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

BRIEF AND ARGUMENT OF DEFENDANT/COUNTER-PLAINTIFF/APPELLANT

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Oral Argument Requested

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POINTS AND AUTHORITIES

NATURE OF THE ACTION

This appeal raises the following issue of first impression: In 1908, when Congress enacted the Federal Employers' Liability Act (45 U.S.C. § 51 *et seq.*) (the FELA)—expanding railroad workers' rights to sue their employers for injuries—did Congress, by implication, also eliminate the long-held common law rights of railroads to sue for property damage caused by their injured workers' negligence?

The plaintiffs are two railroad workers employed by Wisconsin Central, Ltd. They brought FELA actions, which were consolidated in the circuit court, against Wisconsin Central to recover for the personal injuries they suffered when the train they were operating ran into another Wisconsin Central train that was stopped ahead on the same track. Wisconsin Central filed counterclaims against each plaintiff to recover its damages, including property damage, caused by their alleged negligent operation of the moving train.

The plaintiffs moved to dismiss the railroad's counterclaims on the ground that they were barred by the FELA. The circuit court granted that motion; and the appellate court, in a 2 to 1 decision, affirmed, rejecting the decisions of four United States Courts of Appeals—the only federal appellate courts to decide the issue—which held that Congress did not, expressly or by implication, bar common law counterclaims for property damage. *Ammons v. Canadian National Ry. Co.*, 2018 IL App (1st) 172648 ("Op."), A1-17. Citing a

hand full of decisions from other federal courts, including *dictum* in a Seventh Circuit Court of Appeals decision, and a Washington state court decision, the appellate court reasoned that the lack of uniformity allowed it to adopt its "own interpretations of federal law." Op., ¶ 20, A8. That interpretation, as the dissent opined, was not well-grounded in the text of the FELA or public policy. Op., ¶ 36, A14 (Pierce, J., dissenting).

ISSUE PRESENTED FOR REVIEW

Whether sections 55 or 60 of the FELA (45 U.S.C. §§ 55, 60) eliminated the long-held common law rights of railroads to recover for property damage caused by their injured workers' negligence.

STATEMENT OF JURISDICTION

The appellate court issued its opinion on December 17, 2018. No petition for rehearing was filed. Wisconsin Central, the Defendant/ Counterplaintiff-Appellant, timely filed its petition for leave to appeal on January 22, 2019. On March 20, 2019, this Court granted the petition for leave to appeal.

STATUTES INVOLVED

Section 55 of the FELA provides:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall 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. § 55.

Section 60 of the FELA provides in pertinent part:

> 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, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall upon conviction therefore, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided*, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

(Emphasis in original.) 45 U.S.C. § 60.

STATEMENT OF FACTS

Wisconsin Central's counterclaims were filed in separate FELA lawsuits brought by Plaintiffs Melvin Ammons (C 26-32; C 214-21)[1] and Darrin Riley (C 90-92; C 130-35) for the personal injuries they suffered on December 13, 2014 when they ran the train they were operating (Riley as locomotive engineer and Ammons as conductor) into another train, also

[1] Plaintiff Ammons initially brought his FELA action against Wisconsin Central and Canadian National Railway Company, Ltd. C 26-32. Early in the case, and by agreement, Ammons voluntarily dismissed Canadian National Railway as a defendant. C 58.

owned by Wisconsin Central, that was stopped ahead on the same track. The plaintiffs' complaints accused the railroad of negligence by failing to provide them with a safe place to work and by violating various rules and regulations. C 132-34 at ¶¶ 9-18; C 216-19 at ¶¶ 8, 10-18. The two cases were consolidated for discovery and trial. C 102.

Wisconsin Central's counterclaims alleged that Riley and Ammons violated a number of company U.S. Operating Rules and safe operating practices and that they acted in a careless and negligent manner, including by ignoring or failing to obey a number of speed restrictions on the tracks. C 159-60, 166-68. Despite their knowledge of distances needed to stop the train at various speeds and despite track signal warnings to reduce speed, Riley exceeded speed limits while Ammons did not communicate known speed restrictions or do anything to reduce the train's speed. C 148-49, 156-59, 164-66. Ultimately, the train they were operating ran into the train stopped ahead. Riley and Ammons suffered physical injuries, and Wisconsin Central suffered significant damage to both trains, railroad track and railroad track structures and was required to perform environmental cleanup and remediation. C 160, 168, 170.

The first count of Wisconsin Central's counterclaims sought recovery for property damage. The second count sought recovery from each plaintiff under the Joint Tortfeasor Contribution Act (740 ILCS § 100.01 *et seq.* (West 2014)) for damages, if any, owed by Wisconsin Central to the other plaintiff

for injuries suffered in the same train collision. C 155-62; C 163-70. (Only the dismissal of the property damage counterclaims are at issue.)

Plaintiff Riley moved to dismiss the railroad's property damage counterclaim, arguing that it was prohibited by sections 55 and 60 of the FELA (45 U.S.C. §§ 55, 60). C 227-32. Ammons joined in Riley's motion. C 330-33. Section 55 of the FELA makes void "[a]ny contract, rule, regulation, or device whatsoever" that "exempt[s]" a common carrier from liability under FELA. Section 60 prohibits any "device whatsoever" that prevents employees from providing information regarding injury or death to an employee. *Supra* at 2-3.

Wisconsin Central responded by citing every decision of the federal circuit courts of appeals (there were four) that reached the issue. Those decisions uniformly held that property damage counterclaims were not prohibited by the FELA. C 341-42. Wisconsin Central argued that those decisions should be followed over plaintiffs' sources that supported a contrary view. C 343-47.

The circuit court granted plaintiffs' joint motion to dismiss the counterclaims on June 14, 2017. C 364-80, A18-34. Addressing the issue of whether the FELA and federal law permitted Wisconsin Central's counterclaims, the court explained the two views, one followed by four federal courts of appeals and the other raised in *dicta* in a Seventh Circuit Court of Appeals decision. C 373-78, A27-32. Ultimately, the circuit court did not

choose which view was the better reasoned, saying that it would be "presumptuous" to do so. C 378, A32. Instead, the circuit court set forth its own reasons as to why Wisconsin Central's property damage counterclaims could not proceed: (1) they would create an impermissible chill upon the rights extended to FELA plaintiffs; (2) they would run counter to the FELA's purpose of persuading railroad employers to exercise caution in hiring and supervising its employees; and (3) the railroad is liable for its agents' acts committed in the scope of their employment. C 378-79, A32-33.

Wisconsin Central moved for reconsideration, which was denied on October 17, 2017. C 427-38; C 478. In its order of denial, the circuit court, *sua sponte*, included a finding that "pursuant to Rule 304(a) that there is no just reason to delay enforcement of this order." C 478. Wisconsin filed a notice of appeal on October 26, 2017. C 479-525.

Because the circuit court's Supreme Court Rule 304(a) finding referred to enforceability but not appealability, there was some question as to whether that order could vest jurisdiction in this Court. See*, e.g., In re DuPage County Collector*, 152 Ill. 2d 545, 550-51 (1992) ("where appeal is sought pursuant to Rule 304(a) from a judgment which defeats a claim or is in the nature of a dismissal, the written finding is sufficient only if it refers to appealability."). As a result, on December 14, 2017, pursuant to the circuit court's instructions, Wisconsin Central filed an agreed emergency motion to

recall the case to issue a new Rule 304(a) finding and to clarify the dismissal ruling entered on June 14, 2017. Sup C 6-9.

The circuit court granted that motion and made a Rule 304(a) finding as to the enforceability and appealability of its June 14, 2017 order. It also clarified that the dismissal with prejudice applied to all of Wisconsin Central's counterclaims. Sup C 45. Wisconsin Central filed a second notice of appeal on December 29, 2017 that appealed from the December 14, 2017 order as well as the June 14, 2017 and October 17, 2017 orders. Sup C 46-66. Leave was granted by the appellate court to consolidate both of Wisconsin Central's appeals on January 18, 2018.

In a 2 to 1 decision, the appellate court affirmed the circuit court's dismissal of Wisconsin Central's counterclaims. In doing so, the majority rejected 30 years of decisions of the four federal circuit courts of appeals followed by several district courts around the country. It found "most persuasive" the dissents in two of the courts of appeals decisions; Seventh Circuit *dictum*, which it characterized as judicial *dictum*; three district court decisions; and a 1980 Washington state decision that preceded the earliest federal court of appeals decision. Op., ¶¶ 17-19, 21, A6-9. According to the appellate court, there was no uniformity among the federal courts and, thus, it was free to adopt its "own interpretation of federal law." Op., ¶ 20, A8-9.

Following what it considered the "more pragmatic approach" and an "interpretation most consistent" with the purpose of FELA—to provide a

remedy to railroad workers who work in a dangerous occupation—the majority held that railroads could not pursue property damage counterclaims because their recoveries would offset and could eliminate the workers' FELA recoveries, chill the filing of personal injury claims, and potentially silence other employees from testifying in favor of injured workers. Op., ¶¶ 21-30, A9-13.

The dissenting justice disagreed, opining that the decision of the first of the four federal courts of appeals—*Cavanaugh v. Western Maryland Railway Co.*, 729 F.2d 289 (4th Cir. 1984), *cert. denied*, 469 U.S. 872—adopted by the other three, was "sound" and "the better-reasoned." Op., ¶ 35, A14 (Pierce, J., dissenting). According to the dissent, those four courts spoke "with a single voice" to hold that a railroad's counterclaim for property damage brought in an employee's negligence suit for personal injury is not a "device" prohibited by the FELA. Op., ¶ 36, A14. The dissent opined that the "majority here adopted an expansive view of the term 'device' that was not well-grounded in the text of the FELA or a public policy that favors an injured party's right to seek damages for another's negligence." *Id.*

The dissent also criticized the majority's concerns about the curtailment of the injured worker's FELA rights as "speculative, since there is no evidence that railroad's possess such an animus." Op., ¶ 39, A16. The dissent opined that the majority's holding was "premised on a misunderstanding of how defendant's counterclaim affects its potential

liability for plaintiffs' injuries, which is zero." *Id.* It also noted an absence of evidence that Congress implicitly intended to eliminate the railroads' long-held right to seek property damage (a point also made by the Fourth Circuit in *Cavanaugh*, 729 F.2d at 292-93). Op., ¶ 40, A16-17.

STANDARD OF REVIEW

Plaintiffs' motion to dismiss was labeled a section 2-615 motion to dismiss, but the motion did not attack the sufficiency of the factual allegations of Wisconsin Central's counterclaims. Rather, the motion argued that the counterclaims were barred by sections 55 and 60 of the FELA. C 227-32. This argument raises affirmative matter that seeks to avoid the legal effect of or defeat the claims and is governed by section 2-619(a)(9) of the Illinois Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2014)). A dismissal under either provision is reviewed *de novo*. *E.g. Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 29.

In addition, the interpretation of a federal statute, such as the FELA, is governed by federal law. *E.g. St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985) (*per curiam*); *State Bank of Cherry v. CGB Enterprises, Inc.,* 2013 IL 113836, ¶¶ 33, 34. In the absence of a United States Supreme Court decision, the weight to be given federal circuit and district court interpretations of federal law depends on factors such as uniformity of law and soundness of decision. *State Bank of Cherry*, 2013 IL 113836, ¶ 33. When federal circuit court decisions are uniform in their

interpretation, Illinois courts are to give those interpretations "*considerable weight*." (Emphasis original.) *Id.* ¶ 34. If a split exists, Illinois courts are to follow the decisions that are better reasoned. *Id.* ¶ 35.

ARGUMENT

Summary of Argument

All four circuit courts of appeals that decided the issue have held that the FELA does not bar counterclaims brought by railroads asserting their common law rights for property damage recovery against FELA plaintiffs. The Seventh Circuit expressed disagreement with these four sister courts but explicitly avoided a ruling that would create a conflict. The two-justice majority of the appellate court panel gave significant weight to the Seventh Circuit's musings and created the very conflict that the Seventh Circuit purposefully avoided. Like the Seventh Circuit, the majority did not apply the statutory construction rule of *ejusdem generis* (of the same kind); and it engaged in judicial law-making by adding words into the FELA in order to give negligent workers total immunity from liability for the property damage they may have negligently caused.

Concerned only about diminishing the injured worker's FELA claim, the appellate court majority ignored the plain language of the FELA and its legislative history, which, as the four courts of appeals concluded, showed no evidence of Congressional intent to deny railroads of their long-held common law right to sue their employees for property damage. The majority's ruling

creates national disharmony and encourages injured railroad workers to forum shop and bring their FELA lawsuits in Illinois state courts.

The majority's opinion also invites false claims of injury because the FELA does not limit claims to those involving severe injuries. In order to escape liability, a slightly injured, but negligent, worker who causes damage to railroad property may file a FELA action in order to bar the railroad's property damage action. Similarly, multiple negligent workers could conspire so that one among them claims injury (no matter the extent) and files a FELA action. For under the majority's view and the view of its "persuasive" authorities, immunity then would be extended to all of the workers involved in the incident so long as one FELA claim is made. A railroad's right to assert its common law property rights and a negligent railroad worker's liability for property damage should not depend upon such fortuitous (or feigned) circumstances.

There is another compelling reality that the appellate court majority ignored. It has been over 30 years since the Fourth Circuit first held (in *Cavanaugh*) that the FELA did not eliminate the common law rights of railroads to bring property damage counterclaims. In that 30 years, Congress has not amended the statute. That inaction "speaks volumes." *Nordgren v. Burlington Northern R.R. Co.*, 101 F.3d 1246, 1253 (8th Cir. 1996). *Cf. Hilton v. South Carolina Public Rys. Comm'n*, 502 U.S. 197, 202 (1991) (noting that Congress had almost 30 years to correct case law

interpreting the FELA if it disagreed).

I. Reversal of the appellate court opinion is warranted because the majority failed to follow the uniform, well-reasoned decisions of all four federal courts of appeals.

Prior to the adoption of the FELA, railroads had a common law right to assert claims against their workers who negligently caused damage to railroad property. *Nordgren*, 101 F.3d at 1252, 1253; *Cavanaugh*, 729 F.2d at 290. The FELA enacted in 1908 created a federal statutory cause of action for injured railroad employees and eliminated certain defenses that previously barred that recovery. *Nordgren*, 101 F.3d at 1248, 1249. As the United States Supreme Court instructed, "[o]nly to the extent of [its] explicit statutory alterations is FELA an avowed departure from the rules of the common law. [Citation.]" (Internal quotation marks omitted.) *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994). The question here is whether Congress intended to eliminate the common law rights of railroads to bring property damage claims against their employees whenever a FELA claim is made as to the same occurrence.

The two provisions in the FELA at issue here are sections 55 and 60. Section 55 of the FELA prohibits the common carrier from attempting to "exempt itself from any liability" pursuant to "[a]ny contract, rule, regulation, or device whatsoever." 45 U.S.C. § 55. Section 60 prohibits "[a]ny 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." 45 U.S.C. § 60; *supra* at 2-3. Neither provision expressly prohibits counterclaims for property damage.

A. All four federal courts of appeals, following rules of statutory construction, uniformly held that sections 55 and 60 do not prohibit property damage counterclaims.

Every federal circuit court of appeals called upon to decide the issue has held that neither section 55 nor section 60 of the FELA explicitly or implicitly bars a railroad employer from pursuing a counterclaim for property damage in a personal injury lawsuit brought by an employee. *Withhart v. Otto Candies, L.L.C.*, 431 F.3d 840 (5th Cir. 2005) (construing FELA as incorporated into Jones Act); *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).

This Court has instructed that federal circuit court decisions are considered persuasive and should be given considerable weight when there is a lack of United States Supreme Court precedent and no split among the federal courts. *State Bank of Cherry*, 2013 IL 113836, ¶¶ 33-35. In giving deference to uniform federal court precedent, an Illinois court cannot simply rule the other way. It must find that the unanimous federal court decisions were "wrongly decided" and that they were "outside 'logic' and 'reason.' " *Id.* ¶ 54.

Here, as will be shown below, there is no split among the circuit courts

of appeals that decided the issue at hand; and even if this Court determines that a split exists, the better-reasoned decisions are those of the four circuit courts of appeals.

1. Fourth Circuit – *Cavanaugh* (1984)

Cavanaugh, the first federal court of appeals to decide the issue, began its analysis by recognizing the "well accepted common law principle that a master or employer has a right of action against his employee for property damages" arising out of the employee's ordinary negligence committed within the scope of employment and the lack of any explicit language in the FELA that required "a sacrifice" of that right. 729 F.2d at 290-91. The two-judge majority further opined that Congress's failure to expressly deprive the railroad of that right could not have been inadvertent, given its explicit elimination of certain defenses and proceedings by defending railroads, such assumption of the risk and contributory negligence (adopting comparative negligence). *Id.* at 291.

The majority then turned its attention to whether such a proscription was implicit in the language or purpose of the statute. *Id.* at 291-92. Examining section 55 (referred to as section 5), the Fourth Circuit opined that it would be "no easy feat of linguistics to read a prohibition of a valid counterclaim as within the term 'device'." *Id.* at 292.

Reasoning that the "critical word" in the definition of "device" was "exemption," because it is only when a "device qualifies as an exempt[ion]

itself from any liability that it is void[ed]," the court held that a counterclaim was "not a device within the contemplation of Congress." (Internal quotation marks omitted.) *Id.* According to the court, "a counterclaim by the railroad for its own damages is plainly not an 'exempt[ion] *** from liability.'" *Id. Cf. Duncan v. Thompson*, 315 U.S. 1, 4 (1942) (recognizing Congress's intent to void only creative instruments meant to exempt carriers from liability).

Next, the Fourth Circuit examined whether section 60 of the FELA (referred to as section 10) implicitly barred the railroad's counterclaim. The court determined that the plain language of that section showed an intent to prevent any direct or indirect chill on the availability of information to the FELA plaintiff. *Cavanaugh,* 729 F.2d at 293 (citing *Stark v. Burlington Northern, Inc.*, 538 F. Supp. 1061, 1062 (D.C.Colo. 1982)). But it refused to accept the plaintiff's argument that this section showed an intent to proscribe property damage counterclaims. According to the Fourth Circuit, there was no authority for the assumption that such counterclaims would prevent or prejudice the injured railroad worker in seeking redress for his injuries or securing a fair award. *Cavanaugh,* 729 F.2d at 294. In addition, the court rejected the plaintiff's argument that section 10 was intended to bar property damage claims against fellow employees who have knowledge of the incident, "lest they be prevented 'from voluntarily furnishing information' in support of plaintiff's action." *Id.* at 293. The court did not "believe that Congress had any such far-fetched purpose in enacting section 10." *Id.*

A dissent in *Cavanaugh* agreed with the plaintiff and with a decision by the Washington Supreme Court in *Stack v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 615 P.2d 457 (Wash. 1980). Like the court in *Stack*, the dissenting judge concluded that a counterclaim for property damage was a "device" that was calculated to intimidate and exert economic pressure upon the injured worker to curtail and chill his rights and "ultimately to exempt the railroads from liability." *Cavanaugh*, 729 F.2d at 296 (Hall, J., dissenting).

Also agreeing with *Stack*, the dissent concluded that the railroad's counterclaim would contravene section 60 (referred to as section 10) because it would prevent employees from voluntarily furnishing information regarding the extent of their own negligence. *Id.* The dissent failed to realize, however, that *Stack* applied section 60 to the railroad's third-party claims against uninjured employees, not to the railroad's counterclaim against the FELA plaintiff. *Stack*, 615 P.2d at 159-60 (applying section 60 to the third-party claims and section 55 to the counterclaim against the FELA plaintiff). There were no third-party property claims at issue in *Cavanaugh*. See *infra* at 23-24.

The United States Supreme Court denied the petition for writ of *certiorari* in *Cavanaugh*. 469 U.S. 872.

2. Fourth Circuit – *Sprague* (1985)

One year later, the First Circuit agreed with the "persuasive" analysis

of the *Cavanaugh* majority (not its dissent or *Stack*) and "the majority of other courts to have considered th[e] question." *Sprague*, 769 F.2d at 29 & n.12 (citing *Consolidated Rail Corp. v. Dobin,* No 82-2539 (E.D. Pa. 1981); *Key v. Kentucky & I. Terminal R.R.*, No. C-78-0313-L(A) (W.D. Ky. 1979); *Cook v. St. Louis-San Francisco R.R.*, 75 F.R.D. 619 (W.D. Okla. 1976)).

3. Eighth Circuit – *Nordgren* (1996)

Eleven years later, in *Nordgren*, the Eighth Circuit reached the same holding as *Cavanaugh*, but by applying the rule of statutory construction known as *ejusdem generis* (of the same kind). It explained that the phrase "any *** device whatsoever" in sections 55 and 60[2] was "informed by the terms preceding it—'contract,' 'rule,' and 'regulation' "—meaning "any other creative agreements or arrangements." *Nordgren*, 101 F.3d at 1250-51. *Nordgren* refused to expand that phrase to "go so far as to preclude a railroad from attempting to recover under a separate state-law cause of action for its property damage." 101 F.3d at 1250-51 & n.4 (citing *Duncan*, 315 U.S. at 6). *Cf. Philadelphia, Baltimore, & Washington R.R. Co. v. Schubert*, 224 U.S. 603, 611 (1912) (stating the phrase "any contract, rule, regulation, or device whatsoever" includes "every variety of agreement or arrangement *of this nature*" (emphasis added and internal quotation marks omitted)).

[2] The *Nordgren* majority limited its discussion of section 60 to a footnote in which it construed the phrase "any *** device whatsoever," found in both sections 55 and 60. *Nordgren*, 101 F.3d at 1251 n.4.

Agreeing with the *Cavanaugh* majority, the *Nordgren* court also held that the phrase "any device whatsoever" in section 55 was defined by the phrase that followed it: "exempt itself from any liability." *Nordgren*, 101 F.3d at 1250. Because the railroad would still be liable to the injured employee, notwithstanding the filing of its counterclaim, the court concluded that section 55 did not prohibit the railroad's common-law based counterclaim for property damage against the FELA plaintiff. *Id.* at 1251. This statutory interpretation was still found "highly persuasive" almost twenty years later in *Schendel v. Duluth*, No. 69DU-CV-13-2319, 2014 WL 5365131, at *10 (Minn. Dist. Ct. Sept. 29, 2014).

A dissenting justice in *Nordgren* disagreed, relying almost exclusively on a then-10-year-old law review article of a law firm associate that was critical of the majority decision in *Cavanaugh*. *Nordgren*, 101 F.3d at 1253-58 (McMillian, J., dissenting) (citing William P. Murphy, *Sidetracking the FELA: The Railroad's Property Damage Claims*, 69 Minn. L. Rev. 349, 367-72 (1985) (the "Murphy Article")). According to the dissent, permitting the railroad to pursue property damage counterclaims would frustrate the purpose of the FELA and could inhibit co-workers from volunteering information because of the threat of property damage claims being brought against them. *Nordgren*, 101 F.3d at 1253-58 (McMillian, J., dissenting).

4. Fifth Circuit – *Withhart* (2005)

Nine years after *Nordgren*, the Court of Appeals for the Fifth Circuit

held, like the First, Fourth, and Eighth Circuits, that the FELA did not abrogate an employer's common law right to sue its employee for property damage. *Withhart*, 431 F.3d 840. The operative statutory scheme in that case was a provision in the Jones Act in which Congress extended to seamen the same rights granted to railway employees under the FELA. *Id.* (citing 46 U.S.C. § 688 (now 46 U.S.C. § 30104)). That incorporation made FELA statutory interpretations instructive in Jones Act cases. *Withhart*, 431 F.3d at 843. The *Withhart* court unanimously chose to follow the "majority of the courts, including every federal circuit court to address the issue," which the court found to be "persuasive" and "better reasoned." *Id.*

More specifically, the *Withhart* court agreed with the *Cavanaugh* majority's construction of the words "device" and "exempt" in section 55 of the FELA (45 U.S.C. § 55) (referred to as section 5) and with the *Cavanaugh* majority's conclusion that a counterclaim for property damage is "plainly not an exemp[tion] *** from any liability" and, thus, not a "device" within the contemplation of Congress. (Internal quotation marks omitted.) *Withhart*, 431 F.3d at 844. As to section 60 of the FELA (45 U.S.C. § 60) (referred to as section 10), the Fifth Circuit also agreed there was no authority for assuming that a counterclaim for property damage gives the railroad an unfair advantage or coerces or intimidates the injured party from seeking redress for his injuries. *Id.*; accord *Thompson v. Yellow Fin Marine Services, LLC*, No. 15-311, 2016 WL 3997060 at *1 (E.D. La. July 26, 2016) (following

Withhart as being bound by Fifth Circuit precedent)); *Gabourel v. Bouchard Transportation Co.,* 901 F. Supp. 142, 144-45 (S.D. N.Y. 1995) (holding Jones Act does not prohibit counterclaim for property damage).

B. The majority's reading of sections 55 and 60 is premised on less persuasive authority and unfounded assumptions.

The appellate court majority opined that it was not required to follow the decisions of the four federal courts of appeals because those cases "do not represent a clear consensus." Op., ¶ 17, A6-7. That so-called lack of consensus was premised primarily on the dissents in *Cavanaugh* and *Nordgren*; Seventh Circuit *dictum* in *Deering v. National Maintenance & Repair, Inc.*, 627 F.3d 1039 (7th Cir. 2010); three district court decisions, one of which was the lower court decision in *Deering* ; and the 1980 Washington state court decision in *Stack*, decided before all four of the federal courts of appeals decisions. Op., ¶¶ 17-19, 21, A6-9.

As a preliminary matter, a dissent has no precedential value (*Sanner v. Champaign County,* 88 Ill. App. 3d 491, 495 (4th Dist. 1980)); indeed, the dissenting judges in *Cavanaugh* and *Nordgren* did not persuade their fellow judges or any of the other federal circuit courts of appeals that directly decided the issue. (*Sprague* and *Withhart* were, of course, unanimous.) Moreover, the dissent in *Nordgren* relied heavily on the Murphy Article, a then 10-year-old a law review article written by a law firm associate, that has no 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)).

Notably, none of the other judges in *Sprague*, *Nordgren* or *Withhart* were persuaded by the Murphy Article, nor was Congress.

Moreover, as shown below, the authorities relied upon by the appellate court majority, including *Deering*, were wrongly decided. See *Weiland v. Telectronics Pacing Systems, Inc.*, 188 Ill. 2d 415, 423 (1999) (declining to follow Seventh Circuit decision where federal circuits split and Seventh Circuit decision wrongly decided). While uniformity within the State is an important consideration, Illinois courts need not follow Seventh Circuit decisions that lack reason or are illogical. *Id.*; accord *State Bank of Cherry*, 2013 IL 113836, ¶ 54.

Key to the appellate court majority's decision was its opinion that the allowance of property damage counterclaims would defeat the FELA's purpose by nullifying the employee's personal injury claim. Op., ¶¶ 21-22, A9. The majority characterized those counterclaims as "retaliatory devices calculated to intimidate and exert economic pressure on injured employees, curtail their rights when asserting injury claims and supplying information, and, ultimately, exempt the railways from liability under the FELA." Op., ¶ 19, A8; see also *id.* ¶ 27, A12. The court attributed similar effects of intimidation and retaliation to "counterclaims" brought (or threatened) against employee witnesses,[3] going so far as to suggest that railroads might

[3] The more appropriate term would have been third-party actions. Like the appellate court majority here, the *Cavanaugh* dissent erred in using the term

"accuse[]" employee witnesses of negligence to silence them in the FELA action and administrative hearings. *Id.* ¶¶ 29-30, A12-13. The only support given for this accusation was the dissent in *Cavanaugh*, which made a similarly unsupported accusation. *Id.* ¶ 29 (citing *Cavanaugh*, 729 F.2d at 296 (Hall, J., dissenting)), A13.[4]

The "retaliatory and chilling effects" predictions of the appellate court majority were first made in *Stack* and later adopted by the dissenting judges in *Cavanaugh* and *Nordgren* and by Seventh Circuit *dicta* in *Deering*. They also served as the basis for the two unpublished district court decisions from southern Illinois written by same judge (now retired Judge David Herndon), *In re National Maintenance & Repair, Inc.*, No. 09-0676-DRH, 2010 WL 456758, at *3 (S.D. Ill. Feb. 3, 2010), *aff'd sub nom. Deering*, 627 F.3d 1039, and *Blanchard v. Union Pacific R.R. Co.*, No. 15-0689-DRH, 2016 WL 411019,

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"counterclaim" when referring to the property damage actions brought by the railroad against employees other than the FELA plaintiffs.

[4] The plaintiff in *Cavanaugh* and the dissent in that case suggested that parties privy to the accident would be reluctant to participate in regulatory investigations out of fear of being sued by the railroad. To the contrary, railroads are mandated by law to report certain rail equipment accidents and incidents to the Federal Railroad Administration (49 C.F.R. § 225.12) and to the National Transportation Safety Board (49 C.F.R. §§ 840.3, 840.4). Both of these agencies may issue subpoenas to persons with knowledge of the incidents (49 C.F.R. § 225.31(b); 49 U.S.C. § 20902(b)); and the information provided is protected and cannot be used in any suit or action for damages growing out of any matter mentioned in the accident investigation report (49 C.F.R. § 225.31(f); 49 U.S.C. § 20903). *Atchison, Topeka & Santa Fe Ry. Co. v. Kirk*, 705 S.W.2d 829, 832-33 (Ct. App. Texas 1986). Thus, concerns about reluctance by employee witnesses to testify before regulatory authorities is unfounded.

at *3 (S.D. Ill. Feb. 2, 2016), as well as the one-page district court decision in *Yoch v. Burlington Northern Railroad Co.*, 608 F. Supp. 597 (D. Colo. 1985). These are the cases that the appellate court majority found "most persuasive." Op., ¶ 21, A9.

Stack's purported support for its "retaliatory and chilling effects" predictions came from *Kozar v. Chesapeake & Ohio Railway*, a case that had nothing to do with a railroad's right to assert a state-law counterclaim for property damage. *Stack*, 615 P.2d at 460-61 (citing *Kozar*, 320 F. Supp. 335 (W.D. Mich. 1970), *aff'd in part, vacated in part on other grds*, 449 F.2d 1238 (6th Cir. 1971)). *Kozar* dealt with the railroad's right to enforce a release signed by the widow of an injured worker allegedly obtained by coercion and intimidation. 320 F. Supp. at 383-85. A release falls squarely within the prohibitions of section 55 of the FELA because it is a "contract" and it does "exempt [the railroad] from any liability" (45 U.S.C. § 55).

Stack's reasoning as to section 60 is not only inapplicable to this case, but faulty. The Washington court found that section 60 prohibited the railroad's third-party actions for property damage brought against employees involved in the incident in which the FELA plaintiff was injured. According to the court, those actions operated to suppress the testimony of the third-party defendants in the FELA action. *Stack*, 615 P.2d at 159, 162; see 45 U.S.C. § 60.

This is an important distinction between *Stack* and the other cases

found to be "persuasive" by the appellate court majority. Section 60 prohibits conduct by a railroad that has the effect of preventing employees with knowledge of the occurrence from furnishing information to the FELA plaintiff. 45 U.S.C. § 60; *supra* at 4. The third-party defendants in *Stack*, not the FELA plaintiffs, asserted the protections of section 60.

None of the cases, other than *Stack,* involved property damage claims brought by railroads against employee witnesses who then relied on section 60 of the FELA for immunity. In fact, *Deering* did not even consider section 60, nor did it cite *Stack*. The other cases and the dissents in *Cavanaugh* and *Nordgren*, cited by the appellate court majority, nevertheless concluded that section 60 is violated when railroads bring counterclaims against FELA plaintiffs. See *Nordgren*, 101 F.3d at 1253, 1258 (McMillian, J., dissenting); *Cavanaugh*, 729 F.2d at 295-96 (Hall, J., dissenting); *Blanchard*, 2016 WL 411019, at *3; *In re National Maintenance*, 2010 WL 456758, at *3; *Yoch*, 608 F. Supp. at 598.

Likewise, in the instant case, Wisconsin Central did not bring any third-party claims for property damage; and it is only those types of claims that the *Stack* court reasoned could violate section 60. *Stack*, 615 P.2d at 159 (holding that third-party claims could "inhibit testimony *by the third-party defendants* as to the extent of their own negligence in causing the collision and resultant injury of [the FELA plaintiffs]" (emphasis added)). When, as here, the railroad brings property damage counterclaims against FELA

plaintiffs, those counterclaims will not prevent the FELA plaintiffs "from furnishing voluntarily such information to a person in interest" (45 U.S.C. § 60) because the FELA plaintiffs are the "person in interest" and each of them will freely testify about the occurrence. For that reason alone, the appellate court's application of section 60 to the counterclaims brought against plaintiffs Ammons and Riley was error. See Op., ¶ 30, A13.

Furthermore, *Stack*'s construction of section 60 (endorsed by the appellate court majority and its other authorities) is an overbroad reading of that provision. The *Cavanaugh* court acknowledged that section 60 was intended to equalize access to information and to prevent railroads from making other employees inaccessible to an injured employee. It found no intent by Congress, however, to give immunity to all employees who have knowledge of an accident. *Cavanaugh*, 729 F.2d at 293. As the court opined, "[w]e cannot believe that Congress had any such far-fetched purpose in enacting section 10." *Id.*

The *Cavanaugh* majority also rejected the plaintiff's "fanciful" notion (also professed by the *Stack* court) that property damage counterclaims violate sections 55 and 60 (referred to as sections 5 and 10) because they would coerce or intimidate injured workers and discourage them from filing FELA lawsuits. *Cavanaugh*, 729 F.2d at 294. The *Cavanaugh* majority found a lack of "authority for [such] an assumption" and a failure of Congress to express "any assumed prejudice thereby caused to the plaintiff." *Id.* It

also noted that the "same argument could be advanced against the admissibility of a counterclaim in any tort action." *Id.* The dissenting justice in the case at bar similarly found the majority's concerns of retaliation against FELA plaintiffs speculative given the lack of any evidence of "such an animus." Op., ¶ 39, A16 (Pierce, J., dissenting).

Furthermore, the coercive effect of property damage counterclaims on FELA claims, touted by the appellate court majority and its "persuasive" authorities (Op., ¶ 21, A9), relies on two false assumptions: first, that the railroad will prevail on its counterclaim; and second, that the railroad's recovery against the FELA employee will exceed that employee's separate FELA recovery. None of the courts, including the appellate court majority below, considered the fact that the railroad could be unsuccessful in proving its negligence claim against the injured worker or that other parties could be responsible for the greater share of the railroad's damages. Similarly, none of these courts considered the fact that any contributory negligence by the railroad could significantly reduce or negate its counterclaim recovery. See *Cavanaugh*, 729 F.2d at 291 n.3 (recognizing that whether as an independent action or as a counterclaim, the action of the master or employer may be defeated if the master or employer contributed to his damages by his own negligence).

The FELA is a pure comparative negligence statute. 45 U.S.C. § 53. If the injured worker is more than 50% at fault (even 99% at fault), the railroad

is still liable for the remaining portion of damages. *E.g. Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1283 (3d Cir. 1995); *Parsons v. Norfolk Southern Ry. Co.*, 2017 IL App (1st) 161384, ¶ 36. Moreover, the injured worker's negligence will not reduce the personal injury recovery at all if the railroad is shown to have violated a statute enacted for the safety of its employees. 45 U.S.C. § 53. (The plaintiffs here have alleged that the railroad violated safety rules. C 132-34 at ¶¶ 10-19; C 218-19 at ¶¶ 10-19.)

The railroad's property damage claim, on the other hand, is governed by Illinois common law, which provides a modified comparative negligence rule. If the railroad is more than 51% at fault in causing its property damage, there is no recovery. 735 ILCS 5/2-1116 (West 2014); see *Great American Insurance Co. of New York v. Heneghan Wrecking & Excavating Co.*, 2015 IL App (1st) 133376, ¶ 57 (counterplaintiff denied property damage recovery because more than 50% negligent); see generally *Gratzle v. Sears, Roebuck & Co.*, 245 Ill. App. 3d 292, 295 (2d Dist. 1993) (stating Illinois has a modified comparative negligence regime). The appellate court majority recognized the potential for a reduction in the FELA plaintiff's recovery for that party's contributory negligence, but failed to recognize that there would be no reduction if the plaintiff proved safety rule violations by the railroad. It also failed to recognize the potential for reduction (or total elimination) of liability by the injured worker for the railroad's property damage if the

railroad's negligence was a cause of that loss. See Op., ¶ 26, A11.

Cavanaugh cautioned against reading a counterclaim prohibition into sections 55 or 60 of the FELA (referred to as sections 5 and 10, respectively) absent express intent by Congress and based, instead, upon "some fanciful notion" of prejudice to the injured employee. *Cavanaugh*, 729 F.2d at 294. Likewise, *Nordgren* refused to infer conflict preemption merely because the property damage award might be greater than the FELA award. *Nordgren*, 101 F.3d at 1253. The majority in *Nordgren* acknowledged the policy considerations raised by the plaintiff and its dissenting judge, but it responded that "[w]e are not legislators, however, and in our view, Congress's silence on this issue speaks volumes." *Id.*

C. The appellate court majority and its supporting authorities ignored rules of statutory construction and engaged in judicial lawmaking.

The holdings reached by the appellate court majority and the cases it relied upon resulted from a failure to properly apply rules of statutory construction. As discussed above (*supra* at 14-15, 17-18), the majority opinions in *Cavanaugh* and *Nordgren* applied rules of statutory construction to the term "device" in sections 55 and 60, construing that term in relation to other words in the series (*i.e.,* "contract, rule, regulation"); and they determined the meaning of the critical term "exempt" in section 55 according to its plain meaning (*i.e.,* to eliminate all liability).

In *Deering*, however, the Seventh Circuit rejected the rule of *ejusdem*

generis and failed to limit the meaning of the term "device" in section 55 to the words in the list of which it was a part. Instead, it pointed to the term "whatsoever" that followed the term "device" to support its opinion that the term "device" was "a catch-all." *Deering*, 627 F.3d at 1044.

Deering's failure to apply the *ejusdem generis* rule to section 55 (the only section it considered) is contrary to this Court's instruction on statutory construction. In *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463 (2009), this Court explained the doctrine of *ejusdem generis* as: "when a statutory clause specifically describes several classes of persons or things and then includes 'other person or things,' the word 'other' is interpreted to mean 'other such like.' [Citation.]" *Id.* at 492. Citing Sutherland on Statutory Construction, this Court explained the rationale for the doctrine as follows:

> "The interpretation is justified on the ground that, if the general words were given their full and ordinary meaning, the specific words would be superfluous as encompassed by the general terms. If the legislature had meant the general words to have their unrestricted sense, it would not have used the specific words." *Id.* (citing 2A N. Singer & J. Singer, Sutherland on Statutory Construction § 47:17, at 370-73 (7th ed. 2007)).

Accord Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 211 (1st ed. 2012) ("Any lawyer or legislative drafter who writes two or more specifics followed by a general residual term without the intention that the residual term be limited may be guilty of malpractice."). An excerpt of the Scalia/Garner publication is included in Appendix at A35-50.

The phrase at issue in *Pooh-Bah Enterprises* was "topless dancers, strippers, male or female impersonators or other entertainers." 232 Ill. 2d at 468. Applying the *ejusdem gendris* doctrine, the Court rejected the plaintiff's argument that an actor who appears naked or partially naked in a play is an "other entertainer." *Id.* at 491. According to the Court, the phrase "other entertainer" did not mean any entertainer, but only entertainers like strippers, topless dancers or male or females impersonators. *Id.* at 492; accord *Kouzoukas v. Retirement Board of Policemen's Annuity & Benefit Fund of the City of Chicago*, 234 Ill. 2d 446, 473-77 (2009) (construing phrase "any bond, bill, promissory note, or other instrument of writing" and holding that public pension funds do not share sufficiently similar characteristics with bonds, bills, or promissory notes).

The Seventh Circuit acknowledged in *Deering* that it was not applying the *ejusdem generis* rule, but opined that it didn't matter because a counterclaim " 'device' is much like the first word in the string—'contract'." *Deering*, 627 F.3d at 1044. Of course, a counterclaim is not like a contract or agreement. See *Nordgren*, 101 F.3d at 1250. It is not like a rule or a regulation either. Contracts, rules, and regulations are writings that create rights, obligations and duties. A counterclaim does not create rights, obligations and duties; it enforces existing rights. A counterclaim is an independent cause of action by which to assert rights, obligations, and duties against the opposing party. *Antonicelli v. Rodriguez*, 2018 IL 121943, ¶ 17;

Health Cost Controls v. Sevilla, 307 Ill. App. 3d 582, 589 (1st Dist. 1999). Nor does a property damage counterclaim extinguish the FELA plaintiff's cause of action or exculpate the railroad from its alleged negligence toward that plaintiff. As the *Nordgren* majority found, property damage counterclaims "protect an entirely different interest and arise independently of any liability under the FELA." *Nordgren*, 101 F.3d at 1252. Personal injury and property damage claims involve distinct duties that when breached cause different injuries. *Id.* & n.5.

The appellate court majority in the case at bar did not apply the *ejusdem generis* rule either. Instead, it followed *Deering*'s interpretation of the term "device" as a "catch-all" (Op., ¶ 24, A10), treating that interpretation as judicial *dictum*. *Id.* ¶ 25, A11 (citing *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993) (defining judicial *dictum* as an expression of opinion that must have been "deliberately passed upon")). According to the appellate court, the Seventh Circuit "deliberately delved into the issue" and "made no secret what the determination would or should be." Op., ¶ 25, A11.

To the contrary, the Seventh Circuit may have mused about the meaning of the term "device" in the context of a FELA claim, but it made clear that its affirmance of the dismissal of the property damage counterclaim was based on special considerations in admiralty law and the

Jones Act that had "no counterpart" in FELA lawsuits.[5] *Deering*, 627 F.3d at 1044, 1046-47. (Those differences included the shipowner's right to limit its liability to the injured seaman to the ship's value, which according to *Deering*, magnified the "destructive effect" of a counterclaim for property damage. *Id.* at 1044-46.) In order to avoid a conflict with *Withhart* (and, presumably, the other three circuit courts of appeals decisions the *Withhart* court found persuasive), *Deering* left "for a future day *** the resolution of the issue whether a shipowner who does not seek to limit his liability should nevertheless be forbidden to set off damages for negligent damage to property against a Jones Act claim." *Id.* The appellate court here created the very conflict that the Seventh Circuit sought to avoid.

In *Stack*, another case the appellate court majority found "persuasive" (Op., ¶ 24, A10), the Washington state court violated rules of statutory construction by adding words to section 55 of the FELA. *E.g. 1550 MP Road LLC v. Teamsters Local Union No.* 700, 2019 IL 123046, ¶ 30 (courts may not depart from the plain statutory language by reading into it exceptions, limitations, or conditions that conflict with the legislature's intent); *Palm v. Holocker,* 2018 IL 123152, ¶ 21 ("[i]t is improper for a court to depart from the plain statutory language"); *Wolf v. Toolie*, 2014 IL App (1st) 132243, ¶ 24 (when construing a statute, a court cannot add words to change its meaning).

[5] The injured employee in *Deering* was a seaman and brought his personal injury claims under admiralty law and the Jones Act, which incorporates the FELA (46 U.S.C. § 30104 (formerly 46 U.S.C. App. § 688)).

Stack held that property damage counterclaims violate section 55 because they "would have the effect of *reducing* an employee's FELA recovery." (Emphasis added.) 615 P.2d at 160. The word "reduce" does not appear in section 55. 45 U.S.C. § 55 (making void any "contract, rule, regulation, or device whatsoever *** to enable any common carrier to *exempt* itself from *any* liability" (emphasis added)).

The appellate court majority engaged in similar inappropriate judicial law-making. It concluded that property damage counterclaims are prohibited because they are "*liability-limiting* or liability-exempting devices." (Emphasis added.) Op., ¶ 21, A9; see also Op., ¶ 24, A10 (opining that a counterclaim "is a legal device that enables a railway to *limit* or exempt itself from liability to its employee for its own negligence" (emphasis added)). The word "limit" does not appear in section 55 either.

Such wordsmithing was necessary, however, because as the courts in *Cavanaugh* and *Nordgren* explained, the term "exempt" in section 55 has the common meaning of eliminating liability by the railroad so that the injured employee could not bring suit at all. *Nordgren*, 101 F.3d at 1251; *Cavanaugh*, 729 F.2d at 291-92. It also ignores another term, "void," that appears in sections 55 and 60. Those sections "void" contracts, rules, and regulations that exempt railroads from liability (section 55) or that prevent railroad employees from furnishing information to the FELA plaintiff (section 60). They make such instruments unenforceable. *Cf. 1550 MP Road LLC*, 2019 IL

123046, ¶ 28 (treating contract as void and unenforceable). A counterclaim, on the other hand, may be subject to dismissal, but it is not subject to being rendered "void." As the *Cavanaugh* court opined:

> "It is no easy feat of linguistics to read a prohibition of a valid counterclaim as within the term 'device' in the statute and this is particularly so in that such term is not left dangling in the statute without clarification. *** [A] counterclaim by the railroad for its own damages is plainly not an 'exemption *** from any liability' and is thus not a 'device' within the contemplation of Congress."

729 F.2d at 292; accord *Withhart*, 431 F.3d at 844 (citing with approval above-quoted language from *Cavanaugh*).

Justice Pierce's dissent in the case at bar agreed with *Cavanaugh* and opined that a counterclaim does not exempt a railroad from liability because it does not "free or release defendant from any duty or liability to plaintiffs for their personal injuries." Op., ¶ 35, A14 (Pierce, J., dissenting) (citing Black's Law Dictionary 593 (7th ed. 1999) (defining "exempt")); accord *Nordgren*, 101 F.3d at 1251. Justice Pierce's dissent further explained that the majority's "pragmatic approach" was based on "a misunderstanding of how defendant's counterclaim affects its potential liability for plaintiffs' injuries, which is zero." Op., ¶ 39, A16.

Contrary to the majority's reasoning in this case (Op., ¶ 26, A11-12), the injured employee is not prevented from seeking redress for his injuries, nor is the railroad immunized from liability. The railroad's independent and separate claim, brought as a counterclaim, has no effect on the employee's

right to pursue his own cause of action against the railroad and obtain a judgment against the railroad upon proof of the railroad's negligence. This is unlike the immunity that *Cavanaugh* found would exist if sections 55 and 60 were construed to prohibit counterclaims. *Cavanaugh*, 729 F.2d at 291; see also *Sprague*, 769 F.2d at 29 (agreeing with *Cavanaugh* that prohibition of counterclaims would "clothe the employee" with absolute immunity). In that situation, the railroad is prohibited from even bringing its claim for property damage, and, hence, the employee is immune from liability for that loss. The *Cavanaugh* court found it difficult to believe that Congress intended such a result. *Cavanaugh*, 729 F.2d at 291.

II. The legislative history of the FELA shows that Congress did not intend to ban property damage counterclaims by the railroad.

As the Illinois Supreme Court instructed in *Corbett v. County of Lake*, "[t]he meaning of a statute *** depends upon the intent of the drafters at the time of its adoption, and it is a long-standing principle of statutory construction that it is the court's duty to ascertain and effectuate that intent." (Emphasis and internal quotation marks omitted.) 2017 IL 121536, ¶ 25 (citing *Sayles v. Thompson*, 99 Ill. 2d 122, 125 (1983)); accord *Nordgren*, 101 F.3d at 1250 (the scope of the FELA is limited by the historical realities of the time in which it was enacted).

The legislative history of the FELA and the historical realties also support the allowance of Wisconsin Central's counterclaims for property damage. Although section 60 is inapplicable to counterclaims brought

against FELA plaintiffs (*supra* at 24-25), the intent of that section was to equalize access to information available to the railroads and to FELA claimants. *Stark v. Burlington Northern, Inc.*, 538 F. Supp. 1061, 1062 (D. Colo. 1982) (citing Senate Report No. 661, 76th Cong., 1st Sess. 2, 5 (1939)). As *Stark* explained, the authors of section 60 "recognized the danger that railroad agents would coerce or intimidate employees to prevent them from testifying. [Citation.] The broad prohibition, by threat, intimidation, order, rule, contract, regulation or device, indicates that [section] 60 was designed to prevent any direct or indirect chill on the availability of information to any party in interest in an F.E.L.A. claim." (Internal quotation marks omitted.) *Id.* The *Cavanaugh* majority cited *Stark*, holding that the purpose set forth in the Senate Report does not show an intention to proscribe counterclaims or provide immunity to fellow employees with knowledge of the accident. *Cavanaugh*, 729 F.2d at 293.

As to section 55, both *Cavanaugh* and *Nordgren* noted that it was intended to defeat the railroad's use of contracts and other means in which the railroads caused workers to release or lose their rights to pursue future claims for personal injury. *Cavanaugh*, 729 F.2d at 292 (quoting H.R. Rep. No. 1386, at 4436 *et seq.* (1908)); *Nordgren*, 101 F.3d at 1251. The House Report on the bill that became the 1908 version of the FELA showed that Congress was primarily concerned that railroads were requiring their employees to sign employment contracts and releases that operated as

waivers:

> "Some of the railroads of the country insist on a contract with their employees discharging the company from liability for personal injuries ***. [T]he employees of many of the common carriers of the country today are working under a contract of employment which by its terms releases the company from liability for damages arising out of the negligence of other employees."

42 Cong. Rec. 4426, 4436 (1908).

Congress could have specifically excluded property damage counterclaims. It did not do so. The dissent in *Nordgren* (and *dictum* in *Deering*), which lack any precedential value even as to federal district courts (*supra* at 20, 31-32), suggested that Congress did not expressly exclude property damage counterclaims because there was no need to do that in 1908—railroads were seeking that recovery, but only defensively as setoffs against their employees' wage claims. *Nordgren*, 101 F.2d at 1254 (McMillian, J., dissenting); *Deering*, 627 F.3d at 1043-44. Both cited the Murphy Article.

The majority in *Nordgren* noted that its own research showed a lack of support for this contention. *Nordgren*, 101 F.3d at 1253 n.7. It placed little weight on the fact that pre-FELA cases predominantly involved employer property damage counterclaims in response to employees' claims for wages, rather than for personal injuries. It reasoned that in 1908, the lack of counterclaims for property damage lodged against personal injury actions was due to the fact that employees were contractually barred from seeking

recovery for personal injuries—that was why the FELA was enacted. *Id.*; see also *id.* at 1248-49.

Deering also suggested that there was no need for Congress to specifically exclude property damage counterclaims because, in 1908, railroads were generally barred from pursing such claims based on application of the doctrine of contributory negligence. *Deering*, 627 F.3d at 1046. But *Nordgren* deconstructs that argument too, pointing out that it would have been convincing if in 1908 contributory negligence acted as a total bar to a railroad's recovery. *Nordgren*, 101 F.3d at 1252. There was no total bar at that time because masters could sue their servants for property damage when a second servant's negligence (rather than the master himself) helped cause the property damage. The second servant's negligence was not imputed to the master to bar the master's claim against the first servant. *Id.* at 1252 (presuming Congress was aware of established rules of law at the time it enacted FELA).

Moreover, as the *Cavanaugh* and *Nordgren* majorities noted, Congress was aware in 1908 of the common law rules that allowed masters to sue their servants for property damage and disallowed imputation of the second servant's negligence to the master as a bar to the master's property damage claim against the negligent first servant. *Nordgren*, 101 F.3d at 1252 & n.6; *Cavanaugh*, 729 F.2d at 290-91. Yet Congress did not enact legislation to preclude railroads from recovering their property damages. *Nordgren*, 101

F.3d at 1253; *Cavanaugh*, 729 F.2d at 291 (noting that the absence of explicit language that "sacrifices" the railroads' property claims does not "appear to have been inadvertent"). In short, Congress understood the concerns raised here, but elected not to address them. Its failure to preclude or limit property damage counterclaims, when such claims were permitted in 1908, and its failure to identify such counterclaims as an unpermitted setoff, shows that Congress did not intend to prohibit them.

CONCLUSION

The FELA is not a workers' compensation statute and was enacted to promote the welfare of both the railroad employer and the employee. *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 330 (1958). The question at issue here is whether, by inference, Congress intended to eliminate the railroad's long-held common law right of recovery for property damage caused by employee negligence when an employee seeks FELA recovery. The persuasive weight of authority, coming from four federal circuit courts of appeals, holds that no Congressional intent to protect the injured, but negligent, employee with absolute immunity can be inferred. *Nordgren*, 101 F.3d at 1253; *Sprague*, 769 F.2d at 29-30; *Cavanaugh*, 729 F.2d at 291. *Cf. Withhart*, 431 F.3d at 845 (construing FELA as incorporated in the Jones Act, stating, the "fact that seamen work under difficult conditions is not a reason to shield them from liability from negligence").

For the foregoing reasons, Wisconsin Central, Ltd. respectfully

requests that this Court reverse the decision of the appellate court that affirmed the circuit court's dismissal of Wisconsin Central's counterclaims for property damage and remand the matter for further proceedings consistent with this Court's opinion.

Dated: May 8, 2019

Respectfully submitted,

WISCONSIN CENTRAL, LTD.

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CERTIFICATE OF COMPLIANCE

Pursuant to Illinois Supreme Court Rule 341(c), I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this 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 9,905 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) _____ DARRIN RILEY, Plaintiff/Counter-Defendant/ Respondent, vs. 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.) Honorable John H. Ehrlich, Judge Presiding

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PLEASE TAKE NOTICE that on Wednesday, May 8, 2019, we submitted the BRIEF AND ARGUMENT OF DEFENDANT/COUNTER-PLAINTIFF/APPELLANT for electronic filing with the Clerk of the Supreme Court of Illinois, 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 BRIEF AND ARGUMENT OF DEFENDANT/COUNTER-PLAINTIFF/APPELLANT were served upon counsel noticed as above on this 8th day of May, 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/*Kevin M. Forde*

Appendix

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corrected copy

Lawyers

2018 IL App (1st) 172648

FIRST DIVISION
December 17, 2018

No. 1-17-2648 and 1-17-3205 (cons.)

MELVIN AMMONS, Plaintiff/Counterdefendant-Appellee, v. CANADIAN NATIONAL RAILWAY COMPANY, a Foreign Corporation, and WISCONSIN CENTRAL, LTD., a Foreign Corporation, Individually and as a Subsidiary of Canadian National Railway Company Defendants (Wisconsin Central, Ltd., Defendant and Counterplaintiff-Appellant).	Appeal from the Circuit Court of Cook County, Law Division. No. 15 L 1324 Honorable John H. Ehrlich, Judge Presiding
DARRIN RILEY, Plaintiff/Counterdefendant-Appellee, v. WISCONSIN CENTRAL, LTD., Defendant/Counterplaintiff-Appellant.	Appeal from the Circuit Court of Cook County, Law Division. No. 16 L 4680 Honorable John H. Ehrlich, Judge Presiding

JUSTICE GRIFFIN delivered the judgment of the court, with opinion.
Presiding Justice Mikva concurred in the judgment and opinion.
Justice Pierce dissented, with opinion.

OPINION

¶1 If there is a train crash and the railway employee involved files a personal injury claim against his employer for negligence, can the railway-employer file a counterclaim for negligence for the property damage caused in the crash? That is the question posed by this appeal.

¶2 The trial court held that, no, the employer could not pursue such a counterclaim. The trial court dismissed the counterclaims filed by the railway, finding that they are barred. A finding was entered under Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) that made the order appealable. We agree that the answer to the question posed above is no, and we affirm.

¶3 I. BACKGROUND

¶4 Plaintiffs, Melvin Ammons and Darrin Riley, filed these lawsuits against defendant, Wisconsin Central, Ltd. (Wisconsin Central), for injuries they sustained during the course of their employment. Riley was the locomotive engineer and Ammons was the conductor when the train they were operating struck another train that was stopped ahead on the same track. Both Ammons and Riley filed lawsuits alleging that the railway-defendant was negligent and violated several rules and regulations that led to their injuries. The lawsuits were consolidated below and, for purposes of this appeal, the issues are the same as to both plaintiffs.

¶5 Defendant Wisconsin Central responded to the lawsuit by denying liability and also by filing counterclaims against both employees. The counterclaims are for money damages to redress property damage caused by the accident and for contribution in tort from the plaintiffs for one another's injuries. In its counterclaims, Wisconsin Central alleges that plaintiffs were negligent; that they violated rules and operating practices and that their failure to follow mandated speed limits or apply the emergency brakes before the collision caused significant

damage to its property. Both trains involved in the collision were damaged as was the railroad track, and environmental clean-up and remediation was required.

¶6 Plaintiffs filed a motion to dismiss the counterclaims arguing that such claims are prohibited under sections 55 and 60 of the Federal Employers Liability Act (FELA) (45 U.S.C. § 51 *et seq.* (2012)). Section 55 of the FELA voids "[a]ny 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. *Id.* § 55. Section 60 voids "[a]ny 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.* § 60.

¶7 Plaintiffs argued in their motion to dismiss that the counterclaims asserted by defendant were a "device" that defendant was using to exempt itself from liability for their on-the-job injuries and that the counterclaims were being used coercively—to dissuade injured workers from asserting their FELA claims and providing information about the accident. The trial court dismissed the counterclaims. Defendant appeals pursuant to the trial court's ruling under Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) that there was no just reason for delaying appeal of its order.

¶8 II. ANALYSIS

¶9 This appeal presents a pure question of law. Can a railroad counterclaim for property damage in an employee's personal injury suit where both parties' alleged harm arises out of the same occurrence and both parties are alleged to have been negligent? The trial court answered in the negative and dismissed the counterclaims.

¶10 Plaintiffs' motion to dismiss the counterclaims was presented as a motion under section

2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2016)). Defendant argues that it is really a section 2-619 motion to dismiss because the FELA sections on which plaintiffs rely raise "an affirmative matter that seeks to avoid the legal effect of or defeat the claims" (citing *id.* § 2-619(a)(9)). Our supreme court has stated that raising the defense that a claim is barred by a prevailing statute should be done under section 2-619. See *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 54. We review the dismissal of a claim under either section 2-615 or section 2-619 *de novo*. *Jones v. Brown-Marino*, 2017 IL App (1st) 152852, ¶ 18. Defendant does not raise any serious concern over which section of the Code was applied and is not prejudiced.

¶ 11 The case is governed by FELA (45 U.S.C. § 51 *et seq.* (2012)). The FELA provides injured railroad workers with their exclusive remedy against their employers for injuries resulting from their employers' negligence. *New York Central R.R. Co. v. Winfield*, 244 U.S. 147, 151-52 (1917). The FELA was enacted as a response to the special needs of railroad workers who are exposed daily to the risks inherent in railroad work and are helpless to provide adequately for their own safety. *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 329 (1958). The purpose of the FELA is to provide fair compensation for injured railroad workers by imposing liability upon railroads for injuries to their employees resulting from the railroads' negligence. *Wilson v. CSX Transportation, Inc.*, 83 F.3d 742, 745 (6th Cir. 1996).

¶ 12 Both parties have pointed us to compelling case law that supports their respective positions on appeal. Both parties likewise admit, at least tacitly, that there is decisional law from other jurisdictions that supports the opposing outcome. See Russell J. Davis, *Employers' Liability Acts: Counterclaims*, 11 Fed. Proc., L. Ed. § 30:48 (Nov. 2018 Update). The issue has apparently never been decided by an Illinois court—at least no such decisions have been reported.

¶13 Sections 55 and 60 of the FELA both serve to void certain contracts, rules, regulations, or devices that might be used defensively by a railway in FELA litigation. See 45 U.S.C. §§ 55, 60 (2012). Section 55 bars the use of those instruments insofar as they allow the railway to exempt itself from liability, and section 60 bars their use for preventing employees from furnishing information relating to the injury or death of another employee. *Id.* The determination of this appeal turns on whether the counterclaims for property damage asserted by the railway-defendant are "devices" as set out in the Act and whether their interposition enables defendant to exempt itself from liability. If the counterclaim is such a device, then it is barred as void by section 55 of the FELA.

¶14 One of the first cases to address the issue and shape the discourse on section 55 is *Cavanaugh v. Western Maryland Ry. Co.*, 729 F.2d 289 (4th Cir. 1984). In *Cavanaugh*, the court began its analysis by recognizing the common law principle that employers have a right of action against employees for property damages arising out of an employee's negligence occurring within the scope of employment. *Id.* at 290-91. The court went on to explain that nothing in the FELA explicitly forecloses the railways' right to redress for property damage caused by a negligent employee. *Id.* at 291.

¶15 In addressing section 55 of the FELA (referred to therein as "Section 5"), the court stated that

> "[n]either by its express language nor by its legislative history does Section 5 suggest in any way that the 'device' at which the proscription of the Section was directed was intended to include a counterclaim to recover for the railroad's own losses incurred in connection with the accident out of which the injured employee's claim arose." *Id.* at 292.

The court further stated that a counterclaim by a railway to recoup money for its own property damages is "plainly not an 'exempt[ion] ... from any liability' and thus is not a 'device' within the contemplation of Congress." *Id.* Thus, the court held, railways may file counterclaims for negligent damage to their property in a personal injury case brought by an employee. *Id.* at 294-95. One judge dissented. See *id.* at 295-97.

¶ 16 After the decision in *Cavanaugh*, the United States Courts of Appeals for the First Circuit, Eighth Circuit, and Fifth Circuit followed suit. See *Sprague v. Boston & Maine Corp.*, 769 F.2d 26 (1st Cir. 1985); *Nordgren v. Burlington Northern R.R. Co.*, 101 F.3d 1246 (8th Cir. 1996); *Withhart v. Otto Candies, L.L.C.*, 431 F.3d 840 (5th Cir. 2005). The cases do not really build on *Cavanaugh* with any significant original reasoning but adopt its interpretation of the statute. The basic analytical underpinning of those three cases and *Cavanaugh* is that counterclaims for property damage do not fit within the meaning of "device" under section 55 of the FELA because they do not serve to exempt the railways from liability. Instead, the railway may still be liable to the injured employee for its own negligence, but the employee must answer for his negligence resulting in property damage as well. Those courts held that contracts and devices prohibited under section 55 are those that are "creative agreements or arrangements the railroad might come up with to exempt itself from liability." *Nordgren*, 101 F.3d at 1251. To interpret section 55 as the plaintiffs suggested in those cases and as plaintiff suggests here, those courts reasoned, would be to absolutely immunize railway employees for their own negligence. See, *e.g.*, *Sprague*, 769 F.2d at 29.

¶ 17 However, the reasoning and holdings espoused in those cases do not represent a clear consensus. The dissenting judge in *Cavanaugh* made the compelling argument that "the language of the FELA supports the conclusion that Congress intended to prohibit counterclaims, such as

the one filed by the railroad here, because the filing of such counterclaims will unfairly coerce or intimidate the injured employee from filing and pursuing his FELA action." *Cavanaugh*, 729 F.2d at 295 (Hall, J., dissenting). In the view of the dissenting judge, "the railroads' counterclaim is a 'device' calculated to intimidate and exert economic pressure upon [the employee], to curtail and chill his rights, and ultimately to exempt the railroads from liability under the FELA." *Id.* at 296. The dissenting judge in *Nordgren* took the same position. *Nordgren*, 101 F.3d at 1253 (McMillian, J., dissenting). Heavily relying on William P. Murphy, *Sidetracking the FELA: The Railroads' Property Damage Claims*, 69 Minn. L. Rev. 349 (1985), Judge McMillian would have ruled that "whether filed as counterclaims or brought as separate actions, [property damage claims brought by the railway] are preempted by the FELA's statutory language and are fundamentally incompatible with its remedial purpose." *Nordgren*, 101 F.3d at 1258 (McMillian, J., dissenting).

¶18 Other courts confronted with the question have found that the result advocated for by the dissenting judges in *Cavanaugh* and *Nordgren* represents the correct and more pragmatic approach to interpreting the FELA. Just a year after *Cavanaugh* was decided, the United States Court for the District of Colorado broke from the interpretation employed in *Cavanaugh*. The district court held that "where an injured railroad worker *** asserts personal injury or wrongful death claims under the FELA, a railroad defendant may not counterclaim for damages to its property caused in the occurrence which gave rise to the employee's injuries or death." *Yoch v. Burlington Northern R.R. Co.*, 608 F. Supp. 597, 598 (D. Colo. 1985). Other courts have interpreted sections 55 and 60 of the FELA in the same way. See *In re National Maintenance and Repair*, Inc., No. 09-0676-DRH, 2010 WL 456758 (S.D. Ill. Feb. 3, 2010), *aff'd sub nom. Deering v. National Maintenance & Repair, Inc.*, 627 F.3d 1039, 1047 (7th Cir. 2010);

Blanchard v. Union Pacific R.R. Co., No. 15-0689-DRH, 2016 WL 411019 (S.D. Ill. Feb. 2, 2016); *Stack v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 615 P.2d 457 (Wash. 1980) (*en banc*).

¶19 The basic analytical underpinning of the cases that take exception to allowing counterclaims by a railway for property damage in personal injury cases is that the counterclaims are retaliatory devices calculated to intimidate and exert economic pressure on injured employees, curtail their rights when asserting injury claims and supplying information, and ultimately, exempt the railways from liability under the FELA. See *Blanchard*, 2016 WL 411019, at *3. Being that the FELA is a remedial statute for the benefit of employees, concern has been expressed by the courts rejecting the interpretation used in *Cavanaugh* that "[t]o allow the railroads' counterclaim to proceed would pervert the letter and spirit of the FELA and would destroy the FELA as a viable remedy for injured railroad workers." See *Cavanaugh*, 729 F.2d at 296 (Hall, J., dissenting).

¶20 Defendant argues that we are obligated to follow *Cavanaugh* and the other circuits' decisions on the issue because they are federal interpretations of federal law that are "controlling," citing *Wilson v. Norfolk & Western Ry. Co.*, 187 Ill. 2d 369, 374 (1999). With respect to the interpretation of federal law, we are bound only by the decisions of the United States Supreme Court and the Illinois Supreme Court, not by the decisions of the lower federal courts. *Lakeview Loan Servicing, LLC v. Pendleton*, 2015 IL App (1st) 143114, ¶33; *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 302 (2001). As to the laws of the United States, state courts are coordinate to lower federal courts and possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law. See *Arizonans for Official English*

v. Arizona, 520 U.S. 43, 58 n.11 (1997). To be sure, federal courts' interpretations of federal laws are entitled to deference, and uniformity of decision is an important consideration when state courts are interpreting federal statutes. *State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶35. But on the issue presented here, there is already not "uniformity of decision" among federal courts.

¶21 In our judgment, prohibiting railways from interposing counterclaims for property damage in response to an employee's personal injury suit is the correct interpretation of sections 55 and 60 of the FELA and is the interpretation most consistent with the FELA's overarching goal of providing a remedy to employees injured while participating in this dangerous occupation. Allowing counterclaims for property damage suffered by the railway as a response to a personal injury action defeats the remedial purpose of the FELA. The property damage counterclaims are, in practice, liability-limiting or liability-exempting devices inconsistent with the FELA. We find the logic and analysis of the dissents in *Cavanaugh* and *Nordgren* and the *Deering* court's discussion of the issue to be most persuasive.

¶22 The FELA is meant to impose liability upon railroads for injuries to their employees resulting from the railroads' negligence because of the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. *Cavanaugh*, 729 F.2d at 295-96 (Hall, J., dissenting). If a railway employee has an accident operating the company's machinery that is no doubt exorbitantly expensive, the costs will frequently be more than the cost of the harm suffered by the employee. See *Deering*, 627 F.3d at 1044-45. The nullification of a personal injury claim would thus obtain in such cases, even where the injured employee proves that negligence on the part of the railway caused his injury.

¶23 It is clear that if defendant was trying to accomplish the same ends as desired here, but by contract, its action would be prohibited. Defendant makes no persuasive case as to why it should be able to do so with a counterclaim in tort instead. If the railway required employees to sign a contract saying that any personal injury award would be cancelled or set off by the costs incurred by the railway in the occurrence leading to the injury, it would be void. Congress meant to prohibit *the conduct* of railways exempting themselves from liability for personal injuries. Allowing railways to do by tort what Congress expressly forbids them from doing by contract or other means is an illogical interpretation and result.

¶24 The statute casts a broad net for the type of instruments it prohibits—"any contract, rule, regulation, or device whatsoever." See *Stack*, 615 P.2d at 460 (a broad interpretation of "device" is "supported both by the purpose of the act and by case authority"); *Deering*, 627 F.3d at 1044 (statute's tacking of "whatsoever" to "any device" is a clue that "device" is intended as a catch-all). A "device" is "a plan, procedure, technique" (Merriam-Webster's Collegiate Dictionary 317 (10th ed. 1998)), "a method that is used to produce a particular effect" (Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/device (last visited Dec. 5, 2018)). Counterclaims like those interposed here are legal "devices" that "enable [a] common carrier to exempt itself from liability" in their employees' personal injury actions. A counterclaim for property damage caused in the same occurrence that caused an employee's injury is a setoff or its functional equivalent, regardless of what the railway calls it. It is a legal device that enables a railway to limit or exempt itself from liability to its employee for its own negligence. And it is apparent that, in practice, railways use counterclaims for property damage as setoffs against personal injury claims. See *Cavanaugh*, 729 F.2d at 295 n.1 (Hall, J., dissenting); *Deering*, 627 F.3d 1043. The counterclaims are "creative arrangements" that allow railways to circumvent

FELA liability.

¶25 The parties argue about what level of influence the Court of Appeals for the Seventh Circuit's decision in *Deering* should have on this case. In *Deering*, the court specifically stated that the issue presented in this case was not before it and that the court would "leave for a future day" whether property damage claims by an employer should be permitted in an employee's personal injury FELA case. *Deering*, 627 F. 3d at 1048. Nevertheless, the clear statement by the court in *Deering* is a judicial dictum. A "judicial dictum" is "an expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the cause." *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993). The *Deering* court undertook a wide-ranging analysis of the issue and persuasively made the case that section 55 of the FELA should be interpreted to bar counterclaims such as the one interposed here. *Deering*, 627 F. 3d at 1045-46. While the court was mindful that the case before it did not require that the question be answered, the court deliberately delved into the issue, went through a significant analysis of it, and made no secret what the determination would and should be. See *id.* at 1044.

¶26 While the courts following *Cavanaugh* have expressed apprehension that a decision barring counterclaims would immunize employees from their own negligence, the result that those decisions support can effectively immunize railways from *their negligence* towards their own employees. The railways are in a far better position to bear the collective burden of loss from their employees' negligence than the employees are to bear the personal burden of loss from the railway's negligence. The employee already can recover only those damages attributable to the railway's negligence, and comparative negligence is available to the railway as a defense in mitigation. See *Wilson*, 187 Ill. 2d at 373. The FELA was enacted to protect railway employees against oppressive maneuvers that prevent them from getting redress for workplace

injuries. See *Villa v. Burlington Northern & Santa Fe Ry. Co.*, 397 F.3d 1041, 1045 (8th Cir. 2005) (FELA is a broad remedial statute and is intended by Congress to protect railroad employees by doing away with certain defenses). The FELA is the exclusive remedy for railway employees against their employer, but that exclusive remedy is subject to essentially being abrogated by a property damage counterclaim. The broad remedial endeavors of the FELA demand that a plaintiff's personal injury claim should not be subject to easy defeat.

¶27 Section 55 voids any device that "enable[s]" a railway to exempt itself from FELA liability. 45 U.S.C. § 55 (2012). That means that an exemption from liability by way of counterclaim does not have to be the actual result in every case. Property damage counterclaims plainly *can be used* to enable the railroad to eliminate an employee's personal injury claim and extinguish a railway's FELA liability. And common sense and pragmatic business practices tell us not only that the counterclaims *can be used* to exempt the railway from FELA liability, but that the counterclaims *are used* for that purpose and maybe solely for that purpose.

¶28 Injured railway workers cannot pursue any right of redress in a workers' compensation action or in a common law negligence action—the FELA is all they have. *Sutherland v. Norfolk Southern Ry. Co.*, 356 Ill. App. 3d 620, 622 (2005) (as a railroad employee, the plaintiff was covered by the FELA, which provides the sole remedy for workplace injuries to the exclusion of the Workers' Compensation Act). Allowing a negligent railway to, for practical purposes, vanquish any liability to an injured employee by offsetting the claim with the cost of its damaged equipment is an unacceptable result at odds with the remedial purpose of the FELA—to fairly compensate employees injured by a negligent employer.

¶29 We also find persuasive to our holding the fact that a railway-employer's interposition of counterclaims in a personal injury action has the effect of preventing and discouraging

employees from cooperating in injury and death investigations. Section 60 of the FELA prohibits the use of legal devices for just that purpose. As the dissent in *Cavanaugh* noted,

> "As long as a railroad is permitted to hold the threat of a counterclaim for property damage over the heads of those employees who have the misfortune to be involved in a railroad accident, those witnesses, whether injured or not, may well be reluctant to participate during the initial investigation by the railroad, at hearings held by the National Transportation Safety Board, or at the trial of an FELA action maintained by a fellow employee." *Cavanaugh*, 729 F.2d at 296 (Hall, J., dissenting).

See also *In re National Maintenance & Repair, Inc.*, 2010 WL 456758, at *3 (allowing counterclaims for property damage impermissibly chills the filing of personal injury claims and the voluntary furnishing of information regarding such claims).

¶30 The allowance of counterclaims for property damage not only intimidates potential plaintiffs from filing personal injury claims but also serves as a warning to other employees that might not have been injured, but that might be accused of being negligent, not to participate. The threat of retaliatory suits and potential silencing of employees is what sections 55 and 60 of FELA were enacted to protect against. *Stack*, 615 P.2d at 460 (" 'the crew's testimony will be affected because they will be reluctant to testify candidly when their own pocketbooks are in jeopardy' "). The counterclaim asserted in this case is prohibited by sections 55 and 60 of the FELA and was properly dismissed.

¶31 III. CONCLUSION

¶32 Accordingly, we affirm.

¶33 Affirmed.

¶34 JUSTICE PIERCE, dissenting:

¶35 As the majority notes, this case presents an issue of first impression in this state: whether under the FELA a railroad may counterclaim for property damage in a railroad employee's personal injury suit where both parties' claims sound in negligence. The reasoning in *Cavanaugh*, which was adopted in *Sprauge*, *Nordgren*, and again in *Withhart*, is sound. In my view, those are the better-reasoned decisions, and I would follow those cases in holding that a railroad's counterclaim for property damages is not a "device" used to "exempt" a railroad from "liability" under the FELA. To conclude otherwise ignores that defendant's counterclaim does not seek to exempt defendant from liability for plaintiffs' alleged injuries. "Exempt" means "[f]ree or released from a duty or liability to which others are held." Black's Law Dictionary 593 (7th ed. 1999). Defendant's counterclaim for property damages does not seek to free or release defendant from any duty or liability to plaintiffs for their personal injuries. I respectfully dissent.

¶36 The majority concludes that there is no "clear consensus" on this issue among the courts that have addressed it and elects to follow an interpretation of the FELA that has not been adopted by any federal circuit court of appeals. The four federal circuit courts that have addressed this issue have spoken with a single voice: a railroad's counterclaim for property damages in an employee's negligence suit for personal injury is not a "device" within the meaning of sections 5 and 10 of the FELA. The majority here adopts an expansive view of the term "device" that is not well-grounded in the text of the FELA or a public policy that favors an injured party's right to seek damages for another's negligence.

¶37 In *Cavanaugh*, the Fifth Circuit Court of Appeals scoffed at the notion that the FELA should be read to effectively immunize a negligent employee from liability for the employee's negligent conduct that injures their employer. *Cavanaugh*, 729 F. 2d at 291; see also *Sprague*, 769 F.2d at 29 (agreeing with *Cavanaugh* that denying the employer the right to seek recovery

would "clothe the employee" with absolute immunity). The court of appeals in *Cavanaugh* examined section 5 of the FELA and observed

> "Neither by its express language nor by its legislative history does Section 5 suggest in any way that the 'device' at which the proscription of the Section was directed was intended to include a counterclaim to recover for the railroad's own losses incurred in connection with the accident out of which the injured employee's claim arose." *Cavanaugh*, 729 F. 2d at 292.

Cavanaugh went on to state that the term "device" found within section 5 is a "contract, rule, regulation, or device whatsoever, *the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter*." (Emphasis in original.) (Internal quotation marks omitted.) *Id.* I agree with *Cavanaugh*'s sensible conclusion that a "counterclaim by the railroad for its own damages is plainly not an 'exempt[ion] ... from any liability' and is thus not a 'device' within the contemplation of Congress." *Id.* Furthermore, *Cavanaugh* found no support in the legislative history for the notion that employees should be immunized from property damage claims but instead found an intent to void the railroads' use of unilateral exemptions of liability. *Id.* at 292-93.

¶ 38 Likewise, in *Nordgren*, the Eighth Circuit Court of Appeals observed that "the phrase 'any device whatsoever' is informed by the terms preceding it—'contract,' 'rule,' and 'regulation.' All of these terms refer to the legal instruments railroads used prior to the enactment of FELA to exempt themselves from liability." *Nordgren*, 101 F.3d at 1250-51. *Nordgren* found that the term " 'any device whatsoever' refers only to any other creative agreement or arrangements the railroad might come up with to exempt itself from liability" (*id.* at 1251) but did not "encompass a railroad's common-law based counterclaim for property damages" (*id.*).

Furthermore, *Nordgren* observed that "the law at the time FELA was enacted did not preclude railroads from recovering property damages" and that Congress "never purported to affect the railroads' recovery." *Id.* at 1253.

¶39 Here, the majority reaches the opposite result relying on cases that adopt a "more pragmatic approach to interpreting the FELA." *Supra* ¶ 18. But the majority's concerns that a railroad will use property damage counterclaims as "retaliatory devices calculated to intimidate and exert economic pressure on injured employees, curtail their rights when asserting injury claims and supplying information, and ultimately, exempt the railways from liability under the FELA" (*supra* ¶ 19), is speculative, since there is no evidence that railroads possess such an animus and is premised on a misunderstanding of how defendant's counterclaim affects its potential liability for plaintiffs' injuries, which is zero. Furthermore, we should not assume that Congress implicitly intended to limit the railroads' right to seek property damages where railroads had a right to do so before the FELA and the plain language of the FELA only addresses the imposition of unilateral exemptions of liability.

¶40 The majority opinion firmly closes the door on the ability of defendant or any other employer governed by the FELA to recover damages against an employee for the employee's negligent conduct. It would produce the absurd result that an uninjured employee that negligently causes property damage would be liable for damages but an injured employee that negligently causes damages would be immune from a property damage claim. Because I do not believe that to be a proper interpretation of the FELA, I would follow the decisions from the First, Fourth, Fifth, and Eighth Circuits, the only federal circuits to consider the issue, as controlling law on this issue. *Cavanaugh* and *Nordgren* are controlling decisions within Fourth and Eighth Circuits notwithstanding the dissent filed in each of those cases, and the divergent federal district court

decisions are not controlling law within those circuits. I would reverse the judgment of the circuit court and permit defendant to pursue its counterclaims for property damages.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Melvin Ammons,	)	
	)	
Plaintiff/Counter-defendant,	)	
	)	
v.	)	
	)	
Canadian National Railway Co. and Wisconsin Central, Ltd.,	)	
	)	
	)	No. 15 L 1324 &
Defendants/Counter-plaintiffs,	)	No. 16 L 4680
Darrin Riley,	)	consolidated
	)	
Plaintiff/Counter-defendant,	)	
	)	
v.	)	
	)	
Wisconsin Central, Ltd.,	)	
	)	
Defendant/Counter-plaintiff.	)	

MEMORANDUM OPINION AND ORDER

The Federal Employers' Liability Act voids any device used by a common carrier with the purpose or intent to exempt itself from liability. A state common-law counterclaim brought by a common carrier employer against an employee constitutes such a device because a successful counterclaim could reduce or effectively eliminate a damages award owed by an employer to an employee. For that reason, the plaintiffs' motion to dismiss the defendant's counterclaim must be granted.

Facts

On December 13, 2014, Wisconsin Central, Ltd. (WC) employed Melvin Ammons as a locomotive conductor and Darrin

Riley as a locomotive engineer. On that date, Ammons and Riley jointly operated train A40481-11 on track 2 within WC's Joliet yard, near Joliet, Illinois. While Ammons and Riley operated the train, it collided with train U73851-7 that was standing on track 2. The collision allegedly injured both Ammons and Riley.

On February 9, 2015, Ammons filed a complaint (15 L 1324) against Canadian National Railway (CNR) and WC pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60.[1] On May 10, 2016, Riley filed his complaint (16 L 4680) against WC also based on FELA. On June 17, 2016, the Law Division's presiding judge consolidated the two cases for discovery and trial.

On November 3, 2016 Riley filed an amended complaint, and on March 3, 2017, Ammons filed his first-amended complaint. The two amended complaints are nearly identical in that each plaintiff alleges that WC owed a duty to furnish a safe workplace as required by FELA. The amended complaints further allege violations of the Signal Inspection Act, 49 U.S.C. § 20502(b) & 49 C.F.R. §§ 236.21 & 236.24, the Locomotive Inspection Act, 49 U.S.C. § 20701, *et seq.*, and the Safety Appliance Act, 49 U.S.C. § 20302. Based on these allegations, the amended complaints claim that WC breached its duties by, among other things, failing to: (1) provide a safe workplace; (2) warn of dangerous conditions, including stationary cars, on the same track; (3) implement policies for proper communication between train crews; (4) have an adequate crew; (5) instruct the engineer how to operate an engine and train safely; (6) prevent the engineer from operating the engine and train at too great a speed; (7) instruct the engineer how to read and follow track signals; (8) prevent the engineer from disregarding track signals; (9) train and instruct the engineer on the proper and correct way to control the speed of an engine and train; (10) divert the engine and train onto another track; (11) prevent the engine and train from being operated at a speed beyond that permitted by 49 C.F.R. § 240.117; (12) prevent the

[1] On June 25, 2015, this court entered by agreement of the parties an order dismissing CNR without prejudice from the *Ammons* litigation.

creation of a blind approach in the yard; (13) provide the engine with adequate controls and stopping power; (14) provide the train with adequate brakes; and (15) provide positive train control.

On February 7, 2017 – before Ammons filed his first-amended complaint – WC filed an answer, amended affirmative defenses, and a counterclaim to Ammons's original complaint. Also on that date, WC filed a two-count counterclaim against Riley. Count one seeks compensation for property damage based on Ammons's alleged failure to prevent the train collision. The count alleges that Riley failed to follow signals indicating a diverging approach, meaning that a train must be traveling slow enough so that it can stop at the next signal, the so-called Ruff signal. The counterclaim alleges that train A40481-11 was travelling 23 miles per hour when it passed the bridge signal, 25 miles per hour when it switched to track 2, and 28.6 miles per hour approximately one minute later when it passed the Ruff signal. WC alleges that the train should not have been travelling more than 20 miles per hour. WC further alleges that Riley never engaged the emergency brakes before train A40481-11 struck train U73851-7. Based on these allegations, WC counterclaims that Riley failed to: (1) operate the train safely and efficiently in violation of CN's United States operating rule 104; (2) remain alert for signals; (3) observe and communicate the signal aspects; (4) know the train's speed; (5) reduce the train's speed; (6) reduce the train's speed at the bridge signal in violation of operating rule 812; (7) reduce the train's speed as it passed the bridge signal; (8) reduce the train's speed as it passed the Ruff signal; (9) reduce the train's speed so that it could stop within one-half of the engineer's range of vision in violation of operating rule 814; (10) prevent the train from travelling at an excessive speed; (11) slow the train to prevent a collision; and (12) remain alert and attentive. WC alleges that the collision caused more than $1 million in property damage arising from train car derailments, track damage, train car damage, and environmental remediation. Count two of the counterclaim seeks contribution pursuant to the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01 – 5.

On March 14, 2017, Riley filed a motion to dismiss WC's counterclaim pursuant to the Code of Civil Procedure. *See* 735 ILCS 5/2-615. On March 21, 2017, Ammons filed a motion to join Riley's motion to dismiss. On April 13, 2017, WC filed its joint response brief, and on April 26, 2017, Riley filed the plaintiffs' reply brief.

Analysis

Although Ammons's and Riley's amended complaints allege violations of FELA and other federal statutes, WC's counterclaim for property damage is brought pursuant to state law. Since this court's task is to consider the plaintiffs' motion to dismiss that counterclaim, it is only appropriate to begin by considering the counterclaim's propriety under state law. To that end, the Code of Civil Procedure authorizes that:

> Any claim by one or more defendants against one or more plaintiffs . . . , whether in the nature of setoff, recoupment, cross claim or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief, may be pleaded as a cross claim in any action. . . .

735 ILCS 5/2-608(a). This and all other code provisions are to be liberally construed. *See* 735 ILCS 5/1-106.

The code's broad authorizing language would appear to end perfunctorily the state-law inquiry in WC's favor. Despite Ammons and Riley's failure to raise any arguments based on state law, there are at least two open issues that should be addressed. First, even the code's liberal construction does not permit the filing of a counterclaim for a fraudulent or improper purpose. *See* Ill. S. Ct. R. 137(a). The plaintiffs could have argued that WC's counterclaim is improper because WC, knowing that Ammons and Riley do not have the financial resources to pay all or even a portion of a judgment for liquidated damages, filed the counterclaim to harass them. Such a filing would arguably

constitute an improper purpose that would run counter to the statute's purpose. The plaintiffs, however, save a similar argument for the FELA portion of their response brief.

Second, despite the breadth of section 2-608(a), Illinois common law arguably prohibits the filing of a property-damage counterclaim to a plaintiff's personal-injury case. This argument's genesis lies with the proposition presented in a case both parties cite: "unless otherwise barred, it is well settled that an employer has a common law right of action against its own employees for property damage arising out of ordinary acts of negligence committed within the scope of employment." *Stack v. Chicago, Milwaukee, St. Paul & Pacific Ry.*, 94 Wash. 2d 155, 158 (1980) *citing Greenleaf v. Huntington & B.T.M.R. & Coal Co.*, 3 F.R.D. 24, 25 (E.D. Pa. 1942); *American S. Ins. Co. v. Dime Taxi Serv., Inc.*, 275 Ala. 51, 55 (1963); *Granquist v. Crystal Springs Lumber Co.*, 190 Miss. 572, 582 (1941); *Stulginski v. Cizauskas*, 125 Conn. 293, 296 (1939); *Emerson v. Western Seed & Irrigation Co.*, 116 Neb. 180, 185 (1927). This statement appears to be lifted directly from the law of agency. *See* Restatement (Second) of Agency § 401 ("An agent is subject to liability for loss caused to the principal by any breach of duty.").

This legal principle may be inapplicable in this case for at least three reasons. First, neither *Stack* nor any other case cites to Illinois precedent supporting the proposition. Second, this court has been unable to identify any court opinion adopting section 401 into Illinois common law. Third, and apart from section 401, this court has been unable to find any Illinois decision supporting the proposition that an employer may counterclaim for property damage in an exclusively two-party action brought by an employee for personal injuries received within the scope of employment. Rather, the cases in which an employer has successfully counterclaimed for property damage against an employee have arisen from scenarios in which the employee injured a third person, a circumstance that does not exist here. *See Palier v. Dreis & Krump Mfg. Co.*, 81 Ill. App. 2d 1, 5-6 (1st Dist. 1967) *distinguishing Holcomb v. Flavin*, 34 Ill. 2d 558 (4th Dist. 1962)

(third-person-plaintiff injured by employer's employee); *Embree v. Gormley*, 49 Ill. App. 2d 85 (2d Dist. 1964) (same).

Palier is instructive here although the plaintiff's claim arose under the Structural Work Act (SWA). *See* 81 Ill. App. 2d at 3-4. That statute is similar to FELA both as to the time of its enactment and its dedication to ensuring the rights of workers in a dangerous occupation. As the court wrote:

> [t]he [Structural Work] Act was enacted in 1907 some four years before the birth of the [then] Workmen's Compensation Act. It came into force and effect at a time when employers were continually escaping liability by imposition of the common law defenses against their employees, engaged in hazardous work. It was the Act's intent to rectify this hardship.

Id. at 11.

Like FELA, the SWA explicitly provided a right of action against any person involved in construction for the injury or death of any person killed during that construction. *See* 740 ILCS 150/1-9, *repealed* Feb. 14, 1995. Also like FELA, the SWA's purpose was to "prevent injuries to persons employed in [a] dangerous and extra-hazardous occupation, so that negligence on their part in the manner of doing their work might not prove fatal." *Palier*, 81 Ill. App. 2d at 10. Most important, like FELA, the SWA provided that "a plaintiff's comparative fault is not considered as an offset or a bar to the defendant's damages, in order to preserve the social interest in providing safe working conditions in those instances governed by the Act." *Downing v. United Auto Racing Ass'n*, 211 Ill. App. 3d 877, 897 (1st Dist. 1991).

The court in *Palier* raised two significant points of distinction that resonate here. First, as a matter of fact, other cases in which an employer's counterclaim withstood dismissal,

> involved indemnity actions by an employer against his employee. . , but only where the employee's own negligence injured a third party, thus creating a vicarious liability upon the employer-indemnitee. These cases are distinguishable from the case at bar, for in the instant case the alleged negligence of the employee occasioned injury only to himself.

81 Ill. App 2d at 6. Second, as a matter of law, "Palier's opportunity for recovery is specifically provided for by two statutes [– the SWA and the then Worker's Compensation Act –] to the exclusion of the common law." *Id.* The court reasoned, therefore, that the liability, if any, owed by Palier's employer to the property owner:

> can only be predicated upon a violation of the [Structural Work] Act. It cannot be said that an indemnity action against an employee by an employer, whose indemnity counterclaim hinges upon the possibility of being liable to another under the provisions of the [Structural Work] Act, is an action separate and apart from such statute. We feel such a result would be incorrect.

Id. at 6-7.

Given the court's analysis in *Palier*, it is arguable that WC does not have a right of counterclaim against Ammons and Riley because their exclusive right of recovery is statutory – FELA. To allow WC to proceed with a state common-law counterclaim would defeat FELA's statutory purpose and thereby make WC's counterclaim impermissible as a matter of state law. This court repeats, however, that Ammons and Riley did not present these potentially viable state-law-based arguments and, as a result, this court cannot consider them. Rather, because of the generous authorization given to litigants by the code section 2-608(a), this court finds that, as a matter of state law, WC is may bring its counterclaim.

The more challenging portion of this court's analysis requires interpreting federal law to determine whether FELA authorizes the filing of WC's counterclaim. For its part, FELA renders common-carrier railroads "liable in damages to any person suffering injury while . . . employed by [the] carrier" if the "injury or death result[ed] in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . ." 45 U.S.C. § 51. A railroad's violation of a safety statute is, therefore, considered negligence *per se*. *See Kernan v. American Dredging Co.*, 355 U.S. 426, 438 (1958). Such a presumption is, however, rebuttable since FELA is not a strict liability statute, *see Williams v. Long Island R.R.*, 196 F.3d 402, 406 (2d Cir. 1999), meaning that a plaintiff must present some evidence to support a negligence finding. *See McGinn v. Burlington N. R.R.*, 102 F.3d 295, 300 (7th Cir. 1996).

The parties here contest whether FELA limits, if at all, the degree to which a railroad may limit its liability. The answer to that question, if there is an answer, lies in a subsequent statutory provision: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void. . . ." 45 U.S.C. § 55. The parties do not contest that in this case there exists no contract, rule, or regulation limiting WC's liability; thus, the ultimate question is whether a "device" prohibited by FELA includes a state-law counterclaim.

Such a determination requires this court to construe a federal statute. Before undertaking such a task, this court notes that our Supreme Court "has consistently recognized the importance of maintaining a uniform body of law in interpreting federal statutes if the federal courts are not split on an issue." *State Bk. of Cherry v. CGB Enterps.*, 2013 IL 113836, ¶ 34. To that end, Illinois state courts are to consider federal courts' interpretation of federal laws as binding. *See Carr v. Gateway, Inc.*, 241 Ill. 2d 15, 21 (2011). If, however, there exists a split in

federal authority, a state court is expected to construe federal statutes to achieve the correct result. *See Hiles v. Norfolk & Western Ry.*, 268 Ill. App. 3d 561, 563-64 (5th Dist. 1994), *rev'd* 516 U.S. 400, 411-13 (1996).

Congress enacted FELA in 1908 – one year after the SWA – to "shift part of the 'human overhead' of doing business from employees to their employers." *Conrail v. Gottshall*, 512 U.S. 532, 542 (1994), *quoting Tiller v. Atlantic Coast Line Ry.*, 318 U.S. 54, 58 (1943). The court later avoided such dialectical prose to indicate that FELA's purpose is to give railroad employees "a right to recover just compensation for injuries negligently inflicted by their employers." *Dice v. Akron, Canton, & Youngstown R.R.*, 342 U.S. 359, 362 (1952); *Sinkler v. Missouri Pac. R.R.*, 356 U.S. 326, 329 (1958) ("The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense between the worker and the carrier."). To further that end, Congress barred several common-law tort defenses that had up to that point effectively limited a railroad employee's recovery, including the fellow-servant rule, contributory negligence (in favor of comparative negligence), contracts exempting employers from liability, and the assumption-of-risk defense. *Conrail*, 512 U.S. at 542-43; 45 U.S.C. §§ 51-55.

Although there exists an extensive body of FELA case law, courts are also permitted to rely on Jones Act cases for interpretative purposes.[2] This is so because the Jones Act incorporates by reference the same liability doctrine as FELA. *See Kernan v. American Dredging Co.*, 355 U.S. 426, 439 (1958) (addressing similar language in prior codification at 46 U.S.C. § 688(a)). As currently provided:

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[2] The purpose of the Jones Act, formally known as the Merchant Marine Act of 1920, is to provide workers on navigable waters with a statutory remedy for their illness or injury in addition to the traditional admiralty remedies of maintenance and cure. *See O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 43 (1943).

> A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

46 U.S.C. § 30104. Despite the Supreme Court's liberal construction of FELA, the Court has cautioned that "FELA, and derivatively the Jones Act, is not to be interpreted as a workers' compensation statute and that unmodified negligence principles are to be applied as informed by the common law." *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 436-37 (4th Cir. 1999), *citing Conrail*, 512 U.S. at 543-44.

The ambiguity of what constitutes a "device" under FELA has resulted in highly inconsistent federal decisions interpreting that word. For example, four federal courts of appeal have explicitly held that in a FELA or Jones Act case brought by an employee for personal injury, an employer may pursue a counterclaim against the employee for property damage arising from the same set of facts. *See Cavanaugh v. Western Maryland Ry.*, 729 F.2d 289, 292-94 (4th Cir. 1984); *Sprague v. Boston & Maine Corp.*, 769 F.2d 26, 30 (1st Cir. 1985); *Nordgren v. Burlington N. R.R.*, 101 F.3d 1246, 1251 (8th Cir. 1996); and *Withhart v. Otto Candies, L.L.C.*, 431 F.3d 840, 845 & n. 6 (5th Cir. 2005). Since each of the three later cases relied on the Fourth Circuit's reasoning in *Cavanaugh*, it is best to address that court's analysis.

Cavanaugh served as the engineer of a train that collided with another headed in the opposite direction on the same track. *See* 729 F.2d at 290. Cavanaugh sued the railroad defendants for personal injuries under FELA, and the railroads counterclaimed for property damage under West Virginia common law. *See id.* The federal district court granted Cavanaugh's motion to dismiss, holding that the counterclaim violated sections 5 and 10 of FELA

and was contrary to the public policy underlying the statute. *See id.*

The Fourth Circuit reversed, recognizing initially the "well accepted common law principle that a master or employer has a right of action against his employee for property damages suffered by him 'arising out of ordinary acts of negligence committed within the scope of [his] employment'. . . ." *Id.* at 290-91, *quoting Stack*, 94 Wash. 2d at 158 *citing* cases. According to *Cavanaugh*, the West Virginia Supreme Court had implicitly recognized this principle. *See id., citing National Grange Mut. Ins. Co. v. Wyoming Cty. Ins. Co.*, 156 W. Va. 521 (1973) (insurance company had right to damages against agent who had issued coverage declined by company). The *Cavanaugh* court acknowledged, however, that, "[o]f course . . . , the action may be defeated if the master or employer has contributed to his damages by his own negligence." *Id.* at 291 n.3, *citing Kentucky & Indiana Terminal R.R. v. Martin*, 437 S.W.2d 944, 948 (Ky. 1969).

According to the majority, the key to understanding the word "device" is understanding the word "exemption":

> It is only when the "contract . . . or device" qualifies as an exempt[ion] itself from any liability" that it is "void[ed]" under Section 5. But a counterclaim by the railroad for its own damages is plainly not an "exempt[ion] . . . from an liability" and is thus not a "device" within the contemplation of Congress.

Id. at 292 (quoting statute). The court then quotes an extended section of the House Report on the bill addressing the common practice of railroads to require their employees to enter into contracts releasing the railroads from liability for damages arising out of the negligence of other employees. *See id.* at 292-93, *quoting* House Report No. 1386, 42 Cong. Rec. (1908), pp. 4436, *et seq.* The court further finds nothing in the statute to support the argument that a railroad's counterclaim will "unfairly coerce or intimidate the injured employee from filing and pursuing his

FELA action." *Id.* at 293. Further, "Congress . . . never expressed any interest in denying to the defendant railroad the right of counterclaim. . . ." *Id.* at 294. The court then poses a hypothetical that if the railroad were first to file its property-damage claim followed by an employee's personal-injury claim, the employee's counterclaim would not be barred. *See id.*

In a spirited dissent, Judge Hall comments on and quotes from the oral argument transcript in which the railroad's attorney admitted that:

> railroads generally do not bring actions against their employees for property damage because they have no reasonable expectation of recovery and because their employees may in fact be judgment proof. "In this case, [Cavanaugh] is not going to be judgment proof when he recovers a vast sum of money, which he is attempting to recover from the Railroads . . . [a]nd that is why this [counterclaim] has been asserted. . . .

Id. at 295 n.1 (J. Hall, dissenting). Based on these admissions, Judge Hall concludes that "it is clear to me that the railroads filed their counterclaim either to coerce Cavanaugh into settling his claim or . . . to strip him of any damages by means of an offset." *Id.* More to the point, Judge Hall finds that the filing of a counterclaim,

> "would have the effect of reducing an employee's FELA recovery by the amount of property damage negligently caused by the employee." To allow the railroads' counterclaim to proceed would pervert the letter and spirit of the FELA and would destroy the FELA as a viable remedy for injured railroad workers.

Id. at 296, *quoting Stack*, 94 Wash. 2d at 155.

In contrast to *Cavanaugh* and the three other courts of appeal, the Seventh Circuit would apparently find otherwise. *See Deering v. National Maint. & Repair, Inc.*, 627 F.3d 1039 (7th Cir. 2010). This court purposefully uses the conditional mood because, as explained below, the *Deering* court did not address the precise question at issue here; consequently the court's discussion is merely *dicta*.

Deering suffered substantial injuries and nearly drowned after a surge of water swamped and sank the towboat he had captained. *See id.* at 1041. He filed a Jones Act claim based on the defective steering mechanism that his employer, National, had failed to repair. *See id.* For its part, National filed a common-law counterclaim for the value of the sunken vessel and to limit its liability under the Limitation of Liability Act. *See id.* at 1041-42; *see also* 46 U.S.C. § 30505(a). Deering filed a motion to dismiss the state-law counterclaim, and the district court granted the motion because the statute forbids setoffs to Jones Act claims. *See id.* at 1042. National appealed. *See id.*

The *Deering* court first looks back to the time when Congress enacted FELA. Then, "a railroad's right to recover damages from an employee on account of property damage caused by the employee's negligence was limited . . . to setoffs against claims by employees for unpaid wages." *Id.* at 1043. In addition, most contracts at the time expressly required employees to assume liability for damage to the employer's property; thus, "[i]t would be surprising if Congress had meant to countenance an identical result based on a tort right asserted by employers to which the worker had not waived objections in his employment contract." *Id.* at 1044.

As to the express language of section five, the court does not believe that the word "device" is similar to "contract," "rule," or "regulation" in the same string. *See id.* Congress attached the word "whatsoever," connoting that "device" is a catchall, "in recognition of the incentive of employers to get around the FELA's generous provisions . . . for injured employees." *Id.* According to

the court, a "device" in that sense is much like a "contract" in which National would waive its liability under the Jones Act if Deering had been injured in an accident that caused property damage to National. *See id.* "[S]uch a contractual provision would be unenforceable. So why shouldn't a differently named 'device' of identical purpose and consequence likewise be unenforceable?" *Id.* The court continued by exploring the possibility that Deering's potential damages for his personal injuries could be wiped out if National were to succeed on its counterclaim, given the value of the vessel. *See id.* at 1044-45, *citing Cook v. St. Louis-San Francisco Ry.*, 75 F.R.D. 619 (W.D. Okla. 1976).

The *Deering* court then proceeds to criticize *Cavanaugh*, *Withart*, *Sprague*, and *Nordgren* as wrongly decided, in part for overlooking the Supreme Court's explanation of section five. To the court,

> the evident purpose of Congress [in enacting section 5, which replaced a similar provision in a 1906 predecessor statute to the FELA] was to enlarge the scope of the section and to make it more comprehensive by a generic, rather than a specific, description. It thus brings within its purview 'any contract, rule, regulation, or device whatsoever. . . .' It includes every variety or agreement or arrangement of this nature . . . .

Id. at 1045-46, *quoting Philadelphia, Baltimore & Washington R.R. v. Schubert*, 224 U.S. 603, 611 (1912).

After all of this discussion, the *Deering* court transforms nearly all of its analysis into mere *dicta* so as to avoid a conflict with *Cavanaugh*. *See id.* at 1048. The reason is that, as noted above, National filed a state-law, property-damage counterclaim as well as an admiralty based cause of action to limit its liability to the value of the vessel as provided by the the Limitation of Liability Act. *See id.*; *see also* 46 U.S.C. § 30505(a).

> We leave for a future day (*which may be long in coming, given the paucity of cases such as this*) the resolution of the issue whether a shipowner who does not seek to limit his liability should nevertheless be forbidden to set off damages for negligent damage to property against a Jones Act claim.

Id., emphasis added.

It would be presumptuous for this court to suggest that the day for such a decision has arrived in this case. It is, however, necessary for this court to determine whether WC's property-damage counterclaim may continue. This court has determined that it cannot for at least three reasons.

The first reason is time, a conclusion based, in part, on the hypothetical posed by the *Cavanaugh* court – whether an employee's personal-injury counterclaim would lie against an employer's suit for property damage. Here, WC did not seek to file a property-damage claim within the two-year statute of limitation that expired on December 13, 2016. Indeed, the only reason WC's February 7, 2017 counterclaim is timely at all is because Ammons and Riley effectively saved it by filing their personal-injury actions before the statute expired. In other words, WC appears not to have cared about its property-damage claim until after its employees sued for their personal injuries. Such a tactic has been called "coercive" because it "creates [an] impermissible chill on rights created by Congress" and that extend to FELA plaintiffs and their families. *Kozar v. Chesapeake & Ohio Ry.*, 320 F. Supp. 335, 385 (W.D. Mich. 1970). *See also Yoch v. Burlington N. R.*, 608 F. Supp. 597, 598 (D. Colo. 1985) (defendant railroad may not counterclaim for property damage based on incident giving rise to employee's injuries or death); *Waisonovitz v. Metro-North Commuter R.R.*, 462 F. Supp. 2d 292, 295-96 (D. Conn. 2006) (railroad liable for employee's injuries barred from seeking contribution or indemnification from second employee); *Illinois Central Gulf R.R. v. Haynes*, 592 So.2d 536, 542-43 (Ala. 1991)

(FELA bars employer's third-party complaint for indemnification against co-employee of injured worker).

Second, this court believes that permitting the counterclaim to continue would run counter to one of FELA's basic purposes: "to persuade railroad employers to exercise caution in selecting and supervising its employees. . . ." *Henson v. Baltimore & Ohio R.R.*, 1985 U.S. Dist. LEXIS 21048, at *13 (W.D. Pa. 1985). In other words, "to permit an employer to seek indemnification [against an employee] . . . would violate the intent of Congress rather than foster it." *Illinois Central Gulf*, 592 So.2d at 540. Even if this court were to assume that Ammons and Riley were incompetent at their jobs, their incompetency is a cost of doing business for an employer that hires, trains, or supervises its employees negligently. As has been made plain by this point, FELA is a purely employee-favoring statute; there is no indication that Congress ever intended to permit an employer to shift its fault and damages to an employee, regardless of their alleged conduct leading to their personal injury and the employer's property damage.

The third reason flows from the second – *respondeat superior*. "Generally, a principal is liable for the acts of its agent committed within the scope of his authority." *Vorpagel v. Maxell Corp. of America.*, 333 Ill. App. 3d 51, 59 (2d Dist. 2002), *citing Brubakken v. Morrison*, 240 Ill. App. 3d 680, 686 (1st Dist. 1992). There is nothing to indicate, and WC has not suggested, that Ammons and Riley acted outside the scope of their authority by colliding a moving train into a stationary one. There is, of course, a vast difference between negligent and unauthorized conduct, but WC cannot at this point seek to shift its losses onto the very employees whom WC authorized to act on its behalf.

Conclusion

For the reasons presented above:

1. Ammons and Riley's motion to dismiss the counterclaim is granted; and
2. This case is set for case management conference on June 15, 2017 at 11:00 a.m. in courtroom 2209.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

JUN 14 2017

Reading Law

The Interpretation of Legal Texts

Antonin Scalia & Bryan A. Garner

32. *Ejusdem Generis* Canon

Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned (*ejusdem generis*).

The *ejusdem generis* canon applies when a drafter has tacked on a catchall phrase at the end of an enumeration of specifics, as in *dogs, cats, horses, cattle, and other animals.* Does the phrase *and other animals* refer to wild animals as well as domesticated ones? What about a horsefly? What about protozoa? Are we to read *other animals* here as meaning *other similar animals*? The principle of *ejusdem generis* essentially says just that: It implies the addition of *similar* after the word *other.*

This canon parallels common usage. If one speaks of "Mickey Mantle, Rocky Marciano, Michael Jordan, and other great competitors," the last noun does not reasonably refer to Sam Walton (a great competitor in the marketplace) or Napoleon Bonaparte (a great competitor on the battlefield). It refers to other great *athletes.* But perhaps that is too easy an example, since the general term *competitors* is so nondescript that it almost cries out to be given more precise content by the previous words. A more realistic example (and one that the books are full of) is a passage in which the enumeration is followed by *and all other persons* or *and all other property.* Take, for example, a will that gives to a particular devisee "my furniture, clothes, cooking utensils, housewares, motor vehicles, and all other property." In the absence of other indication (of which more below), almost any court will construe the last phrase to include only personalty and not real estate.

The rationale for the *ejusdem generis* canon is twofold: When the initial terms all belong to an obvious and readily identifiable genus, one presumes that the speaker or writer has that category in mind for the entire passage. The fellow who spoke of "other competitors" did so *in the context* of athletes, and that context narrows the understood meaning of the term. And second, when the tagalong general term is given its broadest application, it renders

the prior enumeration superfluous. If the testator really wished the devisee to receive *all* his property, he could simply have said "all my property"; why set forth a detailed enumeration and then render it all irrelevant by the concluding phrase *all other property*? One avoids this contradiction by giving the enumeration the effect of limiting the general phrase (while still not giving the general phrase a meaning that it will not bear). As expressed by Lord Kenyon in a case holding that the statutory phrase *cities, towns corporate, boroughs, and places* applied only to places of the same sort as those enumerated: "[O]therwise the Legislature would have used only one compendious word, which would have included places of every denomination."[1]

Courts have applied the rule, which in English law dates back to 1596,[2] to all sorts of syntactic constructions that have particularized lists followed by a broad, generic phrase. Today American courts apply the rule often.[3] Some examples through the years:

- "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"—held to include only transportation workers in foreign or interstate commerce.[4]
- "automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails"—held not to apply to an airplane.[5]
- "trays, glasses, dishes, or other tableware"—held not to include paper napkins.[6]

1 *Rex v. Wallis*, (1793) 5 T.R. 375, 101 Eng. Rep. 210.

2 *Archbishop of Canterbury's Case*, (1596) 2 Co. Rep. 46a, 76 E.R. 519. *See Sandiman v. Breach*, [1827] 7 B. & C. 96 (K.B.) (per Lord Tenterden—the rule of *ejusdem generis* also being known as Lord Tenterden's Rule).

3 Preston M. Torbert, *Globalizing Legal Drafting: What the Chinese Can Teach Us About Ejusdem Generis and All That*, 11 Scribes J. Legal Writing 41, 43 (2007).

4 *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 115 (2001) (per Kennedy, J.).

5 *McBoyle v. United States*, 283 U.S. 25, 26, 27 (1931) (per Holmes, J.).

6 *Treasure Island Catering Co. v. State Bd. of Equalization*, 120 P.2d 1, 5 (Cal. 1941).

- "all personal effects, household effects, automobiles and other tangible personal property"—held not to include cash.[7]
- "soldiers' and sailors' home, almshouse, home for the friendless, or other charitable institution"—held not to include a state hospital.[8]
- "gravel, sand, earth or other material" on state-owned land—held not to include commercial timber harvested on state-owned land.[9]
- Licensing requirement for "the business of a blood boiler, bone boiler, fell-monger, slaughterer of cattle, horses, or animals of any description, soap boiler, tallow melter, tripe boiler, or other noxious or offensive business, trade, or manufacture"—held not to apply to a brickmaker or a small-pox hospital, because they were dissimilar to the listed jobs or businesses.[10]
- Authorization to employ and pay "teachers, . . . janitors, and other employes of the schools"—held not to apply to employment and payment of a lawyer.[11]
- A statute authorizing removal from office for "incompetency, improper conduct, or other cause satisfactory to said board"—held to cover only a cause that related to the incumbent's fitness for office.[12]

Examples of such wordings—and of such holdings—are legion.

An especially interesting case[13] involved South Dakota's Equine Activities Act, which stated that "[n]o equine activity sponsor, equine professional, doctor of veterinary medicine, or any

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7 *In re Pergament's Estate*, 123 N.Y.S.2d 150, 153–54 (Sur. Ct. 1953), *aff'd sub nom. In re Pergament's Will*, 129 N.Y.S.2d 918 (App. Div. 1954).

8 *In re Jones*, 19 A.2d 280, 282 (Pa. 1941).

9 *Sierra Club v. Kenney*, 429 N.E.2d 1214, 1222 (Ill. 1981).

10 *Wanstead Local Bd. of Health v. Hill*, (1863) 143 E.R. 190; *Withington Local Bd. of Health v. Manchester Corp.*, [1893] 2 Ch. 19.

11 *Denman v. Webster*, 73 P. 139, 139 (Cal. 1903) (*employes* so spelled).

12 *State ex rel. Kennedy v. McGarry*, 21 Wis. 496, 497–98 (1867).

13 *Nielson v. AT&T Corp.*, 597 N.W.2d 434 (S.D. 1999).

other person, is liable for an injury to or the death of a participant resulting from the inherent risks of equine activities"[14]—risks that were defined as "dangers or conditions which are an integral part of equine activities, including . . . [c]ertain hazards such as surface and subsurface conditions . . . ."[15]

Gregg Nielson's 19-year-old daughter was riding a horse in a pasture leased to a riding club. While running at a controlled gallop, the horse tripped and somersaulted, killing its rider. An investigation revealed that the horse had tripped because it stepped in a cable trench that had been dug by AT&T. Nielson sued the company for its negligence in failing to fill the trench properly and to warn riders of the danger the trench presented. He contended that AT&T was not involved in the sponsorship of equine activities and should therefore not be protected by the Equine Activities Act. AT&T argued that under the plain language of the statute, the phrase *any other person* provided immunity to all persons, regardless of their occupation, their status, or their foreseeable involvement in equine activities. Applying *ejusdem generis*, the court correctly held that *any other person* included only those involved in equine activities.[16] AT&T was liable.

As in all the preceding examples, *ejusdem generis* has traditionally required the broad catchall language to *follow* the list of specifics, as witness a short historical sampling of commentary:

- **1888:** "EJUSDEM GENERIS—. . . It is a rule of legal construction that general words following an enumeration of particulars are to have their generality limited by reference to the preceding particular enumeration."[17]

14 S.D. Codified Laws § 42-11-2.

15 *Id.* § 42-11-1(6)(c)

16 597 N.W.2d at 439–40.

17 Stewart Rapalje & Robert L. Lawrence, *A Dictionary of American and English Law* 435 (1888).

- **1900:** "[*E*]*jusdem generis* [requires that] general words following words of a more particular character are regarded as limited in their meaning by the former."[18]
- **1943:** "There appears to be no case where the *ejusdem generis* rule has been applied to general words which precede specific words."[19]
- **1966:** "*Ejusdem generis.* Of the same kind. If a number of things of the same kind are specified and are followed by general words, the latter may be held to be limited in their scope."[20]
- **1975:** "[*E*]*jusdem generis* . . . says that if a series of more than two items ends with a catch-all term that is broader than the category into which the preceding items fall but which those items do not exhaust, the catch-all term is presumably intended to be no broader than that category."[21]
- **1996:** "The ejusdem generis rule only comes into effect when dealing with general words at the end of a list."[22]
- **2007:** "The ejusdem generis canon asserts that a general phrase at the end of a list is limited to the same type of things (the generic category) that are found in the specific list."[23]

Authorities have traditionally agreed that the specific–general sequence is required, and that the rule does not apply to a general–specific sequence.[24]

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18 H.T. Tiffany, "Interpretation and Construction," in 17 *American and English Encyclopaedia of Law* 1, 6 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1900).

19 Roland Burrows, *Interpretation of Documents* 66 (1943).

20 W.A. Leach, *Legal Interpretation for Surveyors* 63 (1966).

21 Reed Dickerson, *The Interpretation and Application of Statutes* 234 (1975).

22 James A. Holland & Julian S. Webb, *Learning Legal Rules* 202 (3d ed. 1996).

23 William D. Popkin, *A Dictionary of Statutory Interpretation* 74 (2007).

24 *See, e.g.*, E.A. Driedger, *The Construction of Statutes* 86–95 (1974).

But in 1973 the editors of a leading American treatise, *Sutherland Statutes and Statutory Construction*, ill-advisedly amended its traditional explanation with this statement: "Where the opposite sequence is found, i.e., specific words following general ones, the doctrine is equally applicable, and restricts application of the general term to things that are similar to those enumerated."[25] Another commentator has erroneously suggested that applying *ejusdem generis* to general–specific sequences "appears to be the majority view."[26]

That is not so. The vast majority of cases dealing with the doctrine—and all the time-honored cases—follow the species–genus pattern. The question is whether it ought to be so limited. It might be argued that one of the rationales for *ejusdem generis* exists no less when the general term comes first than when it comes last: that when an *introductory* general term is given its broadest application, no less than when a *tagalong* term is given its broadest application, the enumeration of specifics becomes superfluous. That is perhaps not entirely true. Following the general term with specifics can serve the function of making doubly sure that the broad (and intended-to-be-broad) general term is taken to include the specifics. Some formulations suggest or even specifically provide this belt-and-suspenders function by introducing the specifics with a term such as *including* or even *including without limitation* ("all buildings, including [without limitation] assembly houses, courthouses, jails, police stations, and government offices"). But even without those prefatory words, the enumeration of the specifics can be thought to perform the belt-and-suspenders function. Enumerating the specifics before the general, on the other hand, cannot reasonably be interpreted as having such a function. This is perhaps demonstrated by the fact that there is no commonly used verbal formulation (the equivalent of *including without limitation* in the general-followed-by-specific context) that makes that function

25 2A *Sutherland Statutes and Statutory Construction* § 47:17 (C. Dallas Sands ed., 4th ed. 1973) (the statement having been preserved in the fifth and later editions). *See Gulf Ins. Co. v. James*, 185 S.W.2d 966 (Tex. 1945) (applying—or rather misapplying—the rule to a general–specific sequence).

26 Gregory R. Englert, *The Other Side of Ejusdem Generis*, 11 Scribes J. Legal Writing 51, 54 (2007).

clear in the specific-followed-by-general context. One never encounters a provision that reads "all assembly houses, courthouses, jails, police stations, government offices, and, *without limitation by reason of the foregoing*, all other buildings."

The other rationale for the *ejusdem generis* canon undoubtedly does not apply to a genus-followed-by-species sequence. When the genus comes first ("all buildings, assembly houses, courthouses, jails, police stations, and government offices") it is a stranger that arrives, so to speak, without an introduction saying it is limited; one is invited to take it at its broadest face value. So the *ejusdem generis* canon is properly limited to its traditional application: a series of specifics followed by a general. The Supreme Court of Canada was entirely correct in refusing to apply the canon when general words in a statutory provision preceded, rather than followed, the specifics.[27]

Courts have often gotten sloppy in stating the rule. Sometimes they confuse it with the more general rule *noscitur a sociis* (see § 31 [associated-words canon]), as when they disregard the necessary specific–general sequence in the enumeration. The Third Circuit has misleadingly said that *ejusdem generis* applies to "general words *near* a specific list,"[28] and the Supreme Court that "a general statutory term should be understood in light of the specific terms that *surround* it"[29] (an erroneous formulation duly repeated by the Fourth Circuit[30]). In all contexts other than the pattern of specific-to-general, the proper rule to invoke is the broad associated-words canon, not the narrow *ejusdem generis* canon.

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27 *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, ¶12 ("[I]n the clause under consideration, the general words precede and do not follow the specific enumeration. The clause states that coverage as to the interest of the mortgagee is valid notwithstanding 'omission or misrepresentation,' and then provides illustrative examples of such omissions and misrepresentations. The rationale for applying the *ejusdem generis* rule is accordingly absent.").

28 *Cooper Distrib. Co. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 280 (3d Cir. 1995) (emphasis added).

29 *Hughey v. United States*, 495 U.S. 411, 419 (1990) (per Marshall, J.) (emphasis added).

30 *United States v. Parker*, 30 F.3d 542, 553 n.10 (4th Cir. 1994).

There are also potentially objectionable statements to the effect that *ejusdem generis* does not apply "where the intention of the legislative body is otherwise apparent"[31]—unless one takes "apparent" to mean "apparent from text and context." As we have observed, the interpreter's mission should be not to divine the *ignis fatuus* known as "drafter's intention," but instead to determine what the drafter has actually said.

Five caveats.

First, *ejusdem generis* generally requires at least two words to establish a genus—before the *other*-phrase. "Theaters and other places of public entertainment" does not invoke the canon.[32] There are decisions to the contrary. For example, the language "clerical or other error" in tax assessments was held to refer only to ministerial errors and not to errors of judgment.[33] But this is simply another instance of misusing the fairly technical *ejusdem generis* canon for the somewhat less technical associated-words canon. Why should the rule require at least two terms before *other*? A single-word lead-in certainly invokes the second of the two rationales supporting the canon: A general tag-on renders a single specific word superfluous no less than a series of words. If the word *property* is given its general connotation, the testator who devises "my car and all other property" might just as well have said "all my property." But with a single-word lead-in, the first rationale for the canon does not exist. There is no reason to conclude, from the single specification of *car*, that the testator had only personal property in mind. A sign at the entrance to a butcher shop reading "No dogs or other animals" does not suggest that only canines, or only four-legged animals, or only domestic animals are excluded; dogs may have been mentioned only because they are the most common offenders.[34]

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31 *A.H. Jacobson Co. v. Commercial Union Assurance Co.*, 83 F.Supp. 674, 678 (D. Minn. 1949).

32 *Allen v. Emmerson*, [1944] K.B. 362, 366–67. *See also United Towns Elec. Co. v. Attorney-General for Newfoundland*, [1939] 1 All. E.R. 423, 428 (P.C.) ("The mention of a single species . . . does not constitute a genus.").

33 *Hermance v. Board of Supervisors of Ulster County*, 71 N.Y. 481, 486–87 (1877).

34 The context, entrance to a store catering to the public, shows that *animals* does not include *homo sapiens*.

A recent United States Supreme Court opinion presented the question whether the two-specifics minimum for application of the canon applied. In *Ali v. Federal Bureau of Prisons*,[35] a prison inmate sued the bureau under the Federal Tort Claims Act for the mishandling of his belongings. The government invoked a provision of the Act, stating that its waiver of sovereign immunity did not apply to the "detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer."[36] The plaintiff argued that by application of *ejusdem generis* the phrase *any other law enforcement officer* meant only other law-enforcement officers enforcing customs or excise laws.[37] The Supreme Court rightly held that the canon did not apply: "The phrase is disjunctive, with one specific and one general category, not . . . a list of specific items separated by commas and followed by a general or collective term."[38] This conclusion rests on the premise that the phrase *officer of customs or excise* refers to a single, specific type of officer—and is not equivalent to *customs officer or excise officer*. That premise was unexamined, but was probably correct. It is traditional to pair the two terms *customs* and *excise* in reference to officers who enforce exclusion restrictions and assess duties on imports. Great Britain and other countries have long had Bureaus of Customs and Excise.

Second, the doctrine often gives rise to the question how broadly or narrowly to define the class delineated by the specific items listed.[39] What sets *ejusdem generis* apart from the other canons—and makes it unpopular with many commentators—is its indeterminacy. The doctrine does not specify that the court must identify the genus that is at the lowest possible level of generality. The court has broad latitude in determining how much or how little is embraced by the general term. An ordinance that applies to owners of "lions, tigers, and other animals" might be held to

35 552 U.S. 214 (2008) (per Thomas, J.).

36 28 U.S.C. § 2680(c).

37 *Id.* at 218.

38 *Id.* at 225.

39 *See* John F. Manning & Matthew C. Stephenson, *Legislation and Regulation* 252–54 (2010) (examining the problem of scope).

apply only to owners of wildcats or to owners of all dangerous wild animals. Or:

- "horses, cattle, sheep, pigs, goats, and other farm animals." Must they be mammals? (Are catfish included?) Must they be quadrupeds? (Are chickens included?) Must they be hoofed? (Is a sheepdog included?)
- "LPs, CDs, DVDs, and other means of home entertainment." Must they be disks? (Not an iPod?) Must they be disks of a certain type? (A Frisbee is excluded?)

Our advice here must be a generalization: Consider the listed elements, as well as the broad term at the end, and ask what category would come into the reasonable person's mind. It seems to us that a state's reservation of "oil, gas, and other minerals" would include all fossil fuels, including coal—not just liquid and gaseous fossil fuels.[40]

But the difficulty of identifying the relevant genus should not be exaggerated. Often the evident purpose of the provision makes the choice clear. If the previously discussed ordinance required the animal owners to be instructed on the unpredictability of feline behavior—or, on the other hand, required them to adopt certain measures to prevent escape—the choice would be clear. Moreover, it will often not be necessary to identify the genus with specificity in order to decide the case at hand. If the issue is whether the above ordinance applies to the owner of a dachshund, it is inconsequential whether the genus established by the specification is dangerous wild animals or wildcats. That can await a later case involving hyenas. Because *whatever* the genus—wildcats or wild animals—it does not include Fido. So an English case dealing with a ban on importation of "arms, ammunition, gunpowder, or any other goods" held that the prohibition did not apply to pyrogallic acid.[41] It had been argued that pyrogallic acid is used in photography, which, like arms, ammunition, and gunpowder, is

40 *Contra State ex rel. Commissioners of the Land Office v. Butler*, 753 P.2d 1334, 1339 (Okla. 1987) (holding that the common understanding of "other minerals" is limited to those "similar in kind and class to oil and gas," which excludes coal).

41 *Attorney-General v. Brown*, [1920] 1 K.B. 773, 799–800 (per Sankey, J.).

used in war. The court did not identify what the genus was but said that it was assuredly not everything used, or used in preparing some article for use, in modern warfare—since that would include *everything*, making the specification of *arms*, *ammunition*, *and gunpowder* pointless.

Third, sometimes the specifics do not fit into any kind of definable category—"the enumeration of the specific items is so heterogeneous as to disclose no common genus."[42] With this type of wording, the canon does not apply. Thus, the general words *all manner of merchandise* were held not to be limited by a preceding enumeration of fruit, fodder, farm produce, insecticides, pumps, nails, tools, and wagons.[43] The same was held true of the phrase *for any other necessary public purposes* in a statute providing that private property could be expropriated by certain cities for "establishing, opening, widening, extending or altering any street, avenue, alley, wharf, creek, river, watercourse, market place, public park or public square, and for establishing market houses, and for any other necessary public purposes."[44]

Fourth, when the specifics exhaust the class and there is nothing left besides what has been enumerated, the follow-on general term must be read literally.[45] For example, *federal Senators, fed-*

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42 Lord Macmillan, *Law and Other Things* 166 (1938). *See State v. Eckhardt*, 133 S.W. 321, 322 (Mo. 1910) (*ejusdem generis* not applied because "the words 'street' and 'field' . . . are not even remotely related" and "each stands as the representative of a distinct class" in a statute criminalizing the abandonment of a child in "a street, field or other place"); *McReynolds v. People*, 82 N.E. 945, 947–48 (Ill. 1907) (*ejusdem generis* not applied to enumeration of "any wharf or place of storage, or in any warehouse, mill, store or other building" because it should not be applied "where the specific words signify subjects greatly different from one another").

43 *Heatherton Coop. v. Grant*, [1930] 1 D.L.R. 975 (N.S.).

44 *See City of Caruthersville v. Faris*, 146 S.W.2d 80, 86–87 (Mo. Ct. App. 1940) (refusing to apply *ejusdem generis* because of the disparities within the enumeration) (quoting Mo. Rev. Stat. 1929, § 6852).

45 *Mason v. United States*, 260 U.S. 545, 554 (1923) (per Sutherland, J.) (*ejusdem generis* not applied to executive order withdrawing public mining land "from settlement and entry, or other form of appropriation" because the "specific words [settlement and entry] are sufficiently comprehensive to exhaust the genus and leave nothing essentially similar upon which the general words may operate"); *Danciger v. Cooley*, 248 U.S. 319, 326 (1919) (per Van Devanter, J.) (*ejusdem generis* not applied to statute regulating transport of liquor by "[a]ny railroad com-

eral Representatives, and other persons. The class represented by the specifics is obviously members of Congress—but that class consists entirely of senators and representatives; *other persons* would therefore have no effect if limited to that class, and must be given its general meaning. A case exemplifying the point is *Knoxtenn Theatres, Inc. v. McCanless*,[46] involving a state tax on liquid carbonic-acid gas "used in the preparation . . . of soft drinks or other beverages, or for any other purpose." The taxpayer, which used the gas for air conditioning in its theater, argued that *ejusdem generis* limited *any other purpose* so that it could not apply to air-conditioning use. The court quite properly held that the catchall ending language

> cannot extend the same kind or class, because the words "soft drinks or other beverages" exhaust the kind or class and the general words following "or for any other purpose," by necessity, show an intent to go beyond the whole field of soft drinks and beverages. The final general words have a sweeping, all-inclusive effect, otherwise, these final general words have no purpose whatever.[47]

In the congressional example, the outcome would be different if the text read *federal Senators, federal Representatives, and other members of Congress.* There, the concluding phrase simply cannot bear any other meaning than the one already exhausted by the preceding specifics; because it cannot be expanded beyond its permissible meaning, it must be treated as surplusage.

Fifth, since the days of Blackstone[48] and even Coke, commentators have said that the general word will not be treated as applying to persons or things of a higher quality, dignity, or worth than those specifically listed. Thus, a statute applicable to masters and fellows of colleges, deans and chapters of cathedrals, parsons,

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pany, express company, or other common carrier, or any other person" because "[t]he words 'any railroad company, express company, or other common carrier,' comprehend all public carriers").

46 151 S.W.2d 164 (Tenn. 1941).

47 *Id.* at 165–66.

48 1 William Blackstone, *Commentaries on the Laws of England* 88 (4th ed. 1770).

vicars, and "others having spiritual promotions"[49] was held inapplicable to bishops, who were of a higher rank than those listed.[50] And a duty imposed on copper, brass, pewter, tin, and "all other metals not enumerated" was held inapplicable to gold and silver—in part because of *ejusdem generis*, but also because gold and silver are commonly referred to not as "metals" but as "precious metals."[51] Apart from protecting the interests of bishops and other illustrious persons, there seems to us little to be said for the proposition that inferiority of worth always establishes the relevant genus. Although the inferiority rule is an ancient one, it is infrequently applied and even little known in modern times.

Commentators sometimes dispute whether the *ejusdem generis* canon is beneficial. One calls for its abolition;[52] another questions its "lexicographic accuracy."[53] But others call it "a gem of common sense"[54] and say that it "expresses a valid insight about ordinary language usage."[55] The redoubtable Max Radin suggested that the canon has some "foundation in logic and in ordinary habits of speech."[56] And the high court in New Jersey has praised the rule as being "grounded in grammar, logic and reason."[57]

Whatever its intrinsic merit, the canon has sometimes been applied with a rigidity that hampered rather than helped the

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49 13 Eliz. c. 10 § 3 ("And for that long and unfashionable leases made by colleges, deans, and chapters, parsons, vicars, and others having spiritual promotions . . .").

50 *Archbishop of Canterbury's Case*, (1596) 2 Co. Rep. 46a, 76 E.R. 519.

51 *Casher v. Holmes*, (1831) 109 E.R. 1263, 1264 (K.B.).

52 *See, e.g.*, Alex Frame, *Salmond: Southern Jurist* 93 (1995) (noting that John Salmond sought to abolish the rule in New Zealand with a legislative bill drafted in 1908).

53 Reed Dickerson, *The Interpretation and Application of Statutes* 234 (1975) ("Whether the presumption is lexicographically accurate is not entirely clear.").

54 Joel R. Cornwell, *Smoking Canons: A Guide to Some Favorite Rules of Construction*, CBA Record, May 1996, at 43, 45.

55 2A Norman J. Singer, *Statutes and Statutory Construction* § 47:18, at 291 (6th ed. 2000).

56 Max Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863 (1930). *Cf.* William D. Popkin, *Materials on Legislation* 216 (4th ed. 2005) (stating that *ejusdem generis* "is probably based on a genuine attempt to understand language").

57 *President & Dirs. of Manhattan Co. v. Armour* (*In re Armour's Estate*), 94 A.2d 286, 293 (N.J. 1953).

search for genuine textual meaning. Black regarded it as "really a rule of strict construction."[58] As stated in 1895 by Lord Justice Rigby (quoted by Beal, who obviously did not think much of the canon)[59]:

> The doctrine known as that of *ejusdem generis* has, I think, frequently led to wrong conclusions on the construction of instruments. I do not believe that the principles as generally laid down by great judges were ever in doubt, but over and over again those principles have been misunderstood, so that words in themselves plain have been construed as bearing a meaning which they have not, and which ought not to have been ascribed to them. In modern times I think greater care has been taken in the application of the doctrine . . . .[60]

This greater care springs primarily from the recognition that, like the other canons, *ejusdem generis* is not a rule of law but one of various factors to be considered in the interpretation of a text. The canon would have undoubted application to a sign at the entrance to a butcher shop that read: "No dogs, cats, and other animals allowed." It would have application, but given the context of the sign it would not carry the day. Even if the sign were expanded to read "No dogs, cats, pet rabbits, parakeets, or other animals," no one would think that only domestic pets were excluded, and that farm animals or wild animals were welcome. When the context argues so strongly against limiting the general provision, the canon will not be dispositive.

But the canon cannot be dismissed lightly. The truly knowledgeable interpreter (and drafter) knows the *ejusdem generis* canon; it has become part of the accepted terminology of legal documents. Any lawyer or legislative drafter who writes two or more specifics followed by a general residual term without the intention that the residual term be limited may be guilty of malpractice. To be sure,

58 Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* 217 (2d ed. 1911).

59 Edward Beal, *Cardinal Rules of Legal Interpretation* 65–66 (A.E. Randall ed., 3d ed. 1924).

60 *Anderson v. Anderson*, [1895] 1 Q.B. 749, 755 (per Rigby, L.J.) (emphasis added).

other factors can supersede *ejusdem generis*, but the canon would carry some weight nonetheless. We see no basis (except perhaps a rejection of textualism) for Driedger's suggestion that this canon should be applied only as a last resort, after "the substantive context or the object of the Act" has failed to determine the scope of the general word.[61] *Ejusdem generis* is one of the factors to be considered, along with context and textually apparent purpose, in determining the scope. It does not always predominate, but neither is it a mere tie-breaker.

61 E.A. Driedger, *The Construction of Statutes* 94–95 (1974).

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