No. 124454

IN THE SUPREME COURT OF ILLINOIS

MELVIN AMMONS, *Plaintiff/Counter-Defendant/Appellee*,	On appeal from the Appellate Court Court of Illinois, First Judicial District Nos. 1-17-2648 & 1-17-3205 (cons.)
v. WISCONSIN CENTRAL, LTD. *Defendant/Counter-Plaintiff/Appellant*, and	Appeals from the Circuit Court of Cook County, Illinois, Law Division Nos. 15 L 1324 & 15 L 4680
CANADIAN NATIONAL RAILWAY COMPANY, LTD., *Defendant*.	The Honorable Judge Ehrlich Judge Presiding

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DARREN RILEY, *Plaintiff/Counter-Defendant/Appellee*,	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division
v.	No. 16 L 4680
WISCONSIN CENTRAL, LTD. *Defendant/Counter-Plaintiff/Appellant*,	The Honorable John H. Ehrlich Judge Presiding

AMICUS CURIAE BRIEF BY ILLINOIS TRIAL LAWYERS ASSOCATION IN SUPPORT OF PLAINTIFFS/APPELLEES

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Argument

I. The Remedial and Humanitarian Purpose Behind the FELA

Working on railroads has always been dangerous. In 1908 alone, for example, there were almost 300,000 casualties. That same year, in an effort to try to make railroading safer, Congress enacted the Federal Employers Liability Act (FELA). Justice Bader Ginsberg summed up the intent behind the FELA, as follows:

> The railroad business was exceptionally hazardous at the dawn of the twentieth century. As we have recounted, "the physical dangers of railroading…resulted in the death or maiming of thousands of workers every year," *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 542 (1994), including 281,645 casualties in the year 1908 alone, S. Rep. No. 61-432, p.2 (1910). In an effort to shift part of the human overhead of doing business from employees to their employers, *Gottshall*, 512, U.S. at 542, FELA prescribes:
>
>> Every common carrier by railroad…shall be liable in damages to any person suffering injury while he is employed by such carrier…for such injury or death resulting *in whole or in part* from the negligence of any of the officers, agents or employees of such carrier…" 45 U.S.C. Section 51 (emphasis added). *CSX Transp., Inc. v. McBride*, 564 US 685, 692 (2011).

The FELA is an injured railroad employee's exclusive tort remedy against his railroad employers for injuries sustained while working in the course and scope of his employment with the railroad in the furtherance of interstate commerce. *New York Cent. R.R. v. Winfield*, 244 US 147 (1917). A railroad employer has a continuing non-delegable duty to use reasonable care to provide its employees with a safe place to work. *Daily v. Central Vermont Ry.*, 319 US 350, 353 (1943). Moreover, the railroad's duty of care becomes more imperative as the risk increases. *Id.*, at 353. The FELA imposes a higher standard of care beyond the general duty of reasonable care that the law requires of everyone. *Kernan v. American Dredging Co.*, 355 US 426, 451 (1958).

From its inception, the congressional intent in enacting the FELA has been a liberal one, favoring recovery by the employee. The Supreme Court of United States noted in *Kernan v. American Dredging Company* that the FELA decisions up to that point had "plainly rejected many of the refined distinctions necessary in common law tort doctrine for the purpose of allocating risks between persons who are more nearly on an equal footing as to the financial capacity and ability to avoid the hazards involved...instead the theory of the FELA is that where the employer's conduct falls short of the high standard required of him by this Act, and his fault, in whole or in part, causes injury, liability issues." *Id.* at 438.

The FELA is akin to a social welfare statute in that it has been liberally construed to give full effect to the beneficent purposes Congress intended it to have. *Cox v. Roth*, 348 U.S. 207 (1955) (construing the Jones Act, which extended the protections of the FELA to seamen). It is the sole remedy available to railroad workers injured as a result of the negligence of their employers in their place of work. Recovery under the FELA is governed solely by federal law, unhampered by the rigidities and pitfalls of classic state tort rules. The statute is an avowed departure from the common law. The duty of care imposed on the railroads, the breach of which constitutes negligence, is analogous, but by no means identical, to the general common law duty. *Kernan v. American Dredging Company*, 355 US 426 (1957). Over the years, the court has construed FELA liberally to further Congress' remedial and humanitarian purpose." *Urie v. Thompson*, 337 US 163, 181-82 (1949).

Today, FELA is just as important to rail workers as it was more than 100 years ago when it was first enacted. The truth is, the hazardous elements of railroading have changed very little since 1908. They have just become bigger, heavier and faster. Railroading is still a highly hazardous occupation, which, Congress has widely refused to alter, in spite of multiple attempts to replace it with some sort of workers compensation system.

II. Statutory Interpretation of the Term "Device Whatsoever"

This is a case of statutory interpretation of Sections 55 and 60 of the FELA. Section 55 voids "any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from liability" under the FELA. Federal Employers Liability Act, 45 U.S.C. Section 51 et. seq. (2012). Section 60 voids "any contract, rule, regulation or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee." *Id.* Sec. 60. As the lower court made clear, the determination of this appeal turns on whether the counterclaims for property damage asserted by the defendant are "devices" as set out in the Act. Thus, the key term here to be interpreted is "device whatsoever." *Ammons v. Canadian National Ry. Co.*, 2018 Ill.App. (1st) 172648, paragraph 7.

A. Guidelines for Statutory Construction

In the case of *Corbett v. County of Lake*, the Illinois Supreme Court laid out a step by step guide for how to interpret the words in a statute to come up with the meaning intended by the drafters. *Corbett v. County of Lake*, 104 NE 2d 389, 2017 IL 121536 (2017).

In *Corbett*, Plaintiff was riding her bicycle with a group on the Skokie Valley Bike Path in Highland Park when a rider in front of her rode over a defect in the path, which caused him to lose control and fall. Corbett then rode over the fallen rider, sustaining personal injuries. Defendants, Highland Park and County of Lake, both filed Motions for Summary Judgment, alleging various immunities under the Tort Immunity Act. The circuit court granted the motion as to both defendants, and Plaintiff appealed as to Highland Park, only. The appellate court reversed, holding that the circuit court had erred in finding that the Skokie Valley Bike Path was a riding "trail" within the meaning of Section 3-107 (b) of the Act. Thus, Highland Park could not assert absolute immunity under Section 3-107 (b).

In Highland Park's appeal to the Supreme Court, the only issue was the interpretation of the word "trail" within the meaning of Section 3-107 (b) of the Act. If the bike path was considered a "trail," then Highland Park would be given absolute immunity. There were several "tools" the court used to interpret the word "trail." The first was to use a dictionary definition that was in effect when the statute was enacted. The *Corbett* court pointed out that, when using a dictionary to help determine statutory meaning, it is appropriate to use one in existence at the time of the statute's enactment. "The meaning of a statute or constitutional provision depends upon the intent of the drafters *at the time of its adoption*, and it is a longstanding principle of statutory construction that it is the court's duty to ascertain and effectuate that intent." (emphasis added). *Id.*, at 395. With regard to the case at bar, then, the court should look to the definition of "device whatsoever" from 1908.

In the case of *Armour Packing Co. v. United States*, 209 U.S. 56 (1908) the United States Supreme Court defined the term "device whatever" as it appeared in the Elkins Act. *Armour* involved several meat packing company defendants that shipped property at less than the rates published by railroad companies, in violation of the Elkins Act, 32 Stat. 847. The Elkins Act specifically made it an offense to receive any rebate or concession whereby any such property is "by any device whatever," transported at a rate that is less than the published rate. *Id*. at 71.

The *Armour* court started out by giving the history of the Elkins Act, which, it explained, "may be of service in interpreting the meaning of Congress." *Id*. at 69. The Act, originally written in 1887 as the Interstate Commerce Act, and then amended in 1889, made it a criminal offense for shippers or common carriers to *fraudulently* transport property at less than the published rates (emphasis added). *Id*, at 70. The Elkins Act of 1903 amended the Interstate Commerce Act by abolishing punishment by imprisonment, putting the shipper and carrier on equal footing, and making it unlawful for any person to accept or receive any rebate, concession or discrimination in respect to the transportation of property, whereby any such property shall, by any "*device whatever*" be transported for a less rate than the published rate (emphasis added). *Id*. at 71. The court explained why this change was so important:

> We find the word "device" disassociated from any such words as fraudulent conduct, scheme or contrivance, but the Act seeks to reach all *means and methods* by which the unlawful preference of rebate, concession or discrimination is offered, granted, given or received. Had it been the intention of Congress to limit the obtaining of such preferences to fraudulent schemes or devices, or to those operating only by dishonest, underhanded methods, it would have been easy to have so provided in words that would be unmistakable in their meaning. A device need not be necessarily fraudulent; the term includes anything which is a plan or contrivance. Webster defines it to be "that which is devised or formed by

> design; a contrivance; an invention; a project, etc." (emphasis added). *Id.* at 71.

The *Armour* court went on to state the broad reach that Congress intended with the Elkins Act, "to require that all shippers should be treated alike" and pay the same published rate as required by law. "It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit **any and all means** that might be resorted to obtain or receive concessions and rebates from the fixed rates..." (emphasis added). *Id.* at 72.

The term "device whatever" in the Elkins Act of 1905 is essentially the same as "device whatsoever" used in Sections 55 and 60 of the FELA when it was enacted in 1908. Just as with the Elkins Act, Congress clearly intended the term "by any device whatsoever" to reach all means and methods by which a railroad could attempt to exempt itself from liability under FELA. Had it been the intention of Congress to limit the types of contracts, rules, regulations and devices by which a railroad could exempt itself from liability, then Congress certainly would have said so. Instead, Congress intended to prohibit any and all means that railroads might use to exempt themselves from liability.

Another tool used by the *Corbett* court to determine the meaning of "trail" was to view the word inside the context of Section 3-107 as a whole. "It is a fundamental principal of statutory construction (and indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used. The terms in a statute are not to be considered in a vacuum. Rather, the words and phrases in a statute must be construed in light of the statute as a whole, with each provision construed in connection with every other section." *Corbett*, Id. at 396. In this context, the *Corbett* court quoted Judge Learned Hand, who observed:

> "Of course it is true that the words used, even in their literal sense, are the primary and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Corbett*, *Id.* at 396, citing *Cabell v. Markham*, 148 F. 2d 737, 739 (2d Cir. 1945).

Similarly, in *Armour*, the court pointed out that the purpose of the Elkin Act "was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve...The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended be borne in mind, its meaning becomes, if possible, clearer." *Armour*, *Id.* at 72.

It is well-settled that Congress' purpose in enacting the FELA was humanitarian and remedial in nature. *McBride*, *Id.*, citing *Gottshall*, 512 U.S. at 542-543. Therefore, it is entitled to receive the interpretation that accomplishes that purpose. No matter the intention of defendant in filing the counterclaim, it has the effect of defeating that the remedial purpose because it serves to exempt defendant from FELA liability. This is not only a violation of Section 55, but it is also fundamentally incompatible with the FELA's broad remedial purpose.

Another tool of statutory construction used by the Supreme Court in *Corbett* originates from the Latin term, "noscitur a sociis," meaning "a word is known by the company it keeps." *Id.* at 397. Unless a word in a statutory sentence is defined in the statute, it must be read in context in order to determine its meaning. Accordingly, words must be read in the context of the entire sentence in which it appears. *Id.* Furthermore, words grouped in a list should be given related meaning. *Id.* In other words, "a word is given more precise content by the neighboring words with which it is associated." *Id.*

Section 55 states in its entirety:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which should be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, that in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought." (emphasis in original) 45 U.S.C. Sec. 55.

Reading the sentence as a whole, the words "any" and the words "contract," "rule," and "regulation" are all "devices" that can exempt a railroad from liability. There could be other "devices" (such the counterclaim here) that serve to exempt railroads from any liability, and that is why Congress used a catchall term like "any device whatsoever." If Congress had intended to limit Section 55 to only "contracts," "rules," and "regulations," it would have so specified, and certainly would not have included the words "or device whatsoever."

III. It is the Court's Role to Interpret the FELA and not Pass the Buck to Congress

In *Kernan v. American Dredging Company, Id.*, Justice Brennan explained the court's role in the evolution of the FELA:

> "…[I]nstead of a detailed statute codifying common law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it is clear that the general congressional intent was to provide liberal recovery for injured workers, *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508-510, and it is also clear that Congress intended the

> creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers." *Id.*, at 432.
>
> "For Congress, in 1908, did not crystalize the application of the Act by enacting specific rules to guide the courts. Rather, by using generalized language, it created only a framework within which the courts were left to evolve, much in the manner of the common law, a system of principles providing compensation for injuries to employees consistent with the changing realities of employment in the railroad industry." *Id.*, at 437.

Some recent decisions dealing with the statutory interpretation of Sections 55 and 60 of the FELA, however, have ignored the mandate of *Kernan* and, instead, tried to pass the "problem" back to Congress. In *Nordgren v. Burlington Northern R.R.*, 101 F.3d 1246 (8th Cir. 1996), the circuit court was sympathetic to the Plaintiff's argument, and Judge Hall's dissent in *Cavanaugh v. W. Md. R.R. Co.*, 728 F.2d 289 (4th Dist. 1984), holding that counterclaims for property damages were inappropriate in FELA actions, but the court sided with the railroad, stating, "we are not legislators, however, and in our view, Congress' silence on this issue speaks volumes. We therefore hold that FELA does not preempt BN's counterclaim for property damages." *Id.* at 1253.

More recently, in *Norfolk S. Ry. Co. v. Tobergte*, a district court decision from the Eastern District of Kentucky (2018 U.S. Dist. Lexis 207513) held, "it is not the province of this court to stretch the plain meaning of the language of Section 5 to arrive at more equitable outcomes. Rather, it is up to Congress to fix the problem. If Congress wishes to preclude railroads from filing separate state actions or counterclaims for property damages, then it should amend the relevant language of Section 5." *Id.*, at p. 12.

The *Nordgren* and *Tobergte* decisions are exactly what the U.S. Supreme Court in *Kernan* hoped to avoid. Congress simply laid a broad framework for the FELA and left it up to the courts to develop and enlarge in accordance with its remedial and humanitarian purpose. That is exactly what this court must do here.

Conclusion

For all of the reasons stated above, the Illinois Trial Lawyers Association (ITLA), by its volunteer counsel, Peter F. Higgins, asks this court to affirm the judgment of the Appellate Court, First Judicial District, in this important matter.

Respectfully submitted on behalf of the
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341 (a) and (b). The length of this brief, excluding the pages or words contained in Rule 341 (d) cover, the Rule 341 (h)(1) statement of points of authorities, the Rule 341 (c) certificate of compliance, the certificate of service, those matters to be appended to the brief under Rule 342 (a), is 10 pages.

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