

No. 1-10-2967

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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KEITH TRIBE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 06 L 13600
	)	
NORFOLK SOUTHERN RAILROAD CORPORATION,	)	Honorable
	)	Donald J. Suriano,
Defendant-Appellee.	)	Judge Presiding.

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JUSTICE CUNNINGHAM delivered the judgment of the court.  
Presiding Justice Quinn and Justice Connors concurred in the judgment.

**ORDER**

¶1 *Held:* The trial court properly refused the plaintiff's tendered jury instruction and special interrogatory pertaining to a federal regulation, where they were not warranted by the evidence presented at trial.

¶2 Following a jury trial in the circuit court of Cook County, a judgment in the amount of \$190,200, plus costs, was entered in favor of the plaintiff, Keith Tribe, and against the defendant, Norfolk Southern Railroad Corporation (Norfolk Southern). On appeal, the plaintiff argues that the trial court erred in concluding that he had failed to present sufficient evidence to warrant giving a

specific jury instruction (Instruction No. 38) and special interrogatory (Instruction No. 39), which would have allowed the jury to consider whether Norfolk Southern had violated a particular federal regulation (49 C.F.R. §218.27). For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶3

### BACKGROUND

¶4 In January 1994, the plaintiff began working for Norfolk Southern as a locomotive engineer. His duties in operating locomotives included using hand levers, applying handbrakes, connecting hoses between train cars, and performing other manual tasks.

¶5 On September 30, 2004, at approximately 4 p.m., the plaintiff reported to work at the Ashland Avenue Yard in Chicago, Illinois. At approximately 6:30 p.m., the plaintiff was walking toward the locomotive to which he was assigned when he tripped and fell over an air hose laying on a walkway. The plaintiff sustained an injury to his left wrist, but continued to work for four-and-a-half hours after the accident. Subsequently, the plaintiff received medical treatment for his injuries and eventually underwent two wrist surgeries. He was unable to return to work for four years following the accident.

¶6 On December 29, 2006, the plaintiff filed the instant cause of action under the Federal Employer's Liability Act (FELA) (45 U.S.C. §51 *et seq.* (2000)) against Norfolk Southern, alleging that Norfolk Southern failed to provide a safe workplace for the plaintiff, and that its negligence caused his injuries. On April 9, 2008, the plaintiff filed a first amended complaint, which additionally asserted, *inter alia*, that Norfolk Southern failed to comply with the federal "Blue Flag Protection" regulation (blue flag regulation) pursuant to section 218.27 of the Code of Federal

Regulations (CFR) (49 C.F.R. §218.27). On May 12, 2008, in its answer to the first amended complaint, Norfolk Southern raised the affirmative defense that the plaintiff's injuries were caused by his own negligence and lack of due care.

¶7 In June 2010, Norfolk Southern filed a motion *in limine* to bar any reference to the alleged "blue flag violations," on the basis that there was no evidence of record to support those allegations. On June 23, 2010, at the hearing on the motion *in limine*, the plaintiff informed the trial court that evidence would be presented at trial to show that his injuries were connected to Norfolk Southern's alleged violation of the blue flag regulation. The trial court denied the motion *in limine*, noting that the issue could be revisited at the close of all the evidence if no evidence was presented at trial to support these allegations.

¶8 On June 24, 2010, a jury trial commenced. Prior to opening statements, the parties engaged in a discussion before the trial court during which the plaintiff's counsel expressed his intention to mention the blue flag regulation in his opening statement but assured the trial court that "it's based on the evidence." The trial court then allowed the plaintiff's counsel to reference the blue flag regulation in his opening remarks.

¶9 At trial, the plaintiff's counsel presented the testimony of several witnesses, including expert witnesses who testified to the nature and extent of the plaintiff's alleged damages. The plaintiff testified on his own behalf that, at the time of the accident, he was walking in the direction of the setting sun toward "Track 13," where the locomotive to which he had been assigned was stationed, when he tripped over an air hose located on the walkway and fell to the ground. He testified that the setting sun affected his ability to see as he was walking, but that prior to his fall, he had noticed two

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passing trains on the main tracks of the railway and a nearby crew attaching—or "coupling"—train cars together. The plaintiff testified that he did not see the air hose on the walkway when he fell, nor had he, in his entire career as a railroad employee, ever seen an air hose, or pieces of an air hose, placed in the middle of a walkway. Thus, he did not expect that an air hose would be left on the walkway. The plaintiff described the air hose as originally a "dark red," but that it looked black from exposure to dirt, grease and oil. After his fall, the plaintiff experienced pain and his left wrist began to swell. He then iced his wrist, and later reported the incident to a supervisor, who took him to a clinic for medical treatment. Subsequently, the plaintiff's wrist required two separate surgeries and he was unable to return to work until four years later.

¶10 Following the plaintiff's testimony, the jury was dismissed for the day. Thereafter, a jury instruction conference was held during which the parties argued over the applicability of the plaintiff's tendered Instruction Nos. 38 and 39. Instruction No. 38 was formatted to the Illinois Pattern Jury Instructions 60.01 (IPI 60.01) on statutory violations and set forth parts of the language of the blue flag regulation, while Instruction No. 39 was a special interrogatory which asked the jury to determine whether Norfolk Southern violated the blue flag regulation and whether such violation contributed in whole or in part to the plaintiff's injuries. The plaintiff's counsel pointed to the deposition testimony of a supervisor at Norfolk Southern, Daniel Treacy, and argued that the reason that the air hose at issue was in the walkway was because it had been severed by a running train, which supported the notion that a blue signal was not properly displayed on the yard tracks to prevent other moving railcars from rolling into the area where railroad employees were working. The plaintiff's counsel further argued that Daniel Treacy would likewise testify at trial. Counsel for

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Norfolk Southern argued that Instruction No. 38 was inapplicable because the purpose of the blue flag regulation was to protect railroad workers, rather than air hoses. The trial court agreed with Norfolk Southern's counsel and found that the blue flag regulation was inapplicable to the fact situation in this case. The trial court then stated that it would not instruct the jury on Instruction Nos. 38 and 39.

¶11 At the following trial date, counsel for the plaintiff presented the testimony of Jonathan Elswick (Elswick), who was working as a supervisor at the Ashland Avenue Yard on the night of the plaintiff's accident. His duties included supervising locomotive engineers and conductors in the "transportation department" or "operating department" of Norfolk Southern. Elswick testified that federal regulations require that an air-brake test be performed on all railcars, which is the responsibility of the "mechanical" or "car" department at Norfolk Southern, before the trains may leave the yard. In order to perform an air-brake test, the train's brake system must be filled with pressurized air with a ground hose and compressor. Because air hoses and compressors were not positioned alongside every track, railroad employees would sometimes stretch an air hose from its point of origin across a set of tracks in order to pressurize a train which was stationed on an adjacent track that did not have an air hose. Elswick testified that he was aware of the blue flag regulation, which provides that whenever a blue signal is displayed for a particular track, no moving locomotive may enter that track. The purpose of the blue flag regulation was to protect people. He stated that Norfolk Southern's own rules required its employees to "stop short of" and report anything that may be "strung over the rail"—such as an air hose—in order to prevent running over the obstacle with a train. However, he testified that just because an air hose had been "run over" by a train, it did not

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necessarily mean that any rules were violated because it could have been severed as a result of different situations. Elswick surmised that an air hose could be cut by a passing train's wheels, or that it could be severed when the string of railcars to which it is attached rolls backwards, as a result of a defective handbrake, on the set of tracks where they are being serviced by railroad employees. In regards to the plaintiff's accident, Elswick testified that the plaintiff worked for four hours after his fall, and that Elswick took the plaintiff to a clinic to receive medical attention. Elswick testified that he performed some investigation into the accident and prepared an accident report for Norfolk Southern. The accident report stated, based on the plaintiff's representations of what occurred, that the sun was setting at the time of the accident, and that the plaintiff was walking on the east end of the Ashland Avenue Yard when his foot became entangled in an air hose left on the walkway and he fell and crushed his hand. Elswick was later informed that the air hose had been severed; however, he did not investigate how the air hose was cut. Elswick never saw the air hose at issue, never saw pictures of the air hose, and did not recall visiting the accident scene. Elswick noted that the air hose should not have been left on the walkway and that it was "absolutely" a tripping hazard.

¶12 Daniel Treacy (Treacy) testified that he was a mechanical supervisor at the Ashland Avenue Yard at the time of the plaintiff's accident. At that time, only two or three railroad employees from the mechanical department were on duty. He noted that blue flags or signals are displayed whenever the railroad employees pump a train's system with pressurized air. According to Treacy, the blue flag regulation provides that "before any carman can go on, under, or between rolling equipment on a track, the switches gaining access to that track must be locked against such movement, blue flags erected at both ends of the track before any work can be performed." Treacy testified similarly to

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Elswick's testimony that not all tracks were equipped with air hoses and compressors, and that an air hose would at times be stretched from its point of origin across a set of tracks in order to pressurize a train located on a track that did not include an air hose. Treacy testified that on September 30, 2004, he was notified by a "trainmaster" at the Ashland Avenue Yard that the plaintiff was injured as a result of tripping and falling over a coiled air hose. When he arrived at the accident site, he was first unable to find the air hose at issue. Later, he was informed by a "yardmaster" that someone had discarded the "cut-up piece" of air hose in a garbage dumpster. Based on this information, Treacy found the discarded piece of air hose in a garbage dumpster near the accident site and stored it in a room at another train yard. However, the piece of air hose disappeared from the room after Treacy returned from his vacation, and he had no knowledge of what happened to it. As part of his investigation, Treacy spoke with the mechanical department employees who were on duty at the time of the accident. One of those employees informed Treacy that the air hose "had been run over, and [that] he was dragging it out to the [walkway] so he could pick it up with his truck." Treacy acknowledged that a tripping hazard was created by leaving the air hose in the walkway. However, he asserted that based on his investigation of the accident, he had found absolutely no evidence of a "blue flag violation." He noted that the blue flag regulation was "not in place to protect equipment," but rather to protect railroad employees. He further testified that the air hose at issue could have been severed when the railcars to which it was attached rolled over it as the railcars were being serviced by the railroad employees. According to Treacy, air hoses were customarily stored next to the tracks when they were not in use.

¶13 At the close of all relevant evidence, another jury instruction conference was held during

which the trial court revisited the issue of the alleged "blue flag violations." The trial court found that "there's no evidence that there's a violation of a blue flag requirement," and that, "even if there had been a [blue flag] violation, \*\*\* there's no evidence that a train cut the hose." The trial court then refused to instruct the jury on Instruction Nos. 38 and 39.

¶14 On June 29, 2010, the jury returned a verdict in favor of the plaintiff and found that he suffered damages in the total amount of \$634,000. However, the jury also found that the plaintiff was 70% contributorily negligent, thus, reducing the total recoverable damages to the amount of \$190,200.

¶15 On July 23, 2010, the plaintiff filed a post-trial motion for a new trial. On September 29, 2010, the trial court denied the plaintiff's post-trial motion. On October 6, 2010, the plaintiff filed a notice of appeal before this court.

¶16 ANALYSIS

¶17 The sole issue which confronts us on appeal is whether the trial court erred in refusing to instruct the jury on the plaintiff's tendered Instruction Nos. 38 and 39, on the basis that the plaintiff had failed to present evidence to warrant the giving of these instructions.

¶18 The plaintiff argues that the trial court erred in concluding that the blue flag regulation was inapplicable to the instant case, that there was sufficient evidence for a reasonable jury to conclude that a violation of the blue flag regulation contributed to his injuries, and requests that this court remand the matter for a new trial solely on the issue of whether Norfolk Southern violated the blue flag regulation and whether this violation contributed to his injuries.

¶19 Norfolk Southern argues that the trial court acted within its discretion in refusing the

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plaintiff's tendered Instruction Nos. 38 and 39 because he failed to offer any evidence that the air hose at issue was severed as a result of a violation of the blue flag regulation. Further, Norfolk Southern asserts that those instructions were properly rejected by the trial court because they were misleading and argumentative.

¶20 "Every party has the right to have the jury instructed fairly and correctly." *Bielicke v. Terminal R.R. Association of St. Louis*, 291 Ill. App. 3d 690, 693, 684 N.E.2d 160, 162 (1997). "Jury instructions are considered proper where they fairly, fully, and comprehensively informed the jury as to the relevant principles." *Eskew v. Burlington Northern & Santa Fe Ry. Co.*, 2011 IL App (1st) 093450, ¶ 31. A jury instruction may be given only when evidence exists to support the theory of the instruction, and it is error to give an instruction which is not based on the evidence. *Bielicke*, 291 Ill. App. at 693, 684 N.E.2d at 162. It is within the trial court's discretion to determine which issues are raised by the evidence. *Id*; *Ellis v. St. Louis Southwestern Ry. Co., Inc.*, 193 Ill. App. 3d 357, 361, 549 N.E.2d 899, 901 (1990). An abuse of discretion occurs only if no reasonable person would take the view adopted by the trial court. *Eskew*, 2011 IL App (1st) 093450, ¶ 31.

¶21 Under the FELA, "[e]very common carrier by railroad while engaging in commerce \*\*\* shall be liable in damages to any person suffering injury while he is employed by such carrier \*\*\*, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U.S.C. §51 (2000). In a cause of action brought by an injured employee under the FELA to recover damages against a railroad employer, "the fact that the employee may have been guilty of

contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *[p]rovided*, [t]hat no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." (Emphasis in original.) 45 U.S.C. §53 (2000).

¶22 The blue flag regulation under section 218.27 of the CFR provides in relevant part:

"[w]hen workers are on, under, or between rolling equipment on track other than main track –

(a) [a] blue signal must be displayed at or near each manually operated switch providing access to that track;

(b) [e]ach manually operated switch providing access to the track on which the equipment is located must be lined against movement to that track and locked with an effective locking device; and

\* \* \*

(e) [i]f the rolling equipment to be protected includes one or more locomotives, a blue signal must be attached to the controlling locomotive at a location where it is readily visible to the engineman or operator at the controls of that locomotive." 49 C.F.R. §218.27.

¶23 In the case at bar, the plaintiff tendered Instruction Nos. 38 and 39, which the trial court refused to submit to the jury. Instruction No. 38 stated the following:

"[t]here was in force in the United States at the time of the occurrence in question a certain regulation which provided that:

\* \* \*

When workers are on, under, or between rolling equipment on track other than main track – (a) A blue signal must be displayed at or near each manually operated switch providing access to that track;

If you decide that a party violated the regulation in question, then you may consider that fact together with all the other facts to what extent, if any, a party was negligent before and [at] the time of the occurrence."

Instruction No. 39 was a special interrogatory which asked the jury to determine whether Norfolk Southern violated the blue flag regulation and whether such violation contributed in whole or in part to the plaintiff's injuries.

¶24 Based on our review of the record, we find no evidence to support the giving of Instruction No. 38. Testimonial evidence at trial did not establish that the air hose at issue was severed as a result of a violation of the blue flag regulation. In fact, both Elswick and Treacy testified that there was more than one way the air hose could have been cut. We find such speculative testimony to be insufficient to support the theory of a blue flag violation as set forth in Instruction No. 38. Elswick surmised that the air hose could have been severed by a passing train's wheel, or that it could have been severed when a string of railcars to which it was attached rolled backwards, as a result of a defective handbrake, on the set of tracks where they are being serviced by railroad employees.

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Likewise, Treacy testified to different situations under which an air hose could be cut, including the "roll back" scenario described by Elswick, which we find could have occurred regardless of whether the blue flag regulation was fully complied with by Norfolk Southern. According to Treacy, air hoses were customarily stored next to the tracks when they were not in use; thus, a reasonable jury could infer that improperly stored air hoses could inadvertently get run over by a train—a scenario which we find would not even implicate the blue flag regulation. Elswick's testimony further revealed that he did not investigate how the air hose at issue was cut, that he never saw the air hose or pictures of the air hose, and that he did not recall visiting the accident scene. Treacy's testimony showed that he investigated the incident by speaking with mechanical department employees who were on duty at the time of the plaintiff's accident. One of those employees informed Treacy that the air hose "had been run over, and [that] he was dragging it out to the [walkway] so he could pick it up with his truck." However, there is nothing in the record to establish *how* or under *what circumstances* the air hose at issue was "run over." The plaintiff had not presented any evidence to show that the air hose had been strung across a set of tracks to pressurize a train situated on an adjacent track, that the manually operated switches providing access to those tracks were unlocked, that Norfolk Southern failed to display blue signals at each manually operated switch or that blue signals displayed were ignored, and that, as a result, another moving locomotive traveled onto those tracks and severed the air hose. Moreover, Treacy testified that based on his investigation of the accident, he had found absolutely no evidence of a "blue flag violation." Thus, we find that the trial court did not abuse its discretion in determining that the evidence failed to raise the issue of a blue flag violation to support instructing the jury on Instruction No. 38.

¶25 Likewise, the trial court properly refused to submit to the jury the plaintiff's tendered Instruction No. 39, which was a special interrogatory pertaining to the blue flag regulation. See 735 ILCS 5/2-1108 (West 2008) (trial court's refusal to submit a special interrogatory may be reviewed on appeal as a question of law); *Choate v. Indiana Harbor Belt R.R. Co.*, 2011 IL App (1st) 100209, ¶ 22 (trial court's denial of a request for a special interrogatory is reviewed *de novo*). The plaintiff's tendered Instruction No. 39 asked the jury the following two questions: "1. Did Norfolk Southern \*\*\* violate [the blue flag regulation]? 2. If you answered #1 yes, did the violation contribute in whole or in part to [the] [p]laintiff's injury [?]" As discussed, the plaintiff had failed to produce any evidence that the blue flag regulation was implicated, let alone violated, when the air hose at issue was severed. Thus, because Instruction No. 39 was not supported by any evidence in the record, we find that the trial court properly refused to submit it to the jury.

¶26 Notwithstanding a lack of evidence in the record to compel instructing the jury on Instruction Nos. 38 and 39, the plaintiff spends much of his initial brief before this court speculating about other grounds upon which the trial court may have refused the desired instructions. First, the plaintiff argues that the trial court may have refused Instruction Nos. 38 and 39 on the basis that the blue flag regulation was inapplicable because his trip and fall accident was not the type of accident that the regulation was designed to prevent. In support of his contention that the trial court improperly refused his tendered instructions on this basis, the plaintiff cites *Kernan v. American Dredging Co.*, 355 U.S. 426, 78 S. Ct. 394 (1958), which held that liability may be imposed against an employer under the FELA for the violation of a statutory duty even when the injury suffered by the employee was not the type against which the statute was meant to protect. We reject the plaintiff's speculative

contention as unpersuasive and find the case authority relied upon to be inapposite to the case at bar. The plaintiff's argument was premised solely on the presumption that the blue flag regulation was violated in this case, which, as discussed, was not supported by any evidence of record. Moreover, while the trial court mentioned during the first of the two jury instruction conferences that the blue flag regulation was inapplicable to the fact situation at hand, it is clear to this court that the absence of any evidence of a blue flag violation was the trial court's ultimate basis for refusing Instruction Nos. 38 and 39 at the close of all relevant evidence. Thus, we find this argument to be without merit.

¶27 Second, the plaintiff surmises that the trial court may have refused Instruction Nos. 38 and 39 on the basis that a reasonable jury could not have concluded that Norfolk Southern's alleged blue flag violation proximately caused his injuries. He argues that those instructions should have been submitted to the jury because "a reasonable jury could have reasonably concluded that Norfolk Southern violated the [b]lue [f]lag [regulation] and that this violation 'contributed to' the accident that injured [him]." In support of his contention, the plaintiff cites to *Coray v. Southern Pacific Co.*, 335 U.S. 520, 69 S. Ct. 275 (1949) and *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 83 S. Ct. 659 (1963). We also reject this argument as without merit, and find the case law relied on by the plaintiff to be inapplicable to the case at bar, where the issues presented in those cases neither pertained to the blue flag regulation nor the refusal of tendered jury instructions. In making this argument, the plaintiff wholly fails to take into account the requirement that at least *some* evidence needed to have been presented at trial in order to create a basis for giving the instructions at issue. As discussed, because no evidence was presented at trial that the blue flag regulation was violated or even implicated, the trial court properly refused to submit the plaintiff's desired instructions to the

jury.

¶28 For the same reasons, we reject the plaintiff's arguments in his reply brief that the record supported an inference that the air hose over which he tripped was severed as a result of a violation of the blue flag regulation. In an effort to make this contention plausible, the plaintiff argues that the destroyed air hose, which was stretched over several tracks, cut into pieces and thereafter placed on a walkway, supported an inference that a train ran over it in violation of the blue flag regulation. We find the plaintiff's argument to be pure conjecture. While Treacy's testimony revealed that blue signals were required to be displayed *if* an air hose were stretched across a set of tracks to pressurize a train located on an adjacent track, there was no evidence that the air hose at issue had in fact been stretched over the tracks at the time it was severed. Rather, the trial testimony highlights any number of ways by which an air hose could be cut, including a certain scenario—improper storage of the air hose—which would not implicate the blue flag regulation.

¶29 We further reject the plaintiff's claim that Norfolk Southern should be subjected to an "adverse inference" on the basis that it failed to properly preserve the severed air hose as evidence, where he failed to raise this point in his initial brief before this court and does so for the first time in his reply brief. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("[p]oints not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing"). Further, we observe that the plaintiff's tendered jury instruction on missing evidence (Instruction No. 32) was also refused by the trial court. However, the plaintiff does not challenge the trial court's refusal of Instruction No. 32 on appeal, nor had he made any claims of the spoliation of evidence in his written pleadings before the trial court. Thus, we need not consider this point on appeal.

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¶30 Accordingly, we find that the trial court properly refused Instruction Nos. 38 and 39 because they were not supported by the evidence presented at trial. Based on our ruling, we need not address Norfolk Southern's alternative argument that the plaintiff's desired instructions were properly rejected because they were misleading and argumentative.

¶31 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶32 Affirmed.