No. 124454

IN THE SUPEME COURT OF ILLINOIS

MELVIN AMMONS,

Plaintiff/Counter-Defendant/Appellee,

v.

CANADIAN NATIONAL RAILWAY COMPANY, LTD., and
WISCONSIN CENTRAL, LTD.,

Defendants.

(Wisconsin Central, Ltd., *Defendant/Counter-Plaintiff/Appellant*)

DARRIN RILEY,

Plaintiff/Counter-Defendant/Appellee,

v.

WISCONSIN CENTRAL, LTD.,

Defendant/Counter-Plaintiff/Appellant.

On appeal from the Appellate Court of Illinois, First District,
Nos. 1-17-2648 & 1-17-3205 (cons.)
Appeals from the Circuit Court of Cook County, Illinois, Law Division
Nos. 15 L 001324 & 16 L 004680 (cons.)
Honorable John H. Ehrlich, Judge Presiding

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INTRODUCTION

In this appeal, the Court has the task of determining the intent of Congress in 1908 when it reenacted the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (2012) ("FELA"). In pursuing this task, the Court has the benefit of four decisions by four separate United States Courts of Appeals all holding that, when it enacted FELA, Congress did not intend to eliminate the common law rights of railroads to sue employees for negligent damage to property.

Plaintiffs and their *amici* argue that, in reenacting FELA, Congress intended to sweep away all impediments to an injured employee's recovery including the employer's right to sue the employee for damaging company property. Wisconsin Central's opening brief and this brief show the fallacy—if not the absurdity—of this argument. Some reasons why:

(1) Courts, including this Court, have repeatedly stated that the FELA is not a worker's compensation statute.

(2) It is undisputed that the common law in 1908 permitted employers to bring property damage counterclaims in actions brought by injured workers. That right of employers continues to this day. See *Nordgren v. Burlington Northern R.R. Co.*, 101 F.3d 1246, 1252 & n.6 (8th Cir. 1996); *Cavanaugh v. Western Maryland Ry. Co.*, 729 F.2d 289, 290-91 (4th Cir. 1984), *cert. denied*, 469 U.S. 872. The law at the time the FELA was reenacted and the fact that Congress never purported to eliminate the

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railroad's right to pursue property damage counterclaims refute the interpretation of the FELA urged by Plaintiffs and their *amici*. See *Nordgren*, 101 F.3d at 1253.

(3) In interpreting a federal statute, state courts are to look to federal courts for guidance and to promote national uniformity in that interpretation. All four federal circuit courts of appeals to decide the issue of whether the FELA prohibits common law property damage counterclaims brought by railroads have held that it does not. None of the cases relied upon by Plaintiffs or their *amici* overcome the strong reasoning of the four federal circuit court decisions spanning over 30 years, and which are controlling law in federal courts covering 19 states.

(4) Plaintiffs concede that there is no published research supporting their theory that property damage counterclaims have curtailed the recovery rights of injured railroad workers; they suggest that it is a matter of common sense. But the distinguished panel of judges that formed the majority in *Cavanaugh* called it a "fanciful notion." 729 F.2d at 294. And three other courts of appeals apparently agree with this characterization.

(5) Under Plaintiffs' theory, a railroad (like any other employer) can sue an employee for negligently or recklessly damaging company property, but an employee can buy complete immunity from prosecution by filing a FELA action. Adding to the absurdity, as the dissent pointed out, a fellow negligent worker who does not file a claim remains potentially fully liable.

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Ammons v. Canadian National Ry. Co., 2018 IL App (1st) 172648 ("Op."), ¶ 40, A16 (Pierce, J., dissenting).

(6) *Nordgren* observed, the common law rights of railroads to assert property damage claims are separate from the rights given workers under the FELA; and there is no evidence of a congressional intent to interfere with these rights. *Nordgren*, 101 F.3d at 1252.

This Court should reverse the appellate court judgment and join the decisions of the federal appeals courts that are "sound" and "better reasoned" rather than the decisions relied upon by Plaintiffs and their *amici*. See Op., ¶ 36, A14 (Pierce, J., dissenting).

ARGUMENT

I. The only federal courts of appeals decisions to reach the issue—there were four—uniformly held that sections 55 and 60 of the FELA do not prohibit property damage counterclaims; and the appellate court majority's failure to give those decisions considerable weight was error.

As this Court instructed in *Wilson v. Norfolk & Western Railway Co.*, 187 Ill. 2d 369, 383 (1999), Illinois courts are to look to decisions of the federal courts interpreting federal statutes in order to maintain national uniformity. Accord *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479 (1943) ("Only by a uniform federal rule . . . may litigants under the [FELA] receive similar treatment in all states."). If there is a lack of United States Supreme Court precedent and a split among the federal courts, Illinois courts are instructed to follow the better-reasoned decisions. *State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶ 35. Here the split is between the

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decisions of four federal circuit courts of appeals followed by certain district courts, on the one hand, and a nearly 40-year-old Washington state decision followed by a couple of federal district courts, on the other hand.

In its opening brief, Wisconsin Central discussed at length, the four federal circuit court of appeals decisions. Brief and Argument of Defendant/Counter-Plaintiff/Appellant ("WC Br.") at 13-20 (discussing *Withhart v. Otto Candies, L.L.C.*, 431 F.3d 840 (5th Cir. 2005); *Nordgren*, 101 F.3d 1246 (8th Circuit); *Sprague v. Boston & Maine Corp.*, 769 F.2d 26 (1st Cir. 1985); *Cavanaugh*, 729 F.2d 289 (4th Circuit)). Recently, the federal district court in Kentucky described these cases as the "majority view" and, after careful review, adopted their reasoning. *Norfolk Southern Ry. Co. v. Tobergte*, No. 5:18-cv-207-KKC, 2018 WL 6492606, at *3 (E.D. Ky., Dec. 10, 2018).

For their part, Plaintiffs barely discuss the four courts of appeals decisions. See Joint Brief of Plaintiffs/Counter-Defendants/Appellees Melvin Ammons and Darin Riley ("Pls' Br.") at 6, 21-25. Plaintiffs focus on *dicta* in a Seventh Circuit case, *Deering v. National Maintenance & Repair, Inc.*, 627 F.3d 139 (7th Cir. 2010), arguing that it created a circuit split and should be followed as the better-reasoned decision. Plaintiffs are incorrect. Surprisingly, they cite two recent cases, both of which followed the four courts of appeals' decisions. *Id.* at 7, 11 n.2 (citing *Schendel v. Duluth*, No. 69DUCV132319, 2014 WL 5365131, at *10 (Minn. Dist. Ct. Sept. 29, 2014)

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(finding *Nordgren*'s analysis "highly persuasive authority") and *Tobergte*, 2018 WL 6492606, at *3-4 (following "majority view" espoused by the First, Fourth, Fifth, and Eighth Circuits)).

A. *Deering* did not create a conflict with its sister courts and, in any event, was not better reasoned.

The Seventh Circuit decision in *Deering*, 627 F.3d 1039, did not create a split with its sister courts, as Plaintiffs contend. Pls' Br. at 7, 10-11; see WC Br. at 31-32. In fact, Plaintiffs admit that *Deering*'s actual holding was confined to the facts of that case. Pls' Br. at 10. Even the district court in *Blanchard v. Union Pacific Railroad Co.*, No. 15-0689-DRH, 2016 WL 411019 (S.D. Ill. Feb. 2, 2016), another of Plaintiffs' cases, only treated *Deering* as "instructive" because it did not address the exact issue in the FELA context. *Id.* at *2.

Plaintiffs argued, and the appellate court agreed, that *Deering*'s passing comments about the FELA should be treated as judicial *dictum*. Op., ¶ 25, A11. *Deering*'s musings about the FELA do not qualify as judicial *dictum* because the court did not deliberately pass upon the FELA issue. See *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993). To the contrary, the FELA issue was "le[ft] for a future day," specifically to avoid "creating a conflict" with those federal courts of appeals that actually reached the issue. *Deering*, 627 F.3d at 1048.

But even if *Deering* has some influence here, its purely academic analysis pales in comparison to the thorough analysis of the majority

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opinions in *Cavanaugh* and *Nordgren.* Plaintiffs fail to compare or contrast the two views and instead merely parrot *Deering* by setting forth numerous block quotations. Pls' Br. at 8-10. Most recently, the district court in Kentucky rejected *Deering*'s reasoning, stating that it "would strain credulity and common sense" to expand section 55 of the FELA to encompass a railroad's separate action or counterclaim for property damage. *Tobergte*, 2018 WL 6492606, at *3.

Not only was *Deering*'s focus on admiralty law and the Jones Act (*Deering*, 627 F.3d at 1048), but it relied on a then 25-year-old law review article (*id.* at 1043-44 (citing William P. Murphy, *Sidetracking the FELA: The Railroads' Property Damage Claims*, 69 Minn. L. Rev. 349, 367-72 (1985) (the "Murphy Article"))). Of course, law review articles are not binding authority. *Sears, Roebuck & Co. v. Royal Surplus Lines Insurance Co.,* No. 00 C 7084, 2001 WL 1467762, at *4 (N.D. Ill. Nov. 19, 2001). The *Nordgren* court was aware of the Murphy Article because the dissent cited it. *Nordgren*, 101 F.3d at 1253 (McMillian, J., dissenting). But the lack of any reference to that article in the majority's decision suggests that the majority did not find it persuasive. Furthermore, the Murphy Article, published in 1985, one year after *Cavanaugh*, criticized that court's reading of congressional intent. Yet Congress has not acted in the last 35 years, as the author proposed, to change the language of sections 55 or 60 of the FELA.

Here, the appellate court cited *Deering* for the proposition that

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counterclaims would be used by railroads as setoffs against personal injury claims and, thus, exempt themselves from liability. Op., ¶¶ 22, 24, 25, A9-11. Citing the Murphy Article, *Deering* noted that at the time the FELA was enacted, railroads were permitted to seek recovery for property damage, but that recovery was limited to a setoff against claims by employees for unpaid wages. 627 F.3d at 1043. From that fact, *Deering* inferred that there was no need in 1908 for Congress to specifically exclude property damage counterclaims. But that is not accurate. As the *Nordgren* majority explained, property damage setoffs were unlikely in 1908 because there were no personal injury actions against which to assert them. Employee personal injury recoveries had been barred by contract and the common law defense of contributory negligence. *Id.* at 1252, 1253 n.7. The FELA changed that.

Another error in *Deering*'s reasoning, is its failure to apply the rule of statutory interpretation known as *ejusdem generis* ("of the same kind") to the list of terms in section 55 of the FELA within which the term "device" is found. See *infra* at 19-20; WC Br. at 28-31. This failure, too, is a reason to ignore its *dictum*.

B. The reasoning of federal district courts and a Washington state court adopted by the appellate court majority was flawed.

The appellate court majority's interpretation of sections 55 and 60 of the FELA was premised primarily on the dissents in *Cavanaugh* and *Nordgren*; the district court decision underlying *Deering—In re National Maintenance & Repair, Inc.*, No. 09-0676-DRH, 2010 WL 456758 (S.D. Ill.

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Feb. 3, 2010); two other federal district court cases—*Blanchard*, 2016 WL 411019 and *Yoch v. Burlington Northern Railroad Co.*, 608 F. Supp. 597 (D. Colo. 1985); and a Washington state court decision that preceded any of the federal court of appeals decisions—*Stack v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 615 P.2d 457 (Wash. 1980). Op., ¶¶ 17-19, 21, A6-9. *Yoch* is only one page in length, and it merely acknowledged the existence of opposing views in *Cavanaugh* and *Stack* and then summarily adopted the reasoning *Stack* and the *Cavanaugh* dissent without any explanation. *Yoch*, 608 F. Supp. at 598.

Plaintiffs' brief quotes extensively from *Deering, In re National Maintenance, Blanchard, Yoch,* and *Stack*. Pl's Br. at 7-10, 13-18; see also *Amicus Curiae* Brief by the Academy of Rail Labor Attorneys ("ARLA Br.") at 13-15. But Plaintiffs fail to address how the appellate court considered and was persuaded by them. In any event, the appellate court majority did follow those cases to hold that section 55 of the FELA barred the railroad's counterclaim because it was a "device" used to intimidate and exert economic pressure upon the injured worker and curtail and chill his rights, ultimately limiting the railroad's liability. Op., ¶¶ 17-19, 21, A6-9.

That holding was wrong for a number of reasons. First, the majority gave undue weight to the fact that the injured worker had no workers' compensation benefits, and his sole remedy was the FELA. Op., ¶ 28, A12. If anything, the FELA provides injured workers with remedies greater than

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those available under the Workers' Compensation Act or the common law. It lowered the causation standard (see *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 507 (1957)) and provided no ceiling for recovery by extending the railroad's liability to all injuries to the extent the railroad's negligence played any part, no matter how small (*Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 116 (1963)). Other benefits to the railroad workers as a result of the FELA were the elimination of several common law defenses previously available to the railroad. See *Nordgren*, 101 F.3d at 1248-49; *Cavanaugh*, 729 F.2d at 291.

Second, as Wisconsin Central argued in its opening brief (WC Br. at 25-28), the "retaliatory and chilling effects" predictions first made in *Stack* and adopted in the other cases followed by the appellate court majority is nothing but a "fanciful notion." *Cavanaugh*, 729 F.2d at 294. That same sentiment was expressed by the dissent. Op., ¶ 39, A16 (Pierce, J., dissenting). It relies on the false assumption that the railroad will always prevail on its property damage claim and that its recovery will always exceed the injured worker's personal injury claim. See WC Br. at 26-28; see *infra* at 13-14, 22.

Stack, a state court case, was the first case to predict "chilling effects" from the filing of property damage counterclaims. *Stack* was decided before any of the four circuit courts of appeals decisions and, thus, lacked the benefit of any federal interpretation of the FELA. Its support came from a federal

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case that had nothing to do with property damage counterclaims. See WC Br. at 23. Further, its application of section 60, which prohibits the suppression of testimony by co-workers who may be at risk for their own liability (*Stack*, 615 P.2d at 159, 162) has no relevance here. See WC Br. at 23-25. Only the Plaintiffs are alleged to have negligently caused Wisconsin Central's property damage, and Wisconsin Central is seeking recovery only against them.

The potential for suppression of co-worker testimony in a FELA action (which is the conduct forbidden by section 60) is nonexistent here. Moreover, the Fourth Circuit in *Cavanaugh* rejected *Stack*'s conclusions that the railroad's counterclaim improperly coerces or intimidates the injured party from seeking redress. 729 F.2d at 293-94. It also rejected any notion that section 60 of the FELA proscribed property damage claims against all railroad employees with knowledge of the accident (thus, providing them with immunity) because maintenance of such claims would make parties privy to the accident reluctant to furnish information to the FELA plaintiff. *Id.* at 293 ("We cannot believe that Congress had any such far-fetched purpose in enacting section 10.").[1]

Plaintiffs offer nothing of substance in support of their "chilling effects" argument, adopted by the appellate court majority, other than that a FELA

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[1] When the FELA was reenacted in 1908, sections 55 and 60 were internally numbered as sections 5 and 10, respectively.

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plaintiff would fear property damage liability. See Pls' Br. at 18, 26; see ARLA Br. at 19. But so could any party who is subject to liability in tort. *Cf. Cavanaugh*, 729 F.2d at 294 (notion that counterclaim would prevent or prejudice the plaintiff could be advanced against any counterclaim in any tort action).

There is no evidence that Congress sought to give negligent FELA workers immunity to eliminate that fear or to treat injured railroad workers who damage railroad property differently from other injured workers who damage their employers' property. Absent that evidence, the better rule, according to the four federal courts of appeals, is to exercise caution against reading into a statute a congressional intent to eliminate a common law right. *Nordgren*, 101 F.3d at 1253; *Cavanaugh*, 729 F.2d at 294; accord *Tobergte*, 2018 WL 6492606, at *4 ("it is not within 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.").

C. The FELA's remedial purpose cannot be used to expand its language beyond what Congress intended.

Congress reenacted the FELA in 1908 to provide a comprehensive scheme for railroad workplace injuries and death resulting from accidents on interstate railroads. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994). Here, the appellate court majority reasoned that the allowance of property damage counterclaims would defeat the FELA's purpose and goals of providing for that recovery. Op., ¶¶ 21-22, 26, 28-30, A9, A11-12.

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Plaintiffs and the *amici* cite to a number of United States Supreme Court cases that construed the FELA liberally to accomplish its purpose. Pls' Bf. at 11-13; *Amicus Curiae* Brief by Illinois Trial Lawyers Association in Support of Plaintiffs/Appellees ("ITLA Br.") at 1-3; ARLA Br. at 6-8. In those cases only FELA injury claims were being litigated. The courts either expanded the types of injuries recoverable under the FELA or limited the railroad's defenses to the FELA claims. *E.g.*, *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 159-60 (2003) (refusing to allow apportionment of damages between railroad causes and nonrailroad causes); *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 561-62, 567-69 (1987) (extending FELA to certain emotional injuries); *Urie v. Thompson*, 337 U.S. 163, 180-82 (1949) (extending FELA to occupational diseases, like silicosis); *Rogers*, 352 U.S. at 507 (applying a relaxed standard of proof of causation). These cases are of no help in deciding whether Congress intended to bar the railroad's independent common law right to pursue property damages against an employee.

The *Nordgren* majority acknowledged that the FELA was a broad remedial statute to be liberally construed and cited many of the cases cited by Plaintiffs and the *amici* here. But *Nordgren* also noted that the Supreme Court has applied limits to the FELA, interpreting it in light of its historical realities. *Nordgren*, 101 F.3d at 1249-50 (citing, *e.g., New York Central R.R. v. Winfield*, 244 U.S. 147 (1917) (railroad responsible only for injuries

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resulting from some imputable negligence on the railroad's part)). Those historical realities showed that Congress was aware in 1908 of the railroad's ability to exercise its common law right to recover damages from a negligent employee who causes property damage and that, absent negligence by the master himself, the doctrine of contributory negligence, which applied at the time, did not bar that recovery. *Nordgren*, 101 F.3d at 1252; see also WC Br. at 35-39.

As *Nordgren* correctly reasoned in rejecting claims of field preemption and conflict preemption (raised by the ARLA *amicus curiae* here (ARLA Br. at 17-19)), Congress only intended to occupy the field of recovery for personal injuries to railroad workers. According to the *Nordgren* majority, property damage counterclaims "protect an entirely different interest and arise independently of any liability under the FELA" and, thus, did not stand as an obstacle to the accomplishment of the purposes and objectives of Congress. *Nordgren*, 101 F.3d at 1251-52.

Notably, the *Nordgren* majority did not ignore "the unfortunate reality" that "a railroad's claim for property damages may greatly exceed the employee's personal injury claim arising out of the same incident." *Id.* at 1252. The court simply presumed that Congress was aware of this potential and refused to infer conflict preemption "merely because, after all is said and done, the property damage award might be greater than the FELA award. We presume a statute 'to be harmonious with existing law' absent a clear

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manifestation of contrary intent." *Id.* at 1253 (quoting *Wood v. Commissioner of Internal Revenue*, 909 F.2d 1155, 1160 (8th Cir. 1990)).

The *Cavanaugh* court made similar observations, noting the absence of any explicit language in the FELA that would "require, or even suggest, such a sacrifice of the railroads' [property damage] rights." 729 F.2d at 291. According to *Cavanaugh*, Congress understood how to prohibit certain defenses and could have easily barred the railroad's counterclaim, but it did not do so. *Id.*

None of ARLA's other points about offsets for comparative negligence and about issue and claim preclusion support a finding of conflict preemption. ARLA Br. at 18-19. ARLA fails to develop its argument on these points. In any event, the legislative history of the 1908 reenactment of the FELA fails to show that any of these factors were considered by Congress when it added the words "device whatsoever" to sections 55 and 60.

D. The allowance of property damage counterclaims would promote national uniformity and would discourage bogus FELA claims.

Plaintiffs argue that a reversal of the appellate court decision here would create a lack of uniformity in Illinois because federal courts sitting in Illinois and Illinois state courts would be bound by different interpretations. Pls' Br. at 19. First of all, the goal with respect to interpretation of a federal statute is national uniformity. *Brady,* 320 U.S. at 479 (discussing need for a uniform federal rule so that FELA litigants receive similar treatment in all states). And the four federal circuit courts of appeals, the highest federal

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courts to have decided the issue, uniformly held that the FELA does not prohibit property damage counterclaims. National conformity can be accomplished only by following these four circuits. To rule otherwise would create precisely the uncertainty the Plaintiffs argue against.

Second, reversal of the appellate court decision will not cause a lack of uniformity within the state of Illinois. District courts sitting in Illinois are not bound to follow *Deering* because *Deering* expressly stated that it was not reaching the issue. *Supra* at 4-5. The district court in *Blanchard* recognized that *Deering* was only "instructive." *Supra* at 5. And other district courts sitting in Illinois or elsewhere are not required to follow *Blanchard* or *In re National Maintenance*. See *Flanagan v. Allstate Insurance Co.*, 242 F.R.D. 421, 431 (N.D. Ill. 2007) (when deciding a matter of federal question, district court is only bound by decisions of the United States Supreme Court and the Circuit Court of Appeals of the circuit in which it sits). Thus, Plaintiffs' concerns of forum shopping within Illinois are unfounded.

But if this Court affirms the appellate court's decision here, FELA plaintiffs suffering injuries around the country will forum shop and attempt to lodge their FELA claims in Illinois state courts in order to avoid liability for property damage claims brought by their railroad employers. See WC Br. at 10-11.

Plaintiffs also argue that reversal of the appellate court's opinion would lead to absurd results. According to Plaintiffs, if the FELA plaintiff is

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found liable for the railroad's property damage claim, then under the theory of *respondeat superior*, the railroad would be liable to itself. Pls' Br. at 20. That argument makes no sense. The common law principle of *respondeat superior* charges the master with liability for the servant's negligence that causes injury to *third parties*. *E.g., Webb by Harris v. Jewel Cos.*, 137 Ill. App. 3d 1004, 1006 (1st Dist. 1985); *Van Meter v. Gurney*, 240 Ill. App. 165, 176 (1st Dist. 1926); *see generally* Restatement (Third) of Agency § 7.03 (database updated June 2019). That principle has no relevance when the master pursues recovery for its own property damage caused by the master's employee.

Plaintiffs cite *Schendel*, 2014 WL 5365131, but *Schendel* applied a Minnesota indemnification statute, not the common law principle of *respondeat superior.* The statute in that case required employers to indemnify their employees for any damages resulting from the employee's negligence. 2014 WL 5365131 at *11. No comparable Illinois statute exists.

Contrary to Plaintiffs' position, an absurd result will occur if a negligent employee can avoid property damage liability by simply claiming injury, no matter how slight. See *supra* at 2-3; see also WC Br. at 11.

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II. The appellate court majority misapplied rules of statutory construction.

A. The appellate court adopted meanings of the words "device whatsoever" and "exempt" that were not drawn from context.

A cardinal rule of statutory construction is that the meaning of a word must be drawn from the context in which it is used. *Corbett v. County of Lake*, 2017 IL 121536, ¶ 27. The majority decisions in *Cavanaugh* and *Nordgren*, adopted in *Sprague* and *Withhart*, followed that rule. See WC Br. at 14-15, 17-18. Both courts determined the meaning of the words "device whatsoever" in section 55 by examining the preceding words in the series, *i.e.*, contract, rule, regulation, and by examining the words that followed, *i.e.,* "exempt itself from liability." *Nordgren*, 101 F.3d at 1250-51 ("[o]nly when something exempts the railroad from liability can it be a device"); *Cavanaugh*, 729 F.2d at 292 (same).

Both courts concluded that since the railroad's counterclaim was *for its own damages*, it plainly was not an exemption from liability for the FELA plaintiff's damages and, thus, was not a device within the contemplation of Congress. *Cavanaugh*, 729 F.2d at 292; accord *Nordgren*, 101 F.3d at 1250 ("we simply cannot agree that Congress meant 'device' to preclude separate causes of action"). *Nordgren* found further support for its interpretation from the fact that the phase "any device whatsoever" referred only to legal instruments that railroads used prior to the enactment of the FELA to

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exempt themselves from liability, such as contracts, rules, and regulations. 101 F.3d at 1251.

The appellate court, on the other hand, defined the term "device" with reference to current dictionary definitions, not its context within the FELA. WC Br. at 31-35. The court compounded its error by expanding the meaning of the term "exempt" to include "limiting" or "eliminating" FELA liability. Op., ¶¶ 21, 24; A9-10.

Plaintiff and ITLA take issue with the appellate court's use of current definitions of the term "device," contending that the court should have applied the 1908 dictionary definition of "device." Pls' Bf. at 27-28 (citing *Corbett*, 2017 IL 121536, ¶ 35); ITLA Br. at 4-5 (same). They cite *Armour Packing Co. v. United States*, 209 U.S. 56 (1908), a case that construed the term "device" as it appeared in the 1907 version of the Elkins Act. The provision at issue made it

> "'unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce, . . . whereby any such property shall, *by any device whatever*, be transported at a less rate than that named in the tariffs published and filed by such carrier, . . . or whereby any other advantage is given or discrimination is practised.'" (Emphasis added.) 209 U.S. at 70-71.

Prior versions of the Elkins Act included a fraud component; and the question for the Court was whether an offender of the Elkins Act had to engage in "some bad faith or fraudulent conduct in the use of the device." *Id.* at 69.

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Plaintiffs and ITLA highlight a passage in *Armour Packing* that cited to the Webster's dictionary definition of "device" as "that which is devised or formed by design; a contrivance; an invention; a project, etc." Pls' Br. at 28 (citing *Armour Packing*, 209 U.S. at 71 (internal quotation marks omitted)); ITLA Br. at 5-6 (same). ITLA cites additional language in *Armour Packing* that emphasized the remedial purpose of the statute and the requirement for liberal construction. *Armour Packing*, 209 U.S. at 72.

Plaintiffs and ITLA argue that the broad interpretation of "device" in the 1907 version of the Elkins Act should apply to section 55 of the FELA. Pls' Br. at 28; ITLA Br. at 7. Not so. Like the Elkins Act, the FELA may have a remedial purpose, but the similarity ends there. The legislative history of the FELA, referenced in *Cavanaugh* and *Nordgren*, shows that section 55 of the FELA was intended to defeat the railroad's use of contracts and other instruments that caused workers to release or lose their rights to pursuant claims for personal injuries. *Nordgren*, 101 F.3d at 1251; *Cavanaugh*, 729 F.2d at 292; see also WC Br. at 35-37. There simply is no evidence of congressional intent to eliminate the railroad's separate claims for property damage. *Supra* at 11, 12-14.

Furthermore, ITLA agrees with Wisconsin Central that the words "device whatsoever" must be construed in context with the words preceding it. ITLA relies on the rule of *noscitur a sociis* (a word is known by the company it keeps), whereas Wisconsin Central relies on the rule of *ejusdem*

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generis (of the same kind). Compare ITLA Br. at 7-8 with WC Br. at 17, 30-31. *Ejusdem generis* is a cannon of construction related to *noscitur a sociis. Senese v. Village of Buffalo Grove*, 383 Ill. App. 3d 276, 279 (2d Dist. 2008).

Under either rule, the point is to determine the meaning of the words "device whatsoever" with reference to the words that precede it and noting that the words "device whatsoever," which are more general, follow more specific words. *Nordgren* followed these rules (*supra* at 17); the appellate court did not. Instead, it engaged in improper judicial lawmaking, expanding the application of section 55 beyond what Congress intended. See WC Br. at 32-35; see *Tobergte*, 2018 WL 6492606, at *4 ("to stretch [the FELA] to include a [prohibition of the] railroad's claim or counterclaim for property damages would be a significant overstep" by the courts").

Plaintiffs and their *amici* cite *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958), for its instruction that Congress used general terms in the FELA to allow the courts to fashion remedies for injured workers analogous to those at common law. Pls' Br. at 25-26; ARLA Br. at 16; ITLA Br. at 8-9. The problem for Plaintiffs is that the railroad's common law right to seek property damage has nothing to do with the FELA's purpose of providing a remedy for injured workers. Those two rights are independent. See *supra* at 13.

Further, unlike the court in *Kernan*, the appellate court here did not fashion a remedy for personal injuries based on the language of the FELA or

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the common law. It added new language to the FELA (which the four circuit courts of appeals refused to do) to eliminate separate and independent common law rights of recovery held by the railroad. *Supra* at 17. *Kernan* does not support judicial lawmaking. That power is not lodged in the courts, but in Congress. See *Nordgren*, 101 F.3d at 1253 ("We are not legislators"); *Tobergte*, 2018 WL 6492606, at *4 ("it is up to Congress to fix the problem").

B. None of the cases cited by Plaintiffs or the *amici* support the appellate court's expansive reading of the FELA.

Plaintiffs and the ARLA *amicus* cite *Philadelphia, Baltimore & Washington Railroad v. Schubert*, 224 U.S. 603, 611 (1912), for its discussion of congressional intent in 1908 to enlarge the scope of section 55 (then section 5). Pls' Br. at 13; ARLA Br. at 9-11. As *Schubert* points out, the scope of the FELA was enlarged from prohibiting a "contract" to prohibiting "every variety of agreement or arrangement of this nature." 224 U.S. at 611. ARLA cites *Duncan v. Thompson*, 315 U.S. 1, 4, 7 (1942) (ARLA Br. at 10-11, 15), but that case likewise involved an "agreement" or "instrument", *i.e.*, a contract, that took away any right to sue.

ARLA argues that four federal courts of appeals ignored *Schubert* and *Duncan* and other Supreme Court precedent. ARLA Br. at 11-12. Not so. *Nordgren* discussed both *Schubert* and *Duncan* and found that they supported its holding. 101 F.3d at 1251. *Nordgren* saw nothing in the discussion of *Duncan* that "supports the proposition that Congress intended 'any device whatsoever' to include a state-law based counterclaim for

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property damages." *Id.*

Nor does ARLA succeed in its attack of the *Cavanaugh* majority. In fact, ARLA concedes that *Cavanaugh* held that property damage counterclaims were not prohibited by section 55 because they were not devices that barred *the bringing of* a FELA claim. ARLA Br. at 11-12 (citing *Cavanaugh*, 729 F.2d at 292). This is consistent with *Duncan*, which also held that section 55 (then section 5) prohibited instruments or agreements that "exempt" the defendant from liability and, thus, bar the FELA claim.

ARLA nevertheless argues that *Cavanaugh* was wrongly decided because, like the plaintiff in *Duncan*, the *Cavanaugh* plaintiff was left without a remedy because the railroad's property damage counterclaim was $200,000 greater than the plaintiff's FELA claim. ARLA Br. at 12. ARLA misses the point. As Justice Pierce noted in his dissent, the counterclaim has zero effect on the potential liability of the railroad for the plaintiff's injuries. Op., ¶ 39, A16 (Pierce, J., dissenting). This is also consistent with *Urie*, 337 U.S. 163, another of ARLA's cases, because, if the railroad is negligent, the costs relating to the worker's injury are still equitably assigned to the railroad in the judgment entered against it. See also *infra* at 9.

ARLA's citation to *California Home Brands, Inc. v. Ferreira*, 871 F.2d 830 (9th Cir. 1989), is of no help either. ARLA Br. at 13. Not only is *Ferreira* a Jones Act case, but the ship owner in that case was not seeking property damage recovery against the injured seaman. *Withhart* distinguished

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Ferreira on that basis and concluded that "permitting a shipowner-employer to sue its seaman-employee for property damage arising out [of] the seaman-employee's negligence will not narrow the remedies available to seamen-employees." *Withhart*, 431 F.3d at 845.

CONCLUSION

In adopting the FELA, Congress did not intend to bar a railroad from asserting its common law rights to file a claim against an injured employee who damages, through negligence, company property. Nothing in the briefs of Plaintiffs or their *amici* shows otherwise.

For all of the reasons stated above, Wisconsin Central respectfully urges this Court to join the First, Fourth, Fifth, and Eighth Circuit Courts of Appeals in their well-reasoned decisions and to reverse the appellate court decision rejecting these decisions, remand the case for further proceedings, and grant whatever further relief the Court deems appropriate.

Dated: August 1, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Illinois Supreme Court Rule 341(c), I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5,721 words.

/s/*Kevin M. Forde*

No. 124454
IN THE SUPREME COURT OF ILLINOIS

MELVIN AMMONS, Plaintiff/Counter-Defendant/ Respondent, vs. CANADIAN NATIONAL RAILWAY COMPANY, LTD. and WISCONSIN CENTRAL, LTD., Defendants. (Wisconsin Central, Ltd., Defendant/ Counter-Plaintiff/Petitioner)	)	On appeal from the Appellate Court of Illinois, First District, Nos. 1-17-2648 & 1-17-3205 (cons.). Appeals from the Circuit Court of Cook County, Illinois, Law Division, Nos. 15 L 001324 & 16 L 004680 (cons.)
DARRIN RILEY, Plaintiff/Counter-Defendant/ Respondent, vs. WISCONSIN CENTRAL, LTD., Defendant/Counter-Plaintiff/ Petitioner.	)	Honorable John H. Ehrlich, Judge Presiding

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PLEASE TAKE NOTICE that on Thursday, August 1, 2019, we submitted to the Clerk of the Supreme Court of Illinois, REPLY BRIEF OF DEFENDANT/COUNTER-PLAINTIFF/APPELLANT for electronic filing, via OdysseyeFileIL, a copy of which is herewith electronically-served upon you.

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CERTIFICATE OF SERVICE

The undersigned, an attorney, states that the foregoing NOTICE OF FILING and REPLY BRIEF OF DEFENDANT/COUNTER-PLAINTIFF/APPELLANT were served upon counsel noticed as above on this 1st day of August, 2019, BY ELECTRONIC MAIL.

Under penalties as provided by law pursuant to section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/*Joanne R. Driscoll*

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