IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

TINA M. WILCOX, individually and as Personal Representative of the heirs of Michael Wilcox, Deceased, *Plaintiff/Appellee*,

v.

BNSF RAILWAY COMPANY, a corporation, *Defendant/Appellant*.

No. 1 CA-CV 15-0740
FILED 9-28-2017

Appeal from the Superior Court in Maricopa County
No. CV2011-000477
The Honorable Randall H. Warner, Judge

AFFIRMED

COUNSEL

Mandel Young, PLC, Phoenix
By Taylor C. Young

St. John & Romero, PLLC, Mesa
By Jason J. Romero, Don A. St. John

Hildebrand McLeod & Nelson, LLP, Oakland, CA
By Anthony S. Petru, Kristoffer S. Mayfield
Co-Counsel for Plaintiff/Appellee

Thorpe Shwer, PC, Phoenix
By William L. Thorpe, Bradley Shwer, Kristin Paiva
Counsel for Defendant/Appellant

MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the decision of the court, in which Judge Kent E. Cattani and Judge Donn Kessler (retired) joined.

S W A N N, Judge:

¶1 BNSF Railway Company appeals from a jury verdict awarding Tina Wilcox ("Plaintiff") almost $3 million in damages for her husband's ("Wilcox['s]") death after he was struck by a train. We affirm the verdict and the resulting judgment and hold that railroad employees may pursue a Federal Employees Liability Act ("FELA") negligence claim against railroads for violation of the walkway requirements under A.A.C. R14-5-110.

¶2 We hold that R14-5-110, which requires railroads to provide walkways for employees engaged in "trackside duties," is not preempted by the Federal Railroad Safety Act ("FRSA"), because no federal regulation "substantially subsumes" walkways adjacent to railroad tracks. We further hold that when a state regulation is not preempted by FRSA, employees may maintain a negligence or wrongful death claim under FELA based on a violation of that regulation. When the federal government has determined that a safety concern is best regulated by the states, state regulations on that issue are "safety statutes" for purposes of FELA.

¶3 The determination of whether an activity is a "trackside duty" is a question of law to be resolved by the court, and that untying a train as part of a "dog catch" is a trackside duty under R14-5-110. The superior court erred by submitting the issue to the jury, but because the jury found Wilcox was engaged in a trackside duty, we affirm the verdict.

FACTS AND PROCEDURAL HISTORY

¶4 On February 7, 2009, BNSF employees Lynch and Ben were driving a train from Belen, New Mexico, to Winslow, Arizona. By the time they reached Gallup, New Mexico, Ben was concerned they did not have enough time to reach Winslow before their federally mandated 12-work-hour limit. *See* 49 C.F.R. § 228.19(b)(1). He tried to "put [the] idea in the dispatcher's mind" to swap crews in Gallup. The dispatcher did not respond to the request, and they continued toward Winslow after a three-

hour stop in Gallup. At 8:50 p.m., with about 80 minutes of work-time left, they arrived in Holbrook, Arizona, and were ordered to tie the train down near the old Budweiser plant. Train crews can be swapped without tying down the train, but the train must be tied down if the original crew leaves before the relief crew arrives. Only a small percentage of crew swaps involve tying down a train.

¶5 The Budweiser plant is south of Holbrook, and the area has two adjacent, parallel mainline tracks less than nine feet apart: "Main 1" to the north, which usually handles eastbound trains, and "Main 2" to the south, which usually handles westbound trains. There are three "yard tracks" south of Main 2. If trains are on both mainlines, there is less than three feet of space between them. There is a knee-high drop-off to the south of Main 2 where the ballast (engineering material used to support the track, and, in some cases, provide a walking surface) slopes down, and a dirt road north of Main 1. Approximately 80 to 90 trains pass through the area per day.

¶6 With the train stopped on Main 2, Lynch tied up the hand brakes on several of the train cars, and they left the area via taxi. BNSF employees DeSpain and Wilcox were called around 7:15 p.m. and ordered to report to Winslow by 8:40 p.m. After arriving, they were assigned to "dog catch" the train in Holbrook. A "dog catch" happens when a crew hits the federally-mandated 12-hour limit, and a replacement crew is taxied to the train to relieve them. A "swap" is when two crews switch trains. DeSpain and Wilcox were picked up in Winslow and driven to Holbrook, arriving just before 9:30 p.m.

¶7 To untie the train, Wilcox had to walk about 500 feet down the track and unlock the hand brakes on several of the cars, possibly alternating between sides of the train.[1] It takes 10 to 15 minutes to untie a train. While Wilcox was untying the brakes, a second train traveling on Main 1 struck him.[2] The crew of the oncoming train could not see Wilcox until just before impact. Wilcox died of his injuries.

---

[1] Multiple BNSF employees testified that it was easier to untie the brakes while walking between Main 1 and Main 2 because it was flatter and easier to reach the brakes, and because the lights from Holbrook make it easier to see. But they also acknowledged it is more dangerous because of the risk of oncoming trains.

[2] Radio communications show Wilcox was warned of the oncoming train and acknowledged the warnings.

¶8 Plaintiff sued BNSF for negligence. After a jury trial, Plaintiff was awarded just under $3 million in damages. In response to special interrogatories, the jury found that Wilcox was 20% at fault for the accident and that he was engaged in "trackside duties" when he was killed. The superior court entered a judgment for the full amount under 45 U.S.C. § 53, without reducing the award under federal comparative fault principles. BNSF appeals.

STANDARDS OF REVIEW

¶9 BNSF challenges the superior court's denial of its pretrial motions for summary judgment, the denial of its motion at trial for judgment as a matter of law, the partial grant of Plaintiff's motion at trial for judgment as a matter of law, and the denial of its motion for a mistrial.

¶10 Generally, the denial of a motion for summary judgment is not reviewable on appeal after a trial on the merits, but a party may preserve a summary judgment issue by reasserting the argument in a motion for judgment as a matter of law at trial, as BNSF did here. *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 539, ¶ 19 (App. 2004). We review summary judgment rulings, rulings on motions for judgment as a matter of law, and questions of statutory construction de novo. *See Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, 55, ¶ 8 (App. 2007); *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa County*, 222 Ariz. 515, 524, ¶ 14 (App. 2009); *Higginbottom v. State*, 203 Ariz. 139, 142, ¶ 9 (App. 2002). We review rulings on motions for mistrial for abuse of discretion. *See Gray v. Gardiner*, 92 Ariz. 208, 210 (1962).

DISCUSSION

¶11 Plaintiff presented evidence at trial to support several theories of liability: (1) BNSF was negligent in not granting DeSpain and Wilcox "track and time" — holding all trains in all directions along Main 1 and Main 2 — while they untied the train; (2) BNSF was negligent in ordering the train tied down in Holbrook when (a) Ben and Lynch could have been held aboard until DeSpain and Wilcox arrived or (b) DeSpain and Wilcox could have been called to work earlier to meet the train when it arrived (collectively, "the negligent dispatching claims"); (3) BNSF employees failed to adequately warn Wilcox of the oncoming train;[3] (4) BNSF was negligent *per se* by violating R14-5-110(A)(1); and (5) BNSF was negligent by not providing Wilcox with reflective clothing to wear

[3] BNSF does not address this theory on appeal.

while untying the train. The superior court granted BNSF's motion for judgment as a matter of law under Ariz. R. Civ. P. ("Rule") 50 on the reflective clothing theory and partially granted Plaintiff's Rule 50 motion by ruling as a matter of law that there was no walkway adjacent to Main 2.

¶12 BNSF argues that the superior court improperly permitted Plaintiff to present evidence of the negligent dispatching claims because there was no expert testimony on the standard of care for train dispatchers, which BNSF argues is a specialized trade or profession. BNSF also argues that the superior court erred by denying its motion for summary judgment, in which it argued that A.A.C. R14-5-110 may not be considered as a basis for negligence *per se*, because a tort claim based on that regulation is precluded or preempted by federal law. We need not address expert testimony on the negligent dispatching claims, because the negligence *per se* theory supports the verdict on those claims. And the controlling federal statutes prohibited BNSF from raising comparative fault as a defense.

¶13 To evaluate negligence *per se* and the availability of comparative fault, we must examine the relationship between a state regulation, R14-5-110, and two federal statutes, FELA and FRSA. "FELA provides the exclusive remedy for a railroad employee injured as a result of his employer's negligence," *Lane v. R.A. Sims, Jr., Inc.*, 241 F.3d 439, 442 (5th Cir. 2001), "imposes on railroads a general duty to provide a safe workplace," *McGinn v. Burlington N.R.R. Co.*, 102 F.3d 295, 300 (7th Cir. 1996), and creates (though using the term "contributory negligence") a pure comparative fault regime for negligence and wrongful death claims, 45 U.S.C. §§ 51, 53. But FELA also provides that if a railroad violates "[a] regulation, standard, or requirement," 45 U.S.C. § 54a, "enacted for the safety of employees [and if the violation] contributed to the injury or death of such employee," the railroad may not raise comparative fault or assumption of risk defenses, 45 U.S.C. §§ 53, 54.

¶14 "Congress enacted [FRSA] 'to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.'" *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 347 (2000) (quoting 49 U.S.C. § 20101). FRSA seeks national uniformity "to the extent practicable" in "[l]aws, regulations, and orders related to railroad safety." 49 U.S.C. § 20106(a)(1). FRSA specifies numerous requirements to ensure railroad safety, and it authorizes the federal Department of Transportation to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103; *see generally, e.g.*, 49 C.F.R. §§ 213.1–213.369. A.A.C. R14-5-110(A)(1) provides that "[w]alkways shall be provided adjacent to

tracks in all areas where railroad or industrial employees are required to perform trackside duties."[4]

¶15 BNSF contends that (1) FRSA preempts R14-5-110 or alternatively precludes a FELA claim based on R14-5-110, (2) R14-5-110 is not a safety statute under FELA, (3) untying a train is not a "trackside duty," and (4) there was a compliant walkway adjacent to Main 2. If any of these arguments have merit, then BNSF is entitled to a 20% reduction in Plaintiff's damages by virtue of the jury's comparative fault finding. Otherwise, R14-5-110 serves as a basis for a negligence *per se* claim and defeats the defense of comparative fault.

I. FRSA DOES NOT PREEMPT R14-5-110 OR PRECLUDE A FELA CLAIM BASED ON IT.

A. R14-5-110 is Not Facially Preempted by FRSA.

¶16 Under FRSA, "[a] State may adopt or continue in force a law, regulation, or order related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2).[5] By using the term "covering," Congress did not intend federal regulations that

---

[4] The walkway requirement does not apply "during periods of damage or obstruction due to heavy rain or snow, derailments, rock and earth slides and other abnormal periods. Walkways shall be brought back into compliance with this Section within 30 days after the damage or obstruction occurred." A.A.C. R14-5-110(A)(6)(c).

[5] The parties dispute whether the Supreme Court's holding in *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014), impliedly overrules federal circuit courts' holdings that FRSA precludes FELA claims when FRSA would preempt state claims on the same theory (*see, e.g.*, *Nickels v. Grand Trunk W.R.R., Inc.*, 560 F.3d 426, 430 (6th Cir. 2009); *Lane*, 241 F.3d at 443; *Waymire v. Norfolk & W. Ry. Co.*, 218 F.3d 773, 776 (7th Cir. 2000)). In *POM Wonderful*, the Supreme Court held that a private company's right under the Lanham Act, 15 U.S.C. § 1125, to sue a competitor for deceptive and misleading labeling was not precluded by the Federal Food, Drug, and Cosmetic Act's prohibition of false or misleading labels, because the statutes perform distinct functions and complement each other. 134 S. Ct. at 2233, 2238–41. We need not decide the impact of *POM Wonderful* on FELA/FRSA preclusion in this case. Because we find that R14-5-110 is not preempted by FRSA, the FELA claim is not precluded even under the reasoning of *Nickels*, *Lane*, and *Waymire*.

merely "touch upon" or "relate to" a subject to preempt state laws. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Preemption occurs only where "federal regulations substantially subsume the subject matter of the relevant state law." *Id.*

¶17 There are no federal regulations concerning walkways. And we see nothing in FRSA or its related regulations that "substantially subsumes" the topic, though walkway regulations may "touch upon" subjects that are federally regulated. Indeed, the Federal Railroad Administration expressly declined to promulgate walkway regulations on bridges, trestles, and other structures, opting to allow the states to do so based on local safety concerns. Walkways on Railroad Bridges, Trestles, and Similar Structures, 42 Fed. Reg. 22184 (May 2, 1977). It reasoned that "if an employee safety problem does exist because of the lack of walkways in a particular area or on a particular structure, regulation by a State agency that is in a better position to assess the local need is the more appropriate response." *Id.* at 22185.

¶18 We are not persuaded by the reasoning of the cases that hold that walkway regulations are facially preempted — all of which were decided before the Supreme Court interpreted the preemption clause to provide greater deference to state regulations. *See Easterwood*, 507 U.S. at 664. In *Norfolk & W. Railway Co. v. Public Utilities Commission of Ohio*, 926 F.2d 567 (6th Cir. 1991), the Sixth Circuit reasoned that by declining the request to issue walkway regulations, the Federal Railroad Administration impliedly determined that such regulations were unnecessary and negatively preempted state walkway regulations. *Id.* at 570 (citing *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 178 (1978)). Similarly, the Indiana Court of Appeals held that walkway regulations could only be enacted to address "a distinctively local safety hazard" and that walkways were preempted as a general matter because "[t]he Federal Railroad Administration has adopted numerous regulations concerning track roadbed, geometry and structure." *Black v. Seaboard Sys. R.R.*, 487 N.E.2d 468, 469 (Ind. Ct. App. 1986).

¶19 These holdings are contrary to the express language of FRSA's preemption clause, which only applies if the federal government "*prescribes* a regulation or *issues* an order." 49 U.S.C. § 20106(a)(2) (emphases added). Because the federal government has neither prescribed regulations nor issued orders concerning walkways, we cannot conclude that Arizona lacked the authority to promulgate its own regulations. Had the federal government intended to preempt all state regulations concerning walkways, it would have forbidden them, not merely declined to require them.

¶20 Because the Federal Railroad Administration *invited* states to promulgate regulations concerning walkways on federally regulated railroad bridges, and the Supreme Court has held that FRSA's preemption clause requires a topic to be "substantially subsumed," we agree with those courts that have held that walkway regulations are not facially preempted. *See, e.g.*, *Norfolk S. Ry. Co. v. Box*, 556 F.3d 571, 573–74 (7th Cir. 2009); *S. Pac. Transp. Co. v. Pub. Utils. Comm'n of State of Cal.*, 647 F. Supp. 1220, 1224–25 (N.D. Cal. 1986) (finding that a state walkway regulation that required ballast to be extended to provide a walkway was not preempted because Congress intended the states to fill "gaps" in federal regulations), *aff'd*, 820 F.2d 1111 (9th Cir. 1987) (per curiam); *CSX Transp., Inc. v. Miller*, 858 A.2d 1025, 1051–53 (Md. Ct. Spec. App. 2004); *Elston v. Union Pac. R.R. Co.*, 74 P.3d 478, 487–88 (Colo. App. 2003); *cf. Mo. Pac. R.R. Co. v. R.R. Comm'n of Texas*, 948 F.2d 179, 185 (5th Cir. 1991) [hereinafter "*MoPac IV*"] (holding that walkway regulations are not necessarily preempted so long as they do not interfere with federal regulations).

B. R14-5-110 is Not Preempted Under the Facts of This Case.

¶21 Relying on *Nickels*, 560 F.3d 426; *Brenner v. Consolidated Rail Corp.*, 806 F. Supp. 2d 786 (E.D. Pa. 2011); *Norris v. Central of Georgia R.R. Co.*, 635 S.E.2d 179 (Ga. Ct. App. 2006); and three opinions in the Fifth Circuit: *MoPac IV*, 948 F.2d 179; *Missouri Pacific R.R. Co. v. R.R. Commission of Texas*, 823 F. Supp. 1360 (W.D. Tex. 1990) [hereinafter "*MoPac III*"]; and *Missouri. Pacific R.R. Co. v. R.R. Commission of Texas*, 833 F.2d 570 (5th Cir. 1987) [hereinafter "*MoPac II*"], BNSF argues that R14-5-110 is preempted as it applies to this section of track because requiring a walkway next to the track "attack[s] the composition and configuration of ballast supporting track structure, . . . a subject matter covered by federal regulations." It contends that the state cannot require a walkway along a mainline track, because federal ballast regulations substantially subsume the topic. We disagree.

¶22 The federal ballast regulation provides that:

> Unless it is otherwise structurally supported, all track shall be supported by material which will —
>
> (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
>
> (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad

> rolling equipment and thermal stress exerted by the rails;
>
> (c) Provide adequate drainage for the track; and
>
> (d) Maintain proper track crosslevel, surface, and alinement.

49 C.F.R. § 213.103. "Even a cursory glance at the ballast regulation reveals that it is directed at promoting a safe track structure for trains; it does not speak to a railroad's duty to provide safe *walkways* for employees alongside its tracks." *Shiple v. CSX Transp., Inc.*, 75 N.E.3d 1282, 1290, ¶ 35 (Ohio Ct. App. 2017); *see also Elston*, 74 P.3d at 488 ("These standards are directed at promoting a safe roadbed for trains, but offer no indication whether a railroad has a duty to provide safe walkways for employees alongside its tracks.").

¶23 The *Nickels* and *Norris* courts held that state law tort claims based on ballast rock size were preempted when workers alleged they suffered injuries because a railroad used large mainline ballast in areas where smaller yard ballast would have sufficed. *Nickels*, 560 F.3d at 430–33; *Norris*, 635 S.E.2d at 181–84. The *Nickels* court reasoned that "[r]ather than prescribing ballast sizes for certain types or classes of track, the regulation leaves the matter to the railroads' discretion so long as the ballast performs the enumerated support functions. In this way, the regulation substantially subsumes the issue of ballast size." 560 F.3d at 431. Though the conditions were track-specific, by "narrow[ing] the universe of material the railroad may use in a given situation," *id.*, the regulation preempted a tort claim based on ballast size, *id.* at 431–33. The *Brenner* court applied *Nickels*' analysis to hold that negligence claims for lack of an even walking surface predicated on "the nature and size of ballast used for track stability, support, and drainage — including mainline, secondary, and yard track — . . . are precluded." 806 F. Supp. 2d at 795–96. The *Norris* court reasoned that even though the ballast adjacent to the track was not part of the support for the track, federal ballast regulations still preempted a claim for ballast size. 635 S.E.2d at 183–84.

¶24 BNSF reads *Nickels*, *Norris*, and *Brenner* too broadly. Arizona's walkway regulations do not always require a specific type of ballast that would impinge on the existing federal standards. The federal regulation only requires that the ballast material be sufficient to provide drainage and structural support of the track. *See* 49 C.F.R. § 213.103. The regulation grants railroads discretion in selecting ballast material. But we

see nothing that prevents states from imposing walkway regulations. Federal ballast regulations may "touch upon" walkway regulations, but they do not substantially subsume them.

¶25 Also, R14-5-110 does not regulate ballast size in this case. R14-5-110 provides that:

> 2. Walkways shall be:
>
> a. A uniform regular surface with a gradual slope not to exceed 1 inch rise in 8 inches;
>
> b. Kept clean and free of weeds, debris and other materials or equipment that might tend to interfere with the footing of railroad or industrial employees performing trackside duties; and
>
> c. Constructed and maintained to ensure proper drainage and prevent pooling of water, oil, or other liquids.
>
> 3. *In areas where heavy foot traffic exists, such as train yards and manually operated switches*, the uniform surface material used shall be no larger than 3/8 inch fines.

(Emphasis added.) Neither party contends that Holbrook is an area of "heavy foot traffic," and R14-5-110 therefore did not purport to regulate the material used to construct the walkways.

¶26 We similarly do not find the reasoning of *MoPac II*, *III*, and *IV* convincing. There, the district court had ruled that the walkway regulations were preempted because the Federal Railway Administration's decision not to promulgate walkway regulations was an affirmative determination that no such regulations were required and intended to preempt state walkway regulations. *See Mo. Pac. R.R. Co. v. R.R. Comm'n of Texas*, 653 F. Supp. 617, 624–26 (W.D. Tex. 1987) [hereinafter "*MoPac I*"]. The Fifth Circuit held that focusing exclusively on the lack of a federal walkway regulation was too "simplistic" an analysis. *MoPac II*, 833 F.2d at 574. On remand, the district court found that "through the practical involvement of the [Federal Railroad Administration] in the inspection and maintenance of the area adjacent to the roadbed, the [Federal Railroad Administration] has acted to completely occupy the field of railway safety specifically related to the roadbed, track structure, and walkways." *MoPac III*, 823 F. Supp. at 1367. On appeal, the Fifth Circuit held that simply by requiring railroads to "strengthen existing roadbeds to accommodate the

walkways," the regulations were preempted. *MoPac IV*, 948 F.2d at 181–82, 184.

¶27 On this record, there is nothing to suggest that the walkway regulation is incompatible with the ballast regulation. States' regulatory authority is preserved until the Department of Transportation "prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2). Without R14-5-110, BNSF would be free to self-impose stricter standards than the federal regulations, including by installing walkways. *See* 49 C.F.R. § 213.1(a). As the Seventh Circuit observed, "[r]ailroads are free to install [walkways], or not, as they see fit. And if railroads may choose whether to have walkways, how then could it be said that there is a federal regulation that forbids states from acting?" *Box*, 556 F.3d at 573. Indeed, BNSF acknowledged that the ballast regulation is not incompatible with the installation of walkways. Its own "walking on ballast" safety video asks employees to alert management if there is an area that should but does not have a walkway. BNSF's director of engineering safety testified that had he known crew swaps occurred at Holbrook, he would have had walkways installed there. Therefore, even if we assume the Fifth Circuit's factual findings on the Texas regulation applied equally to Arizona's regulation, R14-5-110 is still not preempted, because we conclude the Fifth Circuit improperly dismissed the "simplistic" analysis Congress intended.

¶28 We acknowledge that the state cannot, as a stand-alone requirement, impose a stricter standard for ballast than the federal regulation. *See Easterwood*, 507 U.S. at 661, 674–75 (holding that a negligence claim based on state tort law, which alleged that a train was going faster than was reasonable in the circumstances, was preempted based on compliance with federal speed regulations). But a state regulation that touches upon or concerns a related federal regulation or order may impose a stricter standard so long as the topic of the state regulation is not substantially subsumed by the federal regulation or order. *See id.* at 664. Because R14-5-110 does not require a railroad to construct a track in a manner incompatible with or contrary to a federal regulation or order, we agree with those courts that have held that walkway regulations are not preempted by FRSA ballast regulations and therefore are not preempted along this or any other stretch of track. *See, e.g.*, *Box*, 556 F.3d at 574; *Pub. Utilities Comm'n of State of Cal.*, 647 F. Supp. at 1224–25, *aff'd*, 820 F.2d 1111 (9th Cir. 1987) (per curiam); *Shiple*, 75 N.E.3d at 1290, ¶ 35; *Pantoja v. BNSF Ry. Co.*, 376 P.3d 95 (Kan. Ct. App. 2016); *Elston*, 74 P.3d at 488; *Miller*, 858 A.2d at 1051–53; *CSX Transp., Inc. v. Pitts*, 38 A.3d 445, 460 (Md. 2012), *aff'd*, 61 A.3d 767 (Md. Ct. Spec. App. 2013).

¶29 Finally, even if R14-5-110 was preempted along this stretch of track, BNSF violated the regulation by forcing a crew stop at this location. The regulation does not require BNSF to construct a walkway in Holbrook. It only directs that if there is no walkway, BNSF should not require railroad employees to engage in "trackside duties" there. *See* A.A.C. R14-5-110(A)(1). The undisputed testimony at trial is that if BNSF had held Lynch and Ben on the train until Wilcox and DeSpain arrived, the train would not have needed to be tied down and doing so would not have violated federal work-hour limitations, even if Lynch and Ben would have exceeded their hours of service during the wait.

¶30 BNSF argues that this interpretation of R14-5-110 preventing trackside duties without a walkway goes to Plaintiff's "negligent dispatching" claims and that expert testimony is required to prove the standard of care for train dispatchers. We disagree. "Expert testimony is unnecessary when the disputed subject is something that persons unskilled in the relevant area are capable of understanding and are therefore able to decide relevant fact questions without the opinions of experts." *Rudolph v. Ariz. B.A.S.S. Fed'n*, 182 Ariz. 622, 626 (App. 1995). No expert testimony is required to establish the standard of care in this case, because R14-5-110 expressly prescribes it. Plaintiff need only prove BNSF required Wilcox to perform "trackside duties," a regulatory interpretation question, along a stretch of track that lacked walkways, a factual question that is not materially in dispute here and is within the province of a jury's competence. *See infra* ¶¶ 35–40.

II. R14-5-110 IS ACTIONABLE UNDER FELA.

¶31 BNSF contends that even if R14-5-110 is not preempted, it is not a state safety statute under FELA. We disagree. The Supreme Court has explained that "FELA is a broad remedial statute, and ha[s] adopted a 'standard of liberal construction in order to accomplish [Congress'] objects.'" *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987) (citation omitted). As first enacted, FELA incorporated "any statute," which the Supreme Court then interpreted to mean any *federal* statute. *Seaboard Air Line Ry. v. Horton*, 233 U.S. 492, 503 (1914). FELA was amended in 1970. *See* Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971. As amended, it provides that comparative fault may not be raised as a defense if the railroad violates "[a] regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation . . . *or by a State agency that is participating in investigative and surveillance activities*," 45 U.S.C. §§ 53, 54a (emphasis added), that was "enacted for the *safety of employees* [and whose violation] contributed to the injury or death of [an] employee,"

45 U.S.C. § 53 (emphasis added). Arizona participates in investigative and surveillance activities.

¶32 Relying on *Fletcher v. Chicago Rail Link, L.L.C.*, 568 F.3d 638 (7th Cir. 2009), BNSF argues that FELA only incorporates "state agency regulations that further federal safety standards [and that r]egulations that further *only* state safety standards are not incorporated." (Emphasis added.) In *Fletcher*, the Seventh Circuit held that an Illinois regulation requiring a railroad to maintain its vehicle fleet in a safe condition was not a safety statute under FELA, because "regulations, requirements, etc., are deemed federal safety regulations only when they make the state a participant in the enforcement of such [federal] regulations." 568 F.3d at 638–39. The *Fletcher* court reasoned that "[s]ection 54a requires treating state regulations that support or implement federal safety norms as if they were federal regulations, but there is no basis for thinking that the statute goes further than that." *Id.* at 640. The court therefore concluded that federal courts should not be required to lend the force of federal enforcement power to state safety regulations that are unrelated to the "safety concerns of federal law." *Id.*

¶33 We agree with *Fletcher* insofar as it holds that FELA does not incorporate *every* regulation promulgated by a state that participates in surveillance and enforcement activities. But in this case, we need not decide how broadly Arizona regulations are incorporated, because the Federal Railway Administration has determined that local walkway regulations were more appropriate than federal ones, and thereby recognized that such regulations were related to federal safety concerns. *See* 42 Fed. Reg. 22185. *Fletcher,* therefore, does not support BNSF's position in this case.

¶34 We hold that R14-5-110 is incorporated into FELA, and BNSF was not permitted to raise comparative fault as a defense.

III. THERE WAS NO WALKWAY ADJACENT TO MAIN 2, AND WILCOX WAS ENGAGED IN TRACKSIDE DUTIES.

¶35 BNSF contends that R14-5-110 does not apply here, because tying and untying a train is not a "trackside duty." R14-5-110(A)(1) provides that "[w]alkways shall be provided adjacent to tracks in all areas where railroad or industrial employees are required to perform trackside duties." The term "trackside duties" is not defined in the Arizona Administrative Code.

¶36 The superior court ruled that interpretation of "trackside duties" was a factual question to be resolved by the jury. We disagree. Such

a definition is a legal issue of regulatory interpretation to be resolved by the court.

¶37 Untying a train requires walking about 500 feet along a track and spending 10 to 15 minutes unlocking rail cars' and locomotives' brakes. Such a task is not usually required to swap crews or "dog catch" trains. This task can only be accomplished by walking along a track and handling equipment on the tracks. We therefore hold as a matter of law that untying a train as part of a "dog catch" is a trackside duty.

¶38 BNSF points out that R14-5-110(A)(3) provides: "In areas where heavy foot traffic exists, *such as train yards and manually operated switches*, the uniform surface material used shall be no larger than 3/8 inch fines." (Emphasis added.) It argues this language limits R14-5-110's applicability to areas of heavy foot traffic. In furtherance of this argument, it called the manager of railroad safety for the Arizona Corporation Commission ("ACC") as a witness at trial. He testified that ACC only enforces the walkway requirement for employees who work in railyards or work along a track for at least an eight-hour shift. BNSF argues that the walkway requirement does not apply to sporadically trafficked areas such as Holbrook because the manager's testimony is dispositive, entitled to deference as an agency interpretation of an ambiguous regulation.

¶39 BNSF points to no authority (and we find none) to suggest that the trial testimony of an administrative employee is entitled to deference on a question of law. We do not consider such extrinsic information when the language of the statute or regulation is plain. *See Helvetica Servicing, Inc. v. Pasquan*, 229 Ariz. 493, 497, ¶ 11 (App. 2012). We read R14-5-110(A)(3) as governing only the type of surface material to be used in heavily trafficked areas, and read R14-5-110(A) as a whole to govern the need for walkways in areas in which employees are required to perform trackside duties.

¶40 The superior court ruled as a matter of law there was no walkway adjacent to Main 2. We agree. BNSF challenges this ruling, arguing that there is a road north of Main 1 that a jury could have found was "adjacent" to Main 2. But even assuming the road met the requirements of a walkway, it would have been useless to an employee working on a train on Main 2 — over 13 feet from the road. We conclude that the superior court correctly held on the record before it that there was no walkway serving Main 2 where the train was tied down.

IV. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING BNSF'S MOTION FOR A MISTRIAL.

¶41 BNSF contends that the superior court should have granted its motion for a mistrial based on a question Plaintiff's lawyer asked on direct examination of the train master who was on duty in Winslow the night of the accident. Whether a new trial is warranted is a factual question for the trial court that we will not disturb "unless the record clearly establishes that the trial court was incorrect." *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 455 (1982).

¶42 The relevant exchange was as follows:

> Q. Are you currently working as an engineer for BNSF?
>
> A. No.
>
> Q. Why not?
>
> A. I can't walk. Health reasons.
>
> Q. Before we continue, . . . we'll just get this out of the way. It's true, is it not, that you suffered an on-the-job injury for which Mr. Petru and myself represented you in the past?

BNSF immediately objected, and the court sustained the objection. The court found there was insufficient prejudice to warrant a mistrial, and BNSF declined the court's offer to give a limiting instruction. We perceive no abuse of discretion. There is nothing to suggest that this single question during a ten-day trial materially affected BNSF's rights or actually influenced the verdict. *See Leavy v. Parsell*, 188 Ariz. 69, 72 (1997).

CONCLSUION

¶43 For the foregoing reasons, we affirm the judgment.

AMY M. WOOD • Clerk of the Court
FILED: AA