UNION PACIFIC R.R. CO. V. NAMI: HOW FELA'S RELAXED CAUSATION STANDARD MAY BITE TEXAS RAILROAD EMPLOYERS

I. INTRODUCTION

In an effort to combat the increasing number of injuries and deaths of United States railroad workers, Congress drafted the Federal Employers' Liability Act (FELA) in 1908.[1] Recognizing the dangers associated with railroad labor, FELA lightens the burden on employees seeking damages after work-related injuries by requiring them to prove only that their employer's negligence played some part—no matter how large or small—in bringing about their injury.[2] Moreover, FELA prohibits the employer from alleging contributory negligence or assumption of risk and preempts state common law, requiring state courts to apply FELA standards.[3]

Recently, in *Union Pacific Railroad Company v. Nami*, an employee contracted the West Nile virus during his time at a swampy railroad

1. Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 (2012); Brooke Granger, Comment, *Known Injuries vs. Known Risks: Finding the Appropriate Standard for Determining the Validity of Releases Under the Federal Employers' Liability Act*, 52 HOUS. L. REV. 1463, 1464 (2015).

2. *See* Gallick v. Balt. & Ohio R.R. Co., 372 U.S. 108, 116 (1963); Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 506–07 (1957); David W. Robertson, *Causation Issues in FELA and Jones Act Cases in the Wake of* McBride, 36 TUL. MAR. L.J. 397, 407 (2012).

3. *Rogers*, 352 U.S. at 509 (explaining that Congress amended FELA in 1939 to eliminate the defenses of contributory negligence and assumption of risk in an effort to further protect railroad employees); Dutton v. S. Pac. Transp., 576 S.W.2d 782, 783–84 (Tex. 1978).

worksite with tall grass and copious mosquitoes.[4] A jury found the employer eighty percent negligent for failing to act in accordance with the standard of care of reasonableness under the circumstances, and thus, liable for the majority of the employee's damages.[5] This Note will determine whether or not the Texas appellate court in Corpus Christi properly evaluated the case under FELA standards. With a thorough look at FELA history and an analysis of the way state courts interpret FELA under federal substantive law, this Note will analyze *Nami* under current FELA principles and predict the Texas Supreme Court's judgment regarding the case on appeal.

II. BACKGROUND

A. Legislative Intent Behind FELA

In 1908, when the railroad industry was thriving, Congress drafted the Federal Employers' Liability Act (FELA) to combat extremely high on-the-job injury rates and to protect employees from the industry's inherently dangerous work environments.[6] Before the Act, "harsh and technical rules of state and common law" impeded many employees from recovering compensation for work-related injuries.[7] Specifically, employees were deemed to have "assume[d] the risk of their [railroad] employment," which, in the age of the industrial revolution and mass production, placed the burden of "inevitable industrial accidents" on railroad employees.[8] Frustrated with such inequities, Congress enacted FELA, and in doing so, shifted much of the burden to railroad employers.[9] Congress hoped that the Act would help compensate employees for work-related injuries and, in turn, motivate employers to make their railroad workplaces safer.[10]

B. Common Law Negligence Standard Compared to that of FELA

The Act provides that every railroad that engages in interstate commerce "shall be liable in damages to any [employee] suffering injury . . . resulting in whole or in part from the negligence of any of the

4. Union Pac. R.R. Co. v. Nami, No. 13-12-00673-CV, 2014 WL 4049819, at *1 (Tex. App.—Corpus Christi Aug. 14, 2014, pet. granted) (mem. op.).

5. *Id.* at *7.

6. Granger, *supra* note 1, at 1467.

7. Kan. City S. Ry. Co. v. Oney, 380 S.W.3d 795, 799 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

8. Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743, 1792 (1992).

9. *See id.*; *Oney*, 380 S.W.3d at 799.

10. Granger, *supra* note 1, at 1468.

officers, agents, or employees of such [railroad]."[11] Although FELA is based generally on common law principles and elements, the Act departs in some ways from the common law standards in order to achieve its purpose of railroad employee protection.[12] That is, a FELA plaintiff must prove "common law components of negligence, including duty, breach, foreseeability, causation, and injury."[13] However, under the common law, a plaintiff must prove that the defendant's actions proximately caused the injury, meaning the harm that occurred was within the realm of risks that made the defendant's conduct negligent in the first place.[14] FELA applies a "relaxed standard" of causation, in which the plaintiff can establish proximate cause by proving that the employer's negligence played any part, no matter how small, in bringing about or actually causing the injury.[15]

To establish that such an injury was foreseeable, a plaintiff must show that the employer had "reasonable ground[s] to anticipate that a particular condition would or might result in a mishap and injury."[16] However, the employer does not have to foresee the precise injury or the exact way in which it occurred, and as such, under FELA, an employer must compensate for even the "improbable or unexpectedly severe consequences of his wrongful act."[17] Moreover, FELA eliminates the common law defenses of assumption of risk and contributory negligence, and instead, it incorporates only a comparative fault regime to ensure employee recovery when employers are even slightly negligent.[18] Employers are still free to allege comparative fault, in which the fact-finder can assign an appropriate

11. Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 (2012).

12. *See* CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2634 (2011); Neloms v. BNSF Ry. Co., No. 02-09-00281-CV, 2011 WL 944434, at *3–4 (Tex. App.—Fort Worth Mar. 17, 2011, no pet.) (mem. op.); Robertson, *supra* note 2, at 398.

13. *Neloms*, 2011 WL 944434, at *2 (internal quotation marks omitted).

14. Robertson, *supra* note 2, at 403–04; *see also McBride*, 131 S. Ct. at 2643 (explaining that proximate cause means the complained-of harm resulted from the "natural and probable sequence" of the defendant's action).

15. *McBride*, 131 S. Ct. at 2636, 2640.

16. BNSF Ry. Co. v. Nichols, 379 S.W.3d 378, 389–90 (Tex. App.—Fort Worth 2012, pet. denied).

17. Gallick v. Balt. & Ohio R.R. Co., 372 U.S. 108, 120–21 (1963).

18. FELA was amended in 1939 to eliminate the doctrine of assumption of risk from any and all FELA analyses. *See* Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 506 (1957) ("It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence."); Tiller v. Atl. Coast Line R.R. Co., 318 U.S. 54, 64 (1943) ("The result is an Act which requires cases tried under [FELA] to be handled as though no doctrine of assumption of risk had ever existed."); Granger, *supra* note 1, at 1470 ("Congress wanted to ensure that employees could not be completely barred from recovering damages for an injury due to 'even the slightest' amount of employer negligence." (citing Norfolk S. Ry. Co. v. Sorrell, 549 U.S. 158, 166 (2007))).

percentage of fault for both the plaintiff and defendant, lessening the recovery, but not eliminating it.[19]

C. Preemption

Although state courts frequently face FELA issues, it is federal—not state—substantive law that must apply to resolve such disputes.[20] Under FELA, while a state court is free to apply its own procedural rules, the question of what constitutes negligence under the Act is a federal question, to be resolved under federal law.[21] As a result, the relaxed negligence requirements and limited employer defenses under FELA are applicable to all courts confronted with a FELA dispute.[22]

III. *UNION PACIFIC R.R. CO. V. NAMI*

Recently, the Texas appellate court in Corpus Christi addressed a FELA case regarding an employee, William Nami, who contracted the West Nile virus due to the negligence of his employer, Union Pacific.[23] Specifically, mosquitoes swarmed Nami and his crew every day for four months, yet Union Pacific failed to provide bug spray, refused to patch the holes in Nami's sit-in machine (allowing additional swarms of mosquitoes inside the cab) and chose not to spray or mow down the tall grass and weeds that housed the insects.[24] A jury assessed Union Pacific's fault at eighty percent.[25] On appeal, Union Pacific argued that it was not negligent because it owed no duty to Nami, as landowners generally are not liable for harms by wild animals on their property, and that there is no common law duty to warn for commonly known dangers.[26] Moreover, Union Pacific alleged that Nami failed to meet his burden of causation under FELA, as he could not prove that the injury occurred while at work.[27]

The Corpus Christi appellate court upheld the lower court's ruling, holding each of the following: (1) "Union Pacific's negligent acts created the conditions that attracted the mosquitoes" to the worksite, and thus, although mosquitoes are wild, Union Pacific maintained a duty to warn;[28]

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19. *Tiller*, 318 U.S. at 62.

20. S. Pac. Transp. Co. v. Allen, 525 S.W.2d 300, 305 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

21. Dutton v. S. Pac. Transp., 576 S.W.2d 782, 783–84 (Tex. 1978).

22. *Id.* at 786.

23. Union Pac. R.R. Co. v. Nami, No. 13-12-00673-CV, 2014 WL 4049819, at *1 (Tex. App.—Corpus Christi Aug. 14, 2014, pet. granted) (mem. op.).

24. *Id.* at *2–3, *8.

25. *Id.* at *7.

26. *Id.* at *7–8.

27. *Id.* at *9.

28. *Id.* at *8.

(2) it is not common knowledge that mosquitoes carry and transmit diseases, and as such, Union Pacific was required to warn its employees of such diseases;[29] and (3) under FELA's relaxed causation standard, it was reasonable for the jury to conclude that Nami contracted the disease while at work.[30]

IV. *NAMI* DECISION IN LIGHT OF FELA STANDARDS

Although FELA plaintiffs maintain a relaxed burden of causation, they still must show all other common law requirements of negligence, including duty, breach, foreseeability, and damages.[31]

While Union Pacific seemed sure that it owed no duty to Nami regarding the dangers of mosquitoes, common law principles may contradict its claim.[32] An employer has a recognized duty to warn employees "of the hazards of their employment," especially when employees are "inexperienced" regarding the particular risk, or the risk falls outside of what is "ordinarily incident" to the job.[33] Thus, the *Nami* court properly held that Union Pacific owed a duty to warn Nami of the risks of diseases carried and transmitted by mosquitoes. Though Union Pacific urged that the risk of West Nile is common, the hazard is not "ordinarily incident" to railroad work, nor would the typical railroad worker be experienced regarding the subject. As such, Union Pacific owed a duty to warn Nami of the danger of West Nile, and its failure to warn accordingly was a breach of such duty.

Moreover, an employer is required to "use ordinary care in providing a safe workplace" for its employees.[34] Here, Union Pacific failed to provide Nami with even one can of bug spray, and, more seriously, refused to repair worksite equipment or mow the grass which lodged the abundant swarms of mosquitoes that stung its employees on a daily basis. This nonfeasance is a breach of Union Pacific's duty to provide a safe workplace for Nami and his crew, and it indicates a further reason as to why the *Nami* court was correct in finding that a duty and a breach were present in this case.

Additionally, regarding damages, Nami was hospitalized as a result of the virus and continues to suffer from memory loss, muscle weakness, and

29. *Id.* at *9.

30. *Id.* at *11.

31. Neloms v. BNSF Ry. Co., No. 02-09-00281-CV, 2011 WL 944434, at *2 (Tex. App.—Fort Worth Mar. 17, 2011, no pet.) (mem. op.).

32. *See* Nat'l Convenience Stores, Inc. v. Matherne, 987 S.W.2d 145, 149 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

33. *Id.* (explaining that an employer owes no duty to warn an experienced truck driver employee of dangers commonly associated with driving a truck in an improper manner).

34. Kroger Co. v. Elwood, 197 S.W.3d 793, 794 (Tex. 2006) (per curiam).

kidney dysfunction.[35] Such damages were foreseeable, as Union Pacific had reasonable grounds to anticipate, at the very least, that a mosquito may sting one of its employees. Moreover, Nami specifically complained to his employer that the holes in his sit-in machine were enabling large numbers of mosquitoes to find shelter inside the cab.[36] Although West Nile is a severe and rare consequence of a mosquito bite, an employer must compensate for even the "improbable or unexpectedly severe consequences of his wrongful act."[37] As a result, the common law requirements of foreseeability and damages—as well as duty and breach—were established.

Furthermore, the *Nami* court properly determined that FELA's relaxed standard of causation was met, as Union Pacific's negligence played some part, "even the slightest, in bringing about an injury to the plaintiff."[38] As the *Nami* court noted, Union Pacific's negligent acts "created the conditions" that allowed mosquitoes to swarm and bite Nami.[39] Mosquitoes swarmed Nami and his crew every day for three months, and Nami was further swarmed when he entered his sit-in machine.[40] Further, an expert witness testified that fifteen mosquito pools tested in the same county in which Nami and his crew worked tested positive for West Nile in the same year that Nami contracted the virus.[41] Thus, the evidence establishes that Nami probably contracted the virus while at work.[42] Under FELA standards, a plaintiff meets his burden of causation by establishing that the defendant's negligence was the probable cause of the injury.[43] Therefore, the *Nami* court properly concluded that the plaintiff established the element of causation under FELA's relaxed standard.

Lastly, the *Nami* court applied the appropriate defense of comparative negligence, and the jury assigned Union Pacific eighty percent at fault accordingly. Although Union Pacific urged that Nami's own negligence—of failing to wear long sleeves[44] or read Union Pacific's safety bulletin,

35. *Nami*, 2014 WL 4049819, at *6.

36. *Id.* at *3–4.

37. Gallick v. Balt. & Ohio R.R. Co., 372 U.S. 108, 120–21 (1963). The *Gallick* court held an employer liable under FELA for failing to eliminate a pool of standing water, which housed dead rats, rotting birds, and many insects. *Id.* at 109, 120–21. An insect bit the plaintiff while he was working near the pool, and the injury eventually led to the amputation of both the plaintiff's legs. *Id.* at 109. A jury found that the defendant knew that the pool would attract dead animals and insects, and that, as a result, an injury via insect bite was a foreseeable consequence of its negligence. *Id.* at 110–11.

38. CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2640 (2011).

39. *Nami*, 2014 WL 4049819, at *8.

40. *Id.* at *10.

41. *Id.*

42. *Id.*

43. BNSF Ry. Co. v. Nichols, 379 S.W.3d 378, 382 (Tex. App.—Fort Worth 2012, pet. denied).

44. *Nami*, 2014 WL 4049819, at *2.

which contained statements about West Nile[45]—was the true cause of the injury, its claim was without merit. FELA eliminates the defense of contributory negligence, and it provides that an employee's "failure to use a safer method" is not a complete bar to recovery.[46] Rather, under FELA's comparative fault system, the jury must assign a reasonable percentage of fault for all parties involved.[47] The fact that Nami may have contributed in some way to the injury is not an appropriate defense under FELA standards, as it only serves to reduce and not eliminate Nami's recovery. Therefore, the *Nami* court correctly applied the comparative negligence defense as required under FELA, and the jury's fault determinations were proper.

V. CONCLUSION

Drafted to aid in railroad employee protection, FELA lightens the burdens on railroad workers injured on the job who seek compensation from their employers. Employees must prove all common law elements of negligence, yet they can establish proximate cause simply by proving that the employer's negligence played any part—no matter how small—in bringing about the injury. The *Nami* court appropriately determined that Union Pacific owed a duty to Nami—both to warn him of the risks of disease-carrying mosquitoes and to provide him with a safe work environment. Union Pacific's failure to live up to such duties was a breach, and it played a part in causing the injury by failing to mow the worksite's tall grass, provide Nami with bug spray, or repair the sit-in machine in which Nami worked. Union Pacific's negligence led to Nami's continuing injuries. Although Nami was slightly at fault for failing to wear long sleeves or read Union Pacific's bulletin about West Nile, the *Nami* court appropriately assigned percentages of fault as per FELA standards. Thus, Union Pacific likely will be unsuccessful on appeal, as it failed to live up to FELA requirements to protect its employee appropriately.

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45. *Id.* at *3.
46. Wilkerson v. McCarthy, 336 U.S. 53, 61 (1949).
47. *See* Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 35 (1944); Tiller v. Atl. Coast Line R.R. Co., 318 U.S. 54, 67 (1943); Granger, *supra* note 1, at 1469–70.