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** ▲
Donald F. D'Antuono, #8940 SCHNELL & D'ANTUONO 1120 Lincoln St., #1304 Denver, CO 80203 Telephone: (303) 830-2200 Facsimile: (303) 830-2211 E-mail: dfdant@aol.com Atty. Reg. #: 8940 **~and~** William Kvas Hunegs, LeNeave & Kvas, P.A. 900 Second Avenue, South, Suite 1650 Minneapolis, MN 55402-3339 Telephone: (612) 339-4511 Facsimile: (612) 339-5150 E-mail: wkvas@hlklaw.com	Case No. 09CA1872
APPELLANT'S REPLY BRIEF	

CERTIFCATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g) because it contains 2,933 words.

The brief complies with C.A.R. 28(k) because it contains under a separate heading: (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.__, p.__), not to an entire document, where the issue was raised and ruled on.

Respectfully submitted:

SCHNELL & D'ANTUONO

_____

Donald F. D'Antuono
-and-
HUNEGS, LeNEAVE & KVAS, P.A.
William Kvas

ATTORNEYS FOR APPELLANT

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INTRODUCTION

Appellant Lavern R. Whipple (Whipple) respectfully submits his Reply Brief in response to Appellee BNSF Railway Company's (BNSF) Answer Brief. Whipple's appeal involves two issues that are related. The first issue raises the question whether the district court erred in denying his motion that the evidence established BNSF was negligent as a matter of law (or motion jnov). BNSF's central defense was that its employee's act of driving a large sweeper into a pallet loaded with boxes of water which struck a table where Whipple was seated was just an "accident." The jury found that the BNSF was not negligent, and did not reach the issues of causation or damages. (Special Verdict Form.1)

The second issue raises the question whether the district court erred when it denied Whipple's motion for a new trial based on BNSF's failure to disclose photographs taken shortly after the incident in question (or motion for new trial based on newly discovered evidence). The existence of the photographs was made known to Whipple only after the trial was completed and the jury found BNSF not negligent. The undisclosed photographs are key pieces of evidence because they showed that the collision between the sweeper, pallet and table was more than just a mere tap, which is directly contrary to the situation depicted in the photographs produced by BNSF and

admitted into evidence at trial. In other words, the undisclosed set of photographs undermined BNSF's only liability defense that the collision was merely "an accident."

ARGUMENT

I. THE EVIDENCE PRESENTED AT TRIAL ESTABLISHES ONLY ONE REASONABLE CONCLUSION: BNSF WAS NEGLIGENT WHEN ITS EMPLOYEE STRUCK A PALLET OF WATER WHILE OPERATING A SWEEPER.

The first issue raised by Whipple is whether the evidence supports any reasonable conclusion other than BNSF was negligent as a matter of law. *See Roberts v. Bucher*, 584 P.2d 97, 99 (Colo. Ct. App. 1978), *rev'd on other grounds*, 595 P.2d 239 (Colo. 1979)(a motion notwithstanding the evidence is properly granted where "no reasonable jury could have arrived at the result that the jury in fact reached").

As discussed in Whipple's Opening Brief, his lawsuit was brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (2001), a federal statute that places upon railroad carriers a non-delegable duty to provide railroad workers with a reasonably safe place to work. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 352 (1943)(citation omitted). The plain language of the statute establishes that a railroad carrier such as BNSF is liable for all negligent acts of its "officers, agents, or employees" which result in injury to the railroad worker. 45 U.S.C. 51 (2001).

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1 The Special Verdict Form is found in a large envelope attached to Volume 8.

Accordingly, BNSF is liable for its employee's negligence. *Mullahon v. Union Pacific R.R.*, 64 F.3d 1358, 1362-63 (9th Cir. 1995)(quoting *Chesapeake & Ohio Ry. v. De Atley*, 241 U.S. 310, 313 (1916)(footnote omitted)).

Here the question is whether BNSF's employee, Joseph Herrera, was negligent when the sweeper he was operating struck a pallet of water, which then struck a table where Whipple was seated. Herrera never denied that the sweeper struck the pallet. He testified at trial that he "accidentally hit the pallet of water," and that he "misjudged" where the pallet was located because he believed "it was down a little further." (Whipple's post-trial Ex. 8, 8:18-23, 10:8-11.) There was no evidence presented at trial that the sweeper had any mechanical problems. Indeed, the sweeper functioned as expected. (*Id.* at 19:19-23.) Thus, the only reasonable conclusion that the evidence supports is that Herrera failed to keep a proper lookout while operating the sweeper, which is the quintessential example of negligence. *See Tiller v. Atlantic Coast Line R.R. Co.*, 323 U.S. 574, 581 (1945)(plaintiff properly alleged a compensable claim when he alleged defendant violated the FELA when its employee failed to keep proper lookout).

In its Answer Brief, BNSF depicts the event as involving "[a] BNSF employee was operating a floor sweeper when an unusual incident occurred." (BNSF's Brief at 1.) The statement at best is a disingenuous description of the incident. There is

nothing "unusual" about the incident in question that involved an employee failing to keep a proper lookout while operating a piece of equipment, and then runs into another object. Collisions between moving equipment and stationary objects occur every day, especially when the operator is not maintaining a proper lookout. Again, there was no evidence contradicting the fact that Herrera struck the pallet with the sweeper.

BNSF goes on to argue that Joe Crilly's testimony supports two inferences. (BNSF's Brief at 14-15.) In response to Whipple's counsel's question related to whether Herrera violated BNSF's safety rules2 when the sweeper hit the pallet, Crilly stated "[b]ut it looks as though that's what happened based upon everything I know in the incident. He did hit the pallet, the pallet did hit the table, and I think that's clear." (Whipple's post-trial Ex. 8, 801-6.)

Based on this testimony, BNSF argues:

> [T]his testimony is unclear and could be interpreted in at least two ways. The jury could find from the testimony that when Crilly said, "But it looks as though that's what happened," he was referring to the circumstances of the accident in which the sweeper hit "the pallet, [and] the pallet did hit the table." As Crilly concluded, "I think that's clear": i.e., that the pallet hit the table."

(BNSF's Brief at 15.)

2 BNSF's safety rules included that when Herrera operated the sweeper, he must be "alert and attentive" in order to prevent injury to others. (Whipple's trial Ex. 1.)

Like its explanation that the collision between the sweeper and pallet was "an unusual incident," BNSF's explanation that Crilly's testimony raised two inferences is ridiculous. The testimony offered at trial must support more than one **reasonable** inference. *See Cullinan v. Burlington Northern, Inc.*, 522 F.2d 1034, 1036 (9th Cir. 1975). Crilly's testimony provides no reasonable basis for a finding of no negligence on BNSF's part. The only reasonable inference that can be drawn from the evidence is that Herrera failed to keep a proper lookout while operating the sweeper, which was a violation of BNSF's own safety rules as well as FELA law.

BNSF's brief also fails to discuss, distinguish or even mention the majority of cases cited by Whipple where a court properly exercised its power to grant a motion jnov. Instead, it cites to *Safeway Stores, Inc. v. Langdon*, 187 Colo. 425, 532 P.2d 337 (1975), where the Supreme Court held that the defendant was not negligent as a matter of law. *Id.* at 340. In reaching its holding, the court stated that the issue of negligence "is for the jury when the evidence is such that different conclusions might be drawn by fair minded men as to whether negligence is shown." *Id.* The evidence that was presented at trial that created a fact question for the jury included the plaintiff hesitating to glance at a display in defendant's grocery store, and a carry-out boy then running into her ankle with a shopping cart. 532 P.2d. at 339. In other words, the

plaintiff was an active participant in the accident.

In the pending case, there is no evidence that is even remotely related to the evidence in *Langdon*. Whipple was not an active participant in the incident. Instead, he was merely sitting at the table on a break – Whipple was in the wrong place at the wrong time. Try as it might, BNSF cannot point to any evidence that "fair minded" jurors could find that it was not negligent when Mr. Herrera ran into the pallet with the sweeper.

Last, BNSF argues that "the jury could have properly found that the alleged injury to Whipple was not foreseeable." (BNSF's Brief at 21.) In support of this argument BNSF states:

> It was not foreseeable that by striking a pallet of water near Track 504 at 9:05 in the morning, Herrera could injure a co-employee, because the carmen were all on break at the time, and the designated break area is upstairs. Nor was it foreseeable that Herrera could cause an accident while operating the sweeper, because Herrera had driven the sweeper for "literally hundreds and hundreds of hours" over a span of eight years without hitting any person or object. Crilly never envisioned that BNSF could be sued because a floor sweeper bumped a pallet of water. In fact, one of plaintiff's co-workers, a witness called by [Whipple] who was sitting at the table, was "amazed by the incident because "it's never happened before."

(*Id*. at 22.)

BNSF's "foreseeability" argument ignores Herrera's uncontested testimony:

Q. And what I'm asking you is, if you hit an object or you knock

> something over, and with the employees that are working in the shop, is it foreseeable that that could potentially injure an employee that's working there?
>
> A. If they're there.
>
> Q. So it is foreseeable, correct?
>
> A. Yes.

(Whipple's post-trial Ex. 8, 23:20-25, 24:1-2.)

Equally as important, there was no evidence presented at trial that Whipple and his coworkers were not in plain sight when they sat at the table or that Herrera was suddenly surprised by their presence at the table.

The argument also ignores well-established FELA law that Whipple was not required to offer evidence that the same exact event took place prior to his injury. Under the FELA, an injured worker need only show that it was reasonably foreseeable that he or she would suffer some type of harm (versus the specific injury) as a result of the railroad's negligence. *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 117 (1963). Once the foreseeability requirement is satisfied, a railroad is liable for all its employee's injuries for which its negligence played a part, and its liability extends to "even the improbable or unexpectedly severe consequences of [its] wrongful act." *Id.* at 120-21. Accordingly, BNSF's argument that the incident was not foreseeable because a similar incident had never happened before or that Herrera was an

experienced sweeper operator is legally irrelevant. The question that was legally relevant was whether Herrera kept a proper lookout while operating the sweeper.

Just as important, there was no evidence offered at trial that explained Whipple's injuries other than the incident in question. Again, reviewing all the evidence in the light most favorable to the verdict, there is a complete lack of evidence supporting the jury's finding.

BNSF's feeble attempt to explain the jury's verdict graphically illustrates the lack of evidence supporting the verdict. Accordingly, Whipple respectfully requests that the Court find that BNSF was negligent as a matter of law, and remand the case back to the district court for trial on the issues of causation and damages.

II. THE PHOTOGRAPHS WITHHELD BY BNSF WERE MATERIAL TO ITS DEFENSE AND WOULD HAVE PROBABLY CHANGED THE OUTCOME OF THE TRIAL.

As mentioned previously, the second issue raised by Whipple in his appeal is associated with the first issue concerning whether there was evidence supporting the jury's finding of no negligence on BNSF's part. As outlined in Whipple's Opening Brief, Herrera downplayed the collision between the sweeper, pallet and table. Indeed, Herrera believed that he did not believe that the "pallet even touched the table." (Whipple's post-trial Ex. 8, 19:24-25, 20:1-4.) His testimony was based on his review of a set of photographs that were produced by BNSF as part of discovery.

(Whipple's Brief at 13.)

However, after the verdict for BNSF, Whipple discovered there was another set of photographs taken in close proximity to the incident in question which showed a larger quantity of water on the pallet compared to the first set, and the sweeper, pallet and table right next to each other. (Whipple's Brief at 14.) The photographs clearly show a much different situation than those photographs disclosed by BNSF and offered at trial.

BNSF first argues that the photographs are merely cumulative of other evidence received at trial. (BNSF's Brief at 22.) And second that the evidence probably would not change the outcome of the trial. The elements of materiality and affecting the outcome are two of the three elements that must be satisfied when arguing a new trial is required based on newly discovered evidence. *Aspen Skiing Co. v. Peer*, 804 P.2d 166, 172 (Colo. 1991)(citations omitted).

Whipple's motion for a new trial brought before the district court was based on newly discovered evidence as provided for under C.R.C.P. 59(d)(4). But the undisclosed photographs were unknown only to one party, Whipple. Viewed properly, the traditional requirement that the party who discovers the evidence bears the burden of establishing that the result would not change the trial fails to address the fundamental wrong committed by BNSF when it failed to disclose the existence of the

photographs to Whipple and the district court. Rather, to promote the disclosure of evidence and to properly sanction a party who fails to disclose relevant evidence, which was done with BNSF's counsel's knowledge, a different rule should be followed. In the circumstances presented in the pending case, it was incumbent that BNSF, the party in exclusive control of the photographs who failed to disclose them, must bear the burden of showing that the evidence could not have affected the outcome of the trial.

Consistent with the important policy to promote full disclosure, Whipple cited and relied on *Aloi v. Union Pacific R.R. Corp.*, 129 P.3d 999 (Colo. 2006), in his Opening Brief. The case involved a railroad failing to preserve evidence under its exclusive control in a FELA case, and the issue reviewed was whether the district court properly instructed the jury on the issue of the inference that it could draw based on the railroad's destruction of the evidence based on the legal theory of spoliation of evidence. *Id.* at 1000. Thus, the fact scenario is exactly the same as the situation in the pending case where BNSF had exclusive control over evidence, and denied Whipple's access to the evidence.

BNSF argues that because *Aloi* did not involve the issue of newly discovered evidence, the Court applied rules that are different from the standard applied when under C.R.C.P. 59(d)(4). (BNSF's Brief at 37-38). Again, BNSF's argument allows

it to escape from its legal obligations without penalty.

Additionally, BNSF's argument misses the point that both newly discovered evidence under C.R.C.P. 59(d)(4) and the legal doctrine of spoliation of evidence involve the concept that a party to litigation is denied access to evidence. In the case at bar, there is no dispute that BNSF had exclusive control over evidence that it failed to disclose under C.R.C.P 26(e). Just as important, once BNSF's counsel knew about the existence of the photographs before trial, it was their ethical duty to disclose the evidence. Colo. Rule of Prof'l Conduct 3.4(a) & (c). Thus, Whipple was denied access to evidence that was strictly controlled by BNSF.

Like the requirement under Rule 59(d)(4) that requires the evidence must be material, the doctrine of spoliation of evidence requires "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)).

In adopting the Fourth Circuit's approach as to materiality, the Court reasoned:

> We find this approach accords with the rationales behind the adverse inference instruction. It serves the remedial function because it minimizes the prejudice suffered by the non-destroying party. This standard also serves the punitive function because it deters destruction by placing the risk that destroyed evidence may not have been detrimental on the party responsible for the destruction.

Id. (citation omitted).

In the pending case, the prejudice suffered by Whipple as the aggrieved party was great. Again as discussed at length in his Opening Brief and above, BNSF's central liability theory was that the contact between the sweeper and pallet was minimal, and the pallet possibly never even touched the table. The non-disclosed photographs show a completely different situation compared to the disclosed photographs. To argue that the non-disclosed photographs are nothing more than cumulative evidence ignores that the evidence completely undermined BNSF's defense. Similarly, an argument that the non-disclosed evidence would not have changed the outcome ignores the undermining effect the photographs had on BNSF's defense.

Last, BNSF should not be allowed to benefit from its unlawful conduct. As specifically noted by the Colorado Supreme Court, "[a]mong the many important purposes of discovery, the most central to a fair trial is the parties' production of all relevant evidence." *Trattler v. Citron*, 182 P.3d 674, 679 (Colo. 2008)(citations omitted). Here in the pending case, BNSF's failure to disclose the inculpatory evidence prevented Whipple from receiving a fair trial. Accordingly, Whipple respectfully requests that the Court reverse the district court's denial of his motion for a new trial, and remand the case back to the district court so he may receive a fair trial,

and have the opportunity to offer all the relevant evidence.

CONCLUSION

Based on the foregoing evidence, law and argument presented in his brief, 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 for a new trial based on newly discovered evidence, and remand the case for trial on all issues.

Dated this 1st day of July, 2010.

SCHNELL & D'ANTUONO

_____

Donald F. D'Antuono
-and-
HUNEGS, LeNEAVE & KVAS, P.A.
William Kvas

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of July 2010, I electronically filed **APPELLANT'S REPLY BRIEF** via Lexis/Nexis File and Serve on the clerk of this Court and hand delivered a CD-ROM of this brief to the clerk, and also served a copy of the REPLY BRIEF upon the following by Lexis/Nexis:

Malcolm S. Mead. Esq.
Andrew J. Carafelli, Esq.
Thomas L. Beam, Esq.
1125 17th Street, Suite 600
Denver, CO 80202
meadm@hallevans.com
carafellia@hallevans.com
beamt@hallevans.com

_____