No. 124454

IN THE SUPREME COURT OF ILLINOIS

MELVIN AMMONS, Plaintiff/Counter-Defendant/ Appellee, vs. WISCONSIN CENTRAL, LTD., Defendant/Counter-Plaintiff/ Appellant, and CANADIAN NATIONAL RAILWAY COMPANY, LTD., Defendant.	))))))))))))))))	On appeal from the Appellate Court of Illinois, First Judicial District Nos. 1-17-2648 & 1-17-3205 (cons.) Appeals from the Circuit Court of Cook County, Illinois, Law Division No. 15 L 1324 and 15 L 4680 (cons.) The Honorable John Ehrlich, Judge Presiding.
DAREN RILEY, Plaintiff-Counter-Defendant/ Appellee, vs. WISCONSIN CENTRAL, LTD. Defendant/Counter-Plaintiff/ Appellant.	))))))))))	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division No. 16 L 4680 The Honorable John Ehrlich, Judge Presiding.

JOINT BRIEF OF PLAINTIFFS/COUNTER DEFENDANTS/ APPELLEES, MELVIN AMMONS AND DAREN RILEY

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Oral Argument Requested

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NATURE OF THE CASE

Melvin Ammons and Darrin Riley, employed by Wisconsin Central, Ltd. as a conductor and engineer, respectively, were operating a Wisconsin Central locomotive when the train struck another Wisconsin Central train stopped along the same track. Both men were injured and they both sued the railroad, under the Federal Employers' Liability Act, 45 U.S. C. § 51 *et seq.* ("FELA"), alleging that the railroad had failed to provide them a safe place to work and that it had violated various railroad rules and regulations. The railroad answered the complaints and filed affirmative defenses, alleging that the plaintiffs were negligent and to blame for their own injuries. After the two cases were consolidated, the railroad filed counterclaims against both men, seeking recovery for property damage caused to the train and contribution.

On plaintiffs' motions, the circuit court dismissed the counterclaims, finding them barred by Sections 55 and 60 of the FELA. The railroad appealed and the Appellate Court affirmed the dismissals, with one justice dissenting. This court granted the railroad's petition for leave to appeal.

ISSUE PRESENTED ON APPEAL

Are the railroad's counterclaims for property damages in these consolidated FELA actions barred by sections 55 and/or 60 of the FELA?

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ARGUMENT

THE APPELLATE COURT PROPERLY AFFIRMED THE CIRCUIT COURT'S DISMISSAL OF THE RAILROAD'S COUNTERCLAIMS.

A. Standard of Review

The standard of review for a dismissal under Section 2-619 of the Illinois Code of Civil Procedure (735 ILCS 2-619) is *de novo*. *Solaia Technology, LLC, v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006), citing *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). *De novo* consideration means the Court performs the same analysis that a trial judge would perform. *Mareskas-Palcek v. Schwartz, Wolf & Bernstein, LLP*, 2017 IL App (1st) 162746, ¶ 23.

Defendant concedes that this Court is not bound by any of the federal court decisions on this issue. (Def. Br. at 9) The following rules apply when interpreting the FELA:

> "When interpreting federal statutes, we look to the decisions of the United States Supreme Court and federal circuit and district courts." *State Bank of Cherry v. CGB Enters.*, 2013 IL 113836, ¶ 33, 984 N.E.2d 449, 368 Ill. Dec. 503. Decisions of the United States Supreme Court interpreting federal law are binding on this court. *Id.* Lower federal court decisions, however, are persuasive but not binding in the absence of a decision of the United States Supreme Court. *Id.* ¶ 34. In the absence of a United States Supreme Court decision, the weight this court gives to federal circuit and district court interpretations of federal law depends on factors such as uniformity of law and the soundness of the decisions. *Id.* ¶ 33.
>
> ¶ 26 Because uniformity of the law is an important factor in deciding how much deference to afford lower federal courts'

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> interpretations of federal law, we will give "considerable weight" to lower federal courts' interpretations of a federal statute if they are uniform. Id. ¶ 35. "However, if the federal courts are split, we may elect to follow those decisions we believe to be better reasoned." *Id.* For example, in *Weiland v. Telectronics Pacing Systems, Inc.*, 188 Ill. 2d 415, 423, 721 N.E.2d 1149, 1154, 242 Ill. Dec. 618 (1999), the supreme court declined to follow a decision of the Seventh Circuit in a case involving a preemption issue under FELA when there was a split of authority among the federal circuits and the supreme court believed that the Seventh Circuit case was wrongly decided.

Morris v. Union Pacific R.R. Co., 2015 IL App (5th) 140622, ¶¶ 25-26.

Application of these rules directs the conclusion that the Appellate Court's ruling in this appeal should be affirmed.

B. Summary of Argument

Section 5 of the FELA pertinently provides that "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable a common carrier to exempt itself from any liability created by this chapter, shall to that extent be void . . . ." 45 U.S.C. § 55. Section 10 voids "any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee." 45 U.S.C.S. § 60.

The Appellate Court considered these provisions in light of the federal and state court decisions construing them and the remedial purpose of the FELA, and decided that "[c]ounterclaims like those interposed here are legal 'devices' that

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'enable [a] common carrier to exempt itself from liability in their employees' personal injury actions." *Ammons v. Canadian National Ry. Co.*, 2018 IL App (1st) 172648, ¶24. Accordingly, the Appellate Court affirmed the circuit court's order dismissing the counterclaims.

The Appellate Court made the right decision.

If the Court allows defendant railroads to pursue counterclaims for property damages against injured railroad workers, who do not have the right to file workers' compensation actions or common law actions against their employers – the railroads that caused their injuries – very few injured workers, if any, would file FELAs action for injuries sustained in a train collision, knowing that they could be found liable for the cost of the damage to the locomotive or train.[1] In other words, they would be deprived of meaningful access to the courts.

Defendant's assertion that it creates "national disharmony" (Def. Br. at 11), is baseless. There was no "harmony" before *Ammons.* And its assertion that the majority's opinion "invites false claims of injury" (*Id.*) is farfetched and completely speculative.

Unquestionably, the courts that have considered this question have come down on both sides of the issue. *See e.g., Cavanaugh v. W. Md. Ry. Co.*, 728 F.2d

[1]The cost of a locomotive is not of record, but internet research shows it can be as high as $3 million. See e.g. https://www.theglobeandmail.com/report-on-business/cn-to-buy-200-locomotives-from-ge-as-freight-volumes-surge/articles37418466

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289 (4th Cir. 1984) and *Deering v. Nat'l Maint. & Repair, Inc.*, 627 F.3d 1039 (7th Cir. 2010). In light of the conflicting state of the law, and the absence of United Sates Supreme Court precedent, this Court should follow the better reasoned decisions. In plaintiff's view, *Deering* is better reasoned than *Cavnaugh* and its progeny. *Deering* correctly consider the rules of statutory construction and the remedial purpose of the FELA.

Moreover, the plain fact that the railroad, under Illinois law, would be required to indemnify the plaintiffs for their alleged negligence, and the practical reality that allowing such counterclaims in the state courts, in the face of *Deering*, would lead to forum shopping, should lead to the conclusion that this Court should affirm the Appellate Court's majority decision.

The dissent's view, and the railroad's argument, that it is speculative as to whether counterclaims would, in fact, curtail plaintiffs' rights (Op., ¶ 39; Def. Br. at 23.) is naive. While there may be no published research studies documenting the fact that injured railroad workers rights have actually been curtailed in the First, Fourth, Fifth and Eighth Circuits, since those circuit courts began allowing property damage counterclaims in FELA actions (at least counsel has not yet found such studies), judges, like jurors, are not required to leave their common sense at home when they decide cases. They can consider the evidence presented in the light of their own observations and experience in life. *McHenry v. McHenry (In re Estate of McHenry)*, 2016 IL App (3d) 140913, ¶ 148, citing *People v. Tye*, 141 Ill.

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2d 1, 25(1990). As stated above, for an injured railroad worker, the thought of having to pay for the cost of a locomotive is chilling.

Further, the fact that "[p]rior 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" (Def. Br. at 12, 14), is irrelevant. That is not the question presented here. The question presented in this appeal is only whether railroads can maintain property damage counterclaims in FELA actions. The answer to that question turns on whether such a counterclaim is a "device" under § 55 of the FELA and on whether, under § 60, such a counterclaim has 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."

C. The Appellate Court properly considered the well-reasoned case law in concluding that the counterclaims were properly dismissed.

Four federal circuit court decisions allow property damage counterclaims in FELA actions – *Cavanaugh v. W. Md. Ry. Co.*, 728 F.2d 289 (4th Cir. 1984), *Norgren v. Burlington N. R.R. Co*, 101 F.3d 1246 (8th Cir. 1996), *Sprague v. Boston & Me. Corp.*, 796 F.2d 26 (1st Cir. 1985) and *Winthart v. Otto Candies, L.L.C.*, 431 F.3d 8400 (5th Cir. 2005).

On the other hand, one federal circuit court decision, *Deering v. Nat'l Maint. & Repair, Inc.*, 627 F.3d 1039 (7th Cir. 2010) and several district and state

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court cases, *In re National Maintenance & Repair, Inc.*, No. 09-0676-DRH, 2010 U.S. Dist. LEXIS 9313 (S.D. Ill. Feb. 3, 2010), *Yoch v. Burlington N.R. Co.*, 608 F.Supp. 597 (D. Colo., 1985), *Blanchard v. Union Pac. R.R. Co.*, 2016 U.S. Dist. LEXIS 12108; 2016 WL 411019, *Stack v. Chi.*, 94 Wn.2d 155, 615 P.2d 457 (Supreme Court of Washington, 1980), *Schendel v. Duluth*, 2014 WL 5365131 (D. Minn., 2014), and *Ammons v. Canadian National Railway Co.*, 2018 IL App (1st) 172648, bar them.

Under this circumstance, the Appellate Court, like the circuit court, before it, did not simply "rule the other way" and ignore "uniform federal court precedent." (Def. Br. at 13) The law is not uniform and the court properly considered the soundness of the relevant decisions, and appropriately ruled that the *Deering* decision was better reasoned. The railroad's claim that there is no "split among the circuit courts" (Def. Br. at 13), is mistaken and it knows that to be so. The Seventh Circuit's decision in *Deering* is judicial *dictum*, which is binding authority. *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993).

1. *Deering* provides persuasive authority for the circuit court's ruling.

This Court should follow *Deering* and the case law that follows it. In *Deering*, the plaintiff was a river-boat pilot who was injured when the tow boat he was piloting sunk due to an allegedly defective steering mechanism. Pertinently, Deering sued his employer, National, under the Jones Act, the admiralty

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counterpart to the FELA. 46 U.S.C. § 30104. National, in turn, filed a counterclaim against Deering, seeking the value of the tow boat. National claimed that Deering's negligence was at least partially responsible for the tug boat's sinking. On Deering's motion to dismiss the counterclaim, the district court judge dismissed it on the ground that counterclaims in the nature of setoffs to Jones Act claims are forbidden. 627 F.3d at 1042. National appealed and the Seventh Circuit affirmed.

Writing for the court, Judge Posner realistically saw the counterclaim for what it was–a setoff:

> General admiralty law, like common law, creates liability for negligent damage to property. But ship-owners, unless they are trying to reduce or eliminate their liability for personal injuries caused by their negligence, do not sue their employees for property damage except in the very rare case in which the employee is so highly paid as to be worth suing. In the case of seamen, even when they are riverboat pilots rather than just deckhands, such suits are unknown—unless, as in this case, the seaman is seeking damages from the employer. *As a practical matter, then, a suit or counter-claim by a shipowner against a seaman is a setoff against the seaman's personal injury claim; the question is whether such a setoff is permissible.*

Id. at 1043; emphasis added.

Moving on to the merits, the court considered Section 5 of the FELA, the same provision at issue here:

> Setoffs in personal injury suits by employees are addressed in section 5 of the Federal Employers' Liability Act, 45 U.S.C. § 55, which like the rest of that statute is incorporated into the Jones Act by reference. Section 5 says that "any contract, rule, regulation, or

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> 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."

Id. Then, the court matter-of-factly concluded that "National's counterclaim, the only purpose of which could be to exempt itself from liability to Deering (as further shown by its not having sued the pilot of the boat who contributed to the accident by approaching National's towboat at an excessive speed–and against whom Deering has filed a third-party complaint for negligence), is a good description of a "device . . . the purpose or intent of which shall be to enable [the shipowner] to exempt itself from any liability created by [the Jones Act]." *Id.*

Explaining the rationale for its conclusion, the court stated:

> The setoff provision section 5 supports the inference that the word "device" embraces all setoffs with the exceptions (irrelevant to this case) specified in the proviso, as otherwise there would be no need for an express exclusion. Ordinarily we would put little weight on this point lest we be attributing an unrealistically high degree of precision and care to legislative drafts-men in an era in which congressional staffs were rudimentary. But when the FELA was enacted, a railroad's right to recover damages from an employee on account of property damage caused by the employee's negligence was limited, either in law or as a matter of custom, to setoffs (whether or not formally denominated as such) against claims by employees for unpaid wages. William P. Murphy, "Sidetracking the FELA: The Railroads' Property Damage Claims," 69 Minn. L. Rev. 349, 367-72 (1985). This suggests that the setoff proviso in section 5 may indeed have been based on an understanding that the courts

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> would deem any property claim by a railroad that had the effect of a setoff against an employee's personal injury claim to be a forbidden "device." Hence the need to carve out from the prohibition of setoffs in section 5 those that Congress wanted to permit.

Id. at 1043-1044.

The court further explained that "when the FELA was enacted most property claims by railroads against their employees were based on the employees' having expressly assumed in their employment contracts liability for damaging the employer's property, and therefore fell under the 'contract' bar of section 5." [Citation omitted.]

The court made short-shrift of National's argument that the fact that Congress did not explicitly state that counterclaims were forbidden, was relevant. *Id.* at 1044. They were included in the "catch all" phrase, "any device whatsoever." *Id.*

Ultimately, due to the fact that the Jones Act differed from the FELA in that a Jones Act defendant can file a claim to limit its liability to the cost of the vessel, while there is no similar provision in the FELA, the *Deering* Court confined its actual holding to the particular facts before it, stating that where a defendant in a Jones Act case files an action to limit its liability, any counterclaim that would wipe out a personal injury claim, no matter how substantial, is barred. *Id.* at 1048.

The *Deering* Court's analysis was well-reasoned, logical and realistic. And, as noted above, as judicial *dicta* it is binding. *Cates v. Cates*, 156 Ill. 2d 76, 80

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(1993).[2] Defendant's assertion that the Seventh Circuit merely "may have mused about the meaning of the term 'device' in the context of a FELA claim" (Def. Br. at 31), is wrong. It ignores the concept of judicial *dicta*.

It is undisputed that the FELA provides injured railroad workers, injured in the United States, with their exclusive remedy against their employers for injuries resulting from their employees' negligence. *New York Central Railroad Co. v. Winfield*, 244 U.S. 147 (1917). The FELA came into being in 1908 as a result of public anger over the devastating injuries and loss of life that were an all too common part of life on the rails. The hazards of railroading were so well-known that the United States Supreme Court observed that, "in 1888 the odds against a railroad brakeman dying a natural death were almost four to one," and that "the average life expectancy of a switchman in 1893 was seven years." *Brotherhood of*

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[2]Moreover, the *Deering* Court's analysis is generally considered its holding. *Norfolk Southern Ry. Co. v. Tobergte*, No. 5:18-cv-207-KKC, 2018 U.S. Dist. LEXIS 207513 (E.D. Ky. Dec. 10, 2018), is exemplary. In that very recent decision, the plaintiffs cited *Deering* it support of their motion to dismiss the railroad's action against them for property damage arising out of a train collision. Explaining the rationale for the motion, the district court stated:

> This setoff theory derives from the Seventh Circuit's decision in *Deering v. Nat'l Maint. & Repair, Inc.*, 627 F.3d 1039 (7th Cir. 2010). There, a Seventh Circuit panel concluded that a common carrier's counterclaim for property damages qualified as a "device" for Section 5, 45 U.S.C. § 55, purposes. *Id.* at 1048. Judge Posner specifically reasoned that FELA's legislative history suggested that any setoff claim by a common carrier would be construed as a forbidden "device" under Section 5. *Id.* at 1044.

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R.R. Trainmen v. Virginia, 377 U.S. 1, 3 (1964). In *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326 (1958), the Supreme Court likewise stated that the FELA:

> was a response to 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. The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier.

Id. at 329 [Citations omitted]. The relevant statute, Title 45 of the United States Code, Section 51, states:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

By enacting the FELA, Congress set up a system where injured railroad workers can sue their employers in court for damages resulting from the negligence of their employers. The worker may sue in either state or Federal court in any district where the railroad is doing business.

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When Congress enacted § 55, which replaced a similar provision in the 1906 predecessor statute to the FELA, it clearly meant "to enlarge the scope of the section and to make it more comprehensive by a generic, rather than a specific, description." *Philadephia, Baltimore & Washington R.R. v. Schubert*, 224 U.S. 603, 611 (1912).

And, as the *Deering* Court recognized, allowing counterclaims for property damage could easily wipe-out railroad workers' recoveries for work-related injuries, placing them in great debt to the railroads even though the railroads' negligence caused their injuries. That result would defeat the remedial and humanitarian purpose of the FELA. *Urie v. Thompson*, 337 U.S. 163, 181-82 (1949).

Based on the FELA's humanitarian intent, the Appellate Court, as well as the circuit court, properly ruled that Wisconsin Central's counterclaims could not stand. This Court should affirm that ruling.

3. Other federal district courts and state courts provide persuasive authority for prohibiting counterclaims in FELA actions.

Deering is not the only federal decision that prohibits counterclaims in FELA actions. The *Deering* Court affirmed an order dismissing the railroad's counterclaims in *In re National Maintenance & Repair, Inc.*, No. 09-0676-DRH, 2010 U.S. Dist. LEXIS 9313, at *7 (S.D. Ill. Feb. 3, 2010). In addition to finding that counterclaims for property damage in Jones' Act cases were barred by Rule F

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of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, the district court judge had barred them under Section 5 of the FELA:

> The Court concludes that allowing the Counterclaim violates 45 U.S.C. §§ 55 & 60, and the public policy reflected in the Jones Act and FELA, as it is a "device" that impermissibly will chill the filing of Jones Act claims and the voluntary furnishing of information regarding such claims. The Counterclaim violates Section 55 because the ultimate threat of "retaliatory" legal action would have the effect of limiting National Maintenance & Repair's liability by discouraging employees from filing Jones Act actions. See *Stack v. Chicago, Milwaukee, St. Paul and Pacific RR Co.*, 94 Wn.2d 155, 615 P.2d 457, 461 (Wa.Sup.Ct. 1980). Also, the Counterclaim has the effect of reducing or eliminating Deering's recovery under the Jones Act by the amount of property damages, as a result that clearly controverts the remedial purposes of the Jones Act. See *Kozar v. Chesapeake & Ohio Ry.*, 320 F.Supp. 335, 383-85 (W.D. MI 1970) (Use of coercive tactics to discourage resort to FELA litigation creates "impermissible chill on rights created by Congress," which chill extends not only to FELA plaintiffs, but to all employees and their families -- leading to intolerable results); *Yoch v. Burlington Northern RR Co.*, 608 F. Supp. 597, 598 (D.Col. 1985)(dismissing $ 5 million property damage counterclaim, holding that where injured railroad worker asserts claim under FELA, railroad defendant may not counterclaim for property damages caused in occurrence which gave rise to the employee's injuries or death.).
>
> * * * *
>
> If an injured worker has to fear a counter-claim every time he or she pursues the right to bring a suit for that injury, that worker will be less likely to exercise that right.

In re Nat'l Maint. & Repair Inc., is well-reasoned and persuasive authority.

Blanchard v. Union Pac. R.R. Co., 2016 U.S. Dist. LEXIS 23208, 2016 WL 411019 (S.D. Ill. 2016), falls into the same mold. In that decision, also by the

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same judge in the Southern District of Illinois, again held that counterclaims for property damage in FELA actions were prohibited. In this decision, the court addressed the impact of the Seventh Circuit's decision in *Deering*, noting that the decision was "instructive":

> The *Deering* Court discusses the statutory construction of the fifth section of the FELA, the principal focus of the dispute here, and seems to find favor with the author, William P. Murphy, "Sidetracking the FELA: The Railroads' Property Damage Claims," 69 Minn. L.Rev. 349. In examining the issue of why Congress wasn't simply very specific about disallowing counterclaims, rather than leaving the courts of the succeeding years to interpret the language of any device whatsoever, Murphy pointed out, and the 7th Circuit alluded to, the reality of the day. On page 371 of the article, the author points out that one would not expect, in 1906 and 1908, Congress to anticipate "setoffs sounding in assumpsit could be raised against injured workers suing in trespass on the case. Moreover, the prevalence of the contributory negligence bar in pre-FELA common law also explains Congress' failure to enact an express prohibition of employers' property damage counterclaims in FELA suits." 69 Minn. L.Rev. 349 at 371.

Blanchard v. Union Pacific R.R. Co., No. 15-0689-DRH, 2016 U.S. Dist. LEXIS 12108, at *6-7 (S.D. Ill. Feb. 1, 2016). Based on the authority cited above, and the dissent from *Cavanaugh v. Western M.R. Co.*, 729 F.2d 289 (4th Cir. 1984), the court held that the counterclaim was a "device calculated to intimidate and exert economic pressure on Blanchard, to curtail and chill his rights and ultimately to exempt the railroads from liability under FELA." *Blanchard*, *supra*, at 7, quoting *Cavanaugh, supra*, at 295-296 (Hall J. dissent).

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In *In re National Marine and Repair*, *supra*, the court relied on the Colorado district court's decision in *Yoch v. Burlington N. R. Co.*, 608 F.Supp. 597 (D. Colo, 1985). In *Yoch*, the plaintiff filed an action under the FELA and the Boiler Inspection Act, 45 U.S.C. §23 (1982), alleging that her husband had been killed in a train collision due to the defendant railroad's negligence. She sought $2 million in damages. In turn, the railroad filed a counterclaim for property damages, seeking $5 million. Plaintiff moved to dismiss the counterclaim under sections 55 and 60 of the FELA (45 U.S. C §§ 55 and 60), arguing that it was a "device" intended to exempt the defendant from liability and intimidate other railroad employees so that they would not furnish information about the collision. The court sided with the plaintiff and dismissed the counterclaim, stating as follows:

> The issue here is whether Burlington Northern's counterclaim is a "device" within the meaning of either § 55 or § 60, or both. The arguments on both sides have been fully developed in two leading opinions that reach opposite results. *Cavanaugh v. Western Maryland Ry. Co.*, 729 F.2d 289 (4th Cir. 1984) (allowing a railroad counterclaim in a FELA action) (Judge Hall dissenting) and *Stack v. Chicago, M. St. P. & P.R. Co.*, 94 Wash. 2d 155, 615 P.2d 457 (1980) (dismissing a railroad counterclaim in a FELA action). *Stack* and Judge Hall's dissent in *Cavanaugh* appear to me to present the more realistic and less legalistic view.
>
> For the reasons developed by Judge Hall, dissenting in *Cavanaugh*, and by the unanimous Washington Supreme Court in *Stack*, I hold that where an injured railroad worker, or one who claims in his right if he is killed, asserts personal injury or wrongful death claims under the FELA, a railroad defendant may not

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> 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. Co., 608 F. Supp. 597, 598 (D. Colo. 1985).

The ruling in *Yoch*, in turn, relied on *Stack v. Chi.*, 94 Wn.2d 155, 615 P.2d 457 (Wash. 1980), an FELA case where the Supreme Court of Washington affirmed the trial court's dismissal of a railroad's counterclaim for property damage against the plaintiff and its third-party action against other railroad employees. *Stack* involved a head-on collision of two trains owned by the defendant. The head engineer, Richard Stack, was killed in the crash and the head brakeman, Allan Simpson, was severely injured. When Stack's widow and Simpson filed suit, the railroad filed a counterclaim against Stack and a third party action against remaining crew members, seeking $1.5 million in property damage. The Court considered two issues: (1) did the railroad have a common law right to sue its employees for property damage caused by their alleged negligence; and (2) did the FELA bar the actions.

The Supreme Court held that unless otherwise barred, an employer has a common law right of action against its own employees for property damage arising out of their negligence committed within the scope of their employment. *Id.* at 158. However, even assuming this common law right, the counterclaim and third-party actions were barred as violative of §§ 55 and 60 of the FELA:

> Milwaukee's responsive actions violate sections 55 and 60 in two ways. First, section 60 is violated because the third party claims

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> operate to inhibit testimony by the third party defendants as to the extent of their own negligence in causing the collision and resultant injury of Simpson and death of Stack. Since, in respondents' FELA actions, the negligence of the third party defendants is imputed to Milwaukee (45 U.S.C. § 51), the full and fair revelation of their negligence would, in turn, be largely determinative of their personal liability to Milwaukee in the third party action. As aptly observed by the trial court, "the crew's testimony will be affected because they will be reluctant to testify candidly when their own pocketbooks are in jeopardy." Second, Milwaukee's responsive actions violate section 55 because the ultimate threat of "retaliatory" legal action would have the effect of limiting Milwaukee's liability by discouraging employees from filing FELA actions. Further, it would have the effect of reducing an employee's FELA recovery by the amount of property damage negligently caused by the employee.

Id. at 159-160. The Court further stated that the trial court's broad interpretation of the term "device" in §§ 55 and 60 was "supported both by the purpose of the act and by case authority." *Id.* at 161. The Court cited *Kozar v. Chesapeake & O. Ry.*, 320 F.Supp. 335, 393-95 (W.D. Mich. 1970) for the proposition that any coercive tactic by the railroad against its employees to discourage resort to FELA litigation, created an "impermissible chill on rights created by Congress," which were "intolerable."

Defendant's attempted distinction of *Stack* (Def. Br. at 16, 23-25) fails. The difference between a counterclaim and a third-party claim is without significance. The third-party claim in *Stack* could have easily discouraged the plaintiff's co-workers from providing evidence in his favor.

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4. Allowing property damage counterclaims would encourage forum shopping.

The Appellate Court's decision should be affirmed for the additional reason that allowing counterclaims to proceed in state court would encourage forum shopping. Forum shopping is a driving concern of this Court's *forum non conveniens* jurisprudence. *First National Bank v. Guerine*, 198 Ill. 2d 511, 521 (2002); see also *Torres v. Walsh*, 98 Ill. 2d 338, 351 (1983) ("we hope to promote fair play between plaintiffs and defendants and discourage the incessant jockeying for a more sympathetic jury likely to come forward with a more substantial award"). It is also of paramount concern under The Uniform Child Custody Jurisdiction Act (the Jurisdiction Act), which has been adopted in Illinois. 750 ILCS 35/1 et seq. (West 2000). *See In re Marriage of Kneitz*, 341 Ill. App. 3d 299, 304 (2d Dist. 2003) ("The Jurisdiction Act seeks to avoid jurisdictional competitions and conflicts between states, to protect children's best interests, and to discourage forum shopping.")

It should also be a significant concern in FELA actions filed in Illinois. It would be grossly unfair to have the federal district courts in the Southern District of Illinois, and the Seventh Circuit Court of Appeals have one standard regarding counterclaims for property damage, and the state courts have a different standard. It would encourage forum shopping.

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5. Property damage counterclaims should be barred because they would lead to absurd results – the railroad would have to indemnify the worker.

Further still, the circuit court's last reason for dismissing the counterclaims – that the railroad would be liable for plaintiffs' alleged negligence under the law of *respondeat superior* – (C379.), is reason enough to affirm the Appellate Court's ruling. The railroad has alleged that plaintiffs were negligent, not willful and wanton. As such, Wisconsin Central will be liable for the acts of its agents committed within the scope of their authority. This is essential Illinois law. *See e.g. Gomien v. Wear-Ever Aluminum, Inc.*, 50 Ill. 2d 19 (1971) ("Generally, it is the law that a master is liable for the acts of his servant committed within the scope of his employment. . .", quoted approvingly in *Horwitz v. Holabird & Root*, 212 Ill. 2d 1, 9 (2004). Indeed that was the basis of the court's decision dismissing counterclaims for property damage in *Schendel v. Duluth*, 2014 WL 5365131,*11.

In *Schendel,* the plaintiff, a train engineer, was injured in a head-on collision between two freight trains. He filed suit against the railroad raising claims under the FELA and the LIA. The railroad counterclaimed for property damages and expenses resulting from the collision. Plaintiff sought summary judgment on the counterclaim, asserting preclusion and a statutory bar by Minnesota's indemnification requirement. Minn. Stat. §181.970, subd. 1.

While the court held that the FELA did not preempt the railroad's counterclaim for property damage (2014 WL5365131, *10 (2014), it barred the

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counterlaim under Minnesota's indemnification statute, which imposed a statutory duty on an employer to defend and indemnify an employee for damages arising from the negligent performance of employment duties. *Id.* at *11. Quoting from the federal district court's decision in *Canevo Corp. v. Celyum Solutions Software GMBH & Co. KG*, 504 F.Supp.2d 574, 579 (D. Minn. 2007), the court stated: "To hold otherwise renders a circular result: An employer would have to defend and indemnify an employee for losses the employer seeks from the employee. Because such a construction is absurd, the Court finds that § 181.970 precludes a claim by an employer against an employee for the negligent performance of employment duties." *Id.*

If the counterclaims were allowed, the result would be absurd. And, as is well known, it is assumed that Congress did not intend absurd results. *Corbett v. County of Lake*, 2017 IL 121536, ¶ 35.

D. Defendant's cited authorities defeat the purpose of the FELA.

Cavanaugh v. W. Md. Ry. Co., 728 F.2d 289 (4th Cir. 1984), *Nordgren v. Burlington N. R.R. Co*, 101 F.3d 1246 (8th Cir. 1996), *Sprague v. Boston & Me. Corp.*, 796 F.2d 26 (1st Cir. 1985) and *Winthart v. Otto Candies, L.L.C.*, 431 F.3d 840 (5th Cir. 2005), the four circuit court decisions holding that neither section 55 nor 60 of the FELA bars state law counterclaims for property damage, all defeat the broad remedial and humanitarian purpose of the FELA. All four of the circuit court decisions eviscerate the remedial and humanitarian purpose of the FELA. All

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four of them deprive an injured worker, who has no other right to relief other than the FELA, of a cause of action. This cannot be right.

In light of this overarching reason, the four cases Wisconsin Central relies on are unpersuasive.

Cavenaugh v. Western M. R. Co., *supra*, was issued by a divided panel and is poorly reasoned. Indeed, the dissent has been cited approvingly by the courts in *Deering*, *supra*, 627 F.3d at 1045 and *Yoch, supra*, 608 F. Supp. at 598.

In *Cavenaugh*, the plaintiff filed suit under the FELA seeking $1.5 million for his injuries as a result of a head-on train collision and the defendant railroad counterclaimed for $1.7 million in property damage. The plaintiff moved to dismiss the counterclaim and the district court granted the motion. The Fourth Circuit reversed, finding that "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." *Id.* at 7-8.

Significantly, the *Cavanaugh* majority noted that it was not persuaded by the reasoning in *Stack v. Chicago, M. St. P. & P.R. Co.*, 538 F. Supp. 1061 (D. Colo. 1982), and it stated, "So far as we have found, *Stack* has only been approved in one unreported district court case. . ." *Id.* at 16. Based on this status, the court

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noted, "In the contest of precedents, it would appear that the balance tilts sharply in favor of the allowability of the counterclaim herein." *Id.* at 17.

Now, of course, *Stark* has been approved by *Deering*, *Blanchard*, *Yoch* and *In re Nat'l Main. & Repair Inc.* The balance of authorities no longer tilts in favor of allowability of the counterclaims.

Further still, the dissent in *Cavanaugh* is strong and well-reasoned. Judge Hall found that "the language of the FELA supported 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." *Id.* at 18. Judge Hall explained:

> In my view, the railroads' counterclaim is a "device" calculated to intimidate and exert economic pressure upon Cavanaugh, to curtail and chill his rights, and ultimately to exempt the railroads from liability under the FELA. Here, as in *Stack*, the railroads' counterclaim violates 45 U.S.C. § 55 "because the ultimate threat of 'retaliatory' legal action would have the effect of limiting [the railroads'] liability by discouraging employees from filing FELA actions. Further, it would have the effect of reducing an employee's FELA recovery by the amount of property damage negligently caused by the employee." 94 Wash. 2d at 155, 615 P.2d at 460. 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. The result sought by the railroads, and accepted by the majority, defies common sense and is repugnant to the general goal of the FELA to compensate railroad workers for injuries negligently inflicted by their employers.
>
> In addition, the railroads' counterclaim contravenes 45 U.S.C. § 60 in that it would prevent employees from voluntarily furnishing

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> information regarding the extent of their negligence. *Stack*, 94 Wash. 2d at 155, 615 P.2d at 460. The FELA "is intended to stimulate [railroads] to greater diligence for the safety of their employees and of the persons and property of their patrons." *Jamison v. Encarnacion*, 281 U.S. 635, 640, 74 L. Ed. 1082, 50 S. Ct. 440 (1929). 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.

Id. at 296. Further still, Judge Hall disagreed with the majority's view that the balance of precedents sharply favored allowing the counterclaim. *Id.* at 24.

Finally, defendant's assertion that "a dissent has no precedential value" (Def. Br. at 20), is obviously true, but irrelevant. Plaintiffs do not discuss the dissent because it is precedential. They cite it because it is persuasive.[3]

Winthart v. Otto Candies, L.L.C., 431 F.3d 8400 (5th Cir. 2005), was premised on *Cavanaugh*, and for the same reasons *Cavanaugh* was poorly reasoned, so is *Winthart*. The same logic holds true for the First Circuit's decision in *Sprague v. Boston & Marine Corp.*, 769 F.2d 26, 28-29 (1st Cir. 1985).

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[3]Likewise, plaintiffs rely on "the Murphy Article" "Sidetracking the FELA: The Railroads' Property Damage Claims," 69 Minn, L. Rev. 349 (February, 1985) (Def. Br. at 20), not because it is "binding authority" but because it is persuasive. The fact that it was written in 1985 (*Id.*) does not negate its value. Indeed, the article was just cited by the district court of the Eastern District of Kentucky in *Norfolk Southern Ry. Co. v. Tobergte*, No. 5:18-cv-207-KKC, 2018 U.S. Dist. LEXIS 207513, at *3 (E.D. Ky. Dec. 10, 2018).

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In *Nordgren v. Burlington Northern R. R.*, 101 F. 3d 1246 (8th Cir. 1996), the circuit court was sympathetic to the plaintiff's argument, and Judge Hall's dissent in *Cavanaugh*, holding that counterclaims for property damages were inappropriate in FELA action, but the court sided with the railroad, stating, "We are not legislators, however, and in our view, Congress's silence on this issue speaks volumes. We therefore hold that FELA does not preempt BN's counterclaim for property damages." *Id.* at 1253.

This holding ignores the Supreme Court's explanation, in *Kernan v. American Dredging*, 355 US 426 332-337 (1958), as to why this is not the case. The fact that Congress has not amended the FELA to expressly state that counterclaims for property damage are barred is meaningless. As the Supreme Court noted in *Kernan v. American Dredging*, 355 US 426, 432-437 (1958):

> But instead of a detailed statute codifying common law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it is clear that the general congressional intent was to provide liberal recovery for injured workers, [Citation omitted] and it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet the changing conditions and changing concepts of industry's duty toward its workers.
>
> * * * *
>
> For Congress, in 1908, did not crystallize the application of the Act by enacting specific rules to guide the courts. Rather, by using generalized language, it created only a framework within which the courts were left to evolve, much in the manner of the common law, a

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> system of principles providing compensation for injuries to employees consistent with the changing realities of employment in the railroad industry.

Moreover, the holding of *Nordgren* does not stand up against the logic of *Deerring*, *Stark*, *Blanchard, Yoch* and the others.

E. Defendant's other arguments are not persuasive.

None of defendant's additional arguments in support of reversal has merit. First, defendant asserts that "the coercive effect of property damage counterclaims . . . rests 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." (Def. Br. at 26) This argument ignores the fact that the very existence of a counterclaim for property damage hanging over an injured worker's head will have a chilling effect on the worker. The worker cannot gauge how successful the railroad will be in its endeavor.

It should go without saying that the thought of bankruptcy would be incredibly disturbing.

The same logic applies as to defendant's argument that a jury might find the railroad contributorily negligent. (Def. Br. at 26-27) It is of no comfort. to an injured worker that he or she might not be responsible for the entire cost of the property damage. The fear engendered by the counterclaim is hardly "some fanciful notion" to an injured worker.

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Defendant's next argument, that the *Deering* Court failed "to apply the *ejusdem generis* rule to section 55 is contrary to this Court's instruction on statutory construction" (Def. Br. at 29), fares no better. Defendant's argument ignores the fact that Section 55 refers to "any device *whatsoever*." It writes "*whatsoever*" out of the statute. This ignores the "cardinal rule of construction that every clause, sentence and word in a statute should, if possible, be given effect." *McReynolds v. People*, 230 Ill. 623, 633 (1907).

Defendant also ignores the essential rules that "[i]n construing statutory language, we may consider the consequences that would result in interpreting the statute one way or the other. [Citation omitted.] We also presume that the legislature did not intend absurdity, inconvenience, or injustice." [Citation omitted.] *Corbett v. County of Lake*, 2017 IL 121536, ¶ at 35. In *Corbett*, this Court also pointed out that "when using a dictionary to help determine statutory meaning, it is appropriate to use one in existence at the time of the statute's enactment. *Id.* at ¶ 25. A definition of "device" from 1908 supports plaintiff's argument.[4]

In *Armour Packing Co. v. U.S.*, 209 U.S. 56 (1908) the United States Supreme Court was called on to consider whether the petitioners, who had shipped goods for less than the railroad's rate, violated the Elkins Act of February 19, 1903

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[4]In his dissent in this case, Justice Pierce cited to Black's Law Dictionary from 1999 to define the word "exempt." (Op. at ¶ 39.) He should have used a dictionary from around 1908.

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(32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880), making it a criminal offense for any person or corporation to offer, grant, solicit, give, or to accept or receive, any rebate, concession, or discrimination in respect to transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported at less than the carrier's published rate. The court held that the term "any device whatever" included anything "which is a plan or contrivance." *Id.* at 71.

Applying that timely definition of "any device whatever" to the case at bar, it can easily be said that a counterclaim is a plan or contrivance to exempt the railroad from liability. That definition includes all pertinent words of the statute, leaving none out. "Any device whatsoever" is obviously not identical to a "contract" or a "rule." If only "contracts" and "rules" were to be included in the statute, there would be no reason to include the term "any device whatsoever."

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CONCLUSION

For the reasons stated above, plaintiffs-counter-defendants-appellees, Melvin Ammons and Darrin Riley, ask this court to affirm the Appellate Court's decision affirming the circuit court's Memorandum Opinion and Order of June 14, 2017, and the order of October 17, 2017, denying Wisconsin Central's motion to reconsider.

Respectfully submitted,

By: /s/ Leslie J. Rosen
One of the attorneys for plaintiffs-counter-defendants-appellees, Melvin Ammons and Darrin Riley

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CERTIFICATE OF COMPLIANCE

I certify that this Appellees 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(h)(1) statement of points and authorities, 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 29 pages.

/s/ Leslie J. Rosen

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No. 124454

IN THE SUPREME COURT OF ILLINOIS

MELVIN AMMONS,	)	On appeal from the Appellate Court of
	)	Illinois, First Judicial District
Plaintiff/Counter-Defendant/	)	Nos. 1-17-2648 & 1-17-3205 (cons.)
Appellee,	)	
vs.	)	Appeals from the Circuit Court of
	)	Cook County, Illinois, Law Division
WISCONSIN CENTRAL, LTD.,	)	No. 15 L 1324 and 15 L 4680 (cons.)
	)	
Defendant/Counter-Plaintiff/	)	
Appellant,	)	
and	)	
	)	
CANADIAN NATIONAL RAILWAY	)	The Honorable
COMPANY, LTD.,	)	John Ehrlich,
	)	Judge Presiding.
Defendant.	)	

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

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PLEASE TAKE NOTICE that on July 11, 2019 I electronically submitted the Appellees' Joint Brief to the Clerk of the Supreme Court of Illinois. A copy of this Joint Appellees' Brief is attached to this Notice and served on you.

/s/ Leslie J. Rosen

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CERTIFICATE OF SERVICE

Leslie J. Rosen, an attorney, certifies that she served a copy of this Notice along with a copy of the Joint Appellees' Brief on the attorneys listed above, by using the Odyssey eFileIL system. I further certify that on July 11, 2019 I electronically served the above-mentioned document through Odyssey.

/s/ Leslie J. Rosen

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct.

/s/ Leslie J. Rosen

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