No. 19-

IN THE

Supreme Court of the United States

MELVIN AMMONS AND DARRIN RILEY,

Petitioners,

v.

WISCONSIN CENTRAL, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 5 of the Federal Employers Liability Act, 45 U.S.C. § 55, states:

> 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 act shall to that extent be void....

The questions presented are:

1. When a railroad files a counterclaim for property damage in an injured employee's FELA action to purposely or intentionally evade FELA liability to the employee, is the counterclaim a void device under Sections Five and/or Ten of the FELA, 45 U.S.C. §§ 55 and 60, as the Washington Supreme Court has held; or is it not as the Illinois Supreme Court held below?

2. When a railroad files a counterclaim for property damage in an injured employee's FELA action, does the counterclaim violate the statutory limitations on comparative negligence found in Sections Three and Four (a) of the FELA, 45 U.S.C. §§ 53 and 54a?

3. When a railroad files a counterclaim for property damage in an injured employee's FELA action, is the railroad seeking an impermissible setoff under the proviso in Section Five of the FELA, 45 U.S.C. § 55?

RELATED CASES STATEMENT

- *Melvin Ammons et al. v. Canadian National Railway Company et al.*, Case No. 124454, Illinois Supreme Court, judgment entered December 19, 2019, rehearing denied January 27, 2020.

- *Ammons v. Canadian National Railway Company*, Case Nos. 1-17-2648 and 1-17-3205 (consolidated), Appellate Court of Illinois First District, First Division, judgment entered December 17, 2018.

- *Melvin Ammons v. Canadian National Railway Co. and Wisconsin Central, Ltd.*, Case No., 15 L 1324, Circuit Court of Cook County, Law Division, judgment entered October 17, 2017, certified for immediate appeal December 14, 2017.

- *Darrin Riley v. Wisconsin Central, Ltd.*, Case No., 16 L 4680, Circuit Court of Cook County, Law Division, judgment entered October 17, 2017, certified for immediate appeal December 14, 2017.

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INTRODUCTION

Absent clarification by this Court, the conflicting opinions of the Washington Supreme Court and the Illinois Supreme Court below, along with the irreconcilable opinions of the lower federal courts, will lead to continued chaotic resolution of cases similar to this one. The decision below cannot be squared with the Federal Employers Liability Act or this Court's decisions applying the FELA. Certiorari should be granted to resolve the split in authorities in the lower federal courts and state supreme courts on the important federal questions involved, to restore the protection Congress intended for injured railroad workers.

OPINIONS BELOW

In the Supreme Court of Illinois this case was docket number 124454, captioned *Melvin Ammons et al. v. Canadian National Railway Company et al.* The date of entry of judgment was December 19, 2019. The Court's opinion is reproduced in the Appendix at 1a-24a and reported at 2019 IL 124454 and 2019 Ill. LEXIS 1239. Rehearing was denied on January 27, 2020, reproduced at 69a.

In the Appellate Court of Illinois First District, First Division, this case was docket number 1-17-2648 and 1-17-3205 (consolidated), captioned *Ammons v. Canadian National Railway Company.* The date of entry of judgment was December 17, 2018. The opinion is reproduced at 25a-45a and reported at 2018 IL App (1st) 172648, 124 N.E.3d. 1, 2018 Ill. App. LEXIS 963, 429 Ill. Dec. 232.

In the Circuit Court of Cook County, Law Division, this case was docket number 15 L 1324 and 16 L 4680 consolidated, captioned *Melvin Ammons v. Canadian National Railway Co. and Wisconsin Central, Ltd.* and *Darrin Riley v. Wisconsin Central, Ltd.* Judgment was entered on October 17, 2017 and certified for immediate appeal on December 14, 2017. The judgments of the circuit court are not reported, but are reproduced at 46a-68a and 70a-71a.

JURISDICTION

The Illinois Supreme Court entered the judgment sought to be reviewed on December 18, 2019 with rehearing denied on January 27, 2020. This Court has jurisdiction to review this judgment on a writ of certiorari under 28 United States Code § 1257(a), Supreme Court Rule 10(b) and this Court's March 19, 2020 COVID 19 order.

STATUTORY PROVISIONS INVOLVED

This case concerns 45 U.S.C. §§ 51-60, which are reproduced in the appendix at 72a-77a.

STATEMENT OF THE CASE

1. *Factual background.*

Wisconsin Central, Ltd. is an interstate common carrier by railroad that operates in Wisconsin, Minnesota, Michigan and Illinois. On December 13, 2014, Wisconsin Central employed Melvin Ammons as a freight conductor and Darrin Riley as a locomotive engineer. App. 49a. That day Ammons and Riley were assigned to train A40481-

11 near Joliet, Illinois. App. 49a. In the area Wisconsin Central had a "blind approach" to the Joliet yard on track 2 with "improper signalization." R.C. 217, sub-paragraph (l). At the time train U73851-07 was standing on track 2. App. 49a.

After Wisconsin Central diverted the train Ammons and Riley were operating onto track 2, with the stopped train ahead but outside of their visual range; the two trains collided. R.C. 216-220. Wisconsin Central's dispatcher should have advised Ammons and Riley the stopped train was there, but he negligently failed to do so. R.C. 118, 132, 234. This conduct by Wisconsin Central involved FELA violations, violations of the Signal Inspection Act, 49 U.S.C. § 20502(b) & 49 C.F.R. §§ 236.21 & 236.24; violations of the Locomotive Inspection Act, 49 U.S.C. § 20701, et seq.; violations of the Safety Appliance Act, 49 U.S.C. § 20302; and violations of the regulations promulgated under these statutes. App. 50a.

The collision caused Ammons to injure his neck and low back, incur medical expenses, lose earning capacity and experience pain and suffering. R.C. 220. Riley was also injured, incurring medical expenses, lost earning capacity, pain and suffering. R.C. 134. Wisconsin Central claims it sustained property damage "in excess of $1 million" as a result of the collision. App. 3a.

2. *Trial court proceedings*.

On February 9, 2015, Ammons filed an FELA complaint for personal injury damages arising out of the collision against Wisconsin Central in Illinois state court; and on May 10, 2016, Riley filed a similar complaint in the same venue. App. 49a. On June 17, 2016 the cases were

consolidated for discovery and trial. App. 50a. Riley filed an amended complaint on November 3, 2016 and Ammons filed a nearly identical amended complaint on March 3, 2017. App. 52a.

Ammons and Riley alleged in their amended complaints that Wisconsin Central owed them each a duty under the FELA to furnish a safe workplace; they further alleged Wisconsin Central breached this duty by, *inter alia*: 1) failing to warn them train U73851-07 was standing ahead of them on track 2 and failing to divert train A40481-11 onto another track; (2) failing to provide a locomotive with adequate controls, stopping power, brakes and positive train control; and (3) failing to properly train the engineer in locomotive operations. App. 50a. The amended complaints also allege violations of federal safety statutes and federal safety regulations, specifically FELA violations, violations of the Signal Inspection Act, 49 U.S.C. § 20502(b) & 49 C.F.R. §§ 236.21 & 236.24; violations of the Locomotive Inspection Act, 49 U.S.C. § 20701, et seq.; violations of the Safety Appliance Act, 49 U.S.C. § 20302; and violations of the regulations promulgated under these acts. App. 50a. The amended complaints allege because of these safety statute and safety regulation violations by Wisconsin Central, negligence by Ammons or Riley is not a defense to their FELA claims under 45 U.S.C. §54a.

On February 7, 2017, Wisconsin Central filed two-count counterclaims against Ammons and Riley under Illinois common law and an Illinois statute. R.C. 155-170. In Count I of the counterclaim against Ammons, Wisconsin Central alleged Ammons was negligent; this negligence caused the trains to collide; and Wisconsin

Central was entitled to a judgment against Ammons "in excess one million dollars" for Wisconsin Central's property damage. R.C. 155-160. In Count II of the counterclaim against Ammons, Wisconsin Central alleged Ammons was negligent, and this negligence caused the trains to collide; claiming "contribution" damages under Illinois' Joint Tortfeasor Contribution Act, 740 ILCS § 100/0.01 et seq., for its future losses to Riley in Riley's FELA claim. R.C. 161-162.

Similarly, in Count I of the counterclaim against Riley, Wisconsin Central alleged Riley was negligent; this negligence caused the trains to collide; and Wisconsin Central was entitled to a judgment against Riley "in excess one million dollars" for Wisconsin Central's property damage. R.C. 163-170. In Count II of the counterclaim against Riley, Wisconsin Central again alleged Riley was negligent and this negligence caused the trains to collide; claiming "contribution" damages under Illinois' Joint Tortfeasor Contribution Act for its future losses to Ammons in Ammons' FELA claim. R.C. 168-170.

Wisconsin Central did not file claims for its property damage or contribution for Ammons' or Riley's injuries against the negligent dispatcher who diverted their train onto track 2 and failed to warn Ammons and Riley of the stopped train ahead of them but out of their visual range. No explanation for the disparate treatment of the dispatcher on the one hand, and Ammons and Riley on the other, has ever been offered by Wisconsin Central.

On March 14, 2017, Riley moved to dismiss Wisconsin Central's counterclaim and on March 21, 2017, Ammons joined Riley's motion to dismiss. R.C. 50a. This motion

was briefed and on June 14, 2017, the trial court granted the motion and dismissed the counterclaims, announcing at the outset of a detailed analysis:

> 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.

App. 49a.

In his analysis the trial judge noted "highly inconsistent" federal decisions interpreting what constitutes a "device" under § 5[1] of the FELA. Illustrating this the trial court compared the decision of the Fourth Circuit in *Cavanaugh v. Western Maryland Ry.*, 729 F.2d 289, 292-94 (4th Cir. 1984)(construing "device" narrowly) with the decision of the Seventh Circuit in *Deering v. National Maint. & Repair, Inc.*, 627 F.3d 1039 (7th Cir. 2010)(construing "device" broadly). App. 60a-66a.

1. §§55 and 60 of the FELA were originally numbered and are sometimes still referred to as §§5 and 10 of the FELA. Throughout this petition these numbers are used interchangeably as context requires. Substantively both sections have remained the same since 1908.

After considering the inconsistent federal decisions the trial court articulated "at least three reasons" why the railroad's counterclaims could not continue: 1) time; 2) the counterclaims ran "counter to one of the FELA's basic purposes"; and 3) "respondeat superior." App. 66a to 68a.

Regarding "time," the trial court below noted the railroad here:

> 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.

App. 66a-67a (citations to three federal district court decisions and one decision of the Alabama Supreme Court omitted).

Explaining why the counterclaims ran "counter to one of the FELA's basic purposes," the trial court wrote: "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." App. 67a-68a.

The trial court explained that its third reason for dismissing the counterclaims, "respondeat superior," was based on the fact the two plaintiffs were acting within the scope of their authority at the time of the collision, so the railroad "cannot at this point seek to shift its losses onto the very employees whom WC authorized to act on its behalf." App. 66a.

On October 17, 2017, the trial court denied Wisconsin Central's motion to reconsider the June 14, 2017 ruling dismissing the counterclaims, including finding "there is no just reason to delay enforcement of this order." R.C. Supp. 43. However, the trial court did not say the order was immediately appealable. *Id*. On December 14, 2017, Wisconsin Central moved to clarify the June 14, 2017 order and seek the trial court's approval of an immediate appeal under Illinois Supreme Court 304 (a). R.C. Supp. 7-44. The trial court granted this motion on December 14, 2017, stating: "Counts I and II of Wisconsin Central's counterclaims are dismissed with prejudice for the reasons set forth in the June 14, 2017 memorandum opinion" and "pursuant to Illinois Supreme Court 304 (a)[,] there is no just reason to delay enforcement or appeal of the June 14, 2017 memorandum opinion and order." R.C. Supp. 45.

3. *Illinois Appellate Court.*

On December 29, 2017, Wisconsin Central filed a timely notice of appeal to the Illinois Appellate Court. R. C. Sup 46. However, offering no explanation, in its opening brief on appeal, the railroad withdrew its contribution

counterclaims. Appellant's Brief in Illinois Appellate Court, p. 8, n 2.

On December 17, 2018, a three-judge panel of the Illinois Appellate Court, with one judge dissenting, affirmed the trial court's decision dismissing the counterclaims as void under the FELA. App. 26a – 45a. The court framed the issue as turning "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." App. 30a.

The court held the counterclaims were "devices" within the meaning of § 55 of the FELA, explaining:

> The statute casts a broad net for the 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 catchall). 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.

4. ***Supreme Court of Illinois.***

On January 22, 2019, Wisconsin Central filed a timely petition for leave of appeal in the Supreme Court of Illinois, arguing the appellate and trial court decisions voiding the counterclaims should be reversed. R. Ill. App. 5. The Illinois Supreme Court granted leave to appeal on March 30, 2019. R. *Id.*

On December 19, 2019, with two judges dissenting, the Illinois Supreme Court reversed, reinstating the counterclaims. App. 1a – 24a. The Illinois Supreme Court explained "[a]fter considering the opinions of the five federal courts of appeal, we find better reasoned those four that found counterclaims are not prohibited under sections 55 and 60 of the FELA." App. 14a (rejecting the reasoning of the Seventh Circuit in *Deering v. National*

Maintenance & Repair, Inc., 627 F.3d 1039 (7th Cir. 2010) and adopting the reasoning of the First, Fourth, Fifth and Eighth Circuits in *Cavanaugh v. Western Maryland Ry. Co.*, 729 F.2d 289 (4th Cir. 1984); *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); and *Withhart v. Otto Candies, L.L.C.*, 431 F.3d 840 (5th Cir. 2005)). The Illinois Supreme Court did not mention or discuss that its decision created a conflict between the highest courts of two states on an important federal question. Also not discussed was: 1) that *Cavanaugh*, the leading case the majority opinion relied on, is readily distinguishable (see Argument § III infra); and 2) the trial and appellate courts' conclusions below that Wisconsin Central is using its counterclaims to purposely pursue a nefarious purpose forbidden by §§ 55 and 60 of the FELA.

Dissenting Justice Kilbride, joined by Justice Neville, first observed that the federal courts are split on their interpretation of the FELA as it applies to the circumstances presented by this case, App. 19a, concluding from this that the court "must, therefore, review the federal decisions and follow those we consider better reasoned."

On this point Justice Kilbride concluded:

> Contrary to the majority, I believe the better reasoned decisions hold that the FELA prohibits counterclaims by railroads against their workers for damages to railroad property. The alternative interpretation adopted by the majority defeats the purpose of the FELA

> to provide a remedy for railroad workers injured as a result of the railroad's negligence. Accordingly, I respectfully dissent.

App. 19a.

Explaining this conclusion Justice Kilbride relied on the plain language of §§ 55 and 60 of the FELA, six of this Court's opinions explaining the history and reasons Congress enacted the FELA and these authorities: *Deering v. National Maintenance & Repair, Inc.*, 627 F.3d 1039 (7th Cir. 2010); *Stack v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 615 P.2d 457, 459-461 (Wash. 1980); *Blanchard v. Union Pacific R.R. Co.*, 2016 U.S. Dist. LEXIS 12108, 2016 WL 411019 (S.D. Ill. 2016); and *Yoch v. Burlington Northern R.R. Co.*, 608 F. Supp. 597, 598 (D. Colo. 1985). App. 19a – 24a.

On January 27, 2020, with the same two judges dissenting, the Illinois Supreme Court denied Ammons' and Riley's petition for rehearing. App. 69a.

REASONS FOR GRANTING THE PETITION

I. State supreme courts are divided on the question.

Here, while the trial and appellate courts agreed with the conclusions reached by the Washington Supreme Court in *Stack v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 615 P.2d 457, 459-461 (Wash. 1980), the Illinois Supreme Court majority disagreed, creating for the first time a conflict between two state courts of last resort over interpreting the FELA, an important federal question. *Compare* App. 1a-24a *with Stack*, *supra*

Stack involved a head on collision between two trains operated by the defendant railroad: "Extra Train 171 West failed to stop short of a designated "meet" point to enable Train 200 East to take the siding." 615 P.2d at 156. The head engineer of the westbound Extra was killed in the crash, the head brakeman of the eastbound train was severely injured. The crash also caused $1.5 million in damage to the railroad's property.

The surviving spouse of the deceased engineer, as personal representative of his estate, and the head brakeman' separately sued the railroad for damages under the FELA. Perceiving the crash to be the fault of the crew of the Extra, the railroad filed a counterclaim against the estate of the head engineer on the Extra, and third-party claims against other members of his crew, seeking reimbursement for the railroad's $1.5 million property damage loss from all of them.

The plaintiffs and the railroad employee defendants moved to dismiss the counterclaims and third-party actions and the trial court granted these motions, ruling the railroad's claims were barred by the FELA. The railroad appealed this ruling to the Washington Supreme Court. *Id*. at 157.

At the outset the Washington Supreme Court, ruling *en banc*, skeptically observed "where there is no insurance coverage, suing an employee who negligently causes extensive property damage is ordinarily a useless act because of the limited funds and income available to the employee." *Id*. at 158.

The court analyzed the impact of the FELA on the railroad's counterclaim and third-party claims in depth, ruling regarding the counterclaim:

> 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…. Milwaukee's responsive actions clearly impair respondents' right to sue under the FELA.
>
> Milwaukee also contends its responsive actions do not constitute a "device" under either section 55 or 60 of the FELA. It is asserted that the legislative history of the FELA indicates Congress was primarily concerned with employment contract language which operated as a waiver or limitation on an employee's right to sue his or her employer. See H.R. Rep. No. 1386, 60th Cong., 1st Sess., 4436 et seq. (1908). Milwaukee attempts to distinguish this situation from the instant case wherein the railroad seeks to exercise its own right to sue. We reject such a narrow interpretation of sections 55 and 60. The trial court's broad interpretation of the term "device" is supported both by the purpose of the act and by case authority.

Id. at 160-161

In concluding this the Washington Supreme Court relied on this Court's statement that "Congress intended the creation of no static remedy [under the FELA], but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958). *Id.* at 161. More specifically, the Washington Supreme Court found Judge Fox's analysis in *Kozar v. Chesapeake & O. Ry.*, 320 F. Supp. 335, 383-85 (W.D. Mich. 1970), *aff'd in part and vac'd in part*, 449 F.2d 1238 (6th Cir. 1971) persuasive:

> The drafters of the Federal Employers' Liability Act legislation intended that the Act provide an effective and readily available remedy for negligence-related injuries in the railroad industry. . . .
>
> [§ 55] declares a public policy to void releases or other exculpatory devices procured under circumstances that indicate an attempt to avoid Federal Employers' Liability Act liability. . . .
>
> To the extent coercive tactics are used by railroads against their injured employees to discourage resort to Federal Employers' Liability Act litigation, the result is an impermissible chill on rights created by Congress, and which as a matter of public policy and natural law inheres in each employee as a human being. Any chilling effect can be expected to extend not only to prospective Federal Employers' Liability Act plaintiffs, but to all employees and their families. It could

> be expected to prevent unfavorable testimony as well as the filing of lawsuits. This result is intolerable.

Id. at 161-162

The Washington Supreme Court held in *Stack* that the railroad's "counterclaim and third-party claims constituted "devices contrived to deprive plaintiffs of their right to an adequate recovery" and operated to chill justifiable FELA claims in violation of 45 U.S.C. §§ 55, [and] 60." 94 Wn.2d at 159. Accordingly, the court ruled these counterclaims and third-party claims were void. *Id*. This is the polar opposite of the result reached by the Illinois Supreme Court majority below.

II. This case presents issues of national importance.

The history and plain language of the FELA, the opinions of this Court interpreting it and data all demonstrate the national importance of the issues in this case.

In 1908, the second Federal Employers Liability Act was passed in "response to mounting concern about the number and severity of railroad employees' injuries." *Norfolk Southern Ry. v. Sorrell*, 549 U.S. 158, 165 (2007). "The impetus for the FELA was that throughout the 1870's, 80's, and 90's, thousands of railroad workers were being killed and tens of thousands were being maimed annually in what came to be increasingly seen as a national tragedy, if not a national scandal." *CSX Transp., Inc. v. Miller*, 159 Md. App. 123, 130 (2004).

Working for a railroad involves extraordinarily dangerous work. Trains are massive machines that cannot be stopped on a dime and when things go wrong, disastrous consequences are likely.

The FELA was a recognition by Congress that the physical dangers of railroading results in the risk of death or maiming of thousands of workers every year:

> Cognizant of the physical dangers of railroading that resulted in the death or maiming of thousands of workers ever year, Congress crafted a federal remedy that shifted part of the "human overhead" of doing business from employees to their employers.

Consolidated R. Corp. v. Gottshall, 512 U.S. 532, 542, (1994).

In his concurring opinion in *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949), Justice Douglas paraphrased President Theodore Roosevelt in declaring that a national law was needed that "was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations."

For good reasons and underscoring the importance of the FELA generally, it is settled the act is construed liberally to further its humanitarian and remedial purposes. *E.g. CSX Transp., Inc. v. McBride*, 564 U.S. 685, 691-692 (2011); *Conrail v. Gottshall*, *supra*, 512 U.S. at 535 ("Over the years, the Court has construed FELA liberally to further this remedial goal")(citing *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506 (1957). *See also Monessen*

S. R. Co. v. Morgan, 486 U.S. 330, 337 (1988)("Congress expressly dispensed with other common-law doctrines of that era, … in order "to provide liberal recovery for injured workers" under the FELA.")(quoting *Kernan v. American Dredging Co.*, 355 U.S. 426, 432, (1958)).

Four years after the 1908 version of the FELA was passed, this Court decided two cases involving § 5 of the FELA. As centrally relevant, § 5 states "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 act shall to that extent be void …." 45 U.S.C. § 55 (2012).

In the *Second Employers' Liability Cases*, 223 U.S. 1 (1912), a railroad challenged the Constitutional validity of the FELA. This Court first held Congress had the power to pass the FELA overall and then, regarding § 5, ruled Congress "also possesses the power to *insure its efficacy* by prohibiting any contract, rule, regulation or device *in evasion* of it." 223 U.S. at 52 (emphasis added). The ruling by the majority below cannot be squared with this holding; *insuring* § 5's *impotence, not its efficacy.*

In *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U.S. 603 (1912), another early case involving the FELA, the Court focused on the statement in § 5 "the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act," explaining these words "do not refer simply to an actual intent of the parties to circumvent the statute." 224 U.S. at 613. Instead, the Court held this "purpose or intent" is to be found in the "necessary operation and effect in defeating the liability which the statute was designed to

enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view." *Id.*

The ruling of the majority below also cannot be squared with *Schubert.* The unlawful "purpose or intent" of Wisconsin Central in pursuing the counterclaims is ignored by the majority below, leaving the first issue in this case one that should not even be debatable: "When a railroad files a counterclaim for property damage in an injured employee's FELA action *to purposely or intentionally evade FELA liability to the employee*, is the counterclaim a void device under Sections Five or Ten of the FELA?" If the "purpose or intent" is to be found in the "necessary operation and effect in defeating the liability which the statute was designed to enforce" and it remains that the "[o]nly by such general application could the statute accomplish the object which it is plain that Congress had in view," the only possible answer to the main issue here has to be yes. If the FELA itself remains nationally important, and the holding in *Schubert* remains nationally important, then it follows inevitably that the issues here are issues of national importance.

Respecting the breadth of § 5 and comparing it to then recently passed state workers' compensation statutes, this Court observed "Congress wanted § 5 to have the full effect that its comprehensive phraseology implies." *Duncan v. Thompson*, 315 U.S. 1, 6 (1942). *See also Boyd v. Grand T. W. R. Co.*, 338 U.S. 263, 265 (1949)(contract disturbing railroad workers' statutory right to select the forum for his FELA lawsuit fell within the ambit of § 5 and was void). "Any other result would be inconsistent with *Duncan v. Thompson*, 315 U.S. 1 (1942). *Boyd*, 338 U.S. at

265 (reiterating *Duncan* "reviewed the legislative history and concluded that "Congress wanted § 5 to have the full effect that its comprehensive phraseology implies.""). As in the *Second Employers' Liability Cases*, *supra*, and *Schubert*, *supra*, the holding of the majority below conflicts with this Court's rulings in *Duncan* and *Boyd*.

Turning to the data, in the United States, while the occurrence rates for railroad workers' work-related injuries have declined since 1908, current data from 2019 shows railroad workers still suffered 3,896 work related deaths or nonfatal injuries that year[2]. Accordingly, the FELA remains critically important. Equally so, preventing railroads from undermining the FELA remains critically important. This is no time to flip the presumptions, the FELA must be liberally construed to further its humanitarian, remedial and beneficent purposes.

When a railroad files counterclaims for damage to railroad property against injured employees to purposely or intentionally evade FELA liability to these same employees, as the trial and appellate courts below ruled *happened* in this case (described below variously as "coercive," "retaliatory," "calculated to intimidate" and calculated to "exempt the railways from liability under the FELA)," and which the Illinois Supreme Court has not denied, resolving whether such conduct voids the counterclaims under §§ 55 and/or 60 of the FELA presents issues of obvious national importance.

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2. Extracted from data maintained by the Federal Railroad Administration Office of Safety Analysis at https://safetydata.fra.dot.gov/OfficeofSafety/publicsite/query/castally2.aspx.

III. *Cavanaugh*, the leading case relied upon by the majority below, is readily distinguishable.

The leading case relied upon by the Illinois Supreme Court majority below is *Cavanaugh v. Western Maryland Ry. Co.*, 729 F.2d 289 (4th Cir. 1984). At issue there was a very different kind of counterclaim, one alleging the injured railroad worker plaintiff was *solely* at fault. This means if the allegations in the counterclaim in *Cavanaugh* are accepted as true, then the railroad there was not liable to the employee under the FELA, because the employer's negligence is the *sine qua non* of the employer's liability. A fault free employer has no liability to an injured employee under the FELA, so a counterclaim of the type involved in *Cavanaugh*, if successful could not take away a railroad employee's FELA rights. It is apparent in retrospect the railroad in *Cavanaugh* used a clever and possibly even lawful device there to crack open the door to get around *Stack*. The possibility this was the first step in a coordinated plan to undermine the FELA cannot be eliminated. The majority below did not acknowledge the limited nature of the counterclaim at issue in *Cavanaugh*, nor that because of this *Cavanaugh* is readily distinguishable.

The first case to expand *Cavanaugh* beyond its facts to a counterclaim like the ones here was *Sprague v. Boston & Maine Corp.*, 769 F.2d 26 (1st Cir. 1985). The First Circuit did so without discussion. *Id.* at 28-30. The Fourth Circuit has not taken this next step. In *Dise v. Express Marine, Inc.*, 476 Fed. Appx. 514, 523 (4th Cir. 2011), the Fourth Circuit initially and precisely summarized the *Cavanaugh* holding: "In *Cavanaugh*, we held that FELA neither explicitly nor implicitly proscribes the

filing of a counterclaim by a railroad in a FELA case to recover for property damages sustained by reason of the *sole* negligence of a plaintiff-employee." The court then applied the concept to benefit a fault free defendant: "we have found that EMI was not negligent to any extent, so its property damage counterclaim does not serve as a set off to liability." *Id*. at 525. Accordingly, the court below, while heavily relying on *Cavanaugh*, has actually taken *Cavanaugh* beyond its limits and beyond where the Fourth Circuit has gone. In other words, *Cavanaugh* is readily distinguishable.

IV. The Illinois Supreme Court's decision below is incorrect.

For three reasons the court below broadly concluded counterclaims are not prohibited under §§ 55 and 60 of the FELA: 1) nothing in the FELA suggests it should abrogate an employer's common-law right to assert claims against its workers who negligently caused damage to company property; 2) the plain language of § 55 of the FELA does not evince an intent by Congress to prohibit an employer's counterclaims; and 3) there are several cases that fall on both sides of the issue. App. 14a through 18a. The plain language of the statute refutes all three points.

§ 55 voids "[any] … device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by" the FELA. Instead of focusing, as the statute does, on whether Wisconsin Central's "purpose or intent" in pursuing the counterclaims here was to "enable" the railroad "to exempt itself from any liability created by" the FELA, the court below zoomed in on whether the counterclaims

could fall into the "any device whatsoever" classification in a vacuum. Answering this incomplete question, the majority below concluded the counterclaims were not a device, as if the term "any device whatsoever" could somehow be more broadly worded. *Id.* This all or nothing ruling stands for the proposition that even if used for the nefarious and statutorily forbidden purpose of enabling Wisconsin Central "to exempt itself from any liability created by" the FELA, since counterclaims were not specifically listed by Congress, they can never be "any device whatsoever."

In *Deering v. Nat'l Maint. & Repair, Inc.*, 627 F.3d 1039, 1044 (7th Cir. 2010), speaking for the Seventh Circuit, Judge Posner took apart a similar argument in a Jones Act case, where §§ 55 and 60 of the FELA apply:

> National argues that the phrase "any device whatsoever" must be confined to documents that are just like a "contract, rule, [or] regulation." In so arguing it invokes the rule of interpretation known as eiusdem generis (Latin for "of the same kind"). But like most rules of interpretation this one is not so much a rule as an item in a checklist of considerations bearing on the sensible interpretation of a document. Words in a string often are intended to bear similar meanings. But not always—and not in this instance. The fact that the statute tacks "whatsoever" on to "any device" is a clue that "device" is a catch-all, [citation omitted], in recognition of the incentive of employers to get around the FELA's generous provisions—generous relative both to the common law of

> torts and workman's compensation law—for injured employees. The fact that Congress didn't think to say that a counterclaim for property damage was a forbidden device for extinguishing the employer's liability for injuries to his employees confirms the wisdom of including a catch-all.
>
> Anyway National's "device" is much like the first word in the string—"contract." National's counterclaim has the same effect as would a provision in its employment contract with Deering waiving National's liability under the Jones Act if he was injured in an accident that caused property damage to National—and of course such a contractual provision would be unenforceable. So why shouldn't a differently named "device" of identical purpose and consequence likewise be unenforceable?

This analysis is consistent with the Washington Supreme Court's analysis in *Stack*, *supra*, 94 Wn. 2d. 155, at 160-161, discussed above

While the term "any device whatsoever" in the FELA should be deemed clear and unambiguous on its face, the history of its use in the law preceding passage of the FELA offers a deeper perspective. In a late nineteenth century published case, for example, this phrase is found in an 1826 Pennsylvania statute meant to stop people from stealing water: "no person shall construct any building, wharf, basin, or watering place, or make *and apply any device whatsoever*, for the purpose of taking water from any canal or feeders, …." *Losh v. Pennsylvania Canal*

Co., 103 Pa. 515, 516 (1883)(referring to Act of April 10th 1826, § 9 (P. L. 304)(emphasis added).

Plainly, including "any device whatsoever" in the statute guaranteed stealing water was the center of the matter, not whether water thieves used means already known or not yet contrived to accomplish their crime. It is no leap to conclude stealing by "any device whatsoever" means stealing by any means, known or unknown at the time the statute forbidding stealing was first passed.

Similarly, legal "devices" were also frequently mentioned in statutes in the years before the FELA was passed. For example, in *Crane v. Goodwin*, 77 Ga. 362, 363-364 (1886), a Georgia statute was mentioned that prohibited usury by "any device whatsoever." *See also Smith v. State*, 68 Md. 168, 169-170 (1887)(applying statute prohibiting sale of lottery tickets where "[courts] shall adjudge all tickets, parts of tickets, certificates, *or any other device whatsoever* by which money or any other thing is to be paid or delivered on the happening of any event or contingency like a lottery, to be lottery tickets")(emphasis added); *Lowe v. State*, 118 Wis. 641, 653 (1903)(prohibiting unauthorized practice of medicine by *any device whatsoever*).

Near the turn of the 19th century the meaning of the statutory phrase "any device whatsoever" was reflected in a prosecutor's argument to uphold a criminal conviction:

> It is a very common thing for devices to be resorted to to evade liquor-laws. We frequently see liquors advertised with the most harmless names, as "bitters," "tonics," "alteratives," "cordials," [Citation omitted]. But if the view

> which I take of our statutes on the subject be correct, it is impossible to evade them by *any device whatsoever*.
>
> It is claimed that while the appellants could not have sold the whiskey contained in the bitters separately, by mixing other substances with it they could sell it with impunity. Whether mixed or not with other substances, they were selling vinous and spirituous liquors contrary to the statute.

King v. State, 58 Miss. 737, 739 (1881) (emphasis added).

These examples show the term "any device whatsoever" was frequently used in statutes for at least 80 years before the FELA was passed, to stop people from evading the law by creating new devices of any type to accomplish what has been declared unlawful. Against this backdrop, this Court applied the same idea to the statute at issue in this case, noting Congress "possesses the power to *insure* its *[the FELA's] efficacy* by prohibiting *any* contract, rule, regulation or *device in evasion* of it." *Second Employers' Liability Cases*, *supra*, 223 U.S at 52 (emphasis added). As previously mentioned, the Illinois Supreme Court's ruling below conflicts with this holding and with the plain language of the statute.

In its third point, the Illinois Supreme Court made much of the common law right of an employer to sue its employees for negligence, ignoring that employers in general and railroads in particular rarely use this right. In *Deering*, *supra*, Judge Posner explained why the fact employers normally do not sue their own employees matters in the current context:

> 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.

627 F.3d at 1043.

It should be obvious when an employer sues or counterclaims against an employee who is judgment proof but for the employee's lawsuit for FELA damages, that the employer's purpose or intent is to exempt itself from any or even all of its FELA liability to that employee, precisely what the statute prohibits. Moreover, the words "purpose or intent" in Section 5 of the FELA "do not refer simply to an actual intent of the parties to circumvent the statute." *Philadelphia, B. & W. R. Co. v. Schubert*, *supra*, 224 U.S. at 613. Instead, "purpose or intent" is to be found in the "necessary operation and effect in defeating the liability which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view." *Id*.

Exemption from "*any* liability" in § 5 cannot mean only complete exoneration is prohibited. Such an interpretation

cannot be squared with the plain language of the statute. Congress could have easily weakened the protection for injured workers in this fashion, but it chose to use broader language. The harm the FELA prohibits is taking away *any* of the money Congress intended injured workers to receive. While taking *all* of it away is surely worse than taking *only some* of it away, the plain language of the FELA makes clear taking *all* is not required to void a device under § 5.

Relying on *Hilton v. South Carolina Public Rys. Comm'n*, 502 U.S. 197 (1912), in its final point the majority below reasoned:

> *Cavanaugh* was decided in 1984, and since that time, three federal courts of appeal have followed its reasoning, and only one, in dictum, has disagreed. Congress, however, has not stepped in to amend sections 55 and 60 of the FELA to specifically prohibit an employer's counterclaims. Considering the arguments and case law on both sides of the issue throughout the years, we find such silence telling.

App. 17a.

More accurately, this silence tells nothing, and the *Hilton* case undermines rather than supports the ruling below. The Illinois Supreme Court parenthetically described *Hilton as* "stating Congress had had almost 30 years to correct the Supreme Court's decision if it disagreed with it and, because it had chosen not to do so, the Court accorded weight to Congress's continued acceptance of its earlier holding." App. 17a-18a. In sharp relief, the instant matter does not involve

Congressional inaction after *this* Court settled a question of law. On the contrary, at issue here are conflicting lower court decisions involving unsettled legal issues. *Hilton* is, therefore, inapplicable.

Moreover, the timing argument of the majority below is factually incorrect. The first high level lower court to apply §§ 5 and 10 of the FELA in the relevant context was not *Cavanaugh* in 1984, but the Washington Supreme Court four years earlier in *Stack*, *supra*. *Stack* has been the law in Washington state ever since, and its reasoning has been both adopted and rejected elsewhere. Thus, if Congressional inaction following a lower court judicial construction was, hypothetically, a legally valid argument, the inaction after *Stack* would be the most important based on primacy, not the inaction relative to *Cavanaugh*. But the morass below reveals readily why Congressional inaction is a legally invalid argument in this case. There has been no reason for Congress to act on the issues argued in this petition, because the statute is clear and decisions by this Court involving the statute are also clear.

The court below relied on decisions of the First, Fourth, Fifth and Eighth Circuits, but the better reasoned federal and state court decisions reveal flaws in the majority opinion below. For example, the most recent published opinion of this ilk is *Blanchard v. Union Pacific R.R. Co.*, 2016 U.S. Dist. LEXIS 12108, 2016 WL 411019 (S.D. Ill. 2016), where Judge Herndon held:

> Based on the rationale from *Deering* and the cases cited below, the Court finds that counterclaim of the case at bar is "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." [Citations omitted]. Thus, the Court concludes that allowing the counterclaim violates 45 U.S.C. § § 55 & 60, and the public policy reflected in the FELA. Ruling the way Union Pacific argues and as the other circuit courts did "will not only contravene the law, but will place an insurmountable chill on the longstanding rights of admiralty and rail workers to pursue their on-duty injury claims. 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 National Maintenace & Repair, Inc.*, 09-676-DRH; Doc. 42, p. 7.

2016 U.S. Dist. LEXIS 12108, at *6-9.

On the same important federal question, *Deering*, *supra*, rejects the reasoning of the First, Fourth, Fifth and Eighth Circuits in *Cavanaugh v. Western Maryland Ry. Co.*, 729 F.2d 289 (4th Cir. 1984), *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); and *Withhart v. Otto Candies, L.L.C.*, 431 F.3d 840 (5th Cir. 2005), while ultimately deciding the case on other grounds: "Although we doubt that *Cavanaugh* and the cases following it—all but *Withhart* being FELA rather than Jones Act cases—were decided correctly, the case for barring an employer's counterclaim is stronger in the maritime setting …." 627 F.3d. at 1046.

It is surprising the federal questions in this case are unsettled. This is illustrated by comparing the reasoning in the two most recent on point district court opinions: *Blanchard v. Union Pacific R.R. Co.*, *supra*, and *Norfolk S. Ry. Co. v. Tobergte*, 2018 U.S. Dist. LEXIS 207513 (E.D. Ky. 2018).

In *Blanchard* the court found the railroad's counterclaim violated §§ 5 and 10 of the FELA; while on indistinguishable facts, the court in *Tobergte* reached the opposite conclusion. Nevertheless, even the *Tobergte* court recognized "the negative effects this decision will have on railroad employees wishing to file FELA claims." 2018 U.S. Dist. LEXIS 207513 at *11. That court, however, felt the issue was for Congress and not the courts to resolve. *Id.* at * 11-12. But Congress has already resolved the issue with clear and broad language courts are duty bound to follow, yet too many are not.

If certiorari is granted this Court will have the opportunity to settle the authority splits described in this petition by addressing the first question presented and restoring uniform interpretation Sections 5 and 10 of the FELA. Additionally, this Court will be able to clarify the law by addressing the second and third questions presented.

Addressing the second question presented involves deciding whether, when railroad employees are not solely negligent, property damage counterclaims in FELA cases conflict with the statutory limitations on the comparative negligence defense found in §§ 3 and 4a of the FELA. 45 U,S.C. §§53, 54a. The complaints in this case allege violations of federal safety statutes and regulations. If

these allegations are meritorious, then Wisconsin Central has no legally valid comparative negligence defense in this case at all. It should not be possible for railroads Congress has deprived of comparative negligence defenses due to violations of federal safety statutes and regulations to obtain property damage awards under state law based on contributory negligence. Moreover, even when a railroad has not violated federal safety statutes or regulations, §§ 53 and 54a of the FELA come into play to limit the harsh consequences of the previous complete bar to recovery that was the contributory negligence defense before Congress abrogated this defense. An end run around this central tenet of Congressional intent should not be legally possible. The limited consequences of the employee's own negligence are specified in the statute. The FELA occupies the field in this regard, leaving no room for state law to take away from injured workers that which Congress has granted them.

Addressing the third question presented involves determining whether counterclaims by railroads for damage to railroad property filed against injured employees pursuing FELA cases are impermissible requests for setoffs going beyond the set offs recognized under the proviso in § 5 of the FELA. *See Dise v. Express Marine, Inc.*, 476 Fed. Appx. 514, 523 (4th Cir. 2011) and *Deering v. National Maint. & Repair, Inc.*, 627 F.3d 1039 (7th Cir. 2010). Congress answered this question "yes," in 45 U.S.C. § 55 (2012), by listing the permissible setoffs and not including one for contributory negligence of the injured employee. This is a reasonable case to apply the canon *expressio unius est exculsio alterius*. *Compare Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168-169 (2003).

Left without clarification by this Court, we will have continued inconsistent and chaotic resolutions of cases similar to this one in federal and state courts, with some decisions continuing to conflict with the FELA and several of this Court's previous decisions interpreting the FELA. Certiorari should be granted to restore uniformity on questions of national importance by enforcing the plain meaning of §§ 5 and 10 of the FELA prohibiting railroads from intentionally or purposefully using any device whatsoever to evade or defeat FELA liability; to protect the comparative negligence principles articulated in §§ 3 and 4(a) of the FELA; and to enforce the limited set off provision under the proviso in § 5 of the act.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF ILLINOIS, FILED DECEMBER 19, 2019

IN THE SUPREME COURT OF
THE STATE OF ILLINOIS

Docket No. 124454

MELVIN AMMONS *et al.*,

Appellees,

v.

CANADIAN NATIONAL RAILWAY COMPANY *et al.*
(WISCONSIN CENTRAL, LTD.),

Appellant.

December 19, 2019, Opinion Filed

JUSTICE GARMAN delivered the judgment
of the court, with opinion.

Chief Justice Burke and Justices Thomas, Karmeier,
and Theis concurred in the judgment and opinion.

Justice Kilbride dissented, with opinion,
joined by Justice Neville.

Justice Kilbride dissented upon denial of rehearing,
with opinion, joined by Justice Neville.

Appendix A

OPINION

The Federal Employers' Liability Act (FELA) (45 U.S.C. § 51 *et seq.* (2012)) provides the exclusive remedy for railroad employees to recover damages for injuries suffered due to their employer's negligence. This appeal asks whether counterclaims filed by a railroad employer against its allegedly negligent employees are prohibited by sections 55 and 60 of the FELA. We hold that they are not prohibited. We reverse the appellate court's decision and remand to the circuit court for further proceedings.

BACKGROUND

Plaintiffs Melvin Ammons and Darrin Riley filed separate lawsuits under the FELA against defendant Wisconsin Central, Ltd. (Wisconsin Central), for injuries they sustained during their employment with the railroad in December 2014. Ammons was employed as a conductor, and Riley was the locomotive engineer when the train they were operating struck another train that was stationary on the same track. In their lawsuits, both plaintiffs alleged Wisconsin Central was negligent in violating various rules and regulations, which resulted in their injuries. As the lawsuits concerned the same incident and contained similar issues, the Cook County circuit court consolidated the cases.

Wisconsin Central denied liability and filed counterclaims against both plaintiffs. In the counterclaims, Wisconsin Central alleged that plaintiffs failed to exercise ordinary care and acted in an otherwise careless and

negligent manner. As a result of its employees' negligence, Wisconsin Central claimed multiple locomotives, railroad cars, railroad track, and railroad track structures sustained significant damage, which caused it to spend significant amounts of money to repair, perform environmental cleanup and remediation, and incur other incidental and consequential damages. Wisconsin Central sought damages in excess of $1 million.

Plaintiffs filed a motion to dismiss the counterclaims pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2016)), arguing Wisconsin Central's counterclaims violated sections 55 and 60 of the FELA. Section 55 of the FELA prohibits "[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." 45 U.S.C. § 55 (2012). Section 60 of the FELA 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." *Id.* § 60.

Plaintiffs argued that Wisconsin Central's counterclaims constituted a "device" designed to exempt itself from liability to pay damages to injured employees, to deter railroad employees from providing information regarding injury or death of an employee, or both. As the counterclaims had the potential to negate any compensation plaintiffs received for their injuries, plaintiffs argued allowing the counterclaims would have

a chilling effect on the filing of injury claims under the FELA.

The circuit court granted plaintiffs' motion to dismiss, finding a state common-law counterclaim brought by a common carrier employer against an employee constituted a "device" under the FELA because a successful counterclaim could reduce or effectively eliminate a damages award to the employee.

The appellate court affirmed the circuit court's dismissal. 2018 IL App (1st) 172648, 429 Ill. Dec. 232, 124 N.E.3d 1. Noting several federal cases have found counterclaims for property damage do not fall within the meaning of "device" under section 55 of the FELA, the appellate court found a lack of a clear consensus and stated cases to the contrary conclude "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." *Id.* ¶ 19. The appellate court concluded that prohibiting counterclaims by railroads against their employees 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." *Id.* ¶ 21.

Justice Pierce dissented, believing "a railroad's counterclaim for property damages is not a 'device' used to 'exempt' a railroad from 'liability' under the FELA."

Id. ¶ 35 (Pierce, J., dissenting). The dissent expressed concern that the majority's decision "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." *Id.* ¶ 40.

Wisconsin Central petitioned this court for leave to appeal, and we allowed that petition. Ill. S. Ct. R. 315 (eff. July 1, 2018). The Illinois Trial Lawyers Association and the Academy of Rail Labor Attorneys sought, and we granted, leave to file *amicus* briefs. Ill. S. Ct. R. 345 (eff. Sept. 20, 2010).

ANALYSIS

I. Standard of Review

The appellate court affirmed the circuit court's order dismissing Wisconsin Central's counterclaims pursuant to plaintiffs' motion under section 2-615 of the Code. Although the motion to dismiss would have been more appropriately filed under section 2-619 of the Code (735 ILCS 5/2-619 (West 2016)) because plaintiffs' motion sought to raise an affirmative matter seeking to avoid the legal effect of or defeat the claim, our review of a dismissal under either section is *de novo. Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31, 976 N.E.2d 318, 364 Ill. Dec. 40.

II. Whether Wisconsin Central's Counterclaims Against Plaintiffs Are Prohibited

A. The FELA

The FELA provides, in relevant part, that

> "[e]very common carrier by railroad while engaging in commerce *** shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce *** for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51 (2012).

Congress enacted the FELA in 1908 in response to the rising toll of serious injuries and death to railroad workers. *Norfolk Southern Ry. Co. v. Sorrell*, 549 U.S. 158, 165, 127 S. Ct. 799, 166 L. Ed. 2d 638 (2007). To further the humanitarian purposes of the FELA, Congress eliminated several of the common-law defenses that had previously barred railroad workers from prevailing on their injury claims. *Consolidated R. Corp. v. Gottshall*, 512 U.S. 532, 542, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994). For example, Congress "abolished the fellow servant rule, rejected the doctrine of contributory negligence in favor of that of comparative negligence, and prohibited employers from exempting themselves from FELA through contract; a 1939 amendment abolished the assumption of risk defense." *Id.* at 542-43.

B. Federal Court Interpretation of Federal Statutes

This case necessarily requires us to interpret the language of sections 55 and 60 of the FELA and consider the decisions of federal courts analyzing these sections.

> "When interpreting federal statutes, we look to the decision of the United States Supreme Court and federal circuit and district courts. [Citation.] United States Supreme Court interpretation of federal law is clearly binding on this court. However, 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." *State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶ 33, 984 N.E.2d 449, 368 Ill. Dec. 503.

Therefore, "if the lower federal courts are uniform on their interpretation of a federal statute, this court, in the interest of preserving unity, will give *considerable weight* to those courts' interpretations of federal law and find them to be highly persuasive." (Emphasis in original.) *Id.* ¶ 35. If, however, the federal courts are split, we may elect to follow those decisions we believe are better reasoned. *Id.*

Having determined the standard for assigning weight to federal court decisions interpreting federal law, we now

apply that standard in our interpretation of the language found in sections 55 and 60 of the FELA. As the United States Supreme Court has not addressed this issue, we turn to the lower federal courts to guide our interpretation of the statute.

In arguing that sections 55 and 60 of the FELA do not bar counterclaims brought by railroads asserting their common-law right to recover property damages against FELA plaintiffs, Wisconsin Central relies on *Cavanaugh v. Western Maryland Ry. Co.*, 729 F.2d 289 (4th Cir. 1984), *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), and *Withhart v. Otto Candies, L.L.C.*, 431 F.3d 840 (5th Cir. 2005). In arguing that the counterclaims by Wisconsin Central are prohibited because they would defeat the broad remedial purpose of the FELA, plaintiffs rely in large part on *Deering v. National Maintenance & Repair, Inc.*, 627 F.3d 1039 (7th Cir. 2010). We will look at each case in turn.

In *Cavanaugh*, 729 F.2d at 290, the plaintiff train engineer was injured when his train collided head-on with another train. The plaintiff filed an FELA action to recover for personal injuries, and the railroad defendants counterclaimed under state law for $1.7 million in property damages sustained by them in the same accident. *Id.* After the plaintiff moved to dismiss the counterclaim, the district court granted the motion, finding the counterclaim would violate sections 55 and 60 and be contrary to the public policy reflected in the FELA. *Id.*

Appendix A

On appeal, the Fourth Circuit 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 suffered by him 'arising out of ordinary acts of negligence committed within the scope of [his] employment' by the offending employee." *Id.* (quoting *Stack v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 615 P.2d 457, 459, 94 Wn.2d 155 (Wash. 1980) (*en banc*)).

The plaintiff argued that the defendants' counterclaim constituted a "device" in violation of section 55 and to allow it would deprive the plaintiff of his right to recovery under the FELA and chill justifiable claims. *Id.* at 292. The Fourth Circuit found the argument unpersuasive. *Id.*

In looking at section 55, the court of appeals stated that neither the express language of the statute nor the legislative history suggested the word "device" was meant to include a railroad's counterclaim to recover losses in connection with the accident in which the employee was injured. *Id.* The court found the critical word in the definition of "device" was "exemption," as it was only when the contract or device qualified as an exemption from liability that it became void under section 55. *Id.* As a counterclaim was not an exemption of liability, it was not a device within the meaning of the statute. *Id.*

The court of appeals also considered the plaintiff's argument that sections 55 and 60 evince a legislative purpose to prohibit counterclaims by the defendant railroads in FELA actions "because the filing of such

counterclaims will unfairly coerce or intimidate the injured employee from filing and pursuing his FELA action." *Id.* at 293. The court disagreed, finding nothing in the legislative history to support the plaintiff's reasoning, and noted "[t]he same argument could be advanced against the admissibility of a counterclaim in any tort action." *Id.* at 294.

The dissenting judge contended that the majority construed sections 55 and 60 too narrowly and that allowing "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 (Hall, J., dissenting). The dissent believed the railroads' counterclaim was a "'device' calculated to intimidate and exert economic pressure upon [the plaintiff], to curtail and chill his rights, and ultimately to exempt railroads from liability under the FELA." *Id.*

In *Sprague*, 769 F.2d at 27, the plaintiff train engineer sued the railroad under the FELA for injuries he suffered when the locomotive he was operating collided with a train. The railroad filed a counterclaim for damages to the vehicles involved in the accident. *Id.*

On appeal, the plaintiff argued the railroad's counterclaim should have been dismissed because Congress implicitly rescinded an employer's right to sue its employees for property damage. *Id.* at 28. The First Circuit found the reasoning in *Cavanaugh* persuasive and agreed with its analysis. *Id.* at 29.

In *Nordgren*, 101 F.3d at 1247, the plaintiff train conductor filed an FELA suit seeking damages for personal injuries allegedly caused by the railroad's negligence. The railroad sought to file a counterclaim to recover property damage sustained in the train collision but was denied the opportunity to do so. *Id.*

On appeal, the Eighth Circuit considered whether the FELA precluded a railroad from counterclaiming for property damages. *Id.* at 1248. The court noted the United States Supreme Court "has recognized FELA as a broad remedial statute and has construed FELA liberally in order to accomplish Congress's goals." *Id.* at 1249. The plaintiff argued the word "device" in section 55 encompassed a state-law based counterclaim for property damages, which precluded the railroad's counterclaim. *Id.* at 1250. After acknowledging the rulings in *Sprague* and *Cavanaugh*, the Eighth Circuit found the phrase "any device whatsoever" was informed by its preceding terms of "contract," "rule," and "regulation." *Id.* at 1250-51. The court stated the latter terms related to "legal instruments" that railroads had used prior to the enactment of the FELA to exempt themselves from liability and "'any device whatsoever' refers only to any other creative agreements or arrangements the railroad might come up with to exempt itself from liability." *Id.* at 1251. Moreover, finding that "only when something exempts the railroad from FELA liability can it be a device," the court concluded a counterclaim does not constitute a "device" under section 55 because it does not exempt the railroad from FELA liability. *Id.* While the court acknowledged the plaintiff's concerns about

counterclaims frustrating the purpose of the FELA, it stated "Congress's silence on this issue speaks volumes." *Id.* at 1253.

The dissenting judge believed the railroad's counterclaims were "devices" under sections 55 and 60 of the FELA. *Id.* (McMillian, J., dissenting). Relying on a 1985 law review article, the dissenting judge concluded the counterclaims would frustrate the remedial purpose of the FELA and could inhibit coworkers of the injured employee from volunteering information pertinent to an FELA action. *Id.* at 1255-58 (citing William P. Murphy, *Sidetracking the FELA: The Railroads' Property Damage Claims*, 69 Minn. L. Rev. 349 (1985)).

In *Withhart*, 431 F.3d at 841, the plaintiff was an employee on a maritime vessel and was injured at sea as a result of a collision. The plaintiff filed a complaint under the Jones Act (46 U.S.C. app. § 688 (2000)), and the shipowner filed a negligence counterclaim against him for property damage. *Withhart*, 431 F.3d at 841. The district court dismissed the counterclaim. *Id.*

The Fourth Circuit noted that Congress created a negligence cause of action for ship personnel against the employers when it passed the Jones Act and it extended to seamen "the same rights granted to railway employees by FELA." *Id.* at 843. Thus, the court found interpretations of the FELA were instructive in Jones Act cases. *Id.*

The plaintiff argued Congress implicitly rescinded an employer's common-law right to sue its employees under

the FELA and the Jones Act. *Id.* However, the Fifth Circuit disagreed, finding the rulings in *Cavanaugh, Sprague*, and *Nordgren* to be persuasive. *Id.* Thus, the court held "no statutory provision in the FELA, and consequently, in the Jones Act, prohibits a shipowner-employer from pursuing a claim against its negligent seaman-employee for property damage." *Id.* at 845.

In contrast to the rulings in the previous four cases, plaintiffs rely on the Seventh Circuit's decision in *Deering*. There, the plaintiff riverboat pilot sued the defendant employer under the Jones Act for injuries he sustained in an accident on the Mississippi River. *Deering*, 627 F.3d at 1040. The defendant filed a counterclaim for damages the plaintiff allegedly caused to the boat, but the district court dismissed it as in the nature of a setoff and prohibited by the Jones Act. *Id.*

The court of appeals in that case noted "a suit or counterclaim 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. In looking at the language of section 55 of the FELA, the court found the defendant's counterclaim for setoff constituted a "device" and thus was prohibited. *Id.* However, the court acknowledged that the issue presented in this case was not before it and, not wanting to create a conflict with the Fifth Circuit in *Withhart*, stated it would "leave for a future day" whether property damage claims by an employer should be permitted in an employee's personal injury case under the FELA. *Id.* at 1048.

After considering the opinions of the five federal courts of appeal, we find better reasoned those four that found counterclaims are not prohibited under sections 55 and 60 of the FELA. First, nothing in the FELA suggests it was intended to abrogate an employer's common-law right to assert claims against its workers who negligently caused damage to company property. *Nordgren*, 101 F.3d at 1252-53; *Cavanaugh*, 729 F.2d at 290-91.

Second, the plain language of section 55 of the FELA does not evince an intent by Congress to prohibit an employer's counterclaims. Section 55 provides "[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 any liability created by this chapter, shall to that extent be void." 45 U.S.C. § 55 (2012). The parties agree the Seventh Circuit's statements on section 55 amount to judicial *dictum*, which 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, 619 N.E.2d 715, 189 Ill. Dec. 14 (1993). "[A] judicial *dictum* is entitled to much weight, and should be followed unless found to be erroneous." *Id.* We find the Seventh Circuit's reasoning unpersuasive.

The Seventh Circuit found "device" similar to the word "contract" and stated a counterclaim had the same effect as a provision in an employment contract where the employee waives the employer's liability. *Deering*, 627 F.3d at 1044. However, a counterclaim does not equate to a contract, rule, or regulation. A counterclaim does not

create rights between the parties but is an independent cause of action seeking to assert rights against another. See *Wilson v. Tromly*, 404 Ill. 307, 309-10, 89 N.E.2d 22 (1949) ("A counterclaim is an independent cause of action."). Unlike a contract, rule, or regulation that can be rendered "void," a counterclaim, while subject to dismissal, would not suffer the same fate as being void.

The Seventh Circuit also dismissed the doctrine of *ejusdem generis*, which states that, "when a statutory clause specifically describes several classes of persons or things and then includes 'other persons or things,' the word 'other' is interpreted to mean 'other such like.'" *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 492, 905 N.E.2d 781, 328 Ill. Dec. 892 (2009) (quoting *People v. Davis*, 199 Ill. 2d 130, 138, 766 N.E.2d 641, 262 Ill. Dec. 721 (2002)); see also *Bullman v. City of Chicago*, 367 Ill. 217, 226, 10 N.E.2d 961 (1937) (utilizing the doctrine of *ejusdem generis* to construe the words "'junk, rags,'" and "'any second-hand article whatsoever'" to mean that the general words "any second-hand article whatsoever" include "only things of the same kind as those indicated by the preceding particular and specific words"). Here, we find the words "or device whatsoever" are to be interpreted like "contract," "rule," and "regulation," the latter three referring to legal instruments that an employer could use to escape liability. *Nordgren*, 101 F.3d at 1251.

The words "or device whatsoever" are also defined by the phrase that follows: "the purpose or intent of which shall be to enable any common carrier to exempt

itself from any liability." 45 U.S.C. § 55 (2012). Unlike a contractual agreement or a release, a counterclaim does not extinguish a plaintiff's FELA cause of action or exempt the railroad employer from liability. *Nordgren*, 101 F.3d at 1251; *Cavanaugh*, 729 F.2d at 292. Here, Wisconsin Central could still be found liable to plaintiffs in their FELA claims. Thus, we find the specific language of section 55 does not encompass counterclaims filed by an employer against its allegedly negligent employees.

We also find counterclaims are not prohibited by section 60 of the FELA, which 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." 45 U.S.C. § 60 (2012). The court in *Deering* did not discuss section 60. The Fourth Circuit in *Cavanaugh* noted section 60 was intended to keep the railroad from preventing other employees from providing information to the injured employee in the latter's lawsuit against the railroad. *Cavanaugh*, 729 F.2d at 293. We fail to see how a counterclaim against an allegedly negligent employee would prevent other employees from stepping forward to provide relevant information. Instead, like section 55, section 60 prohibits railroad employers from thwarting an employee's ability to provide information by way of "contract, rule, regulation or device whatsoever," and a counterclaim has no such muzzling effect on those employees.

Third, we note there are several cases that fall on both sides of the issue. For example, in 1980, the Washington Supreme Court held the railroad's counterclaim violated sections 55 and 60 of the FELA because the counterclaim had the potential to discourage employees from filing FELA actions or providing information as to facts relating to an employee's injury or death. *Stack*, 615 P.2d at 460-61; see also *Blanchard v. Union Pacific R.R. Co.*, No. 15-0689-DRH, 2016 U.S. Dist. LEXIS 12108, 2016 WL 411019, at *2 (S.D. Ill. Feb. 2, 2016) (finding *Deering* instructive and dismissing the railroad's counterclaim). In contrast, a federal district court recently followed the "majority view" in adopting the reasoning set forth in *Withhart*, *Nordgren*, *Sprague*, and *Cavanaugh* and concluded counterclaims are not a "device" under section 55 of the FELA. *Norfolk Southern Ry. Co. v. Tobergte*, No. 5:18-cv-207-KKC, 2018 U.S. Dist. LEXIS 207513, 2018 WL 6492606, at *3 (E.D. Ky. Dec. 10, 2018).

Cavanaugh was decided in 1984, and since that time, three federal courts of appeal have followed its reasoning, and only one, in *dictum*, has disagreed. Congress, however, has not stepped in to amend sections 55 and 60 of the FELA to specifically prohibit an employer's counterclaims. Considering the arguments and case law on both sides of the issue throughout the years, we find such silence telling. See *Hilton v. South Carolina Public Rys. Comm'n*, 502 U.S. 197, 202, 112 S. Ct. 560, 116 L. Ed. 2d 560 (1991) (stating Congress had had almost 30 years to correct the Supreme Court's decision if it disagreed with it and, because it had chosen not to do so, the Court accorded weight to Congress's continued acceptance of its

earlier holding). Given the employer's long-standing right to sue its employees for negligence and considering the plain language of the statute, the federal court decisions, and Congress's silence, we hold sections 55 and 60 of the FELA do not prohibit a railroad employer from filing a counterclaim for property damages against its employees.

CONCLUSION

We reverse the judgment of the appellate court that upheld the circuit court's dismissal of Wisconsin Central's counterclaims and remand to the circuit court for further proceedings.

Judgments reversed.

Cause remanded.

JUSTICE KILBRIDE, dissenting:

As the majority explains, the federal courts are split on their interpretation of the Federal Employers' Liability Act (FELA) (45 U.S.C. § 51 *et seq.* (2012)) as it applies to the circumstances presented by this case. We must, therefore, review the federal decisions and follow those we consider better reasoned. Contrary to the majority, I believe the better reasoned decisions hold that the FELA prohibits counterclaims by railroads against their workers for damages to railroad property. The alternative interpretation adopted by the majority defeats the purpose of the FELA to provide a remedy for railroad workers injured as a result of the railroad's negligence. Accordingly, I respectfully dissent.

The majority reviews the federal court of appeals decisions weighing on this issue. In my view, the Seventh Circuit's opinion in *Deering v. National Maintenance & Repair, Inc.*, 627 F.3d 1039, 1041 (7th Cir. 2010), is persuasive. In that case, a riverboat pilot suffered career-ending injuries when the towboat he was operating was swamped and sank in the Mississippi River. The plaintiff filed a claim for personal injuries under the Jones Act (46 U.S.C. § 30101 *et seq.* (2006)), the admiralty counterpart to the FELA. *Deering*, 627 F.3d at 1041. The employer responded by filing a counterclaim for damages it alleged the plaintiff caused to the towboat. The district court granted the plaintiff's motion to dismiss the employer's counterclaim, holding it was in the nature of a setoff to the plaintiff's Jones Act claim. *Deering*, 627 F.3d at 1041-42. In affirming, the Seventh Circuit observed that

> "shipowners, 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 if 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 counterclaim by a shipowner against a seaman is a setoff against the seaman's personal injury claim." *Deering*, 627 F.3d at 1043.

The Seventh Circuit observed that the FELA is incorporated by reference into the Jones Act and determined that setoffs are not permitted under section 55 of the FELA, prohibiting "'[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 any liability created by this chapter.'" *Deering*, 627 F.3d at 1043 (quoting 45 U.S.C. § 55 (2006)). The employer's counterclaim for damages to the towboat was properly described as a device intended to enable the employer to exempt itself from liability because that was the only purpose of the counterclaim in those circumstances. *Deering*, 627 F.3d at 1043. The Seventh Circuit concluded that the phrase "any device whatsoever" should be construed broadly as a catchall given Congress's intent to provide a remedy for injured employees. *Deering*, 627 F.3d at 1044.

Similarly, in *Stack v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 94 Wn.2d 155, 615 P.2d 457, 461 (Wash. 1980) (*en banc*), the Washington Supreme Court held a railroad's counterclaim for $1.5 million in property damage was barred by the FELA. The court concluded that the remedial purpose of the FELA supported a broad interpretation of the term "device." *Stack*, 615 P.2d at 460. More recently, in *Blanchard v. Union Pacific R.R. Co.*, No. 15-0689-DRH, 2016 U.S. Dist. LEXIS 12108, 2016 WL 411019 (S.D. Ill. Feb. 2, 2016), the federal district court granted a FELA plaintiff's motion to dismiss a counterclaim for property damage filed by a railroad, holding the counterclaim violated the public policy reflected in the FELA. The district court found the counterclaim was a device calculated to intimidate and exert economic pressure on the plaintiff, to curtail his rights, and ultimately to exempt the railroad from liability under the FELA. *Blanchard*, 2016 U.S. Dist. LEXIS 12108, 2016 WL 411019, at *3; see also *Yoch v. Burlington Northern R.R. Co.*, 608 F. Supp. 597, 598 (D. Colo. 1985) (concluding "the more realistic and less legalistic view" is that the railroad's $5 million property damage counterclaim is a "device" within the meaning of the FELA).

In my view, *Deering, Stack, Blanchard*, and *Yoch* are better reasoned decisions because they effectuate the purpose and intent of the FELA to provide a remedy for injured railroad workers. While the majority engages in a technical construction of the statutory language, we must keep in mind that "'statutes always have some purpose or object to accomplish, whose sympathetic and imaginative

discovery is the surest guide to their meaning.'" *Corbett v. County of Lake*, 2017 IL 121536, ¶ 28, 422 Ill. Dec. 822, 104 N.E.3d 389 (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945)). The purpose of the FELA is to provide compensation for injured railroad workers by imposing liability upon railroads for injuries resulting in whole or in part from the railroad's negligence. 45 U.S.C. § 51 (2012); *Kernan v. American Dredging Co.*, 355 U.S. 426, 432, 78 S. Ct. 394, 2 L. Ed. 2d 382 (1958). In *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 329, 78 S. Ct. 758, 2 L. Ed. 2d 799 (1958), the United States Supreme Court 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. [Citation.] 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. [Citation]."

The FELA provides injured railroad workers with their exclusive remedy for injuries sustained as a result of their employer's negligence (*New York Central R.R. Co. v. Winfield*, 244 U.S. 147, 151-52, 37 S. Ct. 546, 61 L. Ed. 1045 (1917)), and "it is clear that the general congressional intent was to provide liberal recovery for injured workers" (*Kernan*, 355 U.S. at 432). The statute has, therefore, been construed liberally to accomplish its important remedial and humanitarian purpose. *Urie v. Thompson*, 337 U.S.

163, 180, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949). Indeed, the Supreme Court has stated "[t]he coverage of the statute is defined in broad language, which has been construed even more broadly." *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 561-62, 107 S. Ct. 1410, 94 L. Ed. 2d 563 (1987).

In my view, the analysis in *Deering* correctly effectuates the FELA's important remedial and humanitarian purpose by construing its broad language liberally. Here, as in *Deering*, Wisconsin Central would have no incentive to sue plaintiffs for damage to its property if plaintiffs were not seeking damages for their personal injuries. A setoff for damages to the railroad's property in these circumstances defeats the purpose of the FELA to provide a remedy for injured railroad workers. The practical effect is the same as if the railroad had exempted itself from liability by a contract, rule, or regulation. Wisconsin Central's counterclaim seeks more than $1 million in damages to two trains and railroad tracks and reimbursement for environmental cleanup. It is not difficult to imagine a large award, given the potential cost of the damaged property. Those damages will almost certainly eliminate any recovery by plaintiffs for their personal injuries. The majority's interpretation of the FELA allowing the railroad to exempt itself from liability through a setoff defeats Congress's intent to compensate railroad workers for injuries caused negligently by their employer. Consistent with the FELA's purpose, I believe the phrase "any device whatsoever" should be construed broadly as a catchall to prohibit railroads from filing counterclaims for damage to railroad property and thereby exempting

themselves from liability for a railroad worker's personal injuries.

In sum, I would affirm the circuit and appellate court decisions dismissing Wisconsin Central's counterclaim in this case. As the appellate court held, prohibiting the counterclaim "is the interpretation most consistent with the FELA's overarching goal of providing a remedy to employees injured while participating in this dangerous occupation." 2018 IL App (1st) 172648, ¶ 21. I believe the majority's technical reading of section 55 of the FELA defeats the statute's purpose and undermines the congressional intent to provide a remedy for workers injured as a result of a railroad's negligence. Accordingly, I respectfully dissent from the majority's decision allowing Wisconsin Central to pursue its counterclaim for damages to railroad property.

JUSTICE NEVILLE joins in this dissent.

APPENDIX B — OPINION OF THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FIRST DIVISION, FILED DECEMBER 17, 2018

APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT, FIRST DIVISION

December 17, 2018, Decided

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).

DARRIN RILEY,

Plaintiff/Counterdefendant-Appellee,

Appendix B

v.

WISCONSIN CENTRAL, LTD.,

Defendant/Counterplaintiff-Appellant.

First District, First Division

Decision Under Review

Appeal from the Circuit Court of Cook County,
Nos. 15-L-1324, 16-L-4680;
the Hon. John H. Ehrlich, Judge, presiding.

Judgment affirmed.

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

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.

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.

I. BACKGROUND

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.

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.

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.

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.

II. ANALYSIS

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.

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*, 356 Ill. Dec. 733, 962 N.E.2d 418, 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, 413 Ill. Dec. 96, 77 N.E.3d 701 Defendant does not raise any serious concern over which section of the Code was applied and is not prejudiced.

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 Railroad Co. v. Winfield*, 244 U.S. 147, 151-52, 37 S. Ct. 546, 61 L. Ed. 1045 (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 Railroad Co.*, 356 U.S.

326, 329, 78 S. Ct. 758, 2 L. Ed. 2d 799 (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).

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.

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.

Appendix B

One of the first cases to address the issue and shape the discourse on section 55 is *Cavanaugh v. Western Maryland Railway Company*, 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.

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.

Appendix B

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 Railroad 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.

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).

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 Railroad Company*, 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 U.S. Dist. LEXIS 9313, 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 Railroad Co.*, No. 15-0689-DRH, 2016 U.S. Dist. LEXIS 12108, 2016 WL 411019 (S.D. Ill. Feb. 2, 2016); *Stack v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 94 Wash. 2d 155, 615 P.2d 457 (Wash. 1980) (*en banc*).

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*, No. 15-0689-DRH, 2016 U.S. Dist. LEXIS 12108, 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).

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 Railway Co.*, 187 Ill. 2d 369, 374, 718 N.E.2d 172, 240 Ill. Dec. 691 (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, 399 Ill. Dec. 844, 47 N.E.3d 349; *Travelers Insurance Co. of Illinois v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 302, 757 N.E.2d 481, 258 Ill. Dec. 792 (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, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (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, 984 N.E.2d 449, 368 Ill. Dec. 503 But on the issue presented here, there is already not "uniformity of decision" among federal courts.

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.

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.

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.

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 catchall). 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.

Appendix B

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, 619 N.E.2d 715, 189 Ill. Dec. 14 (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.

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 Railway 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.

Section 55 voids any device that "enable[s]" a railway to exempt itself from FELA liability. 45 U.S.C. § 55 (West 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.

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 Railway Co.*, 356 Ill. App. 3d 620, 622, 826 N.E.2d 1021, 292 Ill. Dec. 585 (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.

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.*, No. 09-0676-DRH, 2010 U.S. Dist. LEXIS 9313, 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).

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.

III. CONCLUSION

Accordingly, we affirm.

Affirmed.

JUSTICE PIERCE, dissenting:

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.

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.

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.

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.

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.

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.

APPENDIX C — ORDER OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, DATED DECEMBER 14, 2017

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

Nos. 15 L 1324 and 16 L 4680 (Consol.)

AMMONS/RILEY,

v.

WISCONSIN CENTRAL.

ORDER

This cause coming to be heard on Wisconsin Central's emergency motion to issue a new Rule 304(a) finding and clarify ruling regarding Count II of Wisconsin Central's counterclaims, it is hereby ordered:

1. Wisconsin Central's motion is hereby granted;

2. Counts I and II of Wisconsin Central's counterclaims are dismissed with prejudice for the reasons set forth in the June 14, 2017 memorandum opinion and order; and

3. Pursuant to Illinois Supreme Court Rule 304(a), there is no just reason to delay enforcement or appeal of the June 14, 2017 memorandum opinion and order granting the Plaintiff's motions to

dismiss Counts I and II of Wisconsin Central's counterclaims and an October 17, 2017 order denying Wisconsin Central's motion to reconsider.

ENTERED

Dated: Dec 14, 2017

Judge John H. Ehrlich
Circuit Court 2075

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, LAW DIVISION, DATED JUNE 14, 2017

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

No. 15 L 1324 & No. 16 L 4680
consolidated

MELVIN AMMONS,

Plaintiff/Counter-Defendant,

v.

CANADIAN NATIONAL RAILWAY CO.
AND WISCONSIN CENTRAL, LTD.,

Defendants/Counter-Plaintiffs,

DARRIN RILEY,

Plaintiff/Counter-Defendant,

v.

WISCONSIN CENTRAL, LTD,

Defendant/Counter-Plaintiff.

Appendix D

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), 46 U.S.C. §§ 51-60.[1] On May 10, 2016, Riley filed his complaint (16 L 4680) against WC also based on

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

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 owned 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 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.

Appendix D

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 property 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 plaintiffs 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 plaintiffs 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 plaintiffs 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).

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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).

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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.

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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* eases. 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.*

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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 – *respondent 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.

/s/_____
John H. Ehrlich, Circuit Court Judge

APPENDIX E — DENIAL OF REHEARING OF THE SUPREME COURT OF ILLINOIS, FILED JANUARY 27, 2020

SUPREME COURT OF ILLINOIS

Springfield, Illinois, MONDAY, JANUARY 27, 2020

THE FOLLOWING CASE ON THE REHEARING DOCKET IS DISPOSED OF AS INDICATED:

124454 - Melvin Ammons *et al.*, Appellees, v. Canadian National Railway Company *et al.* (Wisconsin Central, Ltd., Appellant). Appeal, Appellate Court, First District.
Petition for Rehearing Denied.
Kilbride, J., joined by Neville, J., dissented upon denial of rehearing, with opinion.

SEPARATE OPINION UPON DENIAL OF REHEARING

JUSTICE KILBRIDE, dissenting:

For the reasons I stated above, I dissent from the denial of plaintiff's petition for rehearing.

JUSTICE NEVILLE joins in this dissent.

APPENDIX F — ORDER OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, DATED OCTOBER 17, 2017

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

No. 15 L 1324 & No. 16L4680 consolidated

AMMONS/RILEY,

v.

WISCONSIN CENTRAL.

ORDER

This matter coming before the Court for case management and ruling on Wisconsin Central's Motion to Reconsider

It is hereby ordered

1. Wisconsin Central's motion to Reconsider is denied.

2. The Court finds pursuant to rule 304(a) that there is no just reason to delay enforcement of this order.

3. Case is continued to 11/20/17 at 9:00 a.m. for further case management.

Appendix F

ENTERED:

Dated: Oct 17, 2017

Judge John H. Ehrlich
Judge

Circuit Court 2075
Judge's No.

APPENDIX G — RELEVANT STATUTORY PROVISIONS

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

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.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an

Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908) [45 USCS §§ 51 *et seq.*] as the same has been or may hereafter be amended.

45 U.S.C. § 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, 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.

45 U.S.C. § 53. Contributory negligence; diminution of damages

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act [45 USCS §§ 51 *et seq.*] to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact

that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. § 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this Act [45 USCS §§ 51 *et seq.*] to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. § 55. Contract, rule, regulation, or device exempting from liability; set-off

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 act [45 USCS §§ 51 *et seq.*], 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 act [45 USCS §§ 51 *et seq.*], 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.

45 U.S.C. § 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this act [45 USCS §§ 51 *et seq.*] unless commenced within three years from the day the cause of action accrued.

Under this act [45 USCS §§ 51 *et seq.*] an action may be brought in a circuit [district] court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act [45 USCS §§ 51 *et seq.*] shall be concurrent with that of the courts of the several States.

45 U.S.C. § 57. Who included in term "common carrier"

The term "common carrier" as used in this act [45 USCS §§ 51 *et seq.*] shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Appendix G

45 U.S.C. § 58. Duty or liability of common carriers and rights of employees under other Acts not impaired

Nothing in this act [45 USCS §§ 51 *et seq.*] shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

45 U.S.C. § 59. Survival of right of action of person injured

Any right of action given by this act [45 USCS §§ 51 *et seq.*] to a person suffering injury shall survive 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, but in such cases there shall be only one recovery for the same injury.

45 U.S.C. § 60. Penalty for suppression of voluntary information incident to accidents; separability of provisions

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 thereof, 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.

If any provision of this Act [45 USCS §§ 51 *et seq.*] is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the Act [45 USCS §§ 51 *et seq.*] and the applicability of such provision to other persons and circumstances shall not be affected thereby.