (d) Defendant failed to provide plaintiff with a reasonably safe place to work in that defendant failed [sic] warn plaintiff that a hand gun was present on the premises;

(e) Defendant failed to provide plaintiff with a reasonably safe place to work in that defendant failed to properly supervise it's [sic] employees and agents;

(f) Defendant failed to provide plaintiff with a reasonably safe place to work in that defendant knew or reasonably should have known that defendant's employee was in possession of a hand gun and failed to correct the condition.

At trial, Clark testified that he placed the handgun in his luggage a week or two before the incident because he intended to sell it to a friend.[1] He loaded the weapon in order to show his friend that it was operational. After Clark was unable to "hook up" with his friend, he forgot the handgun was still in his bag. Clark did not tell his co-workers about the handgun, and none were aware that it was in his bag on the date of the incident.

Cluck presented evidence of Union Pacific's General Code of Operating Rules. The Code prohibits employees, other than railroad police, from possessing firearms while on duty and requires that violations be reported to supervisors. The Code also requires employees to maintain safe conditions and to warn co-workers of any danger.

At the close of evidence, Cluck and Union Pacific filed motions for directed verdicts. The court denied both motions.

During the conference on jury instructions, the court heard arguments as to whether the FELA negligence claim should be submitted under MAI 24.01(A) for imputed liability or under MAI 24.01(B) for direct liability. Cluck submitted a

[1] Clark's testimony at trial was presented by video deposition.

verdict director patterned on MAI 24.01(A). Cluck argued that MAI 24.01(A) is the proper instruction when the negligence is based on the acts of the railroad's employee, for which the railroad has imputed liability under FELA.

Union Pacific argued that if the negligence claim were submitted under MAI 24.01(A), the pattern instruction would have to be modified to include the elements of *respondeat superior* that are essential to a FELA claim. The court agreed and requested Cluck to modify the instruction to address whether Clark's negligent acts were within the scope and course of his employment. Cluck drafted several instructions, but the court concluded that none properly addressed the objection raised by Union Pacific. The proposed instructions were refused.

Ultimately, over the objection of both parties, the court instructed the jury under MAI 24.01(B) by submitting the following verdict director on direct liability:

> Your verdict must be for plaintiff if you believe:
>
> First, conditions for work were not reasonably safe and defendant knew or by using ordinary care could have known of such conditions and that they were not reasonably safe, and
>
> Second, with respect to such conditions for work, defendant failed to provide reasonably safe conditions for work, and
>
> Third, defendant in any one or more respects submitted in Paragraph Second was negligent, and
>
> Fourth, such negligence resulted in whole or in part in injury to plaintiff.

The jury returned a verdict in favor of Union Pacific. Cluck appeals the judgment entered by the court on the jury's verdict.

ANALYSIS

Jury Instructions

In his first point on appeal, Cluck contends the circuit court erred in refusing to submit a verdict director based on MAI 24.01(A) for imputed liability. Cluck argues the instruction was mandatory because he presented substantial evidence that his injuries resulted from the negligent conduct of a co-employee, who was on duty and acting within the scope of his employment at the time the incident occurred.

The propriety of jury instructions is a matter of law subject to our *de novo* review. ***Closson v. Midwest Div. IRHC, LLC,* 257 S.W.3d 619, 625 (Mo.App. 2008).** Instructions "shall be given or refused by the court according to the law and the evidence in the case." **Rule 70.02(a).**[2] The trial court must instruct in compliance with the Missouri Approved Instructions (MAI) if one exists that is applicable to a particular claim. ***Closson,* 257 S.W.3d at 625.** The instructions "must be supported by substantial evidence, and we review the evidence and inferences in a light most favorable to the submission of the instruction, disregarding all contrary evidence and inferences." ***Id. (quoting Wright v. Barr,* 62 S.W.3d 509, 526 (Mo.App. 2001)** (internal quotations omitted). We will not reverse a jury verdict for instructional error, including the refusal to give an instruction, unless the error was prejudicial. ***Stancombe v. Davern,* 298 S.W.3d 1, 7 (Mo.App. 2009)**

[2] All rule citations are to the Missouri Rules of Procedure (2010) unless otherwise noted.

When FELA cases are filed in state court, they are subject to state procedural rules even though the substantive claim is governed by federal law. ***St. Louis Sw. Ry. Co. v. Dickerson,* 470 U.S. 409, 411 (1985).** "[T]he form of the instructions and the manner in which the substantive law is submitted to the jury in FELA cases are procedural issues to be governed by state law." ***Hedgecorth v. Union Pac. R.R. Co.,* 210 S.W.3d 220, 227 (Mo.App. 2006)**. Because state courts are bound by federal law when adjudicating FELA cases, the parties are entitled to instructions only if they comport with federal substantive law of FELA. ***Kauzlarich v. Atchison, Topeka, & Santa Fe Ry. Co.,* 910 S.W.2d 254, 257 (Mo.banc 1995)**.

FELA provides that "[e]very common carrier by railroad while engaging in commerce … shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce … for such injury resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." **45 U.S.C. § 51**. Courts have liberally construed this provision to mean that a railroad may be held liable if the evidence shows that "employer negligence played any part, *even the slightest,* in producing the injury or death for which damages are sought." ***Rogers v. Mo. Pac. R.R. Co.,* 352 U.S. 500, 506 (1957)(emphasis added);** *see also* ***Coffey v. Ne. Ill. Reg'l Commuter R.R. Corp. (METRA),* 479 F.3d 472, 476 (7th Cir. 2007).**

To recover damages under FELA, a plaintiff must show that: (1) he was injured while in the scope of his employment; (2) his employment was in furtherance of his employer's interstate business; (3) his employer was negligent;

and (4) the employer's negligence played some part in causing the injury for which he seeks compensation. *See* ***Green v. River Terminal Ry. Co.,*** **763 F.2.d 805, 808 (6th Cir. 1985)**. "[R]easonable foreseeability of harm is an essential ingredient of Federal Employers' Liability negligence." ***Gallick v. Baltimore & Ohio R.R. Co.,*** **372 U.S. 108, 117 (1963).**

Under FELA, the negligence of a co-employee is considered the same as the negligence of the employer. ***Mullahon v. Union Pac. R.R.,*** **64 F.3d 1358, 1362 (9th Cir. 1995).** Thus, a railroad "must answer for an employee's negligence as well as for that of an officer or agent." ***Boldt v. Pa. R.R.Co.,*** **245 U.S. 441, 445 (1918).** This vicarious or imputed liability extends to FELA employers under the traditional doctrine of *respondeat superior.* ***Sobieski v. Ispat Island, Inc.,*** **413 F.3d 628, 631 (7th Cir. 2005)**. "Well established precedent applies the common law principle that an employer may be vicariously liable for its employee's negligence … committed within the course and scope of employment – that is, committed while furthering the employer's … business." ***Id.*** **at 631-32.** Under FELA, employers are liable for the negligence of their employees only if it occurs within the scope of employment, and no liability attaches when an employee acts "entirely upon his own impulse, for his own amusement, and for no purpose of or benefit to the defendant employer." ***Copeland v. St. Louis-San Francisco Ry. Co.,*** **291 F.2d 119, 120 (10th Cir. 1961).**

This body of federal law allows injured employees to pursue FELA claims based on the direct and/or imputed liability of the railroad. Following this format, MAI 24.01 sets forth two verdict directing instructions for FELA claims alleging an

unsafe workplace. According to the Notes on Use, MAI 24.01(A) applies to claims in which there is no dispute that the railroad employer had constructive knowledge of an employee's negligent act. This "A" verdict director submits a claim on the basis of the railroad's imputed or indirect liability for the negligence of an employee. MAI 24.01(B) applies to claims where there is a dispute as to whether the railroad had constructive knowledge of a negligent condition in the workplace. This "B" verdict director requires a showing that the railroad knew or could have known of an unsafe condition and, therefore, is based on a theory of direct liability.

The allegations in Cluck's petition are broad enough to include both theories of imputed and direct liability against Union Pacific. At trial, however, Cluck only requested the circuit court to submit the case to the jury on the theory of imputed liability under MAI 24.01(A). The court refused and instead submitted the verdict director for direct liability under MAI 24.01(B). In this appeal, Cluck does not argue that the court erred in instructing the jury on direct liability, but he contends that he was also entitled to have the jury consider his elected theory of imputed liability. Thus, we need only determine whether the evidence was sufficient to require the court to submit a verdict director under MAI 24.01(A) based on constructive notice and imputed liability.

To analyze the submissibility of a claim under MAI 24.01(A), we must first consider whether there was undisputed evidence that Union Pacific had

constructive notice of Clark's conduct.[3] The evidence at trial established that Clark had a loaded handgun in his bag while he was traveling for a work-related purpose. The evidence also established that Union Pacific has a Code of Operating Rules that prohibits employees from bringing guns to work and requires them to maintain safe conditions and warn co-workers of any dangers. These facts were uncontroverted. Clark's possession of a loaded gun in his traveling crew bag clearly constituted a violation of the employer's safety rules.

In determining the submissibility of FELA claims, our courts have recognized that an employee's violation of safety rules establishes the foreseeability element as a matter of law. The "mere violation of a safety rule" charges the offending party with constructive knowledge that an unreasonably dangerous condition exists, i.e., that injury is foreseeable. ***Foltz v. Burlington N. R.R. Co.,*** **689 S.W.2d 710, 715 (Mo.App. 1985);** *see also* ***White v. St. Louis-San Francisco Ry. Co.,*** **539 S.W.2d 565, 570 (Mo.App. 1976).** "From the violation of these safety rules some injury to employees or to members of the public could reasonably have been foreseen." ***Adams v. Atchison, Topeka & Santa Fe Ry. Co,*** **280 S.W.2d 84, 92 (Mo. 1955);** *see also* ***Burrus v. Norfolk & W. Ry. Co.,*** **977 S.W.2d 39, 44 (Mo.App. 1998)** ("With respect to foreseeability, it has been held [that] injury to employees or to members of the public could reasonably be foreseen from the violation of safety rules.")

[3] The title of MAI 24.01(A) is "Verdict Directing – F.E.L.A. – Constructive Knowledge Not In Issue – Failure to Provide Safe Place to Work." The Notes on Use, No. 2, further provides: "The specifications of negligence set forth in this instruction concern conditions of which the defendant had constructive knowledge. See MAI 24.01(B) for cases in which constructive knowledge is disputed."

In this case, Clark, by violating the prohibition against carrying firearms in the workplace, was chargeable with the knowledge that he was producing an unreasonably unsafe condition. *See* ***White*****, 539 S.W.2d at 570**. As noted above, under FELA, Clark's negligence is treated as the negligence of Union Pacific, provided that Clark was acting within the scope of his employment. *See* ***Copeland,*** **291 F.2d at 120.** Thus, Cluck only had the burden to prove that Clark (and not necessarily Union Pacific) had knowledge of the unreasonably unsafe condition, *see* ***Id.***; and, by virtue of violating a safety rule, Clark possessed such knowledge as a matter of law. *See* ***White*****, 539 S.W.2d at 570**; *see also* ***Burrus,*** **977 S.W.2d at 44** (holding that a railroad company was liable when its engineer violated safety rules by falling asleep). For this reason, MAI 24.01A—which took from the jury the question of knowledge of the unreasonably dangerous condition—should have been given.

Accordingly, the undisputed evidence of Clark's safety rule violation was sufficient to remove the issues of knowledge of an unreasonably dangerous condition from the jury. Thus, Cluck met the threshold requirement for submission of his claim under MAI 24.01(A).

We also find that Cluck presented sufficient evidence to support the factual elements of the verdict director in MAI 24.01(A). For FELA claims based on the negligence of a co-employee, the form instruction provides:

> Your verdict must be for plaintiff if you believe:
>
> First, defendant's employee *(characterize the negligent conduct, i.e., failed to keep a careful lookout, etc.)* and,

Second, defendant's employee was thereby negligent, and

Third, such negligence resulted in whole or in part in injury to plaintiff.

MAI 24.01(A) (as modified consistent with Notes on Use 1, 2, & 3). With regard to paragraphs First and Second, Cluck presented evidence of Clark's negligence in carrying a loaded gun in his luggage while traveling for work-related purposes. For paragraph Third, Cluck presented evidence that he was injured when the handgun discharged.

Union Pacific does not dispute that this evidence was sufficient to satisfy the prescribed language of MAI 24.01(A); however, Union Pacific argues that the form verdict director improperly submits the question of the railroad's negligence because it does not include any reference to the fundamental principles *of respondeat superior* upon which a FELA co-employee negligence claim is based. The pattern instruction presupposes the railroad's legal responsibility for the employee's negligence without any consideration of whether the employee was acting within the scope and course of his employment at the time the negligent act occurred. Although Union Pacific disputed that Clark was performing a task in furtherance of his work by bringing a loaded gun to work, the form verdict director would not allow the jury to consider this disputed factual issue.

"[A] party is entitled to an instruction upon any theory supported by the evidence." ***Vandergriff v. Mo. Pac. R.R.,* 769 S.W.2d 99, 104 (Mo. banc 1989)** (quoting ***Hopkins v. Goose Creek Land Co., Inc*., 673 S.W.2d 465, 467 (Mo.App. 1984))**. We conclude that Cluck was entitled to submit his case under MAI

24.01(A) because constructive notice was not in dispute and he presented evidence to support his allegation of co-employee negligence. "Even in a situation where the evidence could support two theories of recovery to which two separate MAI instructions would be applicable, the plaintiff has the right to elect the theory on which to submit [his] case and to select the appropriate MAI verdict director." ***Nagaragadde v. Pandurangi*, 216 S.W.3d 241, 245 (Mo.App.2007)**. Cluck exercised his right of election by requesting the court to instruct the jury only on the theory of imputed liability.

Notwithstanding this right of election, we also agree with Union Pacific that the pattern instruction in MAI 24.01(A) is insufficient for purposes of submitting the co-employee negligence claim in this case. The mere negligence of a railroad employee does not establish the employer's vicarious liability for resulting injuries. ***Lavender v. Ill. Cent. R.R. Co.,* 219 S.W.2d 353, 357 (Mo. 1949).** Under FELA, "not only must *the injured employee* be acting within the scope of employment at the time of injury, but *the employee whose conduct causes the injury* must also be acting within the scope of his employment." ***Gallose v. Long Island R.R. Co.,* 878 F.2d 80, 83 (2d Cir. 1989)(citation omitted).** *See also,* ***Sobieski,* 413 F.3d 628; *Copeland,* 291 F.2d at 120; *McClure v. U.S. Lines Co.,* 368 F.2d 197, 199 (4th Cir. 1966)** (a Jones Act case extending FELA to seamen and broadly applying FELA case law). In cases such as this where there is no allegation of the railroad's direct negligence and recovery is sought on the sole theory of *respondeat superior,* the factfinder should be allowed to consider whether the employee's negligent act

was committed in furtherance of the employer's business or "entirely upon his own impulse, for his own amusement, and for no purpose or benefit to the defendant employer." ***Copeland,* 291 F.2d at 120.**

The question of whether an employee acted within the scope of his employment is generally a factual issue to be determined by the jury. ***Gallose,* 878 F.2d at 84.** *See also* ***Daugherty v. Allee's Sport Bar & Grill,* 260 S.W.3d 869, 872 (Mo.App. 2008).** This is especially true in FELA negligence actions where "the role of the jury is significantly greater … than in common law negligence actions," and where the jury's right to pass upon the question of the employer's liability "must be most liberally viewed." ***Johannessen v. Gulf Trading & Transp. Co.,* 633 F.2d 653, 656 (2nd Cir. 1980)**. The scope of employment issue should only be taken from the jury when it is clear that reasonable people could not reach a differing conclusion. ***Baker v. Tex. & Pac. Ry. Co.,* 359 U.S. 227, 228-29 (1959)**.

Where, as here, the scope and course of employment is a disputed issue of fact, the verdict director must require the jury to decide whether Clark's negligent conduct was committed while furthering the business of Union Pacific. *See* ***Burrell ex rel. Schatz v. O'Reilly Auto., Inc.,* 175 S.W.3d 642, 649-50 (Mo.App. 2005).** Thus, to properly instruct the jury on Cluck's claim of co-employee negligence under MAI 24.01(A), the form instruction must be modified in paragraph Second to

read: defendant's employee was thereby negligent *while acting in the scope of his employment*.[4]

Cluck presented substantial evidence to support his FELA claim based on imputed liability and requested the circuit court to submit that claim to the jury. After Union Pacific raised objections to the form of MAI 24.01(A) at trial, Cluck proffered modified verdict directors that referenced principles of *respondeat superior*. The circuit court rejected those draft instructions as inaccurately stating the law and opted instead to submit the case only on the theory of direct liability under MAI 24.01(B). The court erred in failing to instruct the jury on Cluck's elected theory of liability. "Under Civil Rule 70.02 it is the judge[']s non-delegable duty, and not the attorney[']s to instruct the jury as to the law." ***Meyer v. Clark Oil Co.,* 686 S.W.2d 836, 840 (Mo.App. 1984)**. Despite Cluck's failure to draft a proper instruction, the circuit court had an obligation to submit a verdict director predicated on the theory of imputed liability under FELA. Moreover, the court's refusal to submit such instruction cannot be viewed as harmless error because Cluck was entitled to have the jury consider his chosen theory of liability. ***Adams v. Badgett,* 114 S.W.3d 432, 436 (Mo.App. 2003).** The instructional error was prejudicial, and therefore, Point I is granted.

We reverse and remand the cause for a new trial on Cluck's claim of imputed liability. However, our reversal does not affect the jury verdict and judgment in

[4] The term "scope of employment" will need to be defined as provided in the appropriate MAI Instruction.

favor of Union Pacific on the alternative theory of direct liability, which has not been challenged on appeal.

Directed Verdict

In Point II, Cluck contends the circuit court erred in denying his motion for a partial directed verdict on the claim of co-employee negligence because there were no genuine issues of material fact with regard to imputed liability. Essentially, Cluck argues that he presented undisputed evidence on all of the factual elements for liability under MAI 24.01(A) and, thus, the jury only should have been allowed to determine the damages on the claim of imputed liability.

As discussed in Point I, we agree Cluck presented uncontroverted evidence that Union Pacific had constructive notice of Clark's negligence in bringing a loaded handgun to work by virtue of its policy prohibiting such conduct. However, to prevail on his FELA claim, Cluck was also required to prove that Clark was acting within the scope and course of his employment at the time the handgun discharged and caused injury. This factual issue was disputed by Union Pacific at trial. Union Pacific maintained that the act of bringing a loaded gun to work was beyond the scope of Clark's employment and in no way furthered the railroad's business. A similar defense was affirmed in ***Lavender,* 219 S.W.2d at 357,** where the Supreme Court held that the railroad was not responsible for the death of an employee who was accidentally shot during "horseplay" by co-employees, because such conduct was outside the scope of employment. The Court explained: "to hold the master

liable the act must always have been done in furtherance of the master's business." ***Id.***

Cluck was not entitled to a directed verdict on his claim of imputed liability because there was a genuine factual issue as to whether his injury resulted from a negligent act that occurred within the scope of Clark's employment.[5] As explained in Point I, the imputed liability claim was properly submissible to the jury under a modified MAI 24.01(A) instruction. Accordingly, the circuit court did not err in denying Cluck's motion for a partial directed verdict. Point II is denied.

CONCLUSION

The judgment is reversed, and the cause is remanded for a new trial on the claim of imputed liability. In light of our disposition in this regard, we need not address Cluck's additional points on appeal regarding evidentiary and instructional errors.[6]

LISA WHITE HARDWICK, CHIEF JUDGE

ALL CONCUR.

[5] Union Pacific does not argue on appeal that the evidence establishes its right to judgment as a matter of law on the scope of employment issue.

[6] In Point III, Cluck argues the circuit court erred in refusing to instruct the jury pursuant to MAI 34.05 regarding the non-consideration of collateral source payments. In Point IV, Cluck argues the circuit court erred in refusing to admit the deposition testimony of a Union Pacific management employee.