No. 19-

IN THE

Supreme Court of the United States

RITA GUERRERO, INDIVIDUALLY AND
AS THE SPECIAL ADMINISTRATOR OF
THE ESTATE OF CELSO N. GUERRERO,

Petitioner,

v.

BNSF RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the provisions of the Federal Employers' Liability Act, 45 U.S.C. sec 51 et seq., Petitioner, Rita Guerrero, filed suit against her husband's employer, BNSF Railway Company, to recover damages arising from the death of her husband in a motor vehicle collision which occurred while he was on duty, responding to a Call by his supervisor to report for work to clear switching equipment during a severe snowstorm. On Respondent's Motion For Summary Judgment, the District Court granted summary judgment on the sole ground that there was not sufficient evidence to raise a question of fact whether decedent was within the scope of his employment at the time of the collision. (App. B, 14a). On appeal, the Seventh Circuit Court of Appeals found there was evidence from which a jury could conclude decedent was within the scope of his employment, and thereby covered by FELA, but affirmed summary judgment in favor of BNSF on an alternative ground asserted by Respondent, not considered by the District Court, that there was insufficient evidence to raise a jury question whether BNSF was guilty of negligence which contributed to its employee's death. (App. A, 1a). The questions presented for review are:

1. Whether the decision by the Seventh Circuit panel conflicts with provisions of the Federal Employers' Liability Act, and the uniform precedents of this Court, providing Petitioner the Seventh Amendment right to a jury trial, when the evidence shows that decedent was on duty, "under pay," subject to control by his supervisor, and responding to his supervisor's direction to report for work to clear switches during a severe snow storm, in order to maintain interstate rail service.

2. Whether the precedent set by this Seventh Circuit decision usurps petitioner's right to a jury trial and therefore cannot stand because it will erode Congress' and this Court's strong uniform effectuation of the jury as the body charged with deciding questions of fact in FELA cases.

LIST OF PARTIES

The parties to this proceeding are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Respondent, BNSF Railway Company, is a Delaware Corporation, and is a wholly owned subsidiary of Burlington Northern Santa Fe, LLC, a Delaware Limited Liability Company.

LIST OF RELATED PROCEEDINGS

Guerrero v. BNSF Railway Company, No. 1:17-cv-01044, U.S. District Court for the Central District of Illinois, Peoria Division. Judgment entered January 3, 2019.

Guerrero v. BNSF Railway Company, No. 19-1187, U.S. Court of Appeals for the Seventh Circuit. Judgment entered July 17, 2019. Rehearing denied August 14, 2019.

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The Order of the United States District Court for the Central District of Illinois, Peoria Division (Appendix B, pp. 14a – 23a) was filed on January 3, 2019.

The Denial of Rehearing by the United States Court of Appeals for the Seventh Circuit (Appendix C, pp. 24a – 25a) was filed on August 14, 2019.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

The Seventh Circuit Court of Appeals' Opinion was filed on July 17, 2019. (App. A, 1a). On August 14, 2019, the Seventh Circuit Court of Appeals denied Petitioner's Petition For Rehearing. (App. C, 24a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Seventh Amendment to the Constitution of the United States.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be

otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Title 45 United States Code, Section 51.

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

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 chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

Petitioner, Rita Guerrero, petitions for issuance of a Writ of Certiorari to the U. S. Court of Appeals for the Seventh Circuit to reverse the 7th Circuit's decision entered on July 17, 2019, and denial of Rehearing entered on August 14, 2019, which usurp this FELA employee's right to jury trial, contrary to the provisions of the Federal Employer's Liability Act, 45 U.S.C. sec. 51 et seq., and contrary to the uniform decisions of this Court, lest the strict standard for providing the remedial and humane right of recovery Congress provided be denied.

Proceedings Below:

The U.S. District Court for the Central District of Illinois, Peoria Division, granted summary judgment on January 3, 2019 in favor of respondent, BNSF Railway Company (App. B, 14a), on the single ground that the District Judge found no material questions of fact whether petitioner's deceased husband, Celso Guerrero, was within the scope of his employment for BNSF when he was involved in a motor vehicle collision on February 1, 2015 resulting in his death on February 2, 2015. The District Judge did not address or rule on respondent's alternative contention that there was not sufficient evidence to raise a question of fact whether BNSF, through the acts and omissions of its Roadmaster, could be found negligent by a jury in his management of decedent Guerrero.

In its Opinion, the 7th Circuit panel disagreed with the District Court, finding that there was a question of material fact about the scope of employment question, precluding summary judgment on that ground. (App. A, 8a-9a). But the panel nonetheless affirmed the District

Court's grant of summary judgment on the alternative ground that no reasonable jury could find BNSF was negligent. The facts which follow focus on the 7th Circuit's decision to grant summary judgment on the alternative ground that there was insufficient evidence on which a jury could base a finding that BNSF, by its Roadmaster, was negligent in subjecting its employee, Guerrero, to the extreme hazard of traveling through a known severe snowstorm while on duty, responding to the Roadmaster's Call. Petitioner contends that there was ample evidence upon which a jury could decide that the Roadmaster was negligent in exposing Guerrero to the dangerous storm conditions, such that this Opinion directly conflicts with this Court's uniform decisions affirming the right of FELA claimants to submit their claims to a jury under the Seventh Amendment, as intended by Congress.

The Evidence Supporting Questions Of Fact:

This action under the Federal Employer's Liability Act, 45 U.S.C. sec. 51 et seq., was brought by petitioner, Rita Guerrero, the widow and Special Administrator of the Estate of her husband, Celso Guerrero, to recover compensatory money damages from the respondent, BNSF Railway Company (hereafter BNSF), due to his death on February 2, 2015 resulting from injuries he suffered on February 1, 2015 in a motor vehicle collision which occurred as he was responding to his supervisor's Call to report for snow clearance work at the BNSF Galesburg facility. Celso Guerrero lived in Kewanee, Illinois, approximately 40 miles from the Galesburg Yard. He had worked for BNSF for 35 years as a machine operator on the BNSF surface gang on a regular work shift of five days per week, Monday through Friday. (D.

26, at 4).[1] His work mostly involved track repair, but as weather conditions required, maintenance of way workers were also specially tasked to perform snow clearance. (D. 26-2, Exh. C, Burwell dep. at 6:3-10, 29:14-30:1).

On Friday, January 30, 2015, a heavy snowstorm was forecast for the Galesburg area. (D. 26-3, Exh D, D. Parish dep. at 18:13-19). Unlike neighboring Roadmaster, Dan Parish, who arranged on Friday to bring his crew in, Mr. Guerrero's supervising Roadmaster, Nicholas Burwell, did not pre-arrange with him to come in for work on the weekend to perform anticipated snow clearance work. (D. 26-2, Exh. C, Burwell dep. at 28:14-18). Roadmaster Parish testified: "We were told by our boss at the time that we needed to help out in whatever way to cover our own territories on that particular day. . . . The boss tells you that, you comply, you don't you? . . . You better." (D. 26-3, Exh. D, D. Parish dep. at 21:24-22:10, 25:24-26:4).

From updated weather forecasts on Saturday, Roadmaster Burwell learned that the snow would get heavier overnight, so he would need 8-10-12 additional men "to keep the tracks cleared." (D. 26-2, Exh. C, Burwell dep. at 32:21-33:12). Celso Guerrero was needed for Guerrero's type of work to have more bodies for the big facility and amount of switches that needed to be cleaned out. (D. 26-3, Exh. D, D. Parish dep. at 18:20-19:4). Burwell also knew that the snow was going to worsen; that the people he called to come in on Sunday, February 1 at 7:00 a.m. had to travel the roads that were getting snow covered; and that the only way they could get to work was by their

1. Record citations are to the District Court pleadings and evidence filed for the summary judgment motion.

own private vehicles on those highways. (D. 26-2, Exh. C, Burwell dep. at 38:7-39:6). After the forecast for the storm worsened, on Saturday, January 31, 2015 at approximately 6:00 p.m., Roadmaster Burwell called Mr. Guerrero at home to request that he come in by 7:00 a.m. Sunday to work overtime to clear snow in the Galesburg Yard. (D. 26-2, Exh. C, Burwell dep. at 30:14-31:17, 56:2-5). Burwell knew he could rely on Celso Guerrero, a pretty good worker, dependable, never had any disputes, and didn't turn down overtime. (D. 26-2, Exh. C, Burwell dep. at 36:7-17).

Roadmaster Parish testified: "It was a heck of a snowstorm." (D. 26-3, Exh. D, D. Parish dep. at 26:3). Weather records cited by the court (App. A, 3a, 11a) indicate that 8 inches of snow, fully 1/3rd of the average annual total snowfall at Galesburg, fell that night. BNSF Structures Supervisor, Ellen Burns, was also helping the Roadmaster team at the Galesburg Terminal for winter storm coverage, calling in backup employees from a pre-planned manpower list, if the weather became inclement. (D. 26-10, Exh. I, Burns dep. at 16:4-14, 31:24-33:31). Roadmaster Burwell remarked that after he called his crew, "Did I stay up to watch the snow? No." (D. 26-2, Exh. C, Burwell dep. at 37:6-9).

IDOT snow plow operator, Mark Parrish (no relation to Dan Parish), had begun plowing Snow Route 2 on Route 34 at about 10:00 p.m. Saturday. (D. 26-6, Exh. E, M. Parrish dep. at 6:6-22, 7:11-15). By 5:30 a.m. Sunday, he had completed 10 passes in 5 trips clearing snow in each direction on his 20 mile route. (D. 26-6, Exh. E, M. Parrish dep. at 27:4-14).The rate of snowfall had increased, and the snow was 4 to 5 inches deep on Route 34 in that

area on February 1, 2015. (D. 26-6, Exh. E, M. Parrish dep. at 51:19-52:4, 28:12-16).

Mr. Guerrero left his home in Kewanee at approximately 5:00 a.m. driving his personal auto towards the Galesburg Yard. (D. 26-1, Exh. B, R. Guerrero dep. at 20:12-14). While driving southbound on Rt. 34, near Oneida, Illinois, Mr Guerrero's auto slid on the roadway into collision with Mark Parrish's IDOT snowplow travelling northbound, resulting in his death the next day, February 2. (D. 26, p. 5, para. 8; p. 6, para. 11-12; D. 26-7, Exh. F, Worsfold dep. at 33-45).

Illinois State Trooper Callie Worsfold was called in early, at 2:30 to 2:45 a.m., because they knew with such a large amount of snowfall predicted, it was going to be very troublesome for traffic. (D. 26-7, Exh. F, Worsfold dep. at 9:17-23). She was called to the scene of the collision on February 1, 2015, arriving at about 6:00 a.m. (D. 26-7, Exh. F, Worsfold dep. at 4:7-9, 14:11-13). She thought it would take a bit to get there because the road was completely snow covered by a "good probably three inches or more" of snow on the ground. (D. 26-7, Exh. F, Worsfold dep. at 11:11-19, 13:7-10). She saw no snowplows; Rt. 34 appeared it had not been plowed; and "I was the plow, it felt like." (D. 26-7, Exh. F, Worsfold dep. at 14:13-18). She testified it was dangerous to drive on that Highway 34 that night under the conditions. (D. 26-7, Exh. F, Worsfold dep. at 58:10-12). She later spoke to Mark Parrish and to Celso Guerrero at the hospital, and did not issue any traffic citations. (D. 26-7, Exh. F, Worsfold dep. at 19:19-20:8, 29:22-30:2, 37:8-14, 47:22-24). IDOT driver Mark Parrish testified the portion of Rt. 34 he was plowing was ". . . notorious for drifting and blowing snow." (D. 26-6, Exh. E, M. Parrish dep. at 15:9-10).

Mr. Guerrero Was On Duty, "Under Pay," Subject To Control By BNSF:

For a regularly scheduled workday, employees are not paid until the employee arrives at the work location and the shift starts. (D. 26-2, Exh. C, Burwell dep. at 25:2-7). However, per Rule 30, subpart C, of the union contract, employees who are called into work after release from duty begin to work and be paid from the time called in to when they report to the designated point. [D. 26-9, Exh. H, Rule 30(C)]. Despite the collision, Mr. Burwell approved a "settlement claim statement" for Celso Guerrero's wages from the time Mr. Guerrero agreed by phone to work overtime at 6:00 p.m. Saturday to the planned arrival time of 7:00 a.m. on Sunday. (D. 26-2, Exh. C, Burwell dep. at 13:19-14:16). James Hurlburt, a BNSF labor relations lawyer, testified that Mr. Guerrero was "under pay" "being paid from the time the phone call came to his house under Rule 30(C), and so would not be entitled to a $300,000 Death Benefit under the CBA." (D. 28-1, Exh. J, Hurlburt dep. at 19:5-20, 21:8-22:5).

Mr. Guerrero was considered "under pay" from the time of the 6:00 p.m. call on this Saturday of his off-duty weekend. He was required to report to the Galesburg Yard on time, to be adequately rested, to be fit for duty, and to have his necessary equipment. (D. 26-3, Exh. D, D. Parish dep. at 38:17-39:10, 46:10-47:19). Ms. Burns testified that during the time after the 6:00 p.m. Call, the employee ". . . should be preparing, resting, getting ready for work before you come in to work, . . . and not partake in other activities that would be detrimental to your safety in your ability to do your job." (D. 26-10, Exh. I, Burns dep. at 43:12-44:6).

After Mr. Guerrero went into an "under pay" status, he was subject to directions by his supervisor. The Roadmaster "has the authority to tell him what time he wants him to arrive or any other railroad related tasks that they want him to perform." (D. 26- 10, Exh. I, Burns dep. at 17-23). If the supervisor deemed a particular highway dangerous, the supervisor could tell the employee to avoid that highway and use a different highway. (D. 26-10, Exh. I, Burns dep. at 45:12-16). When Mr. Guerrero comes in at the request of his Roadmaster to respond to an inclement weather situation, he's doing it because the railroad needs him. (D. 26-10, Exh. I, Burns dep. at 31:5-16). As a 24/7 operation moving passengers and freight, it was for the benefit of the railroad to have Guerrero and others called in to keep the tracks and switches open. (D. 26-3, Exh. D, D. Parish dep. at 50:10-22).

It's the judgment of the supervisor, Burwell, if he wants to bring an employee in early before the storm really hits and it gets dangerous, because it's going to get bad later, "and we want to get you here . . .". (D. 26-3, Exh. D, D. Parish dep. at 55:16-56:9). Burwell had the authority during the interim period after the 6:00 p.m. Call, to tell Mr. Guerrero to "mount up" to arrive at any time earlier than 7:00 a.m. the next morning; to come now; or at 3:00 a.m. or at 5:00 a.m. (D. 26-3, Exh D, D. Parish dep. at 65:20-66:10). If Mr. Guerrero got a call with a direction from his supervisor while on his way to Galesburg, whatever the direction might be, he's expected to follow that direction. (D. 26-3, Exh. D, D. Parish dep. at 47:12-18). Roadmaster Parish testified: "If they call an employee like Celso and ask him to come in, if he is available, they expect him to comply." "If they can do it, you expect them to come in." (D. 26-3, Exh. D, D. Parish dep. at 22:11-22).

The supervising Roadmaster also had authority to provide hotel accommodations at the Best Western in Galesburg for the workers called in for overtime (D. 26-10, Exh. I, Burns dep. at 37:1-16), if he wants to bring the employees in early because it's going to get bad and "we want to get you here." (D. 26-3, Exh D, D. Parish dep. at 55:16-56:9). Ellen Burns had been put up in a hotel before, when there was a storm and she did not feel safe making it home. (D. 26-10, Exh. I, Burns dep. at 37:1-16).

Petitioner respectfully shows that BNSF, through its Roadmaster Burwell, knew that Guerrero was called in specially, that the storm forecast to be severe was later forecast to worsen, that Guerrero had no other choice than to drive his own auto over rural Route 34 known to be notorious for blowing snow and dangerous in heavy snow, and that Burwell had authority to prevent exposing Guerrero to the dangerous snow covered road by bringing him in earlier, or later, or by providing a hotel room. The evidence shows, without contradiction, that after calling Guerrero at 6:00 p.m., Burwell did nothing more; not even to remain aware of the worsening storm conditions.

REASONS FOR ALLOWANCE OF THE PETITION

A. Certiorari Is Warranted Because The Decision Of The Court Of Appeals Directly Conflicts With Petitioner's Seventh Amendment Right To Jury Trial Provided By The Federal Employers' Liability Act And Settled Precedents From The Supreme Court

Precedents from the U.S. Supreme Court uniformly protect the important public interest that Congress

intended for the Federal Employer's Liability Act, 45 U.S.C. sec. 51 et seq. to provide liberal recovery for railroad workers injured in the scope of their employment, imposing on the railroad the duty of paying damages when injury is caused in whole or in part by the employer's fault. Kernan v. American Dredging Co., 355 U.S. 426, 432 (1958), citing Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 508-510 (1957). From the earliest decisions in New York C.R. Co. v. Winfield, 244 U.S. 147 (1917) and Erie Railroad Company v. Winfield, 244 U.S. 170 (1917), this Court has emphasized that the carrier's liability is predicated on negligence; and that the railroad's duty increases as the risk increases, Bailey v. Central Vermont Ry., Inc., 319 U.S. 350, 353 (1943); Urie v. Thompson, 337 U.S. 163, 179 (1949); and that reasonableness of the care exercised is "in all cases" the deciding question " . . . for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent." Bailey, supra, 319 U.S. at 353. Bailey teaches at length that:

> "The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasized the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide the scope of that type of issue (citations omitted). To withdraw such a question from the jury is to usurp its functions.
>
> The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' (citation omitted) It is part and parcel of the remedy afforded railroad workers

> under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." Bailey, supra, 319 U.S. at 354.

Neither Congress nor the courts have removed or weakened the injured worker's jury trial right, nor could they since it is predicated on the Seventh Amendment. Accord: Tennant v. Peoria & P.U. Ry. Co., 321 U.S. 29, 34-35 (1944) teaching it is not the function of a court to search the record for conflicting evidence in order to take the case from the jury; nor are courts free to reweigh the evidence and set aside a jury verdict merely because judges feel that other results are more reasonable. In Blair v. Baltimore & O.R. Co., 323 U.S. 600, 602 (1945), this Court taught that "Because important rights under the Act were involved, we granted certiorari." Again, in Lavender v. Kurn, 327 U.S. 645, 652-653 (1946), this Court stressed the Supreme Court of Missouri had no authority to reverse a verdict in the claimant's favor, teaching: "Only when there is a complete absence of probative facts to support the conclusion reached [by a jury] does

a reversible error appear. . . . And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The uniform march of this Court's protection of the right to jury trial in FELA cases was again emphasized in Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 509 (1957):

> "Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination. Some say that the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that Congress has not seen fit to substitute that scheme cannot relieve this Court of its obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction."

See also: Webb v. Illinois Central Railroad Co., 352 U.S. 512, 515-516 (1957), certiorari granted to consider whether the Court of Appeals erred in reversing a finding that the proofs were sufficient to show negligence; Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 109-110 (1959), certiorari granted to reverse an "improper standard" used to review a jury finding based on medical evidence.

Gallick v. Baltimore & Ohio Railroad Company, 372 U.S. 108, 113, 120 (1963) involved bilateral leg amputations as a result of an insect bite from a fetid pool near the work site. Though on the facts, the Court found that reasonable minds could differ as to negligence and causation, the Court reiterated that it is the role of the jury, not judges, to weigh the evidence and draw the inferences and conclusions which support the verdict. Foreseeability of harm was described:

> "It is widely held that for a defendant to be liable for consequential damages he need not foresee the particular consequences of his negligent acts: assuming the existence of a threshold tort against the person, then whatever damages flow from it are recoverable. (citations omitted) And we have no doubt that under a statute where the tortfeasor is liable for death or injuries in producing which his 'negligence played any part, even the slightest' (Rogers v. Missouri Pac. R. Co., (citation omitted), such a tortfeasor must compensate his victim for even the improbable or unexpectedly severe consequences of his wrongful act." Gallick, supra, 372 U.S. at 120-121.

In Dennis v. Denver & Rio Grande Western Railroad Co., 375 U.S. 208, 209 (1963), this Court reversed the decision of the Supreme Court of Utah, to reinstate a jury verdict in favor of a railroad worker who suffered loss of two fingers because he was not provided adequate protection from subzero temperatures while working outside. The Court found:

> "There can be little dispute that these facts, if believed, establish negligence by respondent railroad, since they show that the foreman, who had full control over petitioner's activities while on this job, did not take all necessary and reasonable precautions to prevent injury to petitioner when put on notice of his condition."

Last, in CSX Transportation, Inc. v. McBride, 564 U.S. 685, 699, 703-704 (2011), this Court affirmed the 7th Circuit jury instruction based on the FELA and Rogers causation standard of "in whole or in part" rather than a more traditional standard in negligence cases of "proximate cause", relying in part on the decades of use of the instruction, without Congressional correction, and use of the instruction by countless judges and juries. The Court relied on Gallick to address the concept of "[R]easonable foreseeability of harm" as an ingredient of negligence. The basic meaning of the phrase is whether the carrier "fai[l] to observe that degree of care which people of ordinary prudence and sagacity would use under the same or similar circumstances." "Thus, '[i]f a person has no reasonable ground to anticipate that a particular condition . . . would or might result in a mishap and injury, then the party is not required to do anything to correct [the] condition." So, in this Guerrero case at bar, the question is whether such a prudent person, the reasonable juror, under the severe storm conditions prevailing on February 1, 2015, would or might anticipate a mishap and injury if he/she personally went, or sent someone else out, into the storm. How could they not? Indeed, the 7th Circuit panel below explicitly relied on the fact that the absence of other motorists on the highway that night, as noted by Trooper Worsfold, implied that they elected to

protect themselves from mishap and injury by remaining indoors, thereby distinguishing Guerrero from the general population. (App. A, 8a). If the "general population" perceived danger, and protected themselves from the storm, a jury of those same persons could well find that the proofs in this Record would justify with reason that BNSF through its supervisor was negligent in his control of Mr. Guerrero.

Petitioner respectfully contends that issuance of a Writ of Certiorari is warranted because the history of the FELA remedy enacted by Congress, as consistently interpreted and enforced by this Court, demonstrates that the 7th Circuit decision in this case directly conflicts with Congressional intent and this Court's precedents.

The facts supporting a finding of negligence by a reasonable and prudent jury are undisputed: BNSF, by its Roadmaster Burwell, knew full well that a severe snowstorm would occur, and did develop overnight on Saturday into Sunday. He knew he was bringing crew members from home out into the storm. He knew those crew members would have to travel on snow covered roads, even through an area "notorious" for blowing and drifting snow. He knew they would be using their own autos. And he knew that he could protect them by altering the time of arrival (before or after the intensity of the storm) or even by providing safe hotel accommodations in Galesburg close to the Yard worksite. Instead of taking reasonable available measures to avoid subjecting Mr. Guerrero to this hazard, Mr. Burwell did nothing after issuing the Call, not even to "watch the snowfall." A reasonable and prudent jury could find that Roadmaster Burwell, as in Dennis, was a foreman who had full control over Guerrero's activities, but did not take "all necessary and

reasonable precautions to prevent injury to [him] when put on notice of [the conditions]."

Contrary to this Court's repeated instruction that in nearly all cases the questions of negligence and causation in FELA cases must be submitted to a jury for determination, the 7th Circuit panel substituted their own value judgments to try to explain away the evidence which supports a negligence finding. Thus, the panel infers that petitioner would have the railroad clear the highway of snow (App. A, 10a); but petitioner never suggested such. The panel observes that the reason BNSF needed extra help was due to "nothing but the snowstorm." But the storm was also the condition which imposed great hazard on the railroad's employee. The panel decries a finding of negligence because Guerrero had to "drive while it was still dark," but no one ever suggested darkness alone raised a finding of negligence. And the panel trivialized BNSF's control over its employee by casually observing that "all that BNSF asked Guerrero to do was to come in and help with the task of clearing snow from the tracks." (App. A, 13a). A jury, of course, can equally evaluate these contentions, but could decide to the contrary, that what BNSF did was to send its employee into a known highly dangerous condition, which was totally unnecessary considering the very simple alternative provisions BNSF could have provided for him. Whether the panel's concerns would be persuasive to a jury should be tested in that forum; but on the Record in this case, they cannot be determinative as a matter of law.

Certiorari should be granted to abate the direct conflict between the instant Opinion and this Court's precedents, so to vindicate petitioner's important Seventh Amendment right to a jury trial by vacating the decision below and remanding for jury trial.

B. Certiorari Is Also Warranted In Order To Prevent Erosion Of The Settled Right To Jury Trial In FELA Cases By The Opinion Below Which Alters The Liberal Standard For Entrusting Questions Of Fact As To Negligence To The Jury, And Restricting Such Decisions From The Court

Certiorari is also warranted to prevent the instant Opinion from becoming the basis by which railroads and courts erode the remedial and humane benefits of the Federal Employer's Liability Act. The 7th Circuit panel decision cites but one case, Consolidated Rail Corporation v. Gottshall, 512 U.S. 532 (1994) for the correct proposition that the FELA is not a worker's compensation statute. But Gottshall reaffirms the liberal standards that apply in FELA cases, and was primarily a decision defining the elements to be recognized in federal courts for finding intentional infliction of emotional distress. Gottshall does not, in any way, mitigate the long history of decisions recognizing and implementing the liberal remedy afforded by the FELA.

The 7th Circuit Opinion notes that Mr. Guerrero had "some discretion" in how he carried out this overtime assignment; but expressly disclaims that he was "at fault for the accident." (App. A, 13a). Quite so, because even if Mr. Guerrero had been negligent to some degree, such comparative fault would be limited to consideration by a jury for reduction of damages. Dennis v. Denver & Rio Grande Western Railroad Co., 375 U.S. 208, 210 (1963).[2]

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2. The panel's reference that Mr. Guerrero had "some discretion" and came to work "under conditions known to both of them" (App. A, 13a) implies an element of assumption of risk, which has since 1939 been rejected by Congress as a defense in FELA cases. 45 U.S.C. sec. 54.

Absent applicable relevant case law to support the 7th Circuit panel's decision, it appears that the primary basis for the decision is that the panel simply did not think the conditions to which Guerrero was exposed implicated any responsibility by Burwell to take remedial measures; i.e. "the duty to keep snowy state highways plowed and safe." (App. A, 10a). Of course, plaintiff had never suggested that BNSF had any obligation or ability to plow the highway.

Rather, plaintiff's contention was much less of a burden on BNSF; namely to refrain from exposing Mr. Guerrero to the known hazard of this severe storm. As this Court has held long ago, the non-delegable duty of the railroad is to provide for a reasonably safe place to work, even if on the premises of another. Shenker v. Baltimore & Ohio R.R. Co., 374 U.S. 1 (1963). In practice, liability under the FELA has been imposed when the worker was sent to a dangerous place, over which the railroad had no ability to remedy the condition of the premises, based on the fact that the railroad subjected the worker to the hazard. See, e.g.: Duffield v. Marra, Inc., 166 Ill.App.3d 754 (5th Dist. 1988), a privately owned snow covered parking lot; Howes v. Baker, 16 Ill.App.3d 39 (1st Dist. 1973), snow, ice and debris covered premises of a customer; Yarde v. Hines, 238 S.W. 151 (Mo. App. 1922), a restaurant for breakfast; Payne v. CSX Transportation, Inc., 467 S.W.3d 413 (Tenn. 2015), a customer facility with carcinogenic contaminants; Mills v. CSX Transportation, Inc., 300 S.W.3d 627 (Tenn. 2009), an off-site defective stairwell at a training facility; Empey v. Grand Trunk Western R. Co., 869 F.2d 293 (6th Cir. 1989), an off-duty motor lodge with a defective shower enclosure.

The panel grants that Burwell could have taken any one of several precautionary measures available to him, but characterizes them as "going the extra mile" which,

in the opinion of the panel "does not demonstrate that BNSF was negligent because Burwell did not do so." (App. A, 11a). But this is nothing more than a value judgment which applies the wrong standard. As the Court teaches in Urie v. Thompson, 337 U.S. 163, 181-182 (1949):

> "To read into this all-inclusive wording a restriction as to the kinds of employees covered, *the degrees of negligence required,* or the particular sorts of harms included, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court. (emphasis added).

See: Pehowic v. Erie Lackawanna Railroad Company, 430 F.2d 697, 699-700 (3rd Cir. 1970), citing Sinkler v. Missouri Pacific R. Co., 356 U.S. 326, 329 (1958), Kernan, supra, and Rogers, supra, reciting:

> " . . . a trial court is justified in withdrawing such issues from the jury's consideration only in those extremely rare instances where there is a zero probability either of employer negligence or that any such negligence contributed to the injury of an employee."[3]

The many Supreme Court authorities cited above plainly hold that the decision of which measures, if any, should be taken to protect the worker resides with the jury of reasonable and prudent persons, not with the Court.

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3. The court observed at its footnote 2 that the Supreme Court has made it abundantly clear that it will summarily reverse when this standard has not been applied.

If left to stand, the 7th Circuit Opinion in this Guerrero case is highly likely to be cited for a proposition that railroads may contend, and courts may decide, to substitute their own conceptions of what facts are important, or trivial, and to render decisions which the FELA and this Court's precedents hold must be left for a jury to decide. If so, railroads will assert, and courts may be persuaded to adopt, a new standard in FELA cases; that even when evidence shows actual knowledge of a hazardous condition into which the employer sent the worker, the court rather than a jury could negate the "reasonable prudence" required of the employer, thereby depriving the employee of the right to jury trial which Congress has enacted. Gallick v. Baltimore & Ohio Railroad Company, 372 U.S. 108, 114-115 (1963), citing Tennant v. Peoria & P.U.R. Co., 321 U.S. 29, 35 (1944) teaches:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body.
>
> . . .
>
> Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions *or because judges feel that other results are more reasonable.* (emphasis added).

This Court has never wavered from enforcing the liberal standards of the FELA, which effectuate Congress' "humanitarian" and "remedial" goals. CSX Transportation, Inc. v. McBride, 564 U.S. 685, 691-692 (2011). Now is not the time, and this is not the case, to eviscerate the Federal Employers' Liability Act protections for railroad workers.

Petitioner respectfully requests that the Court grant Certiorari to prevent erosion of the settled standard for FELA cases which the instant Guerrero Opinion will likely foster.

CONCLUSION

For the foregoing reasons, petitioner, Rita Guerrero, respectfully requests that this Court grant her Petition For Writ of Certiorari to provide plenary review of the decision of the Seventh Circuit Court of Appeals, and to reverse that decision to remand for jury trial, in order to effectuate the remedial and humanitarian provisions of the Federal Employers' Liability Act.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED JULY 17, 2019

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 19-1187

RITA GUERRERO, INDIVIDUALLY AND
AS THE SPECIAL ADMINISTRATOR OF THE
ESTATE OF CELSO N. GUERRERO,

Plaintiff-Appellant,

v.

BNSF RAILWAY COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 1:17-cv-01044-MMM-JEH — **Michael M. Mihm**, *Judge.*

May 28, 2019, Argued
July 17, 2019, Decided

Before WOOD, *Chief Judge*, and BAUER and EASTERBROOK, *Circuit Judges.*

Appendix A

WOOD, *Chief Judge*. Behind the legal question we must resolve in this case is a sad story: as Celso Guerrero was trying to drive to his job at BNSF Railway through a snowstorm early one morning, his car skidded, it collided with a snowplow, and he was killed. His widow, Rita Guerrero, who appears on her own behalf and as administrator of her late husband's estate, is seeking compensatory money damages from BNSF. (Our references in this opinion to Guerrero refer to Celso Guerrero, unless the context requires otherwise.) The district court concluded that Guerrero was not acting within the scope of his employment when the fatal accident occurred, and thus the Federal Employer's Liability Act (FELA) does not apply to the case. In our view, the question of work status is a close one, but it is one that we need not resolve. No jury could find that BNSF was negligent in any action it took or failed to take with respect to Guerrero, and so on that ground we affirm the district court's judgment.

I

We take our account of the undisputed facts from the district court's opinion, recognizing that this case was resolved through a motion for summary judgment, and so (as the district court also did), we accept the facts in the light most favorable to the opponent of the motion, Guerrero.

Celso Guerrero was a machine operator for BNSF. His normal schedule required him to work from Monday through Friday, but he was subject to possible overtime

work at other times. His primary duty was track repair, but he was also expected to perform other tasks as needed, including snow removal. On Saturday, January 31, 2015, Guerrero received a telephone call around 6:00 p.m. from Nick Burwell, the BNSF Roadmaster in charge of track maintenance for the Galesburg, Illinois, railyard and surrounding area. Burwell told Guerrero that a significant snowstorm was expected, and so he was looking for employees to clear snow from the tracks starting the next morning at 7:00 a.m. at the Galesburg facility. In making these calls, Burwell followed a union seniority list. Guerrero was not required to accept this work opportunity, but he did. From that point onward, we can assume that BNSF was relying on him to show up at the assigned time, and he at a minimum would have had to notify the company if he no longer wanted to accept the extra work.

Driving his personal vehicle, Guerrero left his home in Kewanee, Illinois (about 40 miles northeast of Galesburg) at 5:00 a.m. on February 1. The predicted snowstorm was underway, and it was snowing hard as Guerrero drove along Illinois Route 34. The National Weather Service documented at least four, but likely closer to eight, inches of snow cover along his route. *Interactive Snow Information, Modeled Snow Depth for 2015 February 1, 12:00 UTC*, The National Weather Service's National Operational Hydraulic Remote Sensing Center, https://www.nohrsc.noaa.gov/interactive/html/map.html (Physical Element "Snow Depth"; Date "February 1, 2015, 12:00 UTC"; City, ST "Galesburg, IL"). While heading southbound, near Oneida, his car slid on the roadway, spun

across the median, and collided with a snowplow being operated by the Illinois Department of Transportation (IDOT); the plow was in the northbound lane. Guerrero was severely injured and died the next day in the hospital. Illinois State Trooper Carrie Worsfold responded to the collision. Commenting that "I was the plow, it felt like," she recalled that the road was completely covered with snow—maybe three inches or more.

II

Rita Guerrero, suing in her own right and for Guerrero's Estate, filed this action under the FELA, 45 U.S.C. §§ 51-59. Asserting that her husband was killed while he was on duty and acting within the scope of his employment, she sought compensatory damages. BNSF took issue with her assertion that Guerrero was on duty at the time of his injury; it contended that he was merely commuting to work, as he did for his normal shift every day, and that commuting falls outside the scope of employment in this situation. BNSF argued in the alternative that no trier of fact could find that BNSF was negligent either by act or omission, and that this was an independent reason for judgment in its favor. On BNSF's motion for summary judgment, the district court ruled that Guerrero's fatal injury occurred at a time when he was not acting within the scope of his employment. The FELA thus did not apply—a conclusion to which the judge attached jurisdictional significance. Without addressing BNSF's negligence argument, the judge granted summary judgment in BNSF's favor, presumably with prejudice, since the judgment document does not

specify otherwise and makes no mention of a jurisdictional ground for dismissal. See FED. R. CIV. P. 41(b); *Swanigan v. City of Chicago*, 775 F.3d 953, 959 n.2 (7th Cir. 2015). Guerrero has appealed.

III

Although the parties spend most of their time arguing over the district court's finding about scope of employment, we have much less to say about that, and more to say about BNSF's alternate, negligence-based argument. The reason is simple: it appears to us that there are disputed issues of material fact on the former point that would preclude summary judgment, but there are no such issues on the latter point.

A

Before turning to the merits, we need to say a word about jurisdiction. Citing *Caillouette v. Balt. & Ohio Chicago Terminal R. Co.*, 705 F.2d 243, 245-46 (7th Cir. 1983), the district court held that the answer to the question whether the FELA covers Guerrero's claims—here, the answer to the question whether Guerrero was within the scope of his employment when the accident occurred—"implicates the Court's subject matter jurisdiction." It is true that the *Caillouette* court's discussion of FELA coverage appears in a section headed "Subject Matter Jurisdiction." But saying so does not make it so. All the court actually held in *Caillouette* was that the injured rail worker was indeed acting within the scope of his employment when he walked across a rail yard, and it affirmed a jury verdict in the worker's favor.

Quite a bit of water has gone under the bridge since 1983, when *Caillouette* characterized a question relating to the scope of coverage under a statute as one affecting the district court's subject-matter jurisdiction. In *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006), the Supreme Court endeavored to clarify the difference between "federal-court 'subject-matter' jurisdiction over a controversy; and the essential ingredients of a federal claim for relief." *Id.* at 503. In that case, it held that the provision in Title VII of the Civil Rights Act limiting its coverage to employers having 15 or more employees does not affect subject-matter jurisdiction. Instead, it simply "delineates a substantive ingredient of a Title VII claim for relief." *Id.* Later decisions from the Supreme Court have made clear that this was not a mere quirk of Title VII law. Over and over, the Court has stressed the difference between the fundamental power to adjudicate a claim (*i.e.* something affecting subject-matter jurisdiction) and lesser restrictions, including claim-processing rules and ingredients of a claim. See, *e.g., Fort Bend Cnty., Texas v. Davis*, 139 S. Ct. 1843, 204 L. Ed. 2d 116 (2019) (administrative charge-filing requirement under Title VII is a mandatory, but non-jurisdictional, prerequisite to suit); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010) (extent of extraterritorial reach of securities statute relates to scope of statute, not subject-matter jurisdiction); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010) (Copyright Act's registration requirement is precondition to suit, but does not affect subject-matter jurisdiction).

The import of those cases is unmistakable: unless Congress has unambiguously said in a statute that a particular limitation affects the district court's subject-matter jurisdiction, a limitation on the right to recover (such as number of employees, or extraterritorial reach, or scope of employment) describes an element of the case. Nothing in the FELA compels the conclusion that the merits of a claim and subject-matter jurisdiction are conflated for its purposes. The question before us is thus only whether Guerrero has alleged enough to survive summary judgment on the scope-of-employment issue. BNSF properly preserved this point in the district court, and so the fact that it would be too late now to inject that issue into the case is of no moment.

B

The federal reporters are littered with cases examining whether the FELA applies to an employee injured while he or she is commuting to or from work. Often the answer is no: courts generally hold that the employee is on her own during the commute and does not report to work until she has reached her place of employment. Some cases, however, slip into a gray area. For example, employment status is often contested where a commuter is injured while traveling to or from work on the same railway that employs her, using a pass issued by the employer. Nonetheless, those cases usually find that the travel is outside the scope of employment. We have noted that those commuters "are excluded from [FELA] coverage for two reasons—they are not required to commute on their employer's trains, and while commuting,

they are in no greater danger than any other member of the commuting public." *Caillouette*, 705 F.2d at 246 (citing *Sassaman v. Pennsylvania R.*, 144 F.2d 950, 953 (3d Cir. 1944)); *Metropolitan Coal Co. v. Johnson*, 265 F.2d 173, 178 (1st Cir. 1959). A second group of borderline cases includes those in which an employee has just clocked out, or not yet clocked in, but is traversing the work site on her way to or from her assigned post when she is injured. Those cases typically uphold FELA coverage, because "traversing the work site ... is a necessary incident of the day's work." *Id.* (citing *Erie Railroad Co. v. Winfield*, 244 U.S. 170, 173, 37 S. Ct. 556, 61 L. Ed. 1057 (1917). Relying on the former line of cases, the district court found that Guerrero's accident occurred while he was on his way to work, far from his worksite, as he drove his personal vehicle on a public highway and faced dangers identical to the rest of the commuting public.

But the situation is more complex than that. With respect to the last point, evidence in the record (for example, Trooper Worsfold's testimony that she was "the plow," implying that she was the first to drive on the newly fallen snow) indicated that members of the commuting public were not out and about—they were waiting out the storm until IDOT could clear the roads and render them passable. Guerrero's commitment to BNSF thus distinguished him from the general population. In addition, Guerrero was not heading to work for his normal job, which as we noted ran from Monday through Friday. He had accepted a special assignment, and once he accepted it, BNSF was relying on him to show up. Guerrero notes that the union contract to which he was

subject provides that "the time of an employee who is called after release from duty to report for work will begin *at the time called* and will end at the time he returns to designated point at headquarters." (Emphasis added.) Burwell called Guerrero at 6:00 p.m. on January 31 and obtained Guerrero's agreement to be at the Galesburg facility by 7:00 a.m. the next morning. Recognizing the adverse conditions caused by the snow, Guerrero budgeted a full two hours to drive the 40 miles between his home and the railyard. In addition, the record shows that Burwell later approved a settlement for Guerrero's wages from the 6:00 p.m. telephone call until the planned time of arrival the next morning. Although BNSF insists that Burwell erred in doing so, a jury would not be required to accept that explanation. Taking that fact favorably to Guerrero, it is evidence that he was not commuting, but instead was "on the clock" and working on the special assignment at the time of the crash.

We set forth these competing views of the record to show why the question of scope of employment is not a straightforward one. It is a question of fact for the jury in an FELA case. See *Wilson v. Chicago, Milwaukee, St. Paul, and Pac. R.R. Co.*, 841 F.2d 1347, 1353-54 (7th Cir. 1988). Rather than wrestle it to the ground to see if summary judgment was nonetheless correct on this ground, we prefer to move to BNSF's alternate argument: whether a trier of fact could find that it was negligent, even under the generous FELA standard, on this record.

Because the district court did not reach the negligence argument, Guerrero understandably said nothing about it in his opening brief. But BNSF properly raised the issue before the district court, and it followed up in its responsive brief in this court. Guerrero then had an opportunity to address negligence in his reply brief. We may affirm on any ground supported by the record, see *Isby v. Brown*, 856 F.3d 508, 529 (7th Cir. 2017), and so this argument is properly before us.

Guerrero argues that there is ample evidence that would support a jury finding of negligence, and so we begin with his examples. He asserts that BNSF had a non-delegable duty to provide a reasonably safe place to work, and that this duty extended to "places remote from railroad premises." Reply Br. at 8. But the cases to which he refers for that proposition do not go so far as to impose on BNSF the duty to keep snowy state highways plowed and safe. Instead, they cover private places specifically known to, if not chosen by, the employer such as snow-covered employee motel parking lots (*Duffield v. Marra, Inc.*, 166 Ill. App. 3d 754, 520 N.E.2d 938, 117 Ill. Dec. 587 (1988)), snow-, ice-, and debris-covered premises of a customer (*Howes v. Baker*, 16 Ill. App. 3d 39, 305 N.E.2d 689 (1973)), and an off-site defective stairwell at a training facility (*Mills v. CSX Transp., Inc.*, 300 S.W. 3d 627 (Tenn. 2009). Guerrero also suggests that BNSF was negligent when, acting through Burwell, it asked Guerrero to show up at 7:00 a.m. the morning after a bad storm. Burwell, he contends, should have paid more attention to the weather

forecast, or he should have had Guerrero show up at 10:00 p.m. the night before and given him a hotel room, or he should have cancelled the work request in the middle of the night when it turned out that the storm was as severe as it was.

We grant that Burwell could have gone the extra mile and taken one or more of those steps, but that fact does not demonstrate that BNSF was negligent when Burwell did not do so. As BNSF points out in its brief, Kewanee and Galesburg are in the upper Midwest, where snow is hardly an unusual phenomenon. (One estimate shows an average annual snowfall for Galesburg of 23 inches. See *Climate Galesburg — Illinois*, U.S. Climate Data, https://www.usclimatedata.com/climate/galesburg/illinois/united-states/usil0439 (last visited July 12, 2019).) Guerrero had lived in Kewanee for more than 35 years, and so it is impossible that he was a novice driving in snow. BNSF did not instruct him when to leave his house to start the drive to Galesburg. Even assuming, as we have, that he was "on the clock" from the time of Burwell's call, he had some discretion in deciding how to carry out his promise to show up at the railyard.

Note in this connection that we are *not* relying on the voluntary nature of Guerrero's initial decision to accept the assignment. From the time he said "yes" forward, we can assume that he was obliged to show up. But we cannot ignore the fact that the reason Burwell needed the extra help was the snowstorm, and nothing but the snowstorm. Nor can we ignore the fact that BNSF had no control over IDOT's efforts to plow the roads. In fact,

Trooper Worsfold's testimony, estimating that the road was covered by about three inches of snow as she was driving to reach the accident site, might suggest that the roads had been plowed, even if new snow had already started accumulating.

A decision that BNSF was negligent merely by asking Guerrero to drive while it was still dark (as it would have been on January 31 to February 1 between 6:00 p.m. and 7:00 a.m., since sunset was about 5:15 p.m. and sunrise about 7:10 a.m., see *Sunrise & Sunset for Galesburg, IL*, Old Farmer's Almanac, https://www.almanac.com/astronomy/sun-rise-and-set/IL/Galesburg/2015-02-01# (last visited July 12, 2019)) would have far-reaching implications. Taken to the extreme, it would mean that employers in snowy (or rainy, or icy) regions would be negligent whenever they required their employees to drive in bad weather. Even under the liberal negligence standards that apply in FELA cases, *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994), that is too much. As the Supreme Court itself recognized in *Gottshall*:

> "[t]hat FELA is to be liberally construed, however, does not mean that it is a workers' compensation statute. We have insisted that FELA does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.

Id. (quotations and citations omitted).

In the end, all that BNSF asked Guerrero to do was to come in and help out with the task of clearing snow from the tracks. Its failure, if one can call it that, to micro-manage exactly when Guerrero left his house, which route he took from Kewanee to Galesburg, and how he handled his car in the snow, cannot be characterized as negligence. Even in the railyard (that is, on the employer's premises and at the place of employment), workers have some discretion in how they carry out their jobs. So too here.

No one doubts that Mrs. Guerrero suffered a terrible personal loss when her husband lost his life as he tried to get to work. And no one here is saying that Guerrero was at fault for the accident. It may have been caused by a sudden gust of wind, or a patch of black ice that was invisible under the snow, or any of a number of other external factors. But by the same token, this record shows that the only action BNSF took was to ask Guerrero to come to work under conditions known to both of them. We cannot pin a finding of negligence on such a slender reed.

The judgment of the district court granting summary judgment in favor of BNSF is AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, PEORIA DIVISION, DATED JANUARY 3, 2019

Case No. 1:17-cv-01044-MMM-JEH

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

RLTA GUERRERO, INDIVIDUALLY AND AS THE SPECIAL ADMINISTRATOR OF THE ESTATE OF CELSO N. GUERRERO,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

ORDER

Before the Court are the Defendant, BNSF Railway Company's ("BNSF"), Motion for Summary Judgment (D. 26),[1] the Plaintiff, Rita Guerrero's, Response (D. 28), and the Defendant's Reply (D. 30). For the reasons stated, *infra,* the Defendant's Motion for Summary Judgment is GRANTED and this matter is terminated.

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1. Citations to the Docket in this case are abbreviated as "D. __ ."

Appendix B

BACKGROUND

The Plaintiff's deceased husband, Celso Guerrero, passed away on February 2, 2015, after sustaining injuries in a car accident the day before. At the time of the accident, he was on his way to report to work for the Defendant. The Plaintiff, individually and as the special administrator of Celso's estate, alleges the Defendant failed to provide Celso with safe working conditions at the time of his death. She asserts that he was on duty at the time he was injured and his death is therefore covered and protected by provisions of the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §§ 51-59. (D. 1 at pg. 2).

According to the Plaintiff, Celso was "instructed" to report to work on the morning of February 1, 2015, while there was a "severe snow storm" covering the area of his route from his home in Kewanee, Illinois to a BNSF facility in Galesburg, Illinois. *Id.* She further alleges Celso was in "under pay" status at the time of the accident, pursuant to a collective bargaining agreement between Celso's union and the Defendant, and therefore, was on duty and engaged in the performance of work for the Defendant. *Id.* at pg. 3. The Plaintiff claims she is entitled to the cost of this suit, $75,000 dollars, along with "exclusive of interest and costs" for "the damages, losses and injuries which she has sustained[.]" *Id.* at pg. 5.

The Defendant insists it is entitled to summary judgment because: (1) Celso was not in the course and scope of his employment at the time of his accident (D. 26 at pp. 10-18) and (2) there is no evidence to support a claim

that BNSF was negligent. *Id.* at pp. 18-20. The Defendant also claims that it is entitled to summary judgment to the extent that the Plaintiff claims she is entitled to damages for loss of society, support, services, companionship, and consortium from the decedent. *Id.* at pp. 20-22. The Plaintiff concedes the Defendant's argument on this last point and limits her damages claim to pecuniary loss. (D. 28 at pg. 28). Accordingly, the Court need only address the Defendant's first two arguments.

The undisputed facts demonstrate the following:

Celso was employed as a machine operator for BNSF. His scheduled work week was Monday through Friday. While Celso's work duties mainly consisted of track repair, he would occasionally perform other tasks, such as clearing snow, as needed. Nick Burwell, a BNSF employee in charge of track maintenance, called Celso at home on Saturday, January 31, 2015, at approximately 6:00 PM and offered him a chance to work overtime. Burwell needed BNSF employees to clear snow from tracks the next day at 7:00 AM at the Galesburg facility. The overtime was offered to Celso on the basis of his seniority in a union and he could have declined to take it. Celso accepted Burwell's offer.

At approximately 5:00 AM on February 1, 2015, Celso left his home in Kewanee in his personal vehicle. There had been substantial snow fall in the region the night before and into the morning. It continued to snow in the area along his route to Galesburg. Celso lost control of his vehicle in the snow at approximately 5:30 AM. His vehicle

drifted out of its lane and collided with another vehicle—an Illinois Department of Transportation snowplow. The accident site was approximately 17 miles from BNSF's Galesburg facility.[2] Unfortunately, Celso died the next day as a result of his injuries.

Celso's union and BNSF have a collective bargaining agreement in place titled "BNSF Agreement between the Burlington Northern and Santa Fe Railway Company and its Employees represented by the Brotherhood of Maintenance of Way Employees" ("CBA"). (D. 26 at pg. 8); (D. 28 at pg. 4). Rule 30(C) of the CBA states:

> The time of an employee who is notified prior to release from duty to report for work will begin at the time required to report and end when released. The time of an employee who is called after release from duty to report for work will begin at the time called and will end at the time he returns to designated point at headquarters.

(D. 26-9 at pg. 2). The latter scenario described in Rule 30(C), when an employee is offered the opportunity to work overtime while they are not on duty, starts the clock on what is commonly known as "under pay" status. Burwell later approved a "settlement claim statement" for Celso's wages from the time he agreed to work overtime on Saturday, January 31, 2015, at 6:00 PM to Sunday, February 1, 2015, at 6:00 AM.

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2. The Court takes judicial notice of this fact since it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2)

Appendix B

LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). The Court reviews the facts in a light most favorable to the non-movants, in this instance, the Plaintiff. *Vodak v. City of Chicago,* 639 F.3d 738, 740 (7th Cir. 2011). The moving party—here, the Defendant—has the burden of providing proper documentary evidence to show the absence of a genuine issue of material fact. *Celotex Corp.,* 477 U.S. at 323-24. Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a genuine issue for trial. *Gracia v. Volvo Europa Truck, NV.,* 112 F.3d 291, 294 (7th Cir. 1997).

The non-movant cannot rest on the pleadings alone, but must designate specific facts in affidavits, depositions, answers to interrogatories or admissions that establish that there is a genuine triable issue; they "must do more than simply show that there is some metaphysical doubt as to the material fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256-57 (1986) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986)); *Hot Wax, Inc. v. Turtle Wax, Inc.,* 191 F.3d 813, 818 (7th Cir. 1999). Undeveloped and unsupported arguments are waived. *Clay v. Holy Cross Hosp.,* 253 F.3d 1000, 1002 n.1 (7th Cir. 2001). Finally, a scintilla of evidence in support of the non-movant's position is not sufficient to successfully

oppose a summary judgment motion; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson,* 477 U.S. at 250.

ANALYSIS

First, the Defendant argues that it is entitled to summary judgment because Celso was not in the course and scope of his employment at the time of his accident. (D. 26 at pp. 10-18). The Plaintiff asserts that Celso's under pay status at the time of his accident places him within the scope of his employment. (D. 28 at pp. 16-20). She further claims Celso was not commuting at the time of his accident. *Id.* at pp. 20-24.

FELA provides the exclusive remedy for railroad employees that are injured or die in the course and scope of their employment. It provides that common carriers by railroad, such as BNSF, engaging in commerce:

> 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 ... 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 [.]
>
> 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 chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. § 51. Whether FELA covers the Plaintiff's claims turns on whether Celso was within the scope of his employment when his accident occurred. For purposes of FELA, an employee is within the scope of their employment when they are engaged in acts incidental to their employment. *Rogers v. Chicago & NW Trans. Co.,* 947 F. 2d 837, 838-39 (7th Cir. 1991). The answer to this question implicates the Court's subject matter jurisdiction. *Caillouette v. Balt. & Ohio Chicago Terminal R. Co.,* 705 F. 2d 243, 245-46 (7th Cir. 1983).

The Seventh Circuit distinguishes commuter cases—those where an employee is injured while commuting to or from work—from traversing cases—those where an employee is injured on the employer's premises, traversing a worksite on their way to or from work. *Id.* at 246. Generally, commuters are not covered by FELA. See *Thompson v. National R.R. Passenger Corp.,* 966 F. 2d 1457 (7th Cir. 1992) (citing *Quirk v. New York, C & St. L. R. Co.,* 189 F. 2d 97 (7th Cir. 1951)). Determining whether a case involves a commuter or someone traversing turns primarily on (1) whether the employee is on the worksite, exposed to risks not experienced by the general public, and (2) whether the employee is within reasonable proximity

to work in terms of time and space. *Schneider v. National Railroad Passenger Corp.,* 854 F. 2d 14, 17 (2d Cir. 1988). "The locus of the injury is critical to determining whether an employee is within the scope of employment, because the policy behind FELA is to protect railway workers from the dangers associated with railway work, *not the risks of commuting to which all passengers are exposed." Ponce v. Northeast Illinois Regional Commuter R.R. Corp.,* 103 F. Supp. 2d 1051, 1058 (ND. Ill. 2000) (citing *Caillouette* 705 F. 2d at 246) (emphasis added).

Celso's accident occurred on his way to work, approximately 17 miles from the Galesburg facility, an hour and a half before his overtime shift was scheduled to begin. He was on a public highway and driving his personal vehicle. The dangers he faced at that time were identical to those faced by the rest of the commuting public. Celso volunteered to work an extra shift. The Plaintiff admits that he could have declined the work. As such, the commuter rule applies to this case.

In *Caillouette,* the Seventh Circuit found "commuter cases" were not covered by FELA, in part, because commuters "are in no greater danger than any other member of the commuting public." *Caillouette* 705 F. 2d at 246. This denial of FELA coverage holds up even for employees commuting on their employer's trains. *Id.* at 245 (citing examples from multiple Circuits); *Ponce,* 103 F. Supp. 2d at 1057 (same). The undisputed facts demonstrate that, as a matter of law, Celso was commuting. Therefore, FELA does not apply and this Court lacks subject matter jurisdiction over this matter.

Appendix B

Given the record before the Court, the Plaintiff cannot establish subject matter jurisdiction. The only reasonable inference to be drawn from the undisputed facts is that Celso was commuting to work at the time of his accident. As a result, the Plaintiff's claim is not properly before this Court.

The Plaintiff argues Celso' s status in under pay makes the commuter rule inapposite. (D. 28 at pg. 17). The Defendant disputes that status. (D. 30 at pp. 15-16). Regardless of who is correct on this point, the issue is not dispositive. See *Parker v. Long Island R.R.,* 425 F. 2d 1013, 1015 (2d Cir. 1970) (noting that if an employee is compensated for time spent traveling home, that fact is one factor that *may* be considered in the scope of employment analysis).

Even assuming Celso was in under pay status, the Plaintiff points to no authority—and the Court is unaware of any—suggesting that the CBA at issue here should take precedence over the federal judiciary's well-established interpretation of FELA which resulted in the commuter rule. The Court is required to apply the common law principles determined by federal courts in deciding whether Celso was acting within the scope of his employment. *Wilson v. Chicago, Milwaukee, St. Paul, & Pacific R. Co.,* 841 F. 2d 1347, 1352 (7th Cir. 1988). The Plaintiff's arguments to the contrary (D. 28 at pp. 16-18) are unavailing. Moreover, although in her pleadings she consistently characterizes Celso's decision to work on Sunday, February 1, 2015 as something he was coerced into doing *(e.g.* D. 1 at pg. 2; D. 28 at pg. 19), she admits

that Burwell "requested" his presence, that Celso wanted the overtime, and that he could have declined to take it (D. 28 at pg. 3; 6).

The undisputed facts of this case necessitate granting summary judgment in favor of the Defendant on this issue. Viewing these facts in a light most favorable to the Plaintiff, the Defendant's Motion for Summary Judgment is GRANTED. Given the Court's finding on this issue, the Court is not at liberty to address the Defendant's remaining argument.

CONCLUSION

Viewing the evidence of record in a light most favorable to the Plaintiff, the Defendant's Motion for Summary Judgment (D. 26) is GRANTED. This matter is hereby terminated.

It is so ordered.

Entered on January 3, 2019

s/ Michael M. Mihm
Michael M. Mihm
Senior U.S. District Judge

APPENDIX C — DENIAL OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, CHICAGO, ILLINOIS 60604, FILED AUGUST 14, 2019

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 19-1187

RITA GUERRERO, INDIVIDUALLY AND AS THE SPECIAL ADMINISTRATOR OF THE ESTATE OF CELSO N. GUERRERO, DECEASED,

Plaintiff-Appellant,

v.

BNSF RAILWAY COMPANY,

Defendant-Appellee.

Before

DIANE P. WOOD, *Chief Judge*

WILLIAM J. BAUER, *Circuit Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

August 14, 2019

No. 17-cv-1044

Appeal from the United States District Court
for the Central District of Illinois.

Michael M. Mihm, *Judge.*

Appendix C

ORDER

On consideration of the petition for rehearing filed by plaintiff-appellant on July 31, 2019, all members of the original panel have voted to deny the petition for panel rehearing.

Accordingly, the petition for rehearing is hereby DENIED.