

INDEX OF APPENDIX

PETITION FOR WRIT OF CERTOIRARI

1. APPENDIX A - DENIAL: APPELANT APPLICATION TO TRANSFER FROM THE MISSOURI COURT OF APPEALS, THE MISSOURI SUPREME COURT DENIAL TRANSFER DATE 27 MAY 2025 CASE NUMBER SC101028.....1a,2a3a

2. APPENDIX B- AFFIRMING ORDER, TRIAL CIRCUIT COURT SUMMARY JUDGMENT 74.04. 16 CIRCUIT COURT MISSOURI COURT OF APPEALS WESTERN DISTRICT MEMORANDUM SUPPLEMENTING ORDER AFFIRMING JUDGMENT PURSUANT TO RULE 84.16 (B). DATED 04 MARCH 2025 CASE NUMBER WD86638.....1b,2b

3. APPENDIX C- ORDER FELA SUMMARY JUDGMENT FEDERAL RULE 74.04 OF THE TRIAL CIRCUIT COURT MISSOURI ORDER, DATE 05 OCT 2023 CASE NUMBER 2216-CV05164.....1c

APPENDIX A

(1a)

IN THE SUPREME COURT OF MISSOURI

SC101028

MISSOURI COURT OF APPEALS WESTERN DISTRICT,

WD86638

PRENTIS BOLES, PRO SE, Appellant)

v. (TRANSFER)

May Session 2025

UNION PACIFIC RAILROAD, COMPANY)

Respondent)

Now at this day, on consideration of Appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that: the said application be, and same is hereby denied.

STATE OF

MISSOURI-Sct

I, Betsy Legerwood, Clerk of the Supreme Court of the state of Missouri, certify that the foregoing is full, true, and complete transcript of the judgment of said Supreme Court, entered of record at the May Session, 2025, and on the 27<sup>th</sup> day of May, 2025, in the above-entitled cause.

APPENDIX A

(2a)

Given under my hand and seal of

Said Court, at the City of Jefferson,

This 27<sup>th</sup> day of May, 2025.

\_\_\_\_\_ Clerk

\_\_\_\_\_ Deputy Clerk

Supreme Court of Missouri

en banc

Prentis Boles, Appellant

v.

SC101028

Union Pacific Railroad Company, Respondent

Sustained

Order issued: Appellant's Motion to file application for transfer out of time  
sustained.

By: \_\_\_\_\_ March 25, 2025

Chief Justice

Dated

APPENDIX B

(1b)

MISSOURI COURT OF APPEALS WESTERN

DISTRICT

PRENTIS BOLES, APPELLANT) Case Number

v. ) Case Number WD86638

) Filed 24 Dec 2024

UNION PACIFIC RAILROAD COMPANY), RESPONDENT)

APPEAL FROM THE CIRUCIT COURT OF JACSKSON MISSOURI AT  
INDEPENDENCE

THE HONORABLE TRIAL CIRCUIT COURT KENNETH GARRETT, JUDGE

BEFORE DIVISON ONE: LISA WHITE HARDWICK, PRESIDING

JUDGE, CYNTHIA L. MARTIN, JUDGE, AND JUDGE, JANET SUTTON, JUDGE

Per Curiam           ORDER

Prentis Boles Appeals the Circuit Court gant of Summary Judgment in favor of Union Pacific Railroad Company (Union Pacific) on his Petition for damages under the Federal Employer's Liability ("FELA"). Upon review of the briefs, we find no error and affirm the judgment. We have provided the parties with a Memorandum explaining the reasons for our decision, because a published opinion would have no precedential value.

AFFIRMED. Rule 84.16 (b)

MISSOURI COURT OF APPEALS WESTERN

DISTRICT

PRENTIS E, BOLES )

Appellant,) WD86638

v ) Filed: December 24, 2024

UNION PACIFIC RAILROAD)

COMPANY,)

Respondent

MEMORANDUM SUPPEMENENTING ORDER

AFFIRMING JUDGMENT PURSANT TO RULE 84.16 (B)

This memorandum is for the information of the and set forth the reasons for the  
Oder affirm the judgment.

PLEASE NOTE: This unpublished memorandum does not constitute a formal  
opinion of the Court. It has no precedential value and should not be cited in  
unrelated cases. See Rule 84.16 (b) A copy of this memorandum must be attached to  
any motion for rehearing or to transfer the case to the Missouri Supreme Court

Prentis Boles Appeals the Circuit Court grant Summary Judgment in favor of Union Pacific Railroad ("Union Pacific") on his partition for damages under the Federal Employer's Liability Act ("FELA"), Boles contends the court erred in entering Summary Judgment because genuine issues of material fact remain; counsel for Union Pacific was not licensed to practice law in Missouri; he did not receive notice of the motion for Summary Judgment or notice of the courts extension of time form him to respond to the motion; the court didn't review his entire deposition; and the court considered improper affidavit. For reason explained herein, we affirm.

#### FACTTUAL AND PROCEDUAL HISHORY

In March 2022, Boles then represented by counsel, filed a petition for damages under FELA, 45 U.S.C. 51-60, against Union Pacific. A YEAR LATER, HE FILE AN AMENDED PETITIONER FOR DAMAGES. In his amended petition, Boles alleged he was employed by Union Pacific as relief utility clerk and was injured at work while driving a company vehicle through the rail yard on March 11, 2019. Union Pacific disclosed its medical expert, a board-certified orthopedic surgeon, Boles didn't depose Union Pacific medial expert. On July 7, 2023. Boles counsel filed a motion for leave to withdraw. The circuit granted the motion on the same day. Discovery closed on July 21, 2023, and disposes motion were due on or before August 4, 2023.

Union Pacific filed a motion for Summary Judgment on August 4, 2023, Boles did not respond to Union Pacific Summary Judgment motion within 30 days as required by Rule 74.04 (c) (2). Because Boles was pro se, the court sua sponte granted an additional 30 days to Boles to respond after the expiration of the initial 30 days. Boles did not respond. Pursuant to the scheduling order, Union Pacific filed witness and exhibits lists, motions in limine, proposed jury instructions, and a trial brief in anticipation of the October 5 2023, pretrial conference. Boles didn't file any documents under the scheduling order. Instead at 500 p.m on October 4 2023, Boles filed motion to strike the affidavits of Union Pacific's and Bole's supervisor at Union Pacific, which Union Pacific had cited to support the Summary Judgment motion a motion to strike Union Pacific , its counsel, or agents "from [the]" 16<sup>th</sup> Circuit Court Missouri, at Independence" suggestions in opposition to Union Pacific's Summary Judgment motion, Boles did not file a response admitting or denying each of the facts set out in Union Pacific's statement of uncontroverted facts set out in Union Pacific's facts.

At the start of the pretrial conference, the informed the parties it had granted Union Pacific's Summary Judgment motion earlier that day, after receiving no to the motion from Boles. The court did not consider Boles motion or suggestions in opposition to the Summary Judgment because it did not receive them prior to entering the Judgment. Boles argued to the court that he never received Union Pacific's Summary Judgment motion because the zip code in the certificate of

service was incorrect. In response, Union Pacific's counsel advised the court that Boles called her office on September 1, 2023 and said he was "calling in response to motion that he received that we had filed. The only motion Union Pacific's had file was the motion for Summary Judgment. Boles admitted Union Pacific's counsel told him during that September 1, 2023 conversation that there was Summary Judgment on file and that "he needed to respond to that motion," but he insisted he didn't see a Summary Judgment on file". Also, during the phone conversation, Union Pacific's offered to email any document, including the Summary Judgment motion, to Boles, but Boles told her he "did not email." The court determined Boles to receive notice of the Summary Judgment motion and failed to respond. In its judgment, the court found Union Pacific's Summary Judgment motion to be unopposed and therefore, all facts alleged in the motion were deemed admitted. Based on those facts, the court found Boles could not establish that Union Pacific 's breach its duty to provide a reasonably safe environment as required under FEOLA. The court found Boles provided no evidence to show where, where, when or how the injury occurred, the road conditions at the time of the alleged incident, or vehicle he was driving at the time of the alleged incident. Additionally, the court found Boles didn't produce any medical evidence that he suffered an injury on March 11, 2019, that was proximately caused by Union Pacific's negligence, or that he suffers from a current, diagnosable, and permanent physical restriction resulting from his

alleged injury. Based on these findings, the court determined Union Pacific 's was entitled to Judgment as matter law. Boles Appeals,

#### BOLES BREIF VIOLATES RULES 84.04

Boles original appellant's brief was struck for multiple Rule 84.04 violations His amended appellant's brief also contains several violations. In particular, his statement of facts is incomprehensible, full of argument, and does not contain specific references to the record, all in velation of Rule 84.04 (c); seral of his points relied on are multifarious and note of them comply with Rule 84.04 (d) 's requirement; and he fails to provide argument under each point relied on as required by Rule 84.04 (c) . While he includes a "Statement of Argument. "Section after setting out his seven points relied on." that section does not address the issue raised each point with relevant authority or argument beyond conclusory statements. Therefore, his points are deemed abandoned. Summers.. v. Dep't of Corr., Empr, & Emp't Sec., 689 S.W. 3d 573, 576-77 (Mo app.2024)

We recognized Boles is appearing pro se. Nevertheless. he is subjected to the same procedural rules as parties represented by as parties represented by counsel. Hoover, 581 S.W . 3d 638, 640 (Mo .app.2019). Compliance with Rule 84.04 is mandatory; the failure to comply preserves nothing for appellate for review and warrants dismissal. Quincy Clark Entm't LLC v. Liquor Control, 677 S.W. .3d 610, 612 (Mo. App, 2923 ). Because we prefer to decide cases on their merits; we has

discretion to review noncomplaining briefs when “we can ascertain the gist of an appellant’s argument” id (citation omitted). Therefore, to the extent we are able to descent the issues raised in Boles’s points on; we will address them and decide this case on its merits

### ANALYSIS

In Point I Boles contends the circuit court erred Judgment in favor of Union Pacific because genuine issues of fact remain on his FELA claim. Appellate review of Summary Judgments is essentially de novo , Green v. Fotoolhighuam, 606 S.W. 3d 113,115 (Mo, banc 2020) Summary Judgment is appropriate when there are no genuine issues of material fact and the movtant is entitled to Judgment as matter of law. Rule 74.04 (c) (6). Where, as in this case, the movant is the defendant, the movant establishes the right to judgment as a matter of law by show one of the following: (facts negating any one of the claimant ‘s elements necessary for judgment; (2) that the claimants, after an adequate period of discovery, has not been able to and will not be able to produce sufficient evidence to allow the trier of fact to find the existence of one claimant’s elements; or (3) facts necessary to support [its] properly pleaded affirmative defense.

Robers v. BJC Health Sys 391 S.W. 3d 433, 437, (Mo.banc: 2013). In determining whether the movant has met this burden, we review the Summary Judgment in the light most favorable to the party against whom judgment was entered and

according to the party that party the benefit of all reasonable inferences. Green, 606 S.W.3d at 116, In the amended petitioner, Boles asserted a claim for direct negligence under FELA, 45 U.S.C. 51. This statute provides, in pertinent part: Every common carrier by railroad while engaging in commerce. shall be liable in damages to any person suffering injury while he is employed 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, or other equipment. 45 U.S.C 51, Boles alleged he suffered injuries on March 11, 2019, when Union Pacific required him to drive a company vehicle through its Neff Yard. Specifically, he alleged Union Pacific failed to provide him with a reasonably safe workplace and equipment because. "Neff Yard was full of portholes, uneven terrain, and non-maintained railroad tracks and struts," Boles asserted that, as a result of the March 11 2019 incident, he suffered injuries to his spine, back and neck, resulting in permanent physical impairment, loss of earnings, diminished earning capacity, past and future medical expenses, and other damages. "FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them federal is federal." Ackman v. Union Pac ., R.R. Co., 556 S.W. 3d 80, 85 (Mo. App.2018) . To recover under FELA, a plaintiff must prove: "(1)" the employer had a duty to provide him a reasonably safe place to work; (2) the employer beached its duty of

care; (3) this lack of due care played some part in causing the plaintiff's injury; and (4) the plaintiff's injury was reasonably foreseeable." Id

In its judgment, the court found Union Pacific's statement of uncontroverted facts establish that Boles would be unable to prove elements (2) (3). We agree. The uncontroverted facts concerning Union Pacific's alleged breach of its duty of care are that, March 11 2019, Boles was driving a vehicle in daylight hours through a rail yard that he had worked in since 1998 but could not remember the moment he was injured, the specific event that caused his injury, or where in the rail yard the incident occurred; he never reported the road conditions in the Neff Yard to anyone at Union Pacific; he didn't actually know which vehicle he drove on March 11, 2019; he did not notify anyone on March 11, 2019, that he was injured but instead worked his entire shift and he called in sick the next day but not tell his supervisor at Union Pacific that he had been injured at work. There are no facts from which to infer that Union Pacific breached its duty of care to provide Boles a reasonable safe workplace on March 11, 2019. "Speculation cannot supply the place of proof," Moore v. Chesapeake & O. RY. Co. 340 U.S. 573, 578 (1951)

As for Union Pacific's alleged lack of due care playing some part in Boles's alleged injury, the uncontroverted fact from Boles's treating physicians and medical records are that Boles had been treated for low back pain since 2014; a comparison of his MRIS from two years before the alleged incident to after the alleged incident

showed only a mild degenerative change without significant interval change; neither Boles's primary care physician nor his orthopedic surgeon advised him he could not work as a result of the alleged incident; and Boles was physically able to drive and applied for jobs similar to the work he did for Union Pacific Railroad. There is no medical evidence indication that negligence on the part of Union Pacific on March 11, 2019, played any part in causing Boles's alleged injury. "When there is no obvious origin of the plaintiff's injury, expert testimony is necessary to establish even that small quantum of causation required by FELA." Ackman, 556 S.W. 3d at 85 (quoting Brooks v. Union Pac. R.R. Co., 620 F.3d 896,889 (8<sup>th</sup> Cir. 2010)).

Because Boles failed to file a response under 74.04 (c) (2) denying Union Pacific's statement of unconverted facts and supporting the denials "with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine factual issue for trial; the fact were deem admitted. Rule 74.04 (c) (2). These facts show Boles could not prove that Union Pacific beached its duty of care and that he was injured as a result. Therefore, Union Pacific was entitled to judgment as a matter of law on Boles's FELA claim. Point I is denied.

In Point II and IV, Boles contends the circuit court erred in allowing one of Union Pacific's attorneys to appear before the court because her office was in Colorado, and she did not meet the requirement of to appear pro hac vice. The circuit court determined attorney is, in fact, licensed to practice law in Missouri. Boles offer no evidence to contrary. Additionally, in Point IV, Boles appears to take issue with the

court reliance on statements made by Union Pacific's counsel during the pretrial conference because she was not under oath. "An attorney is an officer of the court who is bound by the rule of professional conduct." *McIntosh v. State*, 413 S.W.3d 320, 327 (Mo. banc 2013). Rule 4-3.3 (a) (1) states, in pertinent part, that an attorney "shall not knowingly make a false statement of fact of law to a tribunal." *id.* Thus, Union Pacific's Counsel had a duty to be truthful in speaking to the court during the pretrial conference, See *id.* Boles does not indicate which of counsel's statement he believes was untrue, and he provides no reason why the circuit court should have question counsel's truthfulness. Points II and IV are denied

In Point III and V, Boles contends the court erred in entering summary judgment because he did not receive proper notice that the summary judgment was filed on August 4, 2023 or that the court had given him an additional 30 days to respond to the motion after the expiration of the initial 30 days. At the pretrial conference, Boles admitted however, that Union Pacific's counsel told him during their September 1, 2023 phone conversation that there was a summary judgment motion on file and that "he needed to respond to that motion". Although Boles insisted, he "did not see a summary judgment on file," Case.net shows the summary judgment motion was filed August 4, 2023. The court could reasonably infer that had notice of the motion, at the very latest, by September 1, 2023, if not before. Yet, Boles filed no response until 33 days later, at 500 pm. on the night of October 4, 2023, after the expiration of both the original and additional 30 days periods. While Boles is correct

that the court did not notify him it was granting him an additional 30 days to respond, he is unable to show that he was prejudiced. The record supports the circuit court's finding that Boles has sufficient notice of the summary judgment motion and failed to respond in a timely manner.

Ex gratia, we note that, even if the court had considered Boles's untimely response to the summary judgment, Union Pacific Railroad would still be entitled to summary Judgment. In his response, Boles didn't admit or deny each individual fact set forth in Union Pacific's statement of uncontroverted facts and support each denial with discovery, exhibits, or affidavits. Because he failed to comply with Rule 74.04 (c) (2), the facts were deemed admitted, those facts establish Union Pacific is entitled to judgment as matter of law on his FELA Claim, Point III and V are denied

In Point VI, Boles contends the circuit court erred in granting summary because the court considered only the portions of his deposition cited by Union Pacific in support of its summary judgment motion, instead of his entire deposition. The court does not consider anything outside of the summary judgment record. "Facts come into a summary judgment record only via Rule 74.04 (c) 's numbered-paragraphs-and responses framework... Court determines and review summary judgment based on that Rule 74.04(c) record, not the whole trial court record." Green, 606 S.W. 3d at 118 (quoting Jones v. Union Pac. R.R.Co., 508 S.W.3d 159, 161 (Mo. App.2016)). If there were other portions of his deposition that Boles wanted the court to consider

in ruling on the summary judgment motion, he needed to cite them as part of that complied with Rule 74.04 (c) . He failed to do so, Point VI is denied.

In Point VII. Boles contends the circuit court erred entering summary judgment because it considered improper evidence, namely, the affidavit of his Union Pacific supervisor and the affidavit of Union Pacific medical expert, both of which Union Pacific cited to support its statement of uncontroverted facts. Rule 74.04 (e) allows parties to provide affidavits based on personal knowledge in support of and in opposition to summary judgment motions “An affidavit is a written declaration on oath sworn to by a person before someone authorized to administer such oath.” *Shiffman v. Kansas City, Royals Baseball Club, LLC*, 687 S.W. 3d 443, 455 (Mo. App. 2024) citation omitted). The affidavit of Boles’s supervisor at Union Pacific was based on his personal knowledge and was signed and sworn to before notary; therefore, the court properly considered it. Although Union Pacific’s medical expert indicated he executed his affidavit “under penalty of perjury, ” his affidavit was not sworn to before a notary or other person authorized to administer oath. Therefore, it was not an affidavit but was ‘merely an unsworn statement.” See *Brown v. Chipotle Servs., LLC*, 645 S,W, 3d 518,524-525 (Mo. App. 2022). Because Union Pacific medical expert ‘s unnotarized affidavit it was not competent evidence on the motion for summary judgment the court erred in considering it. See *Weiss v. Alford,*, 267 S.W.3d 822, 825 n.1 (Mo.App.2008). This error does not require reversal, however. Disregarding the unnotarized affidavit it, there is still no

medical in the summary judgment record connecting Boles's alleged injury to any incident on March 11, 2019, no evidence that any such incidence was caused by Union Pacific's negligence, and no evidence that Union Pacific was, in fact, negligent, Point VII is denied.

#### CONCLUSION

The judgment is affirmed

APPENDIX C

(1c)

UNOFFICIAL COURT DOCUMENT

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT  
INDEPENDENCE

PRENTIS BOLES, PRO SE, Plaintiff)

v. )Case Number..... 2216-CV05164

UNION PACIFIC RAILROAD COMPANY,) Defendant )

---

JUDGMENT

---

Comes now the Court on Defendant's Motion for Summary Judgment, file herein August 4 2023 After reviewing the Motion, seeing no objections or responses, and being fully advised in the law and premises of the Motion, the Court finds the following Defendant file their Motion for Summary Judgment on or about August 4, 2023, Plaintiff didn't respond. Pursuant to Rule 74.04 (c) (2) , "[With]in 30 days after a motion for summary judgment is served, the adverse party shall serve a response on all parties."Mo. Sup. Ct, R. 74.04 (c) (2), (emphasis supplied). Therefore, seeing no objection or response field by the adverse party, to wit, Plaintiff, the Court finds that Defendant's Unopposed Motion for Summary

Judgment should be GRANTED. Summary Judgment standard In determining whether summary judgment should issue, the facts and inferences from the facts are viewed in a light most favorable to the nonmoving party, Mo. R.Civ Pro 74.04 (a). The burden is place on the movant to establish both the absence of a genuine issue, of material fact and that it is entitled to Judgment as a matter of law. ITT Comm'l fin, Corp. v. Mid-America Marine Supp Corp., 854 S,W,2d 371,378 (Mo.banc. 1993). Once the movant has met this burden, the non moving must set forth specific facts showing that a genuine issue of material facts exists. Mo. R. Pro.74.04. (e); ITT,854 S.W. 2d at 38. A genuine issue of material facts" is a dispute that is real. Not merely argumentative, imaginary, or frivolous, ITT, 854 S.W. 2d at 382. The non-moving party may not rest upon the allegation or denial of its pleading, but instead must present affidavits, deposition testimony, answers to interrogatories, and like, to meet its burden. Id, at 38. If the non-movant cannot contradict the showing of the movant, summary judgment is properly entered in favor of the movant.

Id.

II. Effect of Plaintiff's Failure to Respond When the non-moving party failure to respond to a summary judgment motion. Collons v. Feldman, 991 S.W. 2d 718,719 (Mo. App. E.D. 1999) Defendant filed a Motion for Summary Judgment on MAY 9, 2023. The Plaintiff failed to respond with the required thirty days. Mo R.Civ. Pro. 74.04.04 (c) (2). Therefore, facts alleged in the defendant's Motion for Summary

Judgment are deemed admitted by Plaintiff. Although a failure to respond results in an admission of the facts alleged, the failure to respond does not require that summary judgment should be granted. *Mingo v. Norfolk & Western Railway Co.*, 947 S.W. 2d 480, 483 (Mo. App. E.D. 1997) Even if uncontroverted, facts alleged by Defendant must establish an entitlement to judgment as a matter of law, not merely the absence of an answer to fact question. *Id.* Summary Judgment is appropriate where the record shows “that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.” Mo R. Civ. Pro 74.04 (c) (6). A “genuine issue” exists only when it is “real, not merely argumentative, or imaginary, frivolous.” *ITT Commercial Fin Corp. v. Mid-Am, Marine Supply Corp.*, 854 S.W. 2d 371, 382 (Mo.banc. 1993). The Summary Judgment process ensures that a party is only subject to the burden of trial on genuine and substantial issues. *Henkel v. City of Pevely*, 504 S.W. 2d 141, 149, (Mo. App., (1973). The final purpose of summary judgment is to expedite the disposition of cases and conserve judicial resources. *Dunn v. Dunn*, 536 S.W. 3d 304,310, (Mo.Ct. App. 2017) (citing *Pub. Sch. Ret. Sys. Of Mo. v. Taveau*, 216 S.W.3d 338,345 (Mo. Ct. App. 2010). In determining whether summary judgment is appropriate, courts review the Rule 74.04 (c) record comprised of the parties’ submission of numbered paragraphs and responses. *Columbia Mut. Ins Co v. Heriford*, 518 S.W. 3d 234, 239 (Mo. Ct. App. 2017). (citing *Jones v. Union*

Pacific. R.R. Co.. 508 S.W. 3d 159 (Mo.Ct. App. 2016). Affidavits, exhibits and discovery only play a secondary role as support for Rule 74.04 (c) paragraphs. Id. Rule 74.04 (c) (6) mandates summary judgment in a Defendant's favor if one of the following is established:

(1) facts negating any one of the claimant's elements

(2) that the claimant, after an adequate period of discovery, has not been able to and will not be able to produce sufficient evidence to allow the trier of fact to find the existence of one of the claimant's elements; or

(3) facts necessary to support [Defendant's] properly pleaded affirmative defense.

Roberts v. BJR Health Sys., 391 S.W. 3d 433, 437 (Mo. banc 2013); Mo R Civ. Pro, 74.04.(c) (6) ("If the motion, response, the reply and the sure-reply show that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law, the court shall enter summary judgment forthwith."

(emphasis added). Here, Plaintiff has failed to establish evidence sufficient for a jury to find the existence of the elements of his claim, and his alleged injuries per-date and are not causally connected to any incident on March 11, 2019

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1.Plintiff, Prentis Boles, hire on with UPRR on October 28, 1998, as a Utility Clerk

(Exhibit 1-Prentis Boles HR Report, UPRR-BOLRD-000001-----11

2. He worked the majority of his career as a Utility Clerk at Neff Yard in Kansas City, Missouri.

3. A Utility Clerk transport crews to from train and deliver supplies to different locations (Exhibits 2- Boles Deposition, 22:3-18).

4. Before each shift, Utility Clerks inspect the assigned vehicles, confirm all safety equipment is present is present and complete a vehicle inspection form (Exhibits 2- Deposition, 25: 15-25).

5. Plaintiff was in a car accident in 2001 that left him with a back injury, and he took FMLA.

6. Plaintiff was in car accident in Sept 2017 and complained of a back injury. (Exhibit 2 -Deposition 73 :19-25). Again, he reported a back injury an took leave from September 13, 2017, to March 27, 2018. (Exhibit 2 -Deposition, 74: 9- 21; 97:1-5).

7. On October 30, 2017, Plaintiff was in another car accident that sent him to the emergency room. (Exhibit 2 -Deposition, 74: 22-25).

8. Plaintiff had a December 2017 MRI of his lumber spin which showed no acute lumbar spine abnormalities and small L4-L5 -S1 posterior disc protrusions. (Exhibit 3 -Research Medical Center Radiology Report 2017.12.26 MRI, RMC 000108).

9. Plaintiff received his first official offense of February 1, 2017, and a hearing was held on February 7, 2017, where the discipline was upheld. (Exhibit 4 -ADPS Disciplinary Summary, UPRR-BOLES\_000891-000891-000894).

10. Plaintiff's second official discipline for attendance was heard on August 1, 2018, and upheld. (Exhibits 2 – Disciplinary Summary, UPRR-BOLES\_000891-000894).

11. Plaintiff alleges the UPRR provided an unsafe work environment by exposing him to dangerous road conditions, surfaces and terrain. (Exhibits 2-Deposition, 43: 6-7).

12 Plaintiff believes he was injured while driving a vehicle with unsafe suspension over terrain, obstacles, and potholes at Neff Yard. (Exhibit 2-Deposition, 37: 17-21).

13. Plaintiff never reported his concerns that the road conditions at Neff Yard were unsafe. (Exhibit 2-Deposition, 43; 13-15).

14. March 11, 2019, Plaintiff was working during daylight hours as a Utility Clerk at Topping Rail Yard in Kansas City, Missouri and claims he received an acute injury to his lower back. (Exhibit 2-Deposition, 22: 3-18, 39: 9-15).

15. Michael Buttry Plaintiff's supervisor at the of alleged incident. (Exhibit 2-Deposition, 29: 4-9)

16. Plaintiff worked his full shift at Neff Yard on March 11, 2019. (Exhibit 2-Deposition, 40: 2-3).

17. Plaintiff Does not remember any of his assigned jobs that day, or with whom he worked. (Exhibit 2-Deposition, 47:16-25)

18. Plaintiff didn't believe the vehicle was unsafe on March 11,2019 but came to that opinion after the fact and decided in hindsight that there was something wrong with the suspension. (Exhibit 2-Deposition, 39: 9-15).

19. Plaintiff cannot reminder a specific or even that cause his injury. (Exhibit 2-Deposition, 37: 22-25).

20. Plaintiff cannot remember a specific pothole or even that cause his injury. (Exhibit 2-Depostion, 37: 22-25 ).

21. Plaintiff didn't tell anyone he was injured on March 11, 2019. (Exhibit 2-Deposition, 40: 2-3).

22. The next day, March 12, 2019, Plaintiff called in sick tell the CMS operator he was injured. (Exhibit 5- Prentis Boles Deposition Exhibit 3, CMS Call Transcript 2019, 03.12).

23. Boles testified that Micheal Buttry called Plaintiff on March 12, 2019, around 9 or 10 a.m. to remove him from service for a violation of the Union Pacific Railroad Attendance Policy, (Exhibit 2- Deposition, 53: 16-20).

24 This was Plaintiff third attendance violation, and the placed him at risk of termination. (Exhibit 6- Buttry Affidavit 9).

25. Michael Buttry will testify that Plaintiff didn't inform him that he was injured during the call on March 12, 2019. (Exhibit 6 Buttry Affidavit, 9).

26. Boles didn't tell Buttry that he was seeking medical treatment on March 12, 2019, (Exhibit 6 Buttry Affidavit 9).

FLMA leave. (Exhibit 6- Buttry Affidavit, 9)

28. At 2:22 p.m, March 12, Plaintiff called the nursing call center at the VA, complaining that he has severe back pain for the last three days and reported he was injured when driving a truck over potholes at the railyard. (Exhibit 7 -VA Nursing Call Center progress Notices, Boles 00415).

29. At 2:26 p.m. on March 12, went to the ER at Center Point Medical Center. , with complaints of low back pain and said the pain been on for the past 2 or 3 days. He complained of a sore throat. (Exhibit 8 -Centerpoint Medical Center Visit Notes, 2019, 03.12, (UPRR-BOLES\_001108).

30. X-rays of his lumber spine were taken at Center Point Medical Center Imaging Review 2019. 03,12, (UPRR-BOLES\_001111)).

31. On March 13, 2019 Plaintiff went to the VA hospital for low back pain, (Exhibit 10 VA Nursing Call Center Progress Notes 2019, 03.13, BOLES 00408) Medical records indicate that Plaintiff told staff he was having issues with missing work at Union Pacific and had just been fired. (10-VA Nursing Call Center Progress Notes, Boles 00408).

32. Plaintiff left a message for his supervisor, Michael Buttry, on March 19, 2019, informing him that he wanted to file an injury claim for an injury that occurred on March 11, 2019. (Exhibit 6- Buttry Avidavit, 11; (Exhibit 11- Form 98 Railroad Employee injury and/or Illness Record UPP-002076\_2077).

33. On March 29, 2019, Plaintiff saw his primary care physician, Dr. Houston Gray, for back pain and was referred for imaging, pain management, and physical therapy, (Exhibit 12-Midwest Metropolitan Physicians Group Visit Note 2019. 03,19, BOLES 00431-00433).

34. Plaintiff completed a 52032-injury form on April 2, 2019, (Exhibit 13 UPRR- Personal injury Report form 52032,000002).

35. Plaintiff indicated he was driving Pacific car 88 on the 52032 form. (Exhibit 13- UPRR Personal injury Report form 52032, BOLES 000001-000002).

36. Plaintiff testified that he didn't know if it was car 88 that he was actually driving or just the one that came to mind when he filled out the form. (Exhibit 2 Deposition, 57: 2-12).

37. On April 3, 2019, a hearing was for Plaintiff's disciplinary charge of his Third Offense Violation of the Union Pacific Railroad Attendance Policy. (Exhibit 14- Assessment of Discipline 04/17/2019, UPRR-BOLES\_000889-000890 and Exhibit 4 - ADPS Disciplinary Summary, UPRR-BOLES\_000891\_000894).

38. On April 3, 2019, Dr. Houston Gray, completed and FMLA leave from for Plaintiff for chronic low back pain. (Exhibits 15-Boles FMLA Certification of Health Care Provider, UPRR\_000981\_000984).

39. Dr. Houston Gray noted that Plaintiff had been treated for low back pain since 2014, (Exhibit 15-Boles FMLA Certification of Heath Care Provider, UPRR-BOLES\_000981\_000984

40. Dr. Houston Gray indicated that Plaintiff could still perform his work duties but may experience periodic flareups causing him to miss work. (Exhibits 15 -Boles FMLA Certification of Health Care Provider, UPRR-BOLES\_000981\_000984).

41. On April 8, 2019, Plaintiff had his initial evaluation for physical therapy and asked work a work excuse from March 12 to April 8. (Exhibit 16-VA Nursing call Center Progress Notes, PT evaluating, BOLES 000404).

42. On April 17, 2019, Plaintiff was terminated from Union Pacific for his third Offense Violation of the Union of Discipline 04/17/2019, UPRR-BOLES\_000889\_000890 and Exhibit 4 ADPS Disciplinary Summary, UPRR-BOLES\_000891-000894).

43. By the time of Plaintiff 's final attendance violation, he had missed forty hours of work within four months. (Exhibit 17- Boles Exhibits, Employee Vacancy Detail, UPRR-BOLES \_000750).

44. On May 30, 2019, Plaintiff had an MRI of his lumbar spine, which show "Mild degenerative changes of the lumbar spine without significant interval change in the prior examination from December 26, 2017." (Exhibit 18- Centerpoint Medial Center 2019. 05.30. Lumbar Spine MRI report, UPRR-BOLES\_001442-001443).

45. On November 5, 2019, Plaintiff was in yet another car accident his rotator and aggravated his low back . (Exhibit 2-Deposition, 129: 1-6).

46. On July 7, 2022 Plaintiff was seen by Dr. William Rosenberg, an orthopedic surgeon. Dr. Rosenberg didn't find any reason for spine surgery. (Exhibit 19- Willaim Rosenberg, MD Progress Not 2022. 07.07, CRP 000005-000007).

47. Plaintiff was not told by his primary care physician, Dr Houston-Gray, that he could not work. (Exhibits 2 -Deposition, 140: 7-9).

48 . Orthopedic surgeon, Dr. Rosenbug, didn't tell Plaintiff he could not work. (Exhibit 2-Deposition,140: 10-13).

49.Dr. Micheal Johson, an orthopedic surgeon, was retained by UPRR to review Plaintiff's medical records.

50. Dr. Johnson reviewed the medical record and Plaintiff's lumbar MRI's from 2017 and 2019. Dr Johnson's opinion is that Plaintiff suffer from degenerative lumbar problems, not traumatic injury. (Exhibits 20-Affidavit of Michael Johnson, M.D.).

51. Plaintiff's MRIs from before and after the alleged incident date are stable and show no interval change. (Exhibit 20-Affidavit of Michael Johnson, M.D.).

52. Plaintiff is physically able to drive and has applied for jobs similar to the work he did for Union Pacific. (Exhibit 2 Deposition, 161: 11-25; 162: 1-7).

## INTRODUCTION

Plaintiff Prentis Boles ('Plaintiff') file suit his employer, UPRR, under the federal Employer's Liability, 45 U.X.C. 51-60 ("FELA"). First Amended Petition, par

1. Plaintiff alleges that, on March 11, 2019, while working as a Utility Clerk for UPRR at Neff Yard in Kansas City, Missouri, he injured his back from driving on "rough, uneven terrain, potholes, and railroad tracks" and the "condition of the vehicle" contributed to the injury, First Amended Petition, par.7

Summary Judgment is appropriate because Plaintiff cannot establish that UPRR breach its duty to provide a reasonably safe workplace. Plaintiff has provided no evidence to show where or when the injury occurred, the road conditions at the time of the alleged incident, or even identify the vehicle he was driving, UPRR is also entitled to summary judgment because Plaintiff has not produced any medical evidence that he has an injury that was proximately caused by the negligence of UPRR on March 11, 2019 and therefore, he also has no claim for lost future earning capacity, E.g., *Gorniak v Nat'l R.R. Passenger Corp.*, 889 F. 2d 481, 484, (3<sup>rd</sup> Cir. 1989). UPRR is also entitled to partial summary judgment on Plaintiff's claim for

lost wages because he was terminated for absenteeism occurring prior to March 11, 2019.

### ARGUMENT

FELA is the exclusive remedy for railroad employees to seek damages for injuries occurring on the job that were caused “in whole or in part from the negligence” of the railroad. 45 U.S.C. 51. In a FELA case, state law governs procedural matters, but federal law is binding on substantive issues. *Norfolk & W. Ry. v. Liepelt*, 444 U.S.490 (1980). FELA is not a worker’s compensation statute and does not make an employer an insurer of employee’s safety. *Conrail v. Gottshall*, 512 U.S. 532, 543 (1994). FELA requires a plaintiff to establish the traditional, common-law elements of negligence: duty, breach, foreseeability, and causation. See *id.* at 543-44. Railroads are held to a duty of making reasonable efforts to provide a reasonably safe workplace for their employees. *Cowden v. BNSF Ry Co.*, 690 F.3d 884, 889 (8<sup>th</sup> Cir. 2012) (quotation omitted); *Balt. & Ohio Sw. R.R. v. Carroll*, 280 U.S. 491 (1930). This duty does not require railroads to eliminate all dangers, but those dangers that can be removed by reasonable care. *Raudenbush v. Balt. & Ohio R.R.*, 160 F 2d 363 (3<sup>rd</sup> Cir. 1947). Plaintiff has failed to establish evidence to support a breach of duty by UPRR or an injury that UPRR proximately caused.

**I. PLAINTIFF CANNOT ESTABLISH UPRR BREACH ITS DUTY TO PROVIDE A SAFE WORK ENVIRONMENT BECAUSE NO EVIDENCE HAS BEEN DISCOVERED TO SUPPORT HIS ALLEGATIONS.**

In his First Amended Petition for Damages, Plaintiff alleges UPRR failed to provide him with a reasonable safe place in the following ways:

- a. it negligently and carelessly failed to provide Plaintiff with a reasonably safe place to work in that the Neff Yard was full of potholes, uneven terrain, and non-maintained railroad tracks;
- b. it negligently failed to furnish and provide Plaintiff with reasonably safe conditions for work in that the Neff Yard was full of potholes, uneven terrain and non-maintained railroad tracks;
- c. it negligently failed to furnish and provide Plaintiff with reasonably safe equipment for work in that the vehicle Plaintiff was operating was in a state of disrepair with worn suspension system, shocks and struts; and
- d. it negligently otherwise failed to furnish and provide Plaintiffs with reasonably safe place to work, reasonably safe conditions for work, reasonably safe methods of work by failing to maintain its yards, tracks and equipment.

Plaintiff's First Amended Petition at Plaintiff has no evidence supporting his claims that UPRR breach its duty to provide a reasonably safe work environment. Plaintiff

continually makes broad general statement about diving over rough terrain without any specific facts that would support a claim. And Plaintiff has provided no medical evidence trying an event on March 11, 2019 to an injury he suffered. All of these allegations, therefore, cannot support the finding of negligence against UPRR, and summary judgment is proper. Plaintiff was asked to identify specific conditions or events that occurred on March 11, 2019 and he could provide nothing. SUMF #16-20. He testified with very generic answers that mirrored that language in his petition and injury report, SUMF # 11-12, 16-20, 34. Plaintiff was driving a vehicle in broad daylight through a yard that he had worked in since 1998 and yet he can provide no detail on how he was injured. SUMF #1; 14,16-20. He generic responses highlight the lack of evidence and ability to determine what conditions Plaintiff believes caused his alleged injury. If Plaintiff cannot even define the conditions surrounding the incident, surely, he cannot meet his burden to establish that those unknown conditions amounted to UPRR failing to provide a reasonably safe workplace. A prima facie case in an action under the FELA requires admissible evidence that the defendant's negligence was a cause of the plaintiff's injury. See Fletcher v. Union Pacific Railroad Co., 621 U.S F.2d 902 (8<sup>th</sup> Cir. (1980); Atchison, Topeka & Santa Fe Ry. Co v. Toops, 281 U.S 351, 60 S. Ct. 281 (1930); Wolfe v. Henwood, 162 F. 2d 998 (8<sup>th</sup> Cir.), cert. denied, 332 U.S. 773 (1947); Ewing v. St. Louis Southwestern Ry. Co., 772 S.W. 2d 774 (Mo. App, E.D. (1989) cert. den. 493

U.S. 1022,110 S, Ct.724 (1990); Davis v. Burlington Northern, Inc., 541 F. 2d 182, 185 (8<sup>th</sup> Cir.), cert denied,429 U.S. 1002, 97 S. Ct 533 (1976).

The Plaintiff's burden, therefore, is to show that he was injured because of an unsafe condition that the employer could have reasonably removed. Sportsman, 2011 U.S. Dist. LEXIS 56882 at \* 17 (quoting Conrail, 512 U.S. at 542). Here, Plaintiff can develop evidence of an unsafe condition beyond his allegations because he cannot say where, when or how the incident occurred. Plaintiff has failed to provide any specific details of the alleged incident that caused his "injury" beyond a general description of driving a vehicle over rough terrain at Neff Yard. SUMF # 16-21. A plaintiff cannot sustain burden if one would have to infer from no evidence that the employer's alleged negligence caused the injury. See Moore v. Chesapeake & O. Ry. Co., 340 U.S. 573, 577-78, 71 S. Ct.428,430 (1951). "This would be speculation run riot. Speculation cannot supply the place of proof." Id at 578. In other words, mere possibilities of causation are insufficient to make a submissible case on the issue of cause and effect. Ewing v. St. Louis Southwestern Ry. Co., 772 S.W.2 d 774 (Mo. App. 1989); Deutch v. Burlington R. Co., 1991 WL, 111287 (N.D.LII. 1991). As established by Statement of Uncontroverted Facts, there is no evidence to support where the alleged incident occurred, what condition of the road caused the alleged incident, or what vehicle Plaintiff was driving. SUMF #19-20; #35-36. On March 11, 2019, Plaintiff worked during daylight hours, and all terrain would be visible as he drove through the yard. SUMF #14 Plaintiff claims a

traumatic event occurred on that day while he was driving, and that event caused a lower back injury. But Plaintiff cannot identify where at Neff Yard the incident occurred that caused the alleged injury. SUMF #19-20. Without any information on the location, it is impossible to determine the condition of the road where the event occurred and if that road was unsafe. Plaintiff cannot identify what caused the incident - a pothole, rough terrain, or railroad tracks. SUMF 19-20. Plaintiff didn't report any injury on the day he says it happened, making it impossible to know that actual road conditions on March 11, 2019, SUMF # 21.

On March 12, 2019, Plaintiff called in sick but didn't mention any injury. SUMF # 22. His supervisor, Micheal Buttry, called late on March 12, 2019 and told Plaintiff that he violated the UPRR attendance Policy and was being pulled from service. SUMF # 23.

During that call, Plaintiff didn't tell Mr. Buttry he was injured, that he was sick and was going to ask for FMLA. SUMF #26-27. This was Plaintiff third offense for absenteeism, and he was facing termination. SUMF # 24, On March 12, 2019, facing termination, Plaintiff began seeking treatment for an injury that would justify his absence from work. Medical record show Plaintiff sought treatment for back pain by calling VA Nurse line and going to the Center Point ER only after he was contacted by his supervisor and pulled from service. SUMF # 28-29. Plaintiff finally inform UPRR that he was reporting injury on March 19, 2019 by leaving a voice message

for Mr. Buttry. SUMF # 32. He completed his injury reported more than three weeks later and, in that report, again failed to provide any specific details of the incident that would allow any meaningful investigation into his injury. SUMF # 34. When asked to describe the event, Plaintiff wrote driving on pot holed terrain hazardous. SUMF # 34. Plaintiff also claim the vehicle's condition contributed to his alleged injury, but it is unclear what care he was driving. SUMF # 35-36. In the injury report, Plaintiff identified the vehicle he was driving as # 88 but, at his deposition, testified that he didn't know if that was actual vehicle or just the one that came to mind. SUMF # 35-36. Plaintiff testified that on March 11, 2019, he didn't believe has assigned vehicle was unsafe and that he only came to the opinion it was unsafe after the fact. SUMF # 18. It is impossible for UPRR to defend against this nebulous claim and impossible for any jury to make findings of fact that would support Plaintiff's claims. Plaintiff could not even tell the jury what happened. The lack of supporting evidence makes Plaintiff's claims purely speculative regarding any breach of duty by UPRR. Allegations and speculation alone are not sufficient to defeat a summary judgment motion. *Kroner Invs., LLC v. Dann*, 583 S.W. 3d 126, 129 (2019). Without any specific information on the location or cause, it is impossible for a jury to determine if UPRR breach its duty to provide a reasonably safe work environment.

II. PLAINTIFF FAILED TO IDENTIFY EVIDENCE THAT HIS LUMBAR PAIN WAS PROXIMATELY CAUSED BY ANY INCIDENT ON MARCH 11, 2019 OR THAT HIS FUTURE EARNING CAPACITY IS IMPAIRED AS RESULT OF A MARCH 11, 2019 INJURY. In his First Amended Petition for Damages, Plaintiff that due to UPPR's negligence, he has suffered the following:

Plaintiff suffered injuries to his spine, back, and neck that have cause and will continue to cause him great pain, suffering, inconvenience, anguish and disability. These injuries have required Plaintiff to undergo medical treatment and will in the future require Plaintiff to undergo medical treatment. The strength, and function of Plaintiff's body and spine and Plaintiff's general health and strength have been permanently weakened, diminished and impaired. Plaintiff has suffered and will forever suffer severe physical pain and anguish. Prior to these injuries, Plaintiff was a strong, able-bodied man, capable of earning a substantial wage

Plaintiff's First Amendment, at # 13.

A FELA claim for loss of future earning capacity requires that the plaintiff "must establish the reduction, if any, in his earning capacity proximately resulting from the injury by showing the existence of some condition which demonstrably limits his opportunities for painful activity. "Petition of United States Steel Corp. Lamp, 436 F 2d 1256, 1270 (6<sup>th</sup> Cir. 1970). (citing Wiles v. New York, Chicago, and St. Louis R.R. Co., 283 F 2d 328, 331 (3<sup>rd</sup> Cir. 1960). The critical question is whether "plaintiff

has produced competent evidence suggesting that his injuries have narrowed the range of economic opportunities available to him.” *Gorniak v. Nat’l R.R. Passenger Corp.*, 889 F.2d 481, 484 (3<sup>rd</sup> Cir. 1989). This question is answered by expert testimony that the FELA plaintiff suffers from a current and permanent physical restriction resulting from the injury that impairs his future ability to work for the railroad. See *id.* At 484 (finding that the district court didn’t err in allowing a lost earning capacity claim to go to the jury because the plaintiff had a permanent work restriction that prevented him from working in his previous job); see also *Honeycutt v. Wabash R. Co.*, 313, S.W. 2d 214, 217-219 (Mo. Ct. App. 1958) (holding that error to allow the jury to consider future lost wages because there was no evidence that the plaintiff’s medical condition prevented him from working); *Tanner v. Grand River Navigation Co.*, No. 14-cv-13478, 2015 U.S. Dis.LEXIS 164841, at \*11-15 (E.D.Mich Dec. 9,2015)(granting summary on plaintiff’s future lost wages because testimony of continued pain and the need for additional surgeries were insufficient evidence to support probable impairment of future earning capacity); *Hayes v. Inland Lakes Mgmt.*, 450 F. Supp 2d 741 (E.D. Mich. 2006) (granting employer’s summary judgment because the plaintiff submitted no medical testimony of a current, diagnosable injury impairing futures earning capacity).

Here, Plaintiff has not disclosed a retained expert to testify that any back-pain he suffers from is related to the March 11, 2019 incident or that he suffers any impairment in his ability to perform his job duties. Plaintiff identified his treating

physicians as experts, but again, no treating physician has been disclosed to testify that Mr Boles had any permanent impairment in his ability to work. SUMF # 40, 47,48. Plaintiff has not worked since UPRR terminated him but has applied to work as a driver for patients at the VA Hospital. SUMF # 52. Plaintiff testified that he is physically able to do this transport job, which he agreed is similar to what he did for UPRR. SUMF # 52. Plaintiff has an extensive history of back injuries related to car accidents long before March 11, 2019. Plaintiff was involved in multiple car accidents outside his employment at UPRR that caused back pain. In 2001, he was in a car accident that resulted in back pain and Plaintiff's need for FMLA leave. SUMF # 5. In 2017, Plaintiff was involved in two car accidents, September 12 and 30, that cause him to seek treatment for back pain. SUMF # 6,7, Plaintiff took FMLA leave from September 13, 2017, to March 20, 2018, to recover from the car accidents, Plaintiff had an MRI of his lumbar spine in December 2017, SUMF # 8. That showed no acute lumbar spine abnormalities and small L4-L5 and L5-S1 posterior disc protrusions. SUMF # 8. This MRI was compared to the 2017 MRI and found mild degenerative changes of the lumbar spine without significant interval change in the prior examination from December 26, 2017. SUMF #44. UPRR retained Dr Micheal Johnson to review Plaintiff's medical records. SUMF # 29. Dr. Johnson concurred with MRI findings that Plaintiff has degenerative problems in his back and not any traumatic issues. SUMF # 50. The key point was that the 2019 MRI, taken after the alleged incident, compared to the 2017 MRI and showed no

interval change in Plaintiff back. SUMF # 51. Dr. Houston-Gray, Plaintiff's primary care physician, completed FMLA paperwork on April 5, 2019. SUMF # 38. This paperwork show that Plaintiff was treated for chronic low pain as far back as 2014. SUMF # 39. This chronic back pain is not listed as related to any incident on March 11, 2019. SUMF # 39 Dr. Houston-Gray indicates that Plaintiff can perform his job functions but may episodic flare-ups that might cause him to miss work periodically. SUMF # 40. In sum, no medical expert has evidence supports the claim that Plaintiff suffers from a current, diagnosable, and permanent physical restriction resulting from his claim injury. For these reasons and assuming arguendo that Plaintiff can establish a claim under the FELA, which UPRR denies. Plaintiff cannot prove that he is entitled to lost future earnings due to impaired earning capacity. UPRR is entitled to partial summary judgment on Plaintiff's claim for lost future earnings.

**III. PLAINTIFF HAS FAILED TO IDENTIFY EVIDENCE THAT HE IS ENTITLED TO ANY FUTURE LOST WAGES AS HE WAS TERMINEATED FOR CAUSE. THAT TERMINATION WAS UPHELD THROUGH THE APPEAL PROCESS.** When adjudicating under FELA, a Plaintiff is not entitled to recover all of their lost future earnings. *Kauzlarich v. Atchison, T & S.F. Ry* 910 S.W. 2d 254, 256 (Mo. 1995). The employee may recover the "difference between what he was able to earn before the injury and what he earned or could have earned thereafter." *Holley v. Missouri Pacific R.R.*, 867 S.W. 2d 610,615 (Mo. App. 1993) (citing *Trejo*

Denver & Rio Grande Western R.R. 568 F 2d 181,184 (10<sup>th</sup> Cir. 1977). This calculation cannot be “formed from speculation and conjecture” but must be based with “reasonable certainty” from substrative evidence. Anderson v. Northern R.R., 700 S.W. 2d 469, 477 (Mo. App.1985). Plaintiff has failed to provide evidence that he would have remained employed should he not have endured an alleged incident.

The plaintiff seeks to admit testimony based on speculation and conjecture, not on substantially competent evidence of his actual future earnings capacity.

Substantially competent evidence would look at the totality of the circumstances and not ignore the reality of Plaintiff’s termination for a district reason. Id.

As established by UPRR’s Statement of Uncontroverted Facts, there is no evidence to support that Plaintiff would have remained, employed despite his alleged incident. Plaintiff repeatedly violated UPRR’s attendance policy, SUMF # 9, 10, 37. Plaintiff received his first official offense for absence on February 1, 2017, and a hearing was held on February 7, 2017, where the discipline was upheld. SUMF # 9. Plaintiff’s second official discipline for attendance was attendance was on July 18, 2018, and was heard on August 1, 2018, and upheld. SUMF #10. Plaintiff’s third official discipline, which resulted in his dismissal post hearing on May 3, 2019, was for his absence on March 12, 2019. SUMF # 23,37, 42. He was pulled from service that day and not allowed to work until the discipline was resolved SUMF # 23-24.

Plaintiff didn't tell anyone he was injured on March 11, 2019. SUMF # 25. On March 12, 2019. Plaintiff called in sick but didn't tell the CMS operator he was injured only that he was ill. SUMF # 22. Plaintiff's supervisor called on March 12, 2019, at approximately 9 or 10 a.m. to remove him from service for his third disciplinary violation based on attendance. SUMF # 23, 24. Plaintiff didn't inform Mr. Buttry that he was injured during the call. SUMF # 25, Plaintiff didn't seek medical treatment until after he was pulled out of service for receiving his third disciplinary actions. SUMF # 28,29. Plaintiff didn't even notify Mr. Buttry that he wanted to file an injury report until March 19, SUMF # 32.

Plaintiff's termination was upheld and deemed official on April 17, 2019. SUMF # 42. By Plaintiff's final attendance violation, he had missed forty hours of work within fourth months. SUMF # 43. Plaintiff's termination and his alleged injury are unrelated occurrences. UPRR was unaware of Plaintiff's alleged incident until Plaintiff had already been pulled out of service and notified of his third disciplinary action based on attendance and that it would likely result in termination. The Plaintiff went to the Emergency Room after being told he was being pulled from service, indicating that he was claiming injury to prevent termination.

Plaintiff's termination means that he is not entitled to future lost wages as he has no evidence that he had any earnings capacity post-incident as he was no longer employed with UPRR. Any testimony that he would have future earnings capacity at UPRR is our conjecture as, his termination was upheld based on attendance

policy violations. Plaintiffs have no evidence of any future lost wages as he had no capacity to earn any future wages at UPRR due to his termination. Plaintiff provides no evidence that would not have been terminated had he not been injured on March 11, 2019. As no evidence exists to show that Plaintiff would not been terminated, there in no legitimate question for the jury regarding future lost wages.

Plaintiff has no evidence to create a genuine issue of material fact concerning negligence, causation, or injury, in this case and thus cannot support his claim that UPRR provided an unsafe work environment by exposing him to hazardous road conditions. Based upon the uncontroverted facts, Plaintiff has no evidence that his back pain is causally related to any incident on March 11, 2019, and no evidence that his back pain is restricting his ability to work. UPRR terminated Plaintiff for unrelated reasons on April 17, 2019, and is not entitled to lost wages. UPRR is entitled to summary judgment.

**NOW, THFERORE, IT IS ORDERED, ADJUDED AND DECREED,**

**Defendant's Unopposed Motion for Summary Judgment against plaintiff is hereby GRANTED.**

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that cost are assessed against Plaintiff.**

October 5, 2023

DATE

----- JUDGE