COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1409 **Cir. Ct. No. 2010CV593**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

VICTOR STOCK,

PLAINTIFF-APPELLANT,

V.

WISCONSIN CENTRAL, LTD,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Victor Stock appeals a judgment in favor of Wisconsin Central, LTD, on Stock's negligence claims under the Federal Employers' Liability Act (FELA). Stock argues numerous evidentiary errors and

inadequate jury instructions entitle him to a new trial. We reject Stock's arguments and affirm.

BACKGROUND

¶2 Stock filed suit against Wisconsin Central in 2010. Stock was employed for approximately eleven years at Wisconsin Central's ore dock in Escanaba, Michigan, where iron ore was transferred from railroad cars to ore freighters or stockpiled. Stock's suit asserted that he suffered cumulative trauma from his repetitive work at the dock, resulting in occupational injuries to his back, shoulder, and knee.

¶3 At trial, Stock's theory was that layoffs at Wisconsin Central meant the remaining employees had to cover the increased workload, leaving little time to perform preventative maintenance or cleaning tasks. Stock was particularly concerned with the presence of small ore pellets on walking surfaces, which he stated "were like marbles on concrete." Stock claimed that these manpower reductions, and the corresponding workload, maintenance, and cleanliness issues, constituted causal negligence for his injuries under FELA.

¶4 Prior to trial, Wisconsin Central filed a motion in limine to bar Stock from referring to the Occupational Safety and Health Act (OSHA) and associated regulations. The court apparently deferred this motion for trial.[1] At trial, the court clarified that no such evidence would be permitted, citing relevancy concerns and

[1] Stock claims the court did not address Wisconsin Central's motion, while Wisconsin Central claims the court deferred a ruling. At a post-verdict motion hearing, however, Stock's counsel essentially conceded that the court had decided to hold the issue over for trial.

the potential for jury confusion. Also at trial, the court precluded Stock from eliciting testimony about other workers' injuries and disabilities.

¶5 Wisconsin Central offered evidence that Stock asserts was not disclosed pretrial or was otherwise inadmissible. This evidence included a surveillance video of Stock golfing after he was deemed ineligible for work, evidence relating to diminishing ore production quantities and workforce reductions in the early 2000's, and testimony regarding safety inspections and audits periodically performed at the ore dock.

¶6 The jury was instructed on negligence and causation using a combination of the Wisconsin Jury Instructions—Civil and Federal Civil Jury Instructions of the Seventh Circuit, the latter of which provides specific instructions for cases involving FELA.[2] *See* 7TH CIR. PATTERN CIVIL JURY INSTRUCTION 9.01 (2008). During deliberations, the jury asked about workers' compensation. Stock argued the court should instruct the jury that he was not entitled to workers' compensation, but the circuit court refused, preferring instead to instruct that workers' compensation "should not be an issue" because there was no such evidence adduced at trial.

¶7 The jury found that Stock suffered damages, but that Wisconsin Central was not negligent. Judgment was entered on the verdict. Stock's post-verdict motion for a new trial was denied.

[2] The Federal Civil Jury Instructions of the Seventh Circuit are available at http://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_civ_instruc_2009.pdf

DISCUSSION

¶8 On appeal, Stock alleges the court erred in two ways. First, he contends there were multiple evidentiary errors. Second, he contends the jury was given erroneous instructions.

I. Evidentiary error

A. Standard of review

¶9 We review a circuit court's decision to admit or exclude evidence under the erroneous exercise of discretion standard. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. The circuit court has broad discretion in making evidentiary rulings. ***Id.*** We review such rulings "only to determine whether the trial court examined the facts of record, applied a proper legal standard and, using a rational process, reached a reasonable conclusion." ***Glassey v. Continental Ins. Co.***, 176 Wis. 2d 587, 608, 500 N.W.2d 295 (1993). The test is not whether this court agrees with the trial court's ruling, but whether the trial court appropriately exercised its discretion. ***Martindale***, 246 Wis. 2d 67, ¶29.

B. Erroneous exclusions

¶10 Stock maintains that the trial court erroneously excluded relevant evidence. First, he claims the court should have allowed him to introduce evidence of three OSHA regulations that Wisconsin Central purportedly violated. Second, he argues the court erroneously excluded evidence of other workers' injuries and disabilities, as well as Wisconsin Central's refusal to offer vocational assistance to those employees.

1. OSHA regulations

¶11 Stock asserts the trial court's exclusion of three OSHA regulations—those governing "Housekeeping," "Slippery conditions," and "Fixed stairways" at marine terminals—violated his FELA rights.[3] Emphasizing FELA's role in shifting the risk of occupational injuries to the employer, Stock believes these OSHA regulations were admissible because proof of their violation constitutes prima facie proof of negligence.

¶12 "It is well-settled that the FELA requires a finding of negligence per se when there has been a violation of a safety statute specifically aimed at the railroad industry." ***Ries v. National R.R. Passenger Corp.***, 960 F.2d 1156, 1159 (3rd Cir. 1992). In ***Ries***, the Third Circuit directly addressed whether FELA applies when a general workplace safety statute like OSHA is violated. ***Id.*** After analyzing the policy goals and scopes of the two statutory schemes, the Third Circuit concluded "Congress did not intend for a violation of an OSHA regulation to result in negligence per se and bar contributory negligence under the FELA." ***Id.*** at 1162. Indeed, Congress made explicit that nothing in OSHA "'shall be construed to … enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employees and employees under any law"' with respect to employee injuries. ***Id.*** at 1160 (quoting 29 U.S.C. § 653(b)(4) (1988)). "If a violation of an OSHA regulation could constitute negligence per se and bar contributory negligence under the FELA, it would be almost axiomatic that the effect would be to 'enlarge or diminish or affect' the statutory duty or liability of the employer." ***Id.*** at 1162.

[3] *See* 29 C.F.R. §§ 1917.11, 1917.12, 1917.120 (2013).

¶13 Despite this clear holding, Stock directs us to a recent U.S. Supreme Court case that he contends makes a railroad's violation of an OSHA regulation determinative of liability. In ***CSX Transportation, Inc. v. McBride***, 131 S.Ct. 2630, 2643 n.12, (2011), the Court did say in a footnote that a railroad's violation of a safety statute is negligence per se. ***McBride***, however, had nothing to do with an OSHA regulation; the question there was whether a jury instruction accurately stated the FELA test for causation. ***Id.*** at 2634. The Court simply added the footnote in passing to qualify its general statements about foreseeability.

¶14 Moreover, as authority for its statement regarding negligence per se, the ***McBride*** footnote cited ***Kernan v. American Dredging Co.***, 355 U.S. 426 (1958). ***Kernan*** is fully consistent with ***Ries*** in that the court found negligence per se for a violation of a safety statute specifically aimed at the relevant industry—there, the maritime industry. In ***Kernan***, a tug caught fire after a kerosene lamp hung about three feet from the water ignited petroleum vapors, killing a seaman. ***Id.*** at 427-28. The sailor's family brought suit under the Jones Act, which created a cause of action for injured seamen based on FELA. ***Id.*** at 429 n.3. The court sanctioned per se liability, as the defendant had violated a navigation rule promulgated by the Commandant of the United States Coast Guard requiring, as necessary for marine safety, that lamps be placed no less than eight feet above the water. ***Id.*** at 427 & n.1.

¶15 Stock relies on ***Kernan*** as authority for the proposition that an OSHA violation constitutes per se negligence. This argument stretches ***Kernan*** much too far. ***Kernan*** cited several FELA railroad cases, observing that those cases imposed liability without regard to whether the regulation was intended to prevent the injury inflicted:

> In FELA cases based upon violations of the Safety Appliance Acts or the Boiler Inspection Acts, the Court has held that a violation of either statute creates liability under FELA if the resulting defect … contributes in fact to the death or injury … without regard to whether the injury flowing from the breach was the injury the statute sought to prevent.

Id. at 432-33. ***Kernan*** did not hold that violation of a general safety statute is negligence per se; rather, it held that an employer may be liable for violation of a statute *directed at the relevant industry*, regardless of whether the regulation was designed to prevent the specific injury suffered by the employee.

¶16 This understanding of ***Kernan*** is confirmed by ***Jones v. Spentonbush-Red Star Co.***, 155 F.3d 587 (2nd Cir. 1998). There, the defendant stipulated that it violated an applicable OSHA regulation, resulting in injury to a tugboat's senior deckhand. ***Id.*** at 590, 594. The deckhand argued the violation established negligence per se, relying on ***Kernan***. ***Jones***, 155 F.3d at 594. The Second Circuit rejected this argument, distinguishing ***Kernan*** and similar cases because, unlike those defendants, Spentonbush-Red Star Co. "did not violate a Coast Guard regulation or maritime statute." ***Id.*** at 595. Instead, the court adopted ***Ries***'s reasoning, concluding that imposing negligence per se for violation of a general safety statute like OSHA would "'enlarge or diminish or affect in any other manner' the liability of a maritime employer," contrary to OSHA's terms. *See* ***id.*** at 595-96 (quoting 29 U.S.C. § 653(b)(4) (1994)).[4]

[4] The Third Circuit Court of Appeals has also addressed ***Kernan v. American Dredging Co.***, 355 U.S. 426 (1958). In ***Ries v. National Railroad Passenger Corp.***, 960 F.2d 1156, 1163 (3rd Cir. 1992), the court concluded that, despite the expansive language of ***Kernan***, "the Supreme Court has *never* extended the statutory duty of care of a railroad employer beyond a few safety statutes specific to the railroad industry …."

¶17 Stock also cites ***Practico v. Portland Terminal Co.***, 783 F.2d 255 (1st Cir. 1985), but that decision is not persuasive. There, the First Circuit found it "highly unlikely" that Congress considered OSHA's effect on common law and statutory schemes like FELA. It therefore concluded OSHA's "enlarge or diminish or affect" provision did not bar use of the regulations for the purpose of establishing negligence per se. ***Id.*** at 266-67. But ***Practico***'s reasoning has been questioned by the very court that decided it. *See* ***Elliott v. S.D. Warren Co.***, 134 F.3d 1, 4 (1st Cir. 1998). In ***Elliott***, the First Circuit observed that since ***Practico*** was decided, three out of four federal appellate courts (including the Third Circuit in ***Ries***) had squarely rejected its holding, while the remaining circuits to have addressed the issue had rarely upheld a finding of negligence per se based on an OSHA violation. ***Elliott***, 134 F.3d at 4. The ***Elliot*** court then deemed ***Practico***'s holding to be of "questionable validity." ***Elliott***, 134 F.3d at 4. Given ***Practico***'s questionable precedential status, it would be improper to stand on that decision against all others.

¶18 Stock also contends the trial court should have admitted the OSHA regulations as evidence of the applicable standard of care. Evidence of an OSHA violation "could be considered by a jury in trying to determine whether an employer acted negligently." ***Ries***, 960 F.2d at 1162. The Ninth Circuit Court of Appeals has similarly determined that "OSHA standards may be admitted in a FELA case as some evidence of the applicable standard of care. Such evidence, however, is to be considered only in relation to all other evidence in the case, and a violation of an OSHA regulation is not negligence per se." ***Robertson v. Burlington N. RR. Co.***, 32 F.3d 408, 410-11 (9th Cir. 1994).

¶19 Although Stock is correct that OSHA regulations may be admissible as evidence of negligence, he largely fails to address the circuit court's reasoning

for excluding them. The court was justifiably concerned about the impact a federal regulatory agency's rules on cleanliness of workplace surfaces would have on the jury's assessment of whether the railroad breached its standard of care by inadequately staffing the ore dock—Stock's primary theory of liability. The court observed that the regulations Stock sought to introduce were only marginally relevant in the context of all evidence presented.

¶20 Stock responds that a second component of his negligence claim was based solely on Wisconsin Central's housekeeping failures.[5] That is not how the circuit court, who heard the evidence at trial, perceived Stock's case.[6] In any event, even if Stock's formulation of his case is accurate, the circuit court was reasonably concerned that the OSHA regulations would confuse and mislead the jury, and added little to Stock's negligence case. *See* WIS. STAT. § 904.03.[7] The court stated:

> I believe that this case has been well tried and is well focused, and I believe that … by interjecting peripherally this issue of … [the] OSHA code … and leaving it hanging to the jury to conclude whether they think there was an

[5] The only record citation Stock provides for this assertion is a brief argument by his attorney at the post-verdict motion hearing. Even then, counsel appeared to acknowledge the inadequate workforce and housekeeping claims were intertwined, stating that the "evidence would have been … that once ... the manpower reduction [occurred] and they changed the duties of the men[,] … their primary focus had to be on maintaining the equipment … and not on housekeeping and that as a consequence of that those walkways were left littered with pellets …." Insofar as counsel then argued the jury should have found negligence based on violation of the OSHA regulations, we have already rejected Stock's negligence per se argument.

[6] At the hearing on Stock's post-verdict motion, the court stated that "ongoing repetitive OSHA violations" were never Stock's theory of the case. "The theory of the case on the opening statement and through all the evidence was … that the trigger of this occupational injury was the understaffing which started in the … mid nineties …."

[7] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

> OSHA violation is to distract them from what this case is all about.

The court also observed that the jury was likely to give the OSHA regulations undue weight; essentially, the court was concerned the jury would find Wisconsin Central negligent solely because of an OSHA violation.

¶21 Even if the trial court erred in excluding the OSHA regulations, the error was harmless. An error is harmless if it does not affect the substantial rights of a party. ***Martindale***, 246 Wis. 2d 67, ¶30. For an error to affect the substantial rights of a party, there must be "a reasonable probability that the error contributed to the outcome of the action or proceeding …." ***Id.***, ¶32. Wisconsin Central contends Stock offered ample indirect evidence of the OSHA regulations, including the testimony of an expert witness who used them in formulating his opinion regarding the applicable standard of care.

¶22 Stock does not respond to this argument, other than by arguing that prejudice is implied under ***Schmitz v. Canadian Pacific Railway Co.***, 454 F.3d 678 (7th Cir. 2006). ***Schmitz*** held that it was prejudicial error in a FELA case to refuse to give a jury instruction incorporating a federal regulation requiring a railroad to keep vegetation adjacent to the roadbed trimmed. ***Id.*** at 682-84. However, because that safety regulation was aimed specifically at the railroad industry, ***Schmitz*** is a negligence per se case. As we have explained, OSHA is a general safety statute whose violation does not automatically establish negligence under FELA. Because ***Schmitz*** is inapplicable, Stock has failed to adequately respond to Wisconsin Central's harmless error argument. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded).

2. Other injuries

¶23 Next, Stock contends the trial court erroneously excluded what he describes as "evidence of other workers' injuries, disability and lack of railroad vocational assistance." Stock principally relies on ***Dalka v. Wisconsin Central, Ltd.***, 2012 WI App 22, 339 Wis. 2d 361, 811 N.W.2d 834.

¶24 In ***Dalka***, a railroad employee was injured by an intoxicated trespasser. ***Id.***, ¶¶3-5. At trial, Dalka presented evidence that trespassers were common and that the defendant, Wisconsin Central, was aware of them. ***Id.***, ¶49. The court designated this "other-acts evidence" whose admissibility was subject to WIS. STAT. § 904.04(2). ***Id.***, ¶¶52-53. Under ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), other acts evidence may be admitted if it is offered for an acceptable purpose, is relevant, and has probative value that is not substantially outweighed by the danger of unfair prejudice. ***Dalka***, 339 Wis. 2d 361, ¶53.

¶25 Here, we cannot conclude the circuit court improperly excluded the other acts evidence. Although Stock claims the evidence would have been used for proper purposes (i.e. demonstrating notice and foreseeability), he also claims the evidence would have shown the ore dock to be unreasonably dangerous. However, Stock concedes that "under the FELA, the sole question is whether the railroad failed to provide a reasonably safe place to work." Thus, Stock concedes he would have used the other acts evidence to prove the ultimate issue at trial. As we explained in ***Farrell v. John Deere Co.***, 151 Wis. 2d 45, 77-78, 443 N.W.2d 50 (Ct. App. 1989), it is not an erroneous exercise of discretion for a court to refuse other acts evidence if there is a risk that the jury will find liability based solely on those past events.

¶26 ***Dalka*** does not hold otherwise. There, Wisconsin Central conceded that Dalka's evidence was offered for an acceptable purpose. ***Dalka***, 339 Wis. 2d 361, ¶54. We concluded it was also relevant, as Wisconsin Central's knowledge of prior trespassers related to foreseeability, an element of negligence. ***Id.***, ¶56. Wisconsin Central failed to address the third prong of the ***Sullivan*** analysis. ***Id.***, ¶60. Nonetheless, we concluded that the "danger of unfair prejudice … [was] extremely low and that the evidence of past trespassers easily passe[d] muster." ***Id.***, ¶60.

¶27 Here, we perceive the risk of unfair prejudice to be considerably stronger than in ***Dalka***. If the jury was presented with substantial evidence of other accidents and employee injuries at the ore dock, there is a significant risk it would find Wisconsin Central negligent regardless of the merits of Stock's case. This is particularly true if, as Stock claims, the other "injuries occurred … over the same period of time, and involved exposure to the same poor walking and working conditions alleged in this lawsuit."

¶28 Citing ***Dalka***, Stock contends the trial court improperly restricted the focus of the trial to Stock's injuries. Stock champions the ***Dalka*** court's proclamation that "FELA actions are commonly submitted to juries on 'evidence scarcely more substantial than pigeon bone broth.'" ***Dalka***, 339 Wis. 2d 361, ¶17 (quoted source omitted). Stock's argument is not on point. The quote on which Stock relies is from ***Dalka***'s discussion regarding the availability of summary judgment. The court simply observed that liability standards are relaxed in FELA actions as opposed to cases of ordinary negligence. ***Id.***, ¶¶16-17. It did not set special admissibility standards for FELA cases in derogation of ***Sullivan***. Here, the case was submitted to the jury. If anything, FELA's lower liability standard

suggests that the judiciary should be particularly sensitive to potential jury misdirection.

C. Erroneous admissions

¶29 Stock also challenges the admissibility of some of Wisconsin Central's trial evidence: surveillance video of Stock golfing; testimony and documents regarding Wisconsin Central's finances and ore production quantities; and testimony regarding safety inspections and audits. Stock contends this evidence was inadmissible because it was not disclosed pretrial, and he raises other challenges to the video and finance evidence.

1. Surveillance video

¶30 At trial, Wisconsin Central played for the jury a videotape, recorded during a post-injury golf tournament, which it claims showed Stock swinging golf clubs, stooping, bending, walking on uneven terrain, and engaging in other physical activities. Stock maintains this evidence was inadmissible for two reasons: it was not disclosed pretrial, and lacked probative value.

¶31 We can easily dispose of Stock's challenge to the videotape based on the lack of pretrial disclosure. He cites ***Ranft v. Lyons***, 163 Wis. 2d 282, 300, 471 N.W.2d 254 (Ct. App. 1991), for the proposition that "a party is entitled not only to know before trial whether he or she has been subjected to photographic or video surveillance but to have pre-trial access to the surveillance materials as well." This, however, is the majority rule, which the ***Ranft*** court rejected. ***Id.*** at 300. Instead, the rule in Wisconsin is that surveillance video is protected work-product

of the attorney. ***Id.*** at 301-02. There must be a "strong showing" of need to warrant disclosure.[8] ***Id.*** at 302. Stock has not made such a showing.

¶32 As for probative value, we generally agree with Wisconsin Central's characterization of the tape's contents.[9] Wisconsin Central represents that the video showed Stock "swinging golf clubs, stooping, bending, walking on uneven terrain and engaging in other physical activities that Stock had said he could no longer perform …." This tended to undercut Stock's testimony that his doctors advised him he could golf, but his work restrictions prohibited him from squatting, crouching, or reaching overhead, and it was painful to kneel or bend over. In addition, Stock's friend, Neil Bizeau, testified that Stock would not walk while golfing and would "gingerly" bend to pick up a ball or put a tee in. The circuit court properly determined that this testimony opened the door to admission of the videotape, stating:

> So what is your objection then, Counsel? [Y]ou put in the fact that he golfs. You put in evidence before this jury with regard to how his injury has … affected his ability to golf. So what is the basis of your objection now to the jury observing this golf outing that your client has already testified and his friends have testified he participated in?

[8] In any event, counsel for Stock conceded he had seen the video on the "eve of trial, and … immediately made a motion on it." Thus, any argument that Stock did not have "an opportunity to seasonably challenge any surveillance material prior to the defendants' use of the material at trial" lacks arguable merit. *See* ***Ranft v. Lyons***, 163 Wis. 2d 282, 302, 471 N.W.2d 254 (Ct. App. 1991); *see also* ***Martz v. Trecker***, 193 Wis. 2d 588, 595, 535 N.W.2d 57 (Ct. App. 1995) (court did not err in admitting surveillance videotape into evidence where plaintiff was allowed to view a copy of the tape overnight).

[9] Stock's brief fails to indicate where we might find the videotape in the record. This is a violation of the Rules of Appellate Procedure, and we could affirm on this basis alone. *See* WIS. STAT. RULES 809.19(1)(e); 809.83(2). We only discovered a copy of the videotape during an independent search of the record, which we are not required to undertake. *See* ***Roy v. St. Luke's Med. Ctr.***, 2007 WI App 218, ¶10 n.1, 305 Wis. 2d 658, 741 N.W.2d 256 ("We have no duty to scour the record to review arguments unaccompanied by adequate record citation.").

See ***Sailing v. Wallestad***, 32 Wis. 2d 435, 446, 145 N.W.2d 725 (1966) (once defendants opened the door to traffic ticket testimony they could not be heard to complain).

2. Evidence of Wisconsin Central's ore production volumes

¶33 At trial, Wisconsin Central introduced evidence indicating that ore volumes decreased by approximately fifty percent between 2000 and 2002, then stabilized. As a result, Wisconsin Central laid off workers in phases, eventually reducing its workforce from 48 to 35 employees. Stock construes this as an improper appeal to the wealth of a party, which constitutes grounds for a new trial. *See* ***De Rousseau v. Chicago, St. P., M. & O. Ry. Co.***, 256 Wis. 19, 24, 39 N.W.2d 764 (1949).

¶34 A specific, contemporaneous objection is required to preserve error. ***State v. Delgado***, 2002 WI App 38, ¶12, 250 Wis. 2d 689, 641 N.W.2d 490. At no time did Stock object to the ore volume evidence. Stock claims he objected at various times: pretrial, through a motion in limine; at the final pretrial conference; and at trial. However, no objection appears on the cited pages of Stock's motion in limine or the trial transcript,[10] and the pretrial conference does not appear to have been recorded. Thus, Stock has failed to make a sufficient record to preserve his claim of error.

[10] Stock asserts his objection appears on page 731 of the trial transcript. There is no objection on that page, though it does appear the parties held an off-the-record discussion at the bench.

3. Evidence of safety inspections and audits

¶35 Stock also asserts the circuit court improperly admitted the testimony of Daniel Becker, Wisconsin Central's safety manager. Becker testified he conducted safety audits, training, and evaluations. Audits occurred at least twice a year, and Becker took photographs that were submitted with advisory memoranda to senior management. Stock contends that Wisconsin Central failed to disclose these audits, and "[i]nstead of sanctioning Defendant for its concealment of evidence, the Circuit Court admitted the evidence to Plaintiff's substantial prejudice."[11]

¶36 The decision to impose sanctions for discovery violations lies in the sound discretion of the trial court. *See* ***Sentry Ins. v. Davis***, 2001 WI App 203, ¶19, 247 Wis. 2d 501, 634 N.W.2d 533. "A discretionary decision will be sustained if the circuit court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** Here, Stock contends his motion for sanctions was wrongfully denied, but he failed to make a record of the trial court's reasons for denial. Stock also failed to contemporaneously object to Becker's testimony at trial. Stock has therefore failed to preserve the issue for review.

¶37 In any event, we are not persuaded there was a discovery violation. Stock's primary complaint appears to be that the safety audits and photographs were not disclosed. However Becker, at trial, testified that these records from the

[11] Stock inappropriately refers to the parties by their party designation rather than their name, contrary to WIS. STAT. RULE 809.19(1)(i). Counsel is admonished that future violations of the Rules of Appellate Procedure may result in sanctions. *See* WIS. STAT. RULE 809.83(2).

time of Stock's employment no longer existed. Becker stated there were no regulations or policies requiring him to keep these records, and they would only remain on his system for about a year before being purged.

II. Erroneous jury instructions

¶38 Next, Stock claims the circuit court erroneously instructed the jury. He contends the jury should have been instructed that workers' compensation benefits were unavailable. He also contends the court erred in instructing the jury on negligence and causation.

A. Standard of Review

¶39 A trial court has broad discretion in deciding whether to give a particular jury instruction, and must exercise that discretion to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence. ***State v. Jensen***, 2007 WI App 256, ¶8, 306 Wis. 2d 572, 743 N.W.2d 468. We independently review whether a jury instruction is appropriate under the specific facts of a given case. ***Id.***

B. Workers' compensation instruction

¶40 Stock concedes his sole and exclusive remedy was under FELA, not Wisconsin's workers' compensation law. He contends that jurors are presumptively familiar with workers' compensation, and should have been instructed that Stock was not entitled to this remedy. Further, he claims it was error for the circuit court to instruct the jurors not to discuss or consider workers' compensation during their deliberations.

¶41 As legal authority, Stock cites a number of federal district court pretrial orders and two appellate decisions from other states, one of which is unpublished. The other is not on point. *See* ***Haischer v. CSX Transp., Inc.***, 848 A.2d 620 (Md. 2004). We find more persuasive the Seventh Circuit's holding that instructions regarding the availability of other means of recovery, like workers' compensation, are generally unnecessary. Such instructions may prejudice the defendant since the jury might be "moved to find for [the plaintiff] out of concern that his injury might otherwise go uncompensated." ***Schmitz***, 454 F.3d at 685.

¶42 Under ***Schmitz***, the court's instruction to the jury in this case to "not consider in any way anything relating to workman's compensation" was appropriate. In ***Schmitz***, the Seventh Circuit affirmed a similar curative instruction. There, the jury asked whether the plaintiff received medical or workers' compensation benefits for his injury. ***Id.*** at 685. The court responded that such matters were "simply not before the court or the jury." ***Id.*** Here, the gist of the court's curative instruction was identical to that in ***Schmitz***. The court stated:

> My instructions to you were that you were to decide this case solely on the evidence received in this case. Workman's compensation … should never be … discussed in that jury room. There was no evidence about workman's compensation. Where you got it I don't know, but it is clearly in defiance of my instructions. So I now instruct you that you must not consider in any way anything relating to workman's compensation. This trial … had nothing to say about it. Therefore, I will tell you as a matter of law it has nothing to do with your decision.

Stock has failed to show there was anything inappropriate about this instruction.[12]

¶43 Stock also claims the court's instruction not to consider workers' compensation actually misled and confused the jury. As evidence, he points to what he claims was an inadequate damages award. However, he does not explain what damages evidence was adduced at trial, nor why, based on that evidence, he believes the jury's findings were inadequate. We decline to address such undeveloped arguments. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

C. Negligence and causation instructions

¶44 Next, Stock claims the court gave erroneous instructions about negligence and causation. We address these claims separately.

1. Negligence instruction

¶45 Stock asserts the court should have given his proposed negligence instruction, which incorporated curative instructions set forth in comments to the Federal Civil Jury Instructions of the Seventh Circuit. He contends the jury should have received the instructions included in comments h.(1), (2), (4), and (5) to section 9.01.

¶46 As an initial matter, we observe that in most cases these supplemental instructions are unnecessary. Absent unusual circumstances, the standard negligence instruction "provides a statement of the law comprehensive

[12] Stock's reply brief states in conclusory fashion that the instructions failed to convey the relevant legal principles. We have no duty to address such conclusory statements. *See* ***Riley v. Town of Hamilton***, 153 Wis. 2d 582, 451 N.W.2d 454 (Ct. App. 1989).

and comprehensible enough to permit counsel to argue most cases to an informed jury." 7TH CIR. PATTERN CIVIL JURY INSTRUCTION 9.01, cmt. h. The curative instructions are to be used only if an argument, evidence, or a particular issue at trial provides sufficient reason for the instruction. ***Id.***

¶47 Stock's brief-in-chief and reply brief are vague about why such curative instructions were necessary. His few assertions about what occurred at trial are mostly unaccompanied by record citations and based on inference.

¶48 Stock first argues the jury should have received the instruction in comment h.(1). This instruction may be given if the jury could conclude that a third party's control over equipment or part of the workplace ameliorates the defendant's duty of reasonable care. 7TH CIR. PATTERN CIVIL JURY INSTRUCTION 9.01, cmt. h.(1). Stock's brief-in-chief contends, without record citation, that Wisconsin Central implied that he and other workers were responsible for their safety at the ore dock, and that Wisconsin Central made numerous references to third parties.

¶49 We reject the argument that a curative instruction was warranted because of an inference that Stock was responsible for his own safety. Stock appears to believe that three statements made during Wisconsin Central's opening statement warranted the instruction.[13] However, counsel did not argue it was Stock's sole duty to ensure his safety. Instead, counsel made clear that "Wisconsin Central had a duty to provide its employees with a reasonably safe place to work … and the evidence will show that Wisconsin Central put in place a

[13] While Stock's brief-in-chief fails to cite the record, his reply brief cites to three pages of Wisconsin Central's opening statement.

comprehensive safety program that provided Mr. Stock with that reasonably safe place to work." Counsel did state that Stock also had a duty to act reasonably, but did not suggest this diminished Wisconsin Central's duty. Rather, counsel described Wisconsin Central's safety program, which included rotating a worker's duties, briefings before each shift that included safety information, mandatory and voluntary breaks, and the availability of additional personnel for labor-intensive tasks. It was apparently Wisconsin Central's contention that Stock did not make use of safety mechanisms that were available.

¶50 We similarly reject Stock's argument that the h.(1) instruction was required because of Wisconsin Central's numerous references to third parties. Wisconsin Central advised in its opening statement that these third parties were irrelevant to the jury's consideration:

> There may be some reference in this case to CN or Canadian National. I don't want you to even worry about that at all. It's simply a trade name that Wisconsin Central uses from time to time. Just remember that from January of 1997 on Vic Stock was an employee of Wisconsin Central.

There is simply no reason to believe the jury was confused by the various entities, or that they believed an entity other than Wisconsin Central was responsible for safety at the ore dock.

¶51 The instruction in comment h.(2) may be given if there is a risk the jury may believe the employer's duty of reasonable care does not include inspection or reasonable steps to make the workplace safe. 7TH CIR. PATTERN CIVIL JURY INSTRUCTION 9.01, cmt. h.(2). Stock's brief-in-chief baldly claims, without record citation, that Wisconsin Central commented at trial that it was Stock's responsibility, not Wisconsin Central's, to make his work area safe. However, at trial, Wisconsin Central agreed it had a duty of reasonable care, and

offered extensive evidence on what it had done to create a safe environment for workers. We are not convinced that a separate instruction was necessary.

¶52 Comment h.(4)'s instruction is to be given if there is a risk that the jury may believe the employer's duty of reasonable care does not extend to the assignment of jobs or tasks. 7TH CIR. PATTERN CIVIL JURY INSTRUCTION 9.01, cmt. h.(4). In both his brief-in-chief and reply brief, Stock contends, without citation, that Wisconsin Central attempted to show that Stock chose his work assignments. Not only does this argument violate the Rules of Appellate Procedure, but it leaves him unable to show that the evidence at trial warranted a special instruction.

¶53 Stock also claims that the jury should have been given the instruction in comment h.(5). That instruction is to be given if the evidence leads the jury to believe the duty of reasonable care does not extend to decisions about the number of employees assigned to a task or the methods and procedures employees are required to use. 7TH CIR. PATTERN CIVIL JURY INSTRUCTION 9.01, cmt. h.(5). Stock claims this instruction was necessary given the testimony about diminished ore production and reduced staffing. Since the crux of Stock's claim was that Wisconsin Central's workforce was inadequate, we are not convinced that the jury was somehow misled into believing that staffing quantities were irrelevant to the question of negligence. In any event, the testimony about ore production quantities did not in any way suggest that Wisconsin Central was permitted to

employ fewer workers than would be required to maintain reasonably safe premises.[14]

2. Causation instruction

¶54 Finally, Stock asserts the court failed to properly instruct the jury on causation. He contends the trial court flouted ***CSX Transportation***, 131 S. Ct. at 2644, by giving an instruction that asked the jury to decide whether Wisconsin Central's negligence was "a cause" of Stock's injury, rather than whether Wisconsin Central "caused or contributed to the injury." We discern no error. The instruction largely tracked the one approved by the Supreme Court in ***CSX Transportation***, providing that Wisconsin Central caused Stock's injuries if its negligence "played any part, no matter how small, in causing the injuries." Stock has not explained the significance of the trial court's minor deviation, and because the instruction was otherwise entirely appropriate, we see none.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[14] Contrary to Stock's argument, which again lacks record citations, Wisconsin Central does not appear to have argued at trial that "it was justified in unsafely reducing its workers due to lack of business or ore volume." Rather, Wisconsin Central's defense appears to have been that it employed a sufficient number of workers to ensure a safe environment.