COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue, Third Floor Denver, Colorado 80203	
DISTRICT COURT, CITY AND COUNTY OF DENVER STATE OF COLORADO 1437 Bannock Street, Room 256 Denver, CO 80202-5385 Lower Court Judge: Shelley Gilman Case No. 08CV5665 **Appellant:** Lavern Whipple **Appellee:** BNSF Railway Co.	▲ **COURT USE ONLY** ▲
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STATEMENT OF THE ISSUES

1. Whether the district court erred in denying Appellant Lavern R. Whipple's (Whipple) post-trial motion brought pursuant to C.R.C.P. 59(a)(2) when it held that the evidence did not compel judgment against BNSF as a matter of law on the issue of Appellee BNSF Railway Company's (BNSF) negligence under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60.

2. Whether the district court erred in denying Whipple's motion brought pursuant to C.R.C.P. 59(d)(4) when it held that photographs taken on the day of Whipple's injuries, which were not disclosed by BNSF, did not constitute newly discovered evidence.

STATEMENT OF THE CASE

I. Nature of the Case.

Whipple brought a FELA action against his employer, BNSF, seeking to recover damages for a neck injury. The accident occurred on January 15, 2008 while working as a carman at BNSF's Alliance, Nebraska shops.

The lawsuit was tried to a jury, the Honorable Shelley Gilman presiding, from May 18 to May 21, 2009. The jury returned a verdict finding that BNSF was

not negligent. (Special Verdict Form.[1]) The district court entered judgment in favor of BNSF and against Whipple on May 28, 2009.

Whipple brought post-trial motions, and the motions were denied by the district court in orders dated July 21, 2009 and August 5, 2009. Whipple filed a notice of appeal on August 28, 2009 seeking review based on this Court's jurisdiction under C.A.R. 1(a)(1).

II. Statement of Facts.

A. The jury trial.

On January 15, 2008, Whipple was working on a 504 track, a track where heavy repairs are made to large component parts of railcars at BNSF's Alliance shop. (RT.V3, 23:20-25, 24:1-7.[2]) He was working the first shift, 7:00 a.m. to 3:00 p.m., and during the shift, employees receive a morning break at 9:00 a.m. (*Id.* at 24:16-21, 25:22-25.) During the break, Whipple and three co-workers were seated at a table between tracks 504 and 505. (*Id.* at 26:17-21, 27:13-15.) The table sat four people, and the four chairs were attached to the frame of the table.

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1 Special verdict is found in large envelope attached to Volume 8.

2 "RT.V3, 23:20-25, 24:1-7" refers to Reporter's Transcript, Volume 3, page 23, lines 20 to 25, etc.)

(BNSF's trial Ex. C.[3]) While seated at the table, Whipple ate a sandwich, drank water and read a book. (RT.V3, 27:3-12.)

A pallet with boxes of water stacked on it was in close proximity to the table. (Whipple's post-trial Ex. 8, 12:7-18.[4]) Whipple was seated at the table with the chair turned to the side, and reading with his back to the pallet. (RT.V3, 27:25, 28:1-12.) Other co-workers were also sitting at the table, talking. (*Id.* at 28:25, 29:1-2.) A co-worker, Donny Cole, came up to the table, and he suddenly jumped back when the table was struck by a pallet due to a large floor sweeper striking and shoving the pallet into the table. (*Id.* at 29:19-25, 30:1-22; 31:6-12.) Whipple estimated that the table moved about 12 inches due to the force of the collision. (*Id.* at 31:4-5.) The sweeper struck the pallet with enough force to knock the water boxes onto the floor and onto Whipple's co-worker, Mark Gorecki, who was sitting at the table. (*Id.* at 31:10-12.) Gorecki had to push the bottles of water off of him in order to get up from the table. (*Id.* at 31:10-12.)

Whipple reported the incident to his supervisor, Dan Stefko, immediately after it happened. (*Id.* at 32:10-14, 20-25, 33:1.) About 10 to 20 minutes after the incident, Whipple experienced neck pain. (*Id.* at 32:15-19.) Stefko reported the

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3 BNSF's trial exhibits are found in envelopes attached to Supplemental Index.

4 Whipple's post-trial exhibits are found in envelopes attached to Supplemental Index.

incident to Andrew Callahan, the general car foreman. (*Id* at 33:11-14, 34:11-13.)

The sweeper that struck the pallet was operated by Joe Herrera. (*Id.* at 31:16-18.) The sweeper is large enough that an operator sits on it. (BNSF's trial Exs. I, J.)

Herrera described the machine as having three wheels, with the rear wheel having the ability to turn, and a clutch or throttle. The sweeper is used to pick up "hub bolts, sand, coal, about anything," which goes into a hopper. (Whipple's post-trial Ex. 8, 6:24-25, 7:1-13.)

Herrera testified that he was sweeping in the immediate area and as he turned to park the sweeper, he "accidentally hit this pallet of water . . . ." (*Id.* at 8:18-23.) At the time he struck the pallet, Herrera "wasn't going fast. I was turning around at the time, so I let my foot off the accelerator." (*Id.* at 10:4-7.) Herrera stated he "misjudged" where the pallet was located because he believed "it was down a little further." (*Id.* at 10:8-11.) He also testified that the pallet "slid a little ways." (*Id.* at 10:12-15.)

Herrera went on to testify on direct examination that he did not believe "the pallet even struck the table . . ." because he did not "feel a jolt." (*Id.* at 11:2-18.) And that at the same time the photographs were taken, he looked at the table and saw no coffee spills. (*Id.* at 13:2-6.)

During examination by Whipple's counsel, Hererra testified the sweeper did not have any mechanical problems at the time of the incident, and it was functioning as expected. (*Id.* at 19:19-23.)

Herrera was also asked about his testimony given during direct examination where he stated he did not believe the sweeper struck the pallet with enough force to push it into the table. On March 11, 2008, just two months after the incident, Herrera gave a statement to BNSF's claim agent where he stated that while in the process of turning the sweeper around, he hit the pallet at an angle, and pallet was pushed into the table. (*Id.* at 20:3-25, 21:1-5.)

The following exchange then took place between Whipple's counsel and Herrera about the circumstances concerning his changing his testimony:

> Q When, after March 11, 2008, did you then decide that the information you gave to Mr. Fernandes was incorrect, and you are no longer sure that the pallet of water hit the table?
>
> A When I seen those pictures on April 7.
>
> Q So when the lawyers talked to you in April of this year [2009], and at the same time, you get the subpoena telling you that they want you to come here and testify, you remember what you told Mr. Fernandes on March 11, 2008 was wrong?
>
> A Yeah.
>
> Q Was it something they pointed out to you in the pictures that cleared your recollection up as to whether or not the pallet of water had struck the table?

> A Actually, no, I brought it up. Because when I looked at that picture, it looked like that pallet of water was to the west of it, and if it would have hit the table, it would have hit it on the east side of the table.

(*Id.* at 25:6-24.)

Evidence was introduced at trial that BNSF's safety rules that when Herrera operated the sweeper, "[s]afety was the most important element," he must obey the rules, "[i]n case of doubt or uncertainty, take the safe course," and to be "alert and attentive" in order to prevent injury to others. (Whipple's trial Ex. 1.[5])

BNSF's field superintendent of the mechanical department, Timothy Crilly, agreed that Herrera had an obligation to follow the safety rules, had a duty to avoid colliding with objects and employees, and had a duty to keep alert when operating the sweeper. (Whipple's post-trial Ex. 8, 77:21-25, 78:1-12.)

When Crilly was asked whether Herrera violated the rules, he stated "[w]ell again, as I said in my testimony that day, I did not have adequate time to assess that whole situation, Bu it looks as though that's what happened based upon everything I know in the incident. He did hit the pallet, the pallet hit the table, and I think that's clear." (*Id.* at 79:24-25, 80:1-6.)

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5 Whipple's trial exhibits are found in envelopes attached to Supplemental Index.

Despite BNSF's rules and his testimony on cross-examination, Crilly also testified on direct examination that there was no direct rule violation by Herrera if he was operating the sweeper "in an alert and attentive manner but simply misjudged it and bumped into the . . . pallet . . . ." (*Id.* at 46:4-8.)

Likewise, BNSF's general car foreman, Andrew Callahan, testified that Herrera had a duty to maintain a proper lookout and control when he operated the sweeper. (*Id* at 145:16-18.) And that Herrera was trained to keep a lookout and not to crash into objects or people when operating the sweeper. (*Id.* at 145:19-25. 146:1-4.)

Like the testimony of Crilly, Callahan testified on direct examination that he "did not think [Herrera] violated the [safety] rule. He was operating this, and he made a mistake in judgment." (*Id.* at 111:22-25, 112:1-2.) Callahan came to this conclusion despite Herrera accepting responsibility for the incident and his admission that he did not operate the sweeper "as safely as he could." (*Id.* at 111:10-14.) Herrera also signed "a commitment" that he would "try operating [the sweeper] safer than he already [did] . . . ." (*Id.* at 145:2-7.)

There was no evidence offered at trial that the sweeper was defective, that the sweeper made a sudden and unexpected move, that Herrera's view was obstructed, or that he was distracted by other workers or shop activities.

Indeed, he admitted that the same conduct in a parking lot would establish his responsibility in causing an accident. (*Id.* at 36:1-8.)

As previously mentioned, the jury returned a verdict where it found no negligence on BNSF's part. Because the jury found no negligence, it did not reach the questions concerning causation and damages.

B. Post-trial Motion.

Whipple's post-trial motion brought pursuant C.R.C.P. 59(d)(4) was based on photographs of the accident scene which were never provided in the course of discovery despite a specific demand. (Whipple's post-trial Ex. 1, 5.) Specifically, BNSF disclosed only one set of photographs were taken. (*Id.*) BNSF Railway acknowledged formally that it failed to provide five photographs taken on January 15, 2008, and only provided 12 photographs taken on January 17, 2008. (Whipple's post-trial Ex. 6, 2, Ex. 7, 1.) The five photographs depict an accident scene completely contrary than shown in the photographs produced in discovery and introduced as evidence at trial concerning the condition and location of the palate and position of the sweeper. (*Id.* at Ex. 2, Ex. 3.)

BNSF, through affidavits of Stefka, Callahan and Fernandes (claim agent), claimed that it was just a mistake that the crucial photographs taken most closely to

the accident were never provided in discovery and "found" only after the motion was brought. (*Id.* at Ex. 5, Ex. 6, Ex. 7.)

These undisclosed photos show:

1. That the rear of the sweeper (which has a much larger profile than the front) struck the pallet;

2. That there was significantly more water on the palate than in the photographs introduced at trial; and

3. That the pallet was shoved into the table with bottles of water into one of the chairs. (*Id.* at Ex. 3.)

On the other hand, the photographs that were produced by BNSF and introduced into evidence at trial were staged to show the presence of a lunch bucket on the water palate (located proximally to the sweeper and presumably not moved by what the railroad contended was a "tap"), and a notebook on the table which also was presumably remained on the table notwithstanding the impact. (*Id.* at Ex. 2.) None of these objects appeared in the "found" photographs taken on the day of the incident.

In support of Whipple's motion, he offered the affidavit of Robert Long, who sets out discussions he had with Stefka related to a meeting he had with BNSF's counsel prior to trial. (*Id.* at Ex. 12.) Specifically, when Stefka met with counsel and was shown photographs, he informed the attorneys that there were additional photographs that were taken beyond those shown to him. (*Id.*)

Stefka agreed with Long's affidavit on the following points:

1. That he was the one who took the undisclosed photographs;

2. That he observed scrape marks on the floor near the table;

3. That he saw several boxes of water strewn about the floor after the accident; and

4. That he downloaded the "found" photographs to Mr. Callahan's computer. (*Id.* at Ex. 5.)

What is most striking about BNSF's response is what it ded not say. While claiming that the unproduced photographs were not "found" until after Whipple's post-trial motion was filed, BNSF does not explain or offer any evidence concerning Stefka's meeting with its counsel before trial where he complained that the photographs he was being shown were not the ones which he took. The BNSF's submission did not dispute that this conversation occurred, and did not offer any reason why no investigation was done to locate the photographs that were "found."

Callahn's affidavit only adds more questions on why the photographs were never produced. Callahan's affidavit indicates that he and Stefka interviewed Joe Herrera, the sweeper operator, who described that he struck the palate with the *rear* of the sweeper. (*Id.* at Ex. 6.) Callahan asked Stefka to take the "found" photographs showing the *rear* of the sweeper striking a pallet. (*Id.*)

Callahan was the BNSF's corporate representative at trial and remained at counsel table through out the trial. He was present at trial when Herrera testified as follows:

> Q Now, let me ask you a couple more questions, Mr. Herrera. In terms of the pallet of water, do you recall the pallet? Do you recall the pallet that had the water on it?
>
> A Yes.
>
> Q Would you look through any of those photographs and tell us if that appears to be the pallet.
>
> A Letter F.
>
> Q Letter F. Does letter F show what the pallet looked like with the water on it on January 15?
>
> A Yes.
>
> Q Do you believe that the pallet had more water on it than what's shown on Exhibit F, or do you think that fairly and accurately depicts how much water was there?
>
> A That was fairly close.

(*Id.* at 8:25, 9:1-15.)

Callahan was present for this trial testimony and admitted in his subsequent affidavit he was aware of asking Stefka to photograph the conditions depicted in the "found" photographs which show a very different scene. Yet, Callahan and BNSF wants this Court like the trial court to believe that he just forgot that he

asked Stefka to take the photographs and that he never opened the photographs on his computer. The "found" photographs show that the sweeper pushed the pallet into the table and one of the photographs show that a box of water was actually pushed onto a chair. Knowing these photographs existed, Callahan remained silent when Herrera testified as follows:

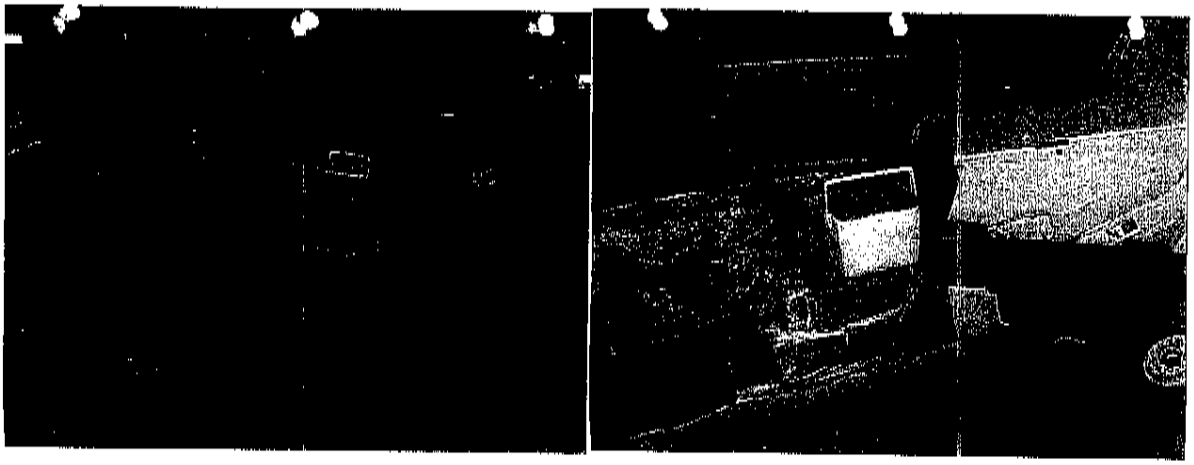
> Q Did you believe that the pallet even struck the table at that time?
>
> A I didn't think it did.
>
> Q What did you think –
>
> A I didn't even feel when I hit the pallet, actually.
>
> Q Okay. Please explain that. I wasn't sure I quite understood.
>
> A Like, when you have a collision with something, you feel a jolt. I didn't feel anything. I thought it just stopped on its own.
>
> Q Okay. Did you see the pallet slide a little bit, though?
>
> A No. Maybe a little bit, yeah.
>
> Q Did you hear any kind of an impact with the table?
>
> A No.

(*Id.* at Ex. 8, 11:2-18.)

The "found" photographs prove that Herrera, at best, was mistaken, and Whipple was deprived of any ability to use the first set of photographs to question Herrera. The "found" photographs, if produced, would have shown a different

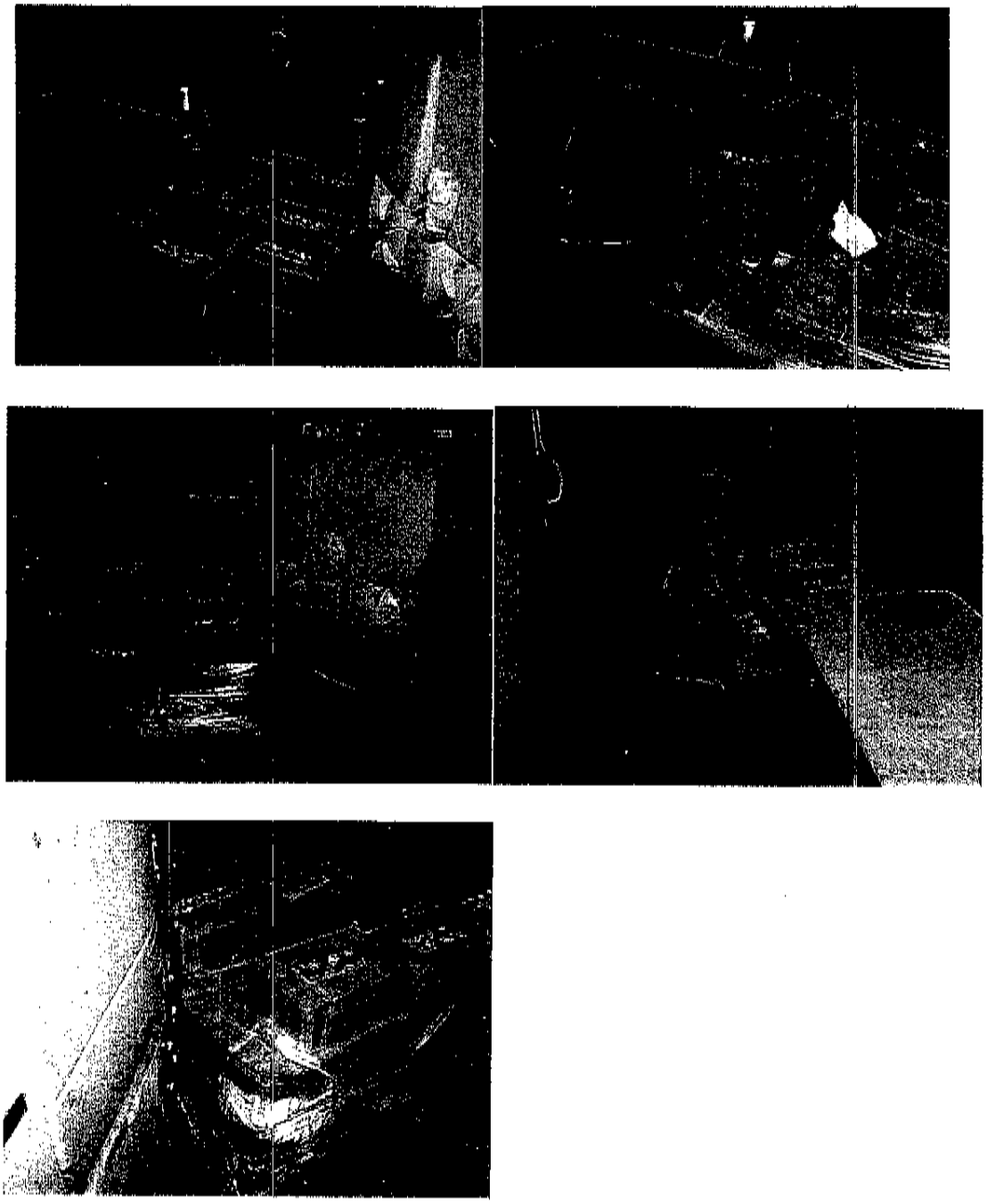
mechanism of impact by the sweeper than the photographs that the jury actually saw.

The significant difference the photographs would have made is established by the comparing the two sets of photographs. For instance, one of the photographs show a relative large distance between the table and pallet, indicating no contact between the two objects. A second photograph shows an impact of front of sweeper with palate with only one case of bottles at the bottom and a lunch box on top:



(*Id.* at Ex. 2.)

These photographs contrast sharply with the five "found" photographs which for the first time show a very different scene:



(*Id.* at Ex. 3.)

Herrera's testimony on cross-examination reinforces how the photographs not only shaped, but changed his testimony.

Q There is no question in your mind, is there, that when you hit the pallet of water; the pallet of water hit the table, correct?

A I don't think it did.

Q Were you asked by Mr. Fernandez on March 11, 2008 to give a recorded statement concerning the facts and circumstances of this accident?

A Yes.

Q And was one of the questions that Mr. Fernandez asked you whether or not the pallet hit the table?

A Yeah.

Q And what did you tell him?

A I told him I thought I had hit the table, **but after I reviewed some of those pictures we took, I don't think that pallet even touched the table.**

(*Id.* at Ex. 8, 19:24-25, 20:1-14.)(Emphasis added.)

Herrera continued to testify on cross examination as follows:

Q When, after March 11, 2008, did you then decide that the information you gave to Mr. Fernandez was incorrect, and you are no longer sure that the pallet of water hit the table?

A **When I seen those pictures on April 7.**

Q So when the lawyers talked to you in April of this year, and at the same time, you get the subpoena telling you that they want you to come here and testify, you remember what you told Mr. Fernandez on March 11, 2008 was wrong?

A Yeah.

Q Was it something they pointed out to you in the pictures that cleared your recollection up as to whether or not the pallet of water had struck the table?

A Actually, no, I brought it up. **Because when I looked at that picture, it looked like that pallet of water was to the west of it, and if it would have hit the table, it would have hit it on the east side of the table.**

(*Id.* at Ex. 8, 21:6-24.)(Emphasis added.)

The re-direct examination of Herrera by BNSF's counsel only reinforces the important role that the photographs played in framing the testimony:

Q So you're subpoenaed, and then I asked you, basically, what?

A What had happened.

Q Did you tell me what had happened?

A Yes.

Q Did you ask to look at various documents?

A Yes, I did.

Q Were those documents provided to you on that day?

A Yes.

Q And after you looked at those documents, what did you essentially tell me? Did you tell me that the pallet hit the table or that it slid underneath the table, or what did you tell me in that regard?

A **Well, with the pictures, it looked like it slid underneath the table. After I viewed the pictures.**

(*Id.* at Ex. 8, 33:5-20.)(Emphasis added).

The harm from the lack of disclosure of the photographs is further illustrated by the Callahan's trial testimony. While testifying, he either forgot or ignored that the "found" pictures had been taken. Instead, he testified on how the pictures produced in discovery represented the conditions at the time of the accident:

Q And can you tell the jury how these photographs came about? Obviously, they weren't taken at the time of the incident; is that correct?

A We would have went out and took them. One of the things we do with an incident is we try to find the root cause so it doesn't happen again. This was a very strange occurrence, for a sweeper to be involved in a situation like that.

Q **As far as the photos, did you go out and try to re-create based on what the witnesses had told you what the situation was?**

A **That is correct.**

Q Okay. And as far as, then, interviewing any employees, did you interview Mr. Herrera?

A Yes.

(*Id.* at Ex. 8, 110:4-18.)(Emphasis added.)

Callahan's testimony is particularly troubling since he is telling the jury that the photographs were an attempt to "re-create . . . what the situation was." The

photographs introduced into evidence showed a relatively empty pallet of water bottles being struck by the front of the sweeper. Based his affidavit, it is clear that Mr. Callahan knew that his testimony at trial was false:

> As a result of Mr. Whipple claiming an injury from the incident, a formal investigation was initialed wherein we interviewed Joe Herrera, the operator of the floor sweeper. During our interview with Mr. Herrera on January 15, 2008, **Mr. Herrera described accidentally striking the pallet of water bottles with the rear of his machine.** Thereafter, I had my Assistant General Foreman, Dan Stefka, **attempt to re-create the incident showing the floor sweeper striking the pallet of water bottles with the rear of the machine.** Mr. Stefka took five photographs of this attempted re-creation, which are attached hereto as Exhibit A. Following the taking of the photographs, the photographs were downloaded onto my computer.

(*Id.* at Ex. 6.)

Stated another way, Callahan tried to tell the jury that the photographs they viewed at trial represented "what the situation was" while his sworn affidavit reflects he asked Stefka to re-create the incident showing the floor sweeper striking the pallet of water bottles with the rear of the machine (e.g. as shown for the first time in the "found" photographs which neither he or anyone else with the railroad even remembered existed until the motion for a new trial was filed.)

To make matters worse, Callahan acknowledge that he also took another photograph of the general area that was never produced in discovery. (*Id.* at Ex. 6.)

If it were not for Stefka's comments to a fellow employee, Robert Long, the existence of the photographs would have remained secret (except for BNSF counsel who was told by Stefka that additional photographs existed). The photographs the jury saw provided the framework for the defense of the case. More importantly, the "found" photographs would have undermined the railroad's claim about the amount of water on the palate, the impact of the sweeper, and cast serious questions on the credibility of Herrera. Herrera, after all, told the claim agent, Larry Fernandes in a recorded statement that the pallet of water was struck with sufficient force to hit the table. (*Id.* at Ex. 8, 20:3-18, 21:6-24.) The sole basis for changing his testimony at trial was his review of the photographs produced in discovery and introduced as evidence at trial. (*Id.*) To say Herrera's testimony based on only the disclosed photographs was important to the railroad's defense is an understatement. It was his conduct that the caused the accident and was the basis of the railroad's negligence.

SUMMARY OF ARGUMENT

The pending appeal involves two issues. The first issue is whether the district court erred when it denied Whipple's motion notwithstanding the verdict ("motion jnov") on the issue of negligence. Although the issue should be decided by a jury, the uncontradicted evidence showed that BNSF's employee, Joe Herrera,

operated a large sweeper without keeping a proper lookout and control of the machine, and the sweeper struck a pallet of water, which in turn struck a table at which Whipple was seated. There was no evidence offered at trial explaining away Herrera's conduct that was not related his negligent operation of the sweeper. Accordingly, the only reasonable conclusion the evidence supports is that BNSF's was negligent due to its employee's negligent conduct.

The second issue seeks review of whether the district court erred when it held that a set of photographs taken on the same day of the incident that was never disclosed to Whipple prior to trial did not constitute newly discovered evidence requiring a new trial. The photographs in question undermined BNSF's central theory that the collision between the sweeper and pallet was so minor that at best there was only a minor tap.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DENIED WHIPPLE'S MOTION BROUGHT UNDER C.R.C.P. 59(a)(2) SINCE THE EVIDENCE POINTS TO ONLY ONE CONCLUSION - THAT BNSF WAS NEGLIGENT.

A. Standard of Review.

Whipple's post-trial motion brought pursuant to C.R.C.P. 59(a)(2) centers on the narrow issue of whether there was sufficient evidence presented at trial to support the jury's finding of no negligence on BNSF's part. Whipple understands

that granting relief under the rule is the exception to the general rule that questions of fault are normally left to the province of a jury. However, the law is equally well-established that a court should grant a motion jnov where there is no evidence supporting the jury's verdict. The pending case presents the situation where the evidence presented at trial established only one reasonable inference – that BNSF was negligent when its employee, Herrera, collided with the pallet of water bottles while operating the floor sweeper.

Whether a motion jnov should be granted is a question of law. *Cissell Manufacturing Co. v. Park*, 36 P.3d 85, 91 (Colo. Ct. App. 2001). The question to be answered by the court is whether there is sufficient evidence to create a jury issue. *Roberts v. Bucher*, 584 P.2d 97, 99 (Colo. Ct. App. 1978), *rev'd on other grounds*, 595 P.2d 239 (Colo. 1979). When answering this question, the court must view the evidence "in the light most favorable to the prevailing party, including the benefit of all legitimate inferences . . . ." *Id.* A motion may be granted when "no reasonable jury could have arrived at the result that the jury in fact reached." *Id.* (citations omitted). A court may direct a verdict on the issue of negligence when it "finds, as a matter of law, that defendant has by his acts or omissions breached a duty which he owed to Plaintiff." *See Brittis v. Freemon*, 527 P.2d 1175, 1177 (Colo. Ct. App. 1974)(a trial court's directing a verdict on the

issue of a defendant's negligence still requires the jury to determine issues of causation and damages). This Court applies a de novo standard of review to the district court's ruling. *MDM Group Assoc. v. CX Reinsurance Co LTD., U.K.*, 165 P.3d 882, 885-86 (Colo. Ct. App. 2007)(citations omitted).

Applying the procedural standards for a motion jnov to the pending case, the only **reasonable** conclusion that the evidence supports is that Herrera failed to exercise reasonable care when he operated the floor sweeper that struck the pallet of water. There was no evidence presented at trial that the sweeper malfunctioned, that Herrera's ability to see was impaired or obstructed which prevented him from exercising reasonable care or any other type of evidence that would excused him from exercising reasonable care.

B. Herrera was negligent as a matter of law.

A railroad violates the FELA when it fails to provide its employees with a reasonably safe place to work. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 353 (1953). This duty is a non-delegable, continuing duty. *Id.* If a railroad violates the Act, it is liable for all injuries that its "negligence played any part, even the slightest, in producing the injury . . . for which damages are sought." *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506 (1957). The Act specifically

provides that a railroad carrier is liable for all negligent acts of its "officers, agents, or employees" which result in injury to the Plaintiff. 45 U.S.C. § 51.

The FELA statutorily imposes a higher standard of care that is in addition to the more general duty of care which the law requires of all persons under common-law negligence. *See Kernan v. American Dredging Co.*, 355 U.S. 426, 438-39 (1959).

From the above-listed general principles, more specific rules have developed relating to a railroad's duty to keep its work place reasonably safe. Specific duties include the duty to adopt reasonably safe work methods, *Blair v. Baltimore & Ohio RR. Co.*, 323 U.S. 600, 603-602 (1945); the duty to instruct, *Lindauer v. New York Central R.R. Co.*, 408 F.2d 638, 640 (2nd Cir. 1969); and the duty to enforce its own rules and procedures, *Duncan v. St. Louis - San Francisco Ry. Co.*, 480 F.2d 79, 83 (8th Cir. 1973).

The district court properly charged the jury with respect to defining negligence as "the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, when prompted by considerations which ordinarily regulate the conduct of human affairs." (Jury Instruction No. 14.[6])

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6 Jury Instructions are found in large envelope attached to Volume 8.

At trial, the jury heard evidence concerning BNSF's safety rules that required employees observe all rules (Rule S-28.1), employees always take the safe course (Rule S-28.1.1), and employees always "be alert and attention when performing their duties and plan their work to avoid injury" (Rule S-28.1.2). (Whipple's trial Ex. 1.)

The fact witnesses testifying at trial agreed that Herrera violated these work rules when he operated the sweeper. Timothy Crilly, BNSF's field, testified that Herrera was under a duty to comply with the safety rules, and to remain alert and attentive when performing his work. (Whipple's post trial Ex. 8, 77:18-25, 78:1-12, 79:8-25, 80:1-6.) Crilly also agreed that it was Mr. Herrera's duty under the safety rules to avoid colliding with objects located near co-workers. (*Id.*) Indeed, Crilly testified that Herrera "did not adequately prepare and was not prepared to avoid that injury or situation with the [Plaintiff]." (*Id.* at 79:22-23.) And that as a result of him being inattentive, Herrera "hit the pallet, the pallet did hit the table, and I think that's clear." (*Id.* at 80:5-6.)

Evidence that Herrera violated BNSF's safety rules directly supports a finding of negligence. *See Kurn v. Stanfield*, 111 F.2d 469, 473 (8th Cir. 1940)(evidence of the railroad's failure to follow its own internal rules supported the jury's finding of negligence, and also an employee may rely upon its

employer's internal rules for the standards of conduct they may anticipate); *Renaldi v. New York, New Haven & Hartford R.R. Co.*, 230 F.2d 841, 844 (2nd Cir. 1956)(the railroad's failure to follow its own safety rule established its negligence since the rule was enacted for the protection of the Plaintiff, and where violation contributed to occurrence of the accident); *Wilson v. Norfolk & Western Ry. Co.*, 440 N.E.2d 238, 248 (Ill. Ct. App. 1982)(the railroad's failure to follow its own rules is evidence of the its negligence); *Chesapeake & Ohio Ry. Co. v. Biliter*, 413 S.W.2d 894, 897 (Ky. Ct. App. 1967).

Just as important, there was no evidence offered at trial that explained Herrera's violation of BNSF's safety rules. In other words, there was no evidence presented at trial that supported a reasonable inference that excused Herrera's negligent conduct. Just as important, Herrera offered no excuses for his failure to keep a proper lookout and operate the sweeper in compliance with BNSF's safety rules.

Likewise, Andrew Callahan, BNSF's general car foreman, testified that Herrera was trained to keep his eyes in the direction he was moving when operating the sweeper, and that he was trained not to crash into objects or people when operating the sweeper. (Whipple's post-trial Ex. 8, 145:19-22.) Callahan also testified that Herrera took responsibility for the incident occurring, and

Herrera "admitted to not handling [the sweeper] as safely as he could." (*Id.* at 111:10-14.)

Trying to negate the only reasonable conclusion that Herrera was negligent when he operated the sweeper that struck the pallet, Callahan's testimony highlights the tortured difference BNSF tried to make between negligence and a momentary lapse of judgment:

> Q [Whipple's counsel] [W]hen you spoke with Mr. Herrera that he accepted responsibility for misjudging his distance and hitting the water pallet. Did I read that right?
>
> A [Callahan] That's correct.
>
> Q And he agreed that, in the future, he would operate more safely and in a more attentive manner. Those were your words?
>
> A I didn't say "attentive." I said an even safer manner.
>
> Q Is that to imply that his actions were not safe on this day?
>
> A No.
>
> Q Is it your testimony before the jury that on January 15, 2008, while Mr. Herrera was operating that sweeper, crashed into the pallet of water and hit the tables, was in full and complete compliance with all of the safety rules of BNSF?
>
> A Yes, sir.
>
> * * *
>
> Q Yes. Did you feel he was operating it in a reasonably safe manner as expected by BNSF at the moment he crashes into the water pallet and hits the table?

A Yes, I do.

Q Mr. Herrera signed a form after this accident, didn't he?

A No. I referred to it as the alternate-handling sheet. And he referred to it as a sign-out, which – that's poor training on my part. I should have briefed him better on you have a sign-out process, and you have an alternate-handling process.

Q A waiver is an admittance of guilt on the BNSF, is it not?

A And a waiver is based on an investigation, I would assume. It was not a waiver.

Q My question to you, is a waiver an admittance of guilt with a commitment to change some behavior?

A Is that what a waiver is? Yes.

Q Was there a waiver here?

A Negative.

Q What did Mr. Herrera then sign?

A He signed a commitment. It's a small sheet on an alternate-handling form in which I wrote down some of the things that I was satisfied with, with his commitment to – number one, try operating safer than he already does; number two, to complete some CBT.

Q So your conclusion was that you needed to counsel him to work more safely, you needed to send him to training, but you were convinced, at that moment in time, there was absolutely nothing that Mr. Herrera did wrong on January 15, 2008 to cause or contribute to this accident, right?

A That's correct. It was an accident. He misjudged the distance.

(*Id.* at 143:4-25, 144:1-25; 145:1-15.)

When Callahan's testimony is condensed to its essence it is clear that Herrera "accepted responsibility for misjudging [the] distance and hitting the pallet," Callahan received assurances from Herrera that he would operate the sweeper in "an even safer manner," and Callahan also required Herrera to take additional training with respect to operating the sweeper. It belies reason that, despite Callahan's testimony, a conclusion could be reached that Herrera was not negligent at the time in question.

Herrera also testified that he did not intentionally hit the pallets that fell on Whipple but that it was done "accidentally." (*Id.* at 15:3-6.) As is typical in all negligence actions, intent is irrelevant. *See Elston v. Union Pacific R.R. Co.*, 74 P.3d 478, 482 (Colo. Ct. App. 2003).

Examining all the evidence, even in the light most favorable to BNSF, there is absolutely no evidence supporting a reasonable inference that Herrera was not negligent.

Courts in FELA actions have held that a railroad was negligent as a matter of law where the evidence supported only one reasonable conclusion that a railroad was negligent. For instance, in *Cullinan v. Burlington Northern, Inc.*, 522 F.2d 1034 (9th Cir. 1975), the plaintiff was injured when he was thrown off a gondola

car as he attempted to affix a cable attached to a crane to the derailed car. *Id.* at 1035. The trial court granted the plaintiff's motion for a direct verdict on the issue of negligence because the uncontradicted evidence presented at trial established that the railroad was negligent. *Id.* at 1036. In affirming the trial court, the Ninth Circuit noted that directed verdicts were appropriate in only exceptional cases. *Id.* Nevertheless, the court agreed with the trial court that the "uncontradicted evidence" established "the supervising employees created a dangerous condition by rolling the cars into contact and by failing to take steps to protect plaintiff when he was ordered to perform work on tope of the canted gondola." *Id.*

Similarly, in *Knierim v. Erie Lackawanna R.R. Co.*, the plaintiff was injured when the train he was riding was struck by another train. 424 F.2d 745, 746 (2nd Cir. 1970). The trial court directed a verdict against the railroad on the issue of negligence.. *Id.* The Second Circuit affirmed the trial court's finding that the defendant railroad was negligent as a matter of law since "no alternative cause not involving negligence on the part of the Railroad has been suggested and indeed it is almost inconceivable that one could exist." *Id.* at 747.

The lesson to be learned from *Cullinan* and *Knierim* is that a trial court may direct a verdict on the issue of a railroad's negligence in FELA cases where the evidence supports only one reasonable conclusion. In the pending case, the only

reasonable inference the evidence supports is that Herrera breached his duty to operate the floor sweeper in a reasonable manner when it collided with the pallet.

The Tenth Circuit has also affirmed courts' granting directed verdicts on the issue of a defendant's negligence in non-FELA cases where the evidence supported only one reasonable inference. *See Weeks v. Latter-Day Saints Hospital*, 418 F.2d 1035, 1038 (10th Cir. 1969)(the evidence established the defendant was in exclusive control of a machine that burned a two year old, and the unrebutted testimony of the plaintiff's expert established that burns were caused by the machine exposing the child to unsafe levels of heat); *Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 499 (10th Cir. 1984)(the uncontradicted established that a piece of equipment was defective, the defect rendered the product unreasonably dangerous, and the product was the cause of the accident).

The various courts' granting and affirming directed verdicts in the cases just discussed is consistent with well-established legal commentary. The function of a trial court in a negligence action is succinctly set out in the Restatement (Second) of Torts:

> In an action for negligence the court determines
>
> (a) whether the evidence as to the facts makes an issue upon which the jury may reasonably find the existence or non-existence of such facts;

> (b) whether such facts give rise to any legal duty on the part of the defendant;
>
> (c) the standard of conduct required of the defendant by his legal duty;
>
> (d) **whether the defendant has conformed to that standard, in any case in which the jury may not reasonably come to a different conclusion**;
>
> (e) the applicability of any rules of law determining whether the defendant's conduct is a legal cause of harm to the plaintiff; and
>
> (f) whether the harm claimed to be suffered by the plaintiff is legally compensable.

Restatement (Second) of Torts § 328 B (1965)(emphasis added).

Thus, the Restatement contemplates situations where the evidence supports only one reasonable conclusion as is the circumstance in the pending case. Specifcially, the comment to Section 328 B provides further direction to courts when faced with a situation where the evidence establishes only one reasonable conclusion or inference:

> Normally the determination of the question whether the defendant has conformed to the standard of conduct required of him by the law is for the jury. Although it involves an application of the legal standard, and to considerable extent a decision as to its content and meaning . . . , it is customarily regarded as a question of fact. **As in the case of other questions of fact, however . . . , the court reserves a power of determination of the preliminary question whether the evidence will permit the jury reasonably to come to more than one conclusion. Where it is clear upon the evidence that the defendant has or has not conformed to what the standard of the law**

> **requires, and that no reasonable man could reach a contrary conclusion, the court must withdraw the issue from the jury and direct a verdict, or give binding instructions if there are still other issues in the case.**

Id. at § 328 B cmt. g.

Here, the court was required to remove the issue of defendant's negligence because the only reasonable inference or conclusion that may be drawn from the evidence is that Herrera was negligent when the floor sweeper he was operating struck the pallet.

It is ultimately the court's responsibility to see that the result of the judicial process is justice. Here, the material facts on Herrera's conduct are not in dispute. Far from being the case where both sides claim to have the green light, this case, as it developed at trial, became a case of applying the undisputed facts to the safety rules of BNSF and, more importantly, to the obligations under the FELA. As great as the jury system is, it will always remain a less than perfect system. It is in these rare circumstances that the Court is empowered, and even obligated, to correct the error. This is especially true where, as here, the crucial facts of Herrera's negligence are uncontested and there is no testimony to excuse the behavior. His acknowledgement that he "misjudged" the distance without any excuse is the very essence of negligence. This is why Crilly testified that Herrera did not comply with the safety rules that day and why Callahan testified that following the

accident, Herrera had to attend additional training and sign a document agreeing to operate in a safer manner in the future.

For these reasons, Whipple respectfully asks that the Court reverse the district court's denial of his motion jnov granted on the issue of BNSF's negligence, and remand the case for trial so the jury may determine issues related to causation and damages.

II. WHIPPLE IS ENTITLED TO A NEW TRIAL SINCE THE PHOTOGRAPHS WERE IMPROPERLY WITHHELD BY BNSF, THE PHOTOGRAPHS WERE MATERIAL, AND THE PHOTOGRAPHS WOULD HAVE PROBABLY CHANGED THE OUTCOME OF THE TRIAL.

A. Standard of Review.

Whipple sought post-trial relief under C.R.C.P. 59(d)(4) based on BNSF's failure to disclose and produce a first set of photographs taken on the day he was injured. When moving for relief under Rule 59(d)(4), the following three elements must be satisfied:

1. That the evidence could not have been discovered by the exercise of reasonable diligence and produced at the first trial;

2. That the evidence was material to an issue in the first trial; and

3. That the evidence, if admitted, would probably change the result of the first trial.

Aspen Skiing Co. v. Peer, 804 P.2d 166, 172 (Colo. 1991)(citations omitted). A district court's decision is reviewed under an abuse of discretion standard. *Id.* (citations omitted).

In denying Whipple's motion for a new trial, the district court held that the first element was satisfied, but the second element (evidence was material) and the third element (evidence would probably change outcome) were not met. (RT, Supp.Index, 165:15-20.) Whipple respectfully disagrees with the district court's holding. As just mentioned, this Court reviews the district court's decision under an abuse of discretion standard. Discretion, however, is not synonymous with license, and a trial court's discretion must be exercised within the bounds of proper legal principles.

Here the legal principle that the district court failed to consider was the spoliation doctrine recognized in *Aloi v. Union Pacific R.R. Corp.*, 129 P.3d 999 (Colo. 2006), and its application of an adverse inference when a party loses evidence that would naturally have been introduced into evidence. This doctrine's application goes to both of the issues - the evidence being material and probably changing the outcome of the trial. This doctrine, coupled with Herrera changing his testimony from a statement given two months after the accident based solely on

his examination of photographs taken two days after the incident, warrant a reversal of the district court's decision.

B. The district court abused its discretion when it denied Whipple's motion.

1. The evidence was not discovered despite reasonable diligence.

Whipple agrees with the district court's finding that he satisfied the first element related to the evidence not being discovered despite reasonable diligence. Clearly, this element is supported by the evidence and the applicable law.

The requirement placed on a party involved in litigation is "to gather all available evidence prior to trial and evaluate and submit such evidence as is consistent with the party's theory of litigation." *Aspen Skiing Co. v. Peer*, 804 P.2d at 172 (citation omitted). The requirement of "reasonable diligence is established when the proponent of the motion demonstrates that the new evidence was not only unknown prior to the first trial but also could not have been timely discovered through **reasonable efforts**." *Id.* at 172-73 (emphasis added)(citation omitted).

Whipple made reasonable efforts to discover the information. He requested that BNSF disclose and provide him with copies of all photographs in the railroad's possession. (Whipple's post-trial Ex. 1, 5.) There was nothing

complicated or novel about the request. BNSF replied by stating there was one set of photographs taken on January 15, 2008 by Stefka and Callahan. (*Id.*)

Whipple's counsel was justified in relying on BNSF's counsel's signature of the discovery responses that all the requested documents were produced. Indeed, by signing the responses, counsel certified that the responses complied with the law. C.R.C.P. 26(g)(2)(4). Just as important, BNSF had an ongoing duty to supplement its responses once its counsel discovered that not all of the photographs were produced under C.R.C.P. 26(e). Indeed, BNSF's counsel knew that not all photographs were produced when he met with Stefka 30 days before trial and was told there were missing photographs. (R.T.Supp.Index, 91:19-22, 92:18-25.) Stefka was then directed to make a cursory investigation to locate the photographs, which consisted of looking on his computer but not questioning Callahan about whether he had the photographs. (*Id.* 93:10-20.) Thus, it is undisputed that BNSF's counsel knew that a second set of photographs had been taken but they did nothing to notify the court or Whipple's counsel.

More troubling is the fact that despite the knowledge of the photographs, BNSF's counsel put on evidence that directly contradicted the photographs. For instance, counsel called Herrera who testified that he did not even believe that the floor sweeper struck the pallet, and that the photographs taken on January 17, 2008

showing only a limited amount of water bottles on the pallet properly represented the condition at the time in question. (Whipple's post-trial Ex. 8, 9:5-10.) Then Herrera was asked on cross-examination by Whipple's counsel why his trial testimony was different than a statement given two months after the incident where he stated he struck the pallet with the sweeper. (*Id.* at 20:3-35, 21:1-5.) Herrera stated he reached a different conclusion after he reviewed the photographs taken on January 17. (*Id.* at 25:6-64.)

The Colorado Rules of Professional Responsibility clearly place the obligation on counsel to be candid toward the court. Rule 3.3(a) demands that:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of material fact . . . to a tribunal or fail to correct a false statement of material fact . . . ;
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or witness called by the lawyer has offered material evidence and the lawyer comes to know its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence . . . that the lawyer reasonably believes is false.

Colo. Rule of Prof'l Conduct 3.3(a).

Likewise, the Colorado Rules of Professional Responsibility require that counsel act fairly with respect to an opposing party and counsel:

> A lawyer shall not:

> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
>
> * * *
>
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists[.]

Colo. Rule of Prof'l Conduct 3.4(a) & (c).

Whipple's discovery request was simple and straight forward when he asked BNSF to identify all photographs that it had taken. BNSF's failure to provide all copies even after its counsel learned that not all of the photographs had been disclosed is inexcusable. Just as important, the photographs that were not disclosed just happened to be those that were most damaging to BNSF's defense. BNSF should not be rewarded for its conduct that violates and undermines rules that are supposed to insure fairness and justice.

2. The evidence is material to the main issue in the trial.

Turning to the second element that requires the evidence must be material, the newly discovered evidence does not satisfy the element if it is cumulative or impeaches trial testimony. *See People v. McNeely*, 222 P.3d 370, 376 (Colo. Ct. App. 2009)(citations omitted)(court discussed the elements a defendant must satisfy in a criminal case).

The importance of the photographs to BNSF's defense can not be overstated. After all, Herrera was BNSF's critical witness. His conduct was the sole focus on the question of negligence. Likewise, his credibility and ability to remember and recollect the specific events of the accident were crucial because his conduct was singularly responsible for the collision.

The testimony at trial revealed that his entire recollection of the collision was shaped by the second re-enactment photographs. He recanted what he told the BNSF claim agent in a recorded statement (e.g. that he did not hit the pallet with enough force to strike the table) based solely on review of photographs prior to trial – "I told him I thought I had hit the table, but after I reviewed some of those pictures we took, I don't think that pallet even touched the table." (citation) What Herrera, Whipple, the judge and jury never knew was the photographs Herrera was shown prior to trial and while he was on the witness stand were not taken on the day of the accident. Instead the photographs which caused him to recant his recorded statement were the photographs taken at the second re-enactment. The photographs from the first re-enactment (which were not discovered or produced until after the trial) showed a much different scene. Even more important, these unproduced photographs from the first re-enactment were based on Herrera's description of the accident. (citation – this comes from the statement of fact on

page 10 of Carlson draft) One can only speculate on why the BNSF felt the need to obtain the second re-enactment photographs. BNSF claims that the second re-enactment photographs were based on descriptions from other witnesses (but not Whipple). The second re-enactment did produce strikingly different pictures and were responsible by Herrera's admission for changing his testimony.

BNSF's failure to produce the first re-enactment photographs (taken on the day of the accident) prevented Whipple from ever cross-examining Herrera on this crucial difference between the two re-enactments. The photographs from the day of the accident would have shown that Herrera's testimony that impact was insufficient to cause the pallet of water to collide with the table was, at best, inaccurate since those photographs show the boxes of water pushed into the table. It would also have cast serious doubt on his testimony that he just "tapped" the pallet. His credibility and recollection of events would have been in question. In short, Whipple was totally deprived of this cross examination. No one, other than BNSF's counsel and BNSF's corporate representative at trial, Andy Callahan, were aware that photographs for a re-enactment on the day of the accident existed.

3. The undisclosed evidence would probably change the result of the first trial.

As discussed above, the undisclosed photographs prevented Whipple from the full ability to cross examine defendant's central witness, Herrera. As noted in

Whipple's first issue on appeal, the evidence of negligence is so strong that it is not a jury issue. Assuming however that there is some basis to allow a jury to consider whether Herrera operated the floor sweeper negligently, evidence that his recollection is inaccurate (because he changed his testimony based on the second re-enactment photographs), or that he was traveling faster than to just "tap" the pallet as claimed, makes it difficult to conceive how a jury would not conclude that his unexcused collision with a pallet of water bottles in the middle of the shop floor is negligence.

There is also the legal doctrine of spoliation that directly relates to the issues that the evidence is material, and that it would probably change the outcome of the case. The doctrine has been fully embraced by Colorado Courts as is confirmed in *Aloi v. Union Pacific R.R. Corp.*, 129 P.3d 999 (Colo. 2006). The doctrine stands for the rule that an adverse inference can be drawn by a jury when a party loses or destroys evidence. *Id.* at 1002. The act by the party losing or destroying the evidence does not have to rise to the level of bad faith. *Id.* at 1003. Instead, the doctrine applies where a party destroys evidence "that they know or should know will be relevant to litigation." *Id.*

Applying this test, the Colorado Supreme Court held a railroad's conduct rose to the level of culpability where its claim agent failed to preserve documents when it knew litigation was imminent. *Id.* at 1001, 1003.

Likewise in the pending case, BNSF's employees, including Callahan, Stefka and Fernandes, failed to preserve the five photographs in such a manner where they were accessible to Whipple. But the pending case presents an even more alarming situation than *Aloi* since BNSF's counsel knew before trial that additional photographs had been taken and the photographs could not be located. Yet counsel did nothing to fulfill its obligation under procedural and ethical rules. Thus, BNSF's counsel's conduct must be presumed to be intentional where they remained quiet.

Turning to the application of spoliation to issues that the evidence is material and would have probably changed the outcome of the trial, the doctrine provides a jury:

> To draw an adverse inference from the absence, loss or destruction of evidence, it would have to appear that the evidence would have been relevant to an issue at trial and otherwise would naturally have been introduced into evidence.

Id. at 1004 (quoting *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995)). If the lost or destroyed evidence meets this threshold, then a trial court

may instruct a jury that it may infer the lost or destroyed evidence would be unfavorable to the culpable party. *Id.* at 1001, 1004.

Here, the conduct of BNSF goes beyond just the spoliation of evidence. BNSF claims the camera that took all of the pictures was stolen prior to trial, and it just made a mistake in failing to produce the photographs. This is spoliation. However, the conduct of BNSF did not stop there. Evidence at the post-trial hearing established that BNSF's counsel was aware 30 days before trial that additional photographs existed. For unexplained reasons, BNSF counsel never testified at the post-trial hearing to either deny knowledge of the existence of the photographs or explain why during the 30 days before trial the photographs were not located. The photographs from the first re-enactment were not "lost" or "destroyed", they were secreted, all while BNSF was fully aware that its representative signed an interrogatory answer under oath that the photographs had been produced. BNSF's conduct passes beyond mere spoliation. With the knowledge of its counsel, BNSF sat on critical evidence of the accident scene in the hope that no one would find out and increase the odds that its crippled employee of nearly 30 years would recover nothing.

In the face of such conduct, discussion of the technical niceties of how the photographs may have affected the outcome of the trial should be unnecessary.

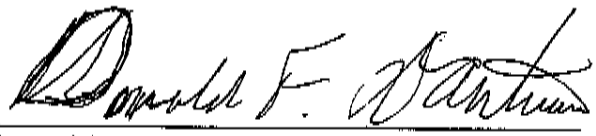
The presumption when such conduct occurs must be that it resulted in harm unless the railroad can make an extraordinary showing that it is impossible for the secreted evidence to have affected the verdict. Any lesser standard not only leaves repugnant conduct unpunished, but invites similar conduct by other litigants who feel that such tactics bear little risk.

CONCLUSION

Whipple respectfully requests that this Court reverse the district court's denial of his post trial motion. With respect to the denial of his motion jnov, Whipple asks the Court to determine that BNSF is negligent as a matter of law, and remand the case back to the district court for trial on the issues of causation and damages. In the alternative, Whipple asks the Court to reverse the district court's denial of his motion based on newly discovered evidence, and remand the case for trial on all issues.

Dated: March 19, 2010

SCHNELL & D'NTUONO



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CERTIFICATE OF SERVICE

The undersigned certifies that on the 19th day of March, 2010, a true and correct copy the foregoing **Appellant's Opening Brief** was served, via United State Mail, postage prepaid, to the following counsel for Appellees as follows:

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