2016 IL App (1st) 143098-U

FIRST DIVISION
JANUARY 19, 2016

No. 1-14-3098

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMES J. NIEMANN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 L 11384
	)	
ILLINOIS CENTRAL RAILROAD COMPANY,	)	Honorable
	)	Susan F. Zwick,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Liu and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in denying railroad's motion for judgment notwithstanding the verdict or for a new trial on the issue of liability in an action brought under the Federal Employers' Liability Act; trial court did not err in refusing to instruct the jury on railroad's proposed jury instruction on negligence; new trial on damages only is warranted where trial court erred in permitting injured plaintiff to present evidence of lost future earnings based on projected railroad wages beyond the date of his termination and in barring railroad from presenting evidence of his termination.

¶ 2 Following a jury trial in the circuit court of Cook County, the jury returned a verdict in favor of plaintiff James Niemann in the amount of $1,818,446, and against defendant Illinois

Central Railroad Company (ICRR), in an action brought under the Federal Employers' Liability Act (FELA) (45 U.S.C. § 51 *et. seq.*). On appeal, ICRR argues that: (1) the trial court erred in denying its motion for judgment notwithstanding the verdict or for a new trial because Niemann failed to present evidence at trial that ICRR was negligent; (2) ICRR is entitled to a new trial because the trial court erred in refusing to instruct the jury on ICRR's proposed jury instruction on negligence; (3) ICRR is entitled to a new trial because the trial court erred in permitting Niemann to present evidence of lost future railroad wages and in barring ICRR from presenting evidence relating to Niemann's termination from ICRR's employ. For the following reasons, we affirm in part and reverse in part the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 From 1977 until his termination in June 2009, Niemann worked as a freight conductor for ICRR. Conductors at ICRR perform duties such as track switching, coupling and uncoupling railcars, applying handbrakes, and mounting and dismounting moving equipment. He was 54 years old at the time of his termination.

¶ 5 In October 2010, Niemann filed the instant FELA action against ICRR for injuries sustained while employed as a conductor by ICRR. He claimed that his employment required him to board and dismount from moving trains, a practice that was unsafe and injurious. As a result of this practice, Niemann developed repetitive injury to both hips, causing degeneration in the hip joint (hip osteoarthritis) and resulting in bilateral hip replacements.

¶ 6 Prior to trial, in April 2014, Niemann filed motions *in limine*, requesting to bar ICRR from presenting any evidence of his termination and to bar ICRR's proposed economist, Gary Skoog, from testifying to computations of Niemann's economic losses that did not include loss of earnings past the date of Niemann's termination. In response, ICRR filed a separate motion *in*

limine, asking the trial court to bar Niemann from offering evidence of any impaired earning capacity based on his projected railroad wages beyond the date of termination or, in the alternative, to permit ICRR to present evidence of Niemann's termination and that as a result of his termination, he would not have been able to obtain any other employment in the railroad industry. The trial court granted Niemann's motions *in limine* and denied ICRR's motion *in limine*.

¶ 7 On April 11, 2014, a jury trial commenced that lasted over several days. Niemann testified that he was employed by ICRR for 33 years. He worked several jobs, including switchman, until his last position with ICRR as a conductor. All of the positions required him to work outdoors, 12-hour day/night shifts, and to board and dismount from moving trains about 10 to 50 times per shift. He was instructed by ICRR in the proper method for boarding and disembarking from moving railcars. Boarding and disembarking moving equipment was a requirement of the job as a conductor, and the railcars had to be loaded within a set schedule. It was normal to board or exit trains moving between 2 to 6 miles per hour by stepping onto railway ballasts. The height of the drop was between 1 to 2½ feet, depending on the level of the ballast and the placement of the train ladder or platform. When moving, trainmen had to be aware and careful of scrap metal and railroad debris in the ballast. Although instructed by ICRR to use both hands when climbing onto or off a moving railcar, trainmen often only had one free hand if holding their radio or a lantern. In 2008, Niemann began having difficulty walking due to hip pain. At that time, he could no longer work most of the yard and switching jobs that required walking. Niemann sought other jobs with the company that would allow him to sit, but his mobility was limited by increasing pain. In January 2009, Niemann requested medical leave. He received pain medication and injections in his lower back and hips, and attempted to return to

work as a conductor on May 28, 2009. Two weeks after returning to work, Niemann was again unable to do the work and left work on medical leave for a second time on June 12, 2009. In September 2009, Neimann consulted Dr. David Smith and, after testing, was determined to be a surgical candidate for bilateral hip replacements. He underwent the first operation in December 2009 and the second on March 2010. Post-surgery, Niemann relearned to walk, but could not return to the physical labor required of railroad work. At present, he could do most of his pre-surgery recreational activities, but is limited by flexion and pain. Niemann's attempts to find employment are restricted by physical capability and his age. Niemann testified that he was not actively looking for work and considered himself retired.

¶ 8 Colin Fulks, Niemann's railroad safety consultant and expert, testified that he was employed by several rail lines in the industry from 1972 through 2005: Norfolk Southern; Norfolk and Western Railway; and Amtrak. Fulks has worked as a brakeman, conductor, fireman, locomotive engineer, and has also worked in management. He remains a certified licensed locomotive engineer. Fulks testified to his familiarity with safety procedures in the rail industry, and with the practice of mounting and dismounting moving trains. In his early years, it was a common practice, but by the 1980s, the practice was criticized for safety reasons. It was discontinued by Burlington Northern & Santa Fe; Norfolk and Western Railway; Union Pacific; and CSX. Amtrak never allowed the practice. Fulks testified to the physical challenges present in the practice as well as his experience and research on the safety issues. At trial, he reviewed his research of the American Association of Railroads (AAR), an organization that standardizes rail business practice, and the 1992 Burlington Northern study authored by William Barbre (the Barbre report). Both the AAR in its 1948 literature and the Barbre report criticized the practice of embarking and disembarking moving trains, as unsafe. He further testified that the majority

of American railroads abandoned the practice for safety reasons, and no longer allows boarding or disembarking unless the train is stopped. Fulks opined within a reasonable degree of certainty as an expert in railroad safety, that ICRR's practice of permitting its employees to mount and dismount moving trains was not a safe practice and that ICRR should have prohibited its employees from dismounting from moving trains. Fulks opined that it was safer for employees to dismount from a stopped railcar than from a moving railcar. On cross-examination, Fulks was questioned about the injury data supplied by the railroads which showed that Union Pacific, Burlington Northern, Norfolk Southern and CSX had more injuries for employees disembarking stopped railcars than ICRR reported for moving railcars. Fulks explained that the employee population was greater for those railroads than ICRR, which accounted for the higher numbers.

¶ 9 Gerald Harris, Ph.D. (Dr. Harris), is a biomechanical engineer and a professor in the Orthopedics Department at the Medical College of Wisconsin. He was retained by Niemann's counsel to evaluate and calculate the difference in forces upon a human body, at various speeds, on a person dismounting from a moving train. He utilized a computer program called Mathematical Dynamic Modeling (MADYMO) to calculate the forces and their differential on the hip joints. Dr. Harris opined, based upon his 25 years of experience and the conclusions seen by the MADYMO modeling, that the repetitive and excessive forces exerted on Niemann's hips over 30 years caused the damage and arthritic condition suffered by Niemann. He also compared the Barbre report in this project, concluding that the Barbre study supports his opinions although his mathematical calculations were more conservative than the Barbre study. To a reasonable degree of biomedical certainty, Dr. Harris opined that the data generated by his MADYMO simulations were accurate and reliable. Based on the MADYMO simulations, which were based on Niemann's height and weight and various speeds of the moving train, Dr. Harris opined that

the amount of force generated by dismounting trains moving at 6 miles per hour was sufficient to cause fracture to a femur bone. Dr. Harris opined that the dismount forces from trains moving at 2 to 6 miles per hour were sufficient to cause progressive destruction in the cartilage of Niemann's hips. Dr. Harris opined to a reasonable degree of biomedical certainty that ICRR failed to provide Niemann with a safe workplace by allowing the practice of dismounting from moving trains.

¶ 10 Dr. David Smith (Dr. Smith), an orthopedic surgeon, testified that on September 28, 2009, Niemann came under his care for hip pain. Dr. Smith diagnosed Niemann with degenerative osteoarthritis in both hips and recommended hip replacement surgery. In December 2009, Dr. Smith performed hip replacement surgery on Niemann's right hip, while hip replacement surgery for his left hip was performed in March 2010. Although Niemann was only 54 years old at the time of the bilateral hip replacements, Dr. Smith opined that the highest incidence of bilateral hip replacements usually occurred in patients age 65 or older. Dr. Smith also noted that Niemann's hips had a condition called femoral acetabular impingement (FAI), which he described occurs "where the ball/neck junction is not *** as spherical as you normally would see, and what's called the cam lesion may play some role in the development of arthritis in some patients." However, Dr. Smith, who holds both an engineering and medical degree, testified to a reasonable degree of medical certainty that Niemann's 30-plus-year work history and job duties involving dismounting from trains moving at 2 to 6 miles per hour for about 10 to 50 times per day, played a role in the development of severe osteoarthritis in Niemann's hips. To a reasonable degree of certainty, Dr. Smith opined that, as a permanent basis, Niemann should not return to work as a railroad freight conductor and that he should avoid heavy work that would place higher loads on his lower extremities.

¶ 11 Terry Corday, a vocational rehabilitation counselor, testified that he worked as a "switchman/brakeman" and conductor for Santa Fe Railroad between 1968 and 1973. On September 19, 2011, Corday met Niemann for a vocational evaluation. Based on the vocational evaluation, the deposition testimony of Dr. Smith, Niemann's medical records, and Niemann's deposition testimony, Corday opined to a reasonable degree of certainty that Niemann was not capable of returning to work as a freight conductor, that he had no transferrable skills outside the railroad industry, and that, as a 58-year-old at the time of trial, he was not marketable in the field of business in which Niemann had obtained a college degree in 1977. Given the fact that Niemann is limited to jobs that would not impact his lower extremities, Corday opined that no competing railroad business in the Chicago area would hire Niemann for a sedentary position because they reserve those positions for their own injured workers.

¶ 12 Stan Smith, Ph.D. (Smith),[1] an economist, was retained by Niemann's counsel to calculate Niemann's lost earning capacity, as a result of his inability to work after age 54. He concluded to a reasonable degree of economic certainty that, due to Niemann's inability to resume employment, Niemann's lost earning capacity, through age 67, would be $1,869,695. In calculating lost earning capacity, Smith included projected wages for both railroad earnings and non-railroad earnings.

¶ 13 Brian Weaver, a biomechanical engineer and an adjunct professor at Lawrence Technology University, testified on behalf of ICRR. He was retained by ICRR to analyze the work that Niemann was required to do and determine whether mounting or dismounting from moving trains put Niemann at an increased risk for developing osteoarthritis in his hips. As part

[1] Stan Smith will be referenced as "Smith," while Niemann's orthopedic surgeon, Dr. David Smith is referenced as "Dr. Smith."

of his research, Weaver went to the ICRR yard in Markham, Illinois, and had a rail worker mount and dismount a moving train at specific speeds. He videotaped the exercise. Weaver explained that the rail worker's motion in the video showed ground-contact forces and opined that the human body dissipates these forces sufficiently so as not to cause damage to any one portion of a body. He also reviewed Dr. Harris' MADYMO video and distinguished between the two films. Weaver concluded that repetitive climbing down from moving railcars 10 to 50 times per day for 32 years does not cause hip osteoarthritis. He further stated that Niemann suffered from FAI, and opined that this condition was the cause of Niemann's osteoarthritis.

¶ 14 Robert Keane testified that he was employed by ICRR as the Director of Risk Management and the Assistant Vice President of Safety and Regulatory until his retirement in March 2012. He testified to the safety programs and procedures for the ICRR at the time Niemann was employed. He stated that ICRR allowed and trained its employees to enter and disembark moving trains, and conducted efficiency testing on this practice. Periodically, conductors would be prohibited from the practice, if yard conditions such as construction work on the tracks or weather conditions interfered. If ICRR employees worked on other rail yards where the practice was not permitted, those employees would have to abide by that particular railway's policy and would not be permitted to exit or enter a moving train. In 2001-2002, a rule change was proposed by Keane to a satellite committee of employees, including brakemen and conductors, to prohibit the employees from mounting or dismounting the moving trains. The proposed change was rejected and the practice was allowed to stand. Employees had a choice to decide whether to dismount moving trains or to wait until the train stopped before dismounting. To date, there is no universal rule, or Federal Railroad Administration regulation, that prohibits the practice of mounting and dismounting moving trains.

¶ 15 Exhibits presented by counsel for Niemann and ICRR during the trial were admitted into evidence, including Niemann's medical records and videos of MADYMO simulations created by Dr. Harris. During closing arguments, Niemann's attorney asked the jury to award $1,724,000 in lost future earnings using Niemann's projected railroad wages and benefits.

¶ 16 The trial court then instructed the jury on the issues in the case, specifically: that Niemann claims he was injured and sustained damages while he was engaged in the course of his employment by ICRR; that Niemann claims ICRR violated the FELA and was negligent in several enumerated ways; that Niemann claims the injury resulted in whole or in part from one or more of the alleged violations of FELA; that ICRR denies it violated the FELA as claimed by Niemann; that ICRR denies any of the alleged injuries resulted in whole or in part from any violation of the FELA; and that ICRR denies Niemann was injured or sustained damages to the extent claimed. The trial court further instructed the jury that Niemann had the burden to prove: (1) that he was injured and sustained damages while he was in the course of his employment by ICRR; (2) that ICRR violated the FELA by being negligent in one of the ways enumerated in the issues instruction; and (3) that the injury and damages to Niemann "resulted, in any part, no matter how small, from a violation of the [FELA]." The trial court also informed the jury that Niemann must prove it was "more probably true than not true" as to the three propositions set forth above. The trial court refused a proposed jury instruction (proposed Jury Instruction No. 13) on negligence tendered by ICRR, which was based on the Eighth Circuit's Model Rule 15.22. Instead, the trial court elected to instruct the jury on Niemann's proposed Illinois Pattern Jury Instructions (IPI) instructions that defined "negligence" and "ordinary care."

¶ 17 Following jury deliberations, the jury returned a verdict in favor of Niemann for $1,818,446, with a breakdown of $500,000 for disability; $300,000 for pain and suffering; and $1,018,446 in loss of earnings and benefits.

¶ 18 On April 17, 2014, the trial court entered judgment on the verdict in the amount of $1,818,446.

¶ 19 On May 13, 2014, ICRR filed a posttrial motion, requesting the trial court to grant a judgment notwithstanding the verdict (JNOV) or a new trial, or, in the alternative, a remittitur in the amount of $1,018,446.

¶ 20 On September 12, 2014, the trial court denied ICRR's posttrial motion for a JNOV, a new trial, or a remittitur of the jury verdict.

¶ 21 On October 8, 2014, ICRR filed a timely notice of appeal.

¶ 22 ANALYSIS

¶ 23 We determine the following issues on appeal: (1) whether the trial court erred in denying ICRR's motion for a JNOV or for a new trial, after the judgment on the verdict was entered in favor of Niemann; (2) whether the trial court erred in refusing to instruct the jury on ICRR's proposed jury instruction on negligence; and (3) whether the trial court erred in permitting Niemann to present trial evidence of lost earning capacity that included projected railroad wages and in barring ICRR from presenting evidence relating to Niemann's termination from ICRR's employ.

¶ 24 As a preliminary matter, we note that Niemann's brief on appeal is completely devoid of record citations in its argument section, in violation of Supreme Court Rule 341(h)(7), (i) (eff. Feb. 6, 2013). Compliance with supreme court rules regarding appellate practice is mandatory, and parties who violate these rules run the risk of having their briefs stricken. *Perona v.*

Volkswagen of America, Inc., 2014 IL App (1st) 130748, ¶ 21. However, because Niemann's failure to cite to the record in no way hinders our resolution of the issues before us, we decline to strike his brief in its entirety for noncompliance with the supreme court rules. We caution Niemann that briefs filed with this court in any future appeals that do not comply with the supreme court rules will be stricken.

¶ 25 Turning to the merits of the appeal, we first determine whether the trial court erred in denying ICRR's motion for a JNOV or for a new trial, after the judgment on the verdict was entered in favor of Niemann.

¶ 26 ICRR argues that the trial court erred in denying its motion for a JNOV or for a new trial[2] because Niemann failed to present any evidence showing that ICRR was negligent. Specifically, ICRR contends that Niemann failed to prove that the practice of dismounting moving trains was not reasonably safe; that Niemann failed to show that the risk of developing hip osteoarthritis was greater when dismounting moving railcars than when dismounting stopped railcars; and that Niemann failed to prove that ICRR could reasonably foresee that conductors might develop hip osteoarthritis by dismounting moving railcars. ICRR concludes that because Niemann failed to prove that ICRR breached its duty of care, the trial court erred in denying its motion for a JNOV or, in the alternative, for a new trial.

¶ 27 Niemann argues that viewing the record in the light most favorable to him, he presented sufficient evidence for a reasonable jury to conclude that it was more likely than not that ICRR was negligent under FELA. Niemann specifically argues that the evidence was sufficient to prove ICRR liable, and that he was not obligated to prove that it was reasonably foreseeable that

[2] On appeal, ICRR does not make any arguments regarding the trial court's posttrial denial of its alternative request for a remittitur.

he would suffer bilateral hip osteoarthritis as a result of ICRR's negligence in not prohibiting the practice of dismounting from moving railcars. Thus, Niemann contends, the trial court neither erred in denying ICRR's motion for a JNOV nor for a new trial.

¶ 28 As a general matter, FELA cases adjudicated in the state courts are subject to state procedural rules, but the substantive law governing such cases is federal. *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985). Moreover, what constitutes negligence under the FELA is a federal question to be decided in accordance with the common law as it is developed in the federal courts. *Wilson v. Norfolk & Western Ry. Co.*, 187 Ill. 2d 369, 373 (1999). However, in the absence of a decision by the United States Supreme Court which would definitively answer the question presented at bar, Illinois reviewing courts may or may not elect to give considerable weight to the decisions of federal courts of appeals and district courts that have addressed the issue. See *Mekertichian v. Mercedes-Benz U.S.A., L.L.C.*, 341 Ill. App. 3d 828, 834-36 (2004) (federal circuit court decisions are considered persuasive, but not binding on Illinois reviewing courts in the absence of a decision by the United States Supreme Court), citing *Sprietsma v. Mercury Marine*, 197 Ill. 2d 112 (2001), *reversed on other grounds*, 537 U.S. 51 (2002). Rather, the Illinois Appellate Court is bound by the decisions of the Illinois Supreme Court, such that after our supreme court has declared the law with respect to an issue, this court must follow that law. *Mekertichian*, 347 Ill. App. 3d at 836.

¶ 29 A motion for a JNOV should be granted only when "all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [a] movant that no contrary verdict based on that evidence could ever stand." (Internal quotation marks omitted.) *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37 (quoting *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006) (quoting *Pedrick v. Peoria & Easter R.R.*

Co., 37 Ill. 2d 494, 510 (1967)). In other words, a motion for a JNOV presents a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiff, there is a total failure or lack of evidence to prove any necessary element of the plaintiff's case. *Lawlor*, 2012 IL 112530, ¶ 37. The standard for entry of JNOV is a high one and is not appropriate if " 'reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented.' " *Id.* (quoting *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 351 (1995)). In ruling on a motion for a JNOV, "a court does not weigh the evidence, nor is it concerned with the credibility of the witnesses." *Maple v.* Gustafson, 151 Ill. 2d 445, 453 (1992). A trial court's ruling on a motion for a JNOV is reviewed *de novo*. *Lawlor*, 2012 IL 112530, ¶ 37.

¶ 30 In contrast, on a motion for a new trial, the trial court will weigh the evidence and order a new trial if the verdict is contrary to the manifest weight of the evidence. *Id.* ¶ 38. A verdict is against the manifest weight of the evidence only where the opposite result is clearly evident or where the jury's findings are unreasonable, arbitrary and not based upon any of the evidence. *Id.* We will not reverse the trial court's ruling on a motion for a new trial absent an abuse of discretion. *Id.*

¶ 31 Under the FELA, "[e]very common carrier railroad while engaging in commerce *** shall be liable in damages to any person suffering injury while he or she is employed by such carrier in such commerce, *** 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 ***." 45 U.S.C. § 51 (2010). Enacted in 1908, the FELA provides a federal remedy for railroad workers who suffer personal injuries as a result of the negligence of their employer or their fellow employees. *Wilson*, 187 Ill. 2d at 372. " 'Cognizant of the physical dangers of railroading that resulted in the

death or maiming of thousands of workers every year, Congress crafted a federal remedy that shifted part of the "human overhead" of doing business from employees to employers.' " *Id.* at 372-73 (quoting *Consolidated R. Corp. v. Gottshall*, 512 U.S. 532, 542 (1994)). The FELA provides the exclusive remedy for a railroad employee injured because of his employer's negligence. *Myers v. Illinois Central R.R. Co.*, 323 Ill. App. 3d 780, 785 (2001). Further, the FELA is a broad remedial statute and is to be liberally construed to accomplish Congress' objectives. *Wilson*, 187 Ill. 2d at 373. The FELA is not, however, a workers' compensation statute; the basis for liability under the statute is the employer's negligence, not merely the fact that an employee is injured on the job. *Id.*

¶ 32 To establish a negligence cause of action under the FELA, a plaintiff must prove the following elements: "(1) defendant is a common carrier; (2) plaintiff was an employee of the common carrier; (3) plaintiff's injury was sustained while employed by the common carrier; and (4) defendant's negligence is the cause of the injuries." *Larson v. CSX Transportation, Inc.*, 359 Ill. App. 3d 830, 834 (2005). The FELA imposes on railroads a general duty to provide a safe workplace. *McGinn v. Burlington Northern R.R. Co.*, 102 F.3d 295, 300 (1996). In order to establish liability under the FELA, the railroad employee "must prove that the railroad was negligent and that the railroad's negligence caused the injury at issue." *Myers v. Illinois Central R.R. Co.*, 629 F.3d 639, 642 (7th Cir. 2010). To establish that a railroad breached its duty to provide a safe workplace, the railroad employee must show circumstances which a reasonable person would foresee as creating a potential for harm. *McGinn*, 102 F.3d at 300. The question is whether the railroad exercised reasonable care in creating a reasonably safe working environment, not whether that working environment could have been safer. *Darrough v. CSX Transportation, Inc.*, 321 F.3d 674, 676 (7th Cir. 2003). Common-law proximate cause standard

is not required to establish liability under the FELA. *CSX Transportation, Inc. v. McBride*, 131 S. Ct. 2630 (2011). Rather, the railroad employee need only show that the railroad's breach of duty—negligence—played any part, even the slightest, in producing the injury. *Id.*; *McGinn*, 102 F.3d at 300; *Fulk v. Illinois Central R.R. Co.*, 22 F.3d 120, 124 (1994). Because the plaintiff need only show slight evidence of negligence, the quantum of evidence required to establish liability in a FELA case is much less demanding than that in a standard negligence action. *McGinn*, 102 F.3d at 300, citing *Harbin v. Burlington Northern R.R. Co.*, 921 F.2d 129, 131 (7th Cir. 1990); *Brzinski v. Northeast Illinois Regional Commuter R.R. Corp.*, 384 Ill. App. 3d 202, 204 (2008) (a plaintiff's burden when suing under the FELA is significantly less than in a common law negligence case).

¶ 33 In the case at bar, the parties do not dispute that ICRR is a common carrier, that Niemann was an employee of ICRR, or that his injury was sustained while he was employed by ICRR. ICRR also does not raise the issue of causation on appeal. Thus, at issue before us is whether Niemann sufficiently presented evidence that ICRR was negligent in allowing employees to mount and dismount moving railcars. At trial, Niemann testified that he had been employed by ICRR for 33 years, during which time he was required to board and dismount from trains moving between 2 to 6 miles per hour, for about 10 to 50 times per 12-hour work shift. Niemann testified to the difficulty he experienced in walking due to hip pain, such that he requested two medical leaves from his job in 2009. The jury also heard testimony about his bilateral hip replacement surgery as a result of hip osteoarthritis, as well as Niemann's physical restrictions, his permanent inability to return to work, and his limited transferrable job skills. Testimonial evidence was also presented to the jury from Fulks, Niemann's railroad safety consultant and expert, who testified to his familiarity with safety procedures in the rail industry and with the

practice of mounting and dismounting from moving trains. Fulks testified that by the 1980s, the practice of allowing railroad employees to mount and dismount from moving trains was criticized for safety reasons. He testified that a majority of American railroads discontinued the practice for safety reasons and only allowed boarding and disembarking trains when they are stopped. Based on Fulks' experience and research of literature by the AAR and findings in the Barbre report, which criticized the practice of mounting and dismounting moving trains as unsafe, he opined within a reasonable degree of certainty that ICRR's practice of permitting its employee to mount and dismount moving trains was an unsafe practice that should have been prohibited. Fulks testified that it was safer for employees to dismount from a stopped railcar than from a moving railcar. Niemann also presented expert testimony from a biomechanical engineer and professor, Dr. Harris, who calculated the forces placed upon a person dismounting from a moving train. Dr. Harris opined, based on his 25 years of experience, conclusions in the MADYMO modeling, and comparison to the Barbre report, that the repetitive and excessive forces exerted on Niemann's hips over 30 years caused damage and osteoarthritis to his hips. To a reasonable degree of biomedical certainty, Dr. Harris opined that the amount of force generated by dismounting trains moving at 6 miles per hour was sufficient to cause fracture to a femur bone, that dismounting forces from trains moving at 2 to 6 miles per hour were sufficient to cause progressive destruction in the cartilage in Niemann's hips, and that ICRR failed to provide Niemann with a safe workplace by allowing the practice of dismounting from moving trains. At trial, Dr. Smith, an orthopedic surgeon, testified to a reasonable degree of medical certainty that Niemann's 33-year work history and job duties involving dismounting from trains moving at 2 to 6 miles per hour for about 10 to 50 times per day, played a role in the development of severe osteoarthritis in his hips. Keane, ICRR's own Director of Risk Management and Assistant Vice

President of Safety and Regulation, acknowledged at trial that ICRR allowed and trained its employees to mount and dismount moving trains. Keane testified that a satellite committee of employees, who was tasked with revising ICRR's safety rule book in 2001 and 2002, rejected Keane's proposal to prohibit employees from mounting or dismounting moving trains. However, although Keane had first become aware of the findings in the Barbre report in the mid-1990s, Keane admitted at trial that he never showed the Barbre report to the committee members. He testified to providing the committee members with data collected by ICRR concerning employee injuries in getting on and off moving railcars. Keane stated that the injury data was also reported to the Federal Railroad Administration.

¶ 34 Based on the foregoing, we find that the evidence was sufficient for the jury to conclude that ICRR was negligent in failing to prohibit the practice of allowing its employees to dismount moving railcars. The jury could reasonably have found that, under the circumstances, ICRR failed to provide a safe workplace for Niemann by allowing conductors to mount and dismount moving railcars, despite having actual knowledge from its own injury data that such practice causes injuries to its employees. Based on the evidence presented, the jury could reasonably conclude that ICRR breached its duty of care by permitting Niemann to dismount railcars moving at 2 to 6 miles per hour, for multiple times per shift over the span of his 33-year career with ICRR, and that such negligence was a cause, in whole or in part, of Niemann's hip osteoarthritis. It was within the province of the jury, as trier of fact, to weigh the contradictory evidence and inference, find Niemann and his witnesses as credible, reject ICRR's witnesses as incredible, and draw the ultimate conclusion as to the facts. " 'Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.'"

Crompton v. BNSF Ry. Co., 745 F.3d 292, 296 (2014) (quoting *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944)); *Maple*, 151 Ill. 2d at 452.

¶ 35 In arguing for a contrary verdict, however, ICRR argues that the trial evidence was insufficient to establish ICRR's negligence because: (1) Niemann failed to show any evidence that by allowing conductors to dismount moving railcars, "ICRR maintained a workplace that was not reasonably safe because it created a risk of hip osteoarthritis"; (2) Niemann failed to show that the risk of developing hip osteoarthritis was greater when dismounting moving railcars than when dismounting stopped railcars; and (3) Niemann failed to prove that ICRR could reasonably foresee that conductors might develop hip osteoarthritis by dismounting moving railcars. We reject these arguments for several reasons. First, with respect to argument (1), ICRR focuses the majority of its arguments in attacking select portions of Fulks and Dr. Harris' testimony as a basis for claiming a lack of negligence. However, as noted, the jury heard all of the testimony presented and was free to weigh any contradictory evidence and draw reasonable inferences to reach the ultimate conclusion as to the facts. As such, we will not reweigh the evidence or set aside the jury verdict merely because another conclusion could have been drawn. Second, with respect to argument (2), ICRR claims that Niemann failed to present any evidence that dismounting from stopped railcars was safer than dismounting from moving railcars. This argument is belied by the record, as Fulks specifically opined at trial that it was safer for employees to dismount from a stopped railcar than from a moving railcar. Dr. Harris also opined, based on his calculations of the dismount forces in causing progressive destruction in the cartilage of Niemann's hips, that ICRR failed to provide a safe workplace by allowing the practice of dismounting from moving trains. The jury heard the entirety of these witnesses' testimony, including how Fulks and Dr. Harris came to their conclusions that the practice of

allowing employees to dismount from moving trains was unsafe. As discussed, we decline to usurp the jury's role in reweighing the evidence or finding fault with the expert testimony of Niemann's witnesses simply because a different result could have been reasonable. Third, the bases of arguments (1), (2) and (3) stem from ICRR's mistaken belief that Niemann was required to specifically prove that ICRR could reasonably foresee that conductors might develop hip osteoarthritis by dismounting moving trains. In essence, ICRR seems to suggest that Niemann failed to prove that it was reasonably foreseeable that ICRR's negligence would cause hip osteoarthritis. ICRR's contentions present a question of law concerning what the foreseeability requirement means in FELA cases.

¶ 36 In *Gallick*, the defendant railroad permitted a pool of stagnant water to accumulate on its property, attracting a variety of insects. *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 109 (1963). While in the vicinity of the pool, the plaintiff-employee was bitten by an insect, causing an injury that ultimately led to the amputation of his leg. *Id.* The employee then brought a FELA claim against the railroad and secured a jury verdict in his favor. *Id.* at 112. The Ohio Court of Appeals overturned that verdict, finding that the absence of direct evidence definitely connecting the infectious insect to the stagnate pool on the railroad's premises—as opposed to other nearby water sources or unsanitary places not owned or controlled by the railroad—left the employee's case unfit for a jury. *Id.* The U.S. Supreme Court disagreed, finding that the employee had presented an appropriate jury question—notwithstanding the other possible sources of the infected bug—by raising a reasonable inference that the fetid pool played a part in his injury. The Supreme Court stated that "[j]udicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the

injury or death, *** and if that test is met, [judges] are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities." *Id.* at 116-17 (quoting *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506-07 (1957)). With the employee's case properly before it, the jury could go on to find that his injury was reasonably foreseeable, for it was within the province of the jury to conclude that the railroad "knew that the accumulation of the pool of water would attract bugs and vermin to the area," and thus "should have realized the increased likelihood of an insect's biting [the employee] while he was working in the vicinity of the pool." *Id.* at 118-19. The *Gallick* court found that "it is widely held that for a defendant to be liable for consequential damages he need not foresee the particular consequence of his negligent acts: assuming the existence of a threshold tort against the person, then whatever damages flow from it are recoverable." *Id.* at 120. Thus, under *Gallick*, the foreseeability requirement in FELA cases does not require that the negligent party should have been able to foresee the injury in the precise form in which it in fact occurred; rather, it is sufficient if the negligent party might reasonably have foreseen that an injury might occur, regardless of whether the negligence only played the slightest part in causing the injury and whether there exists other probable causes.

¶ 37 Recently, the Supreme Court in *McBride* reaffirmed that if negligence is proved in a FELA case and is shown to have *played any part, even the slightest, in producing the injury*," then the railroad is answerable in damages even if the extent of the injury or the manner in which it occurred was not probable or foreseeable. (Emphasis added.) *McBride*, 131 S. Ct. at 2643 (quoting *Rogers* 352 U.S. at 506); *Gallick*, 372 U.S. at 120-21.

¶ 38 Applying the principles of *McBride*, *Gallick*, and *Rogers*, once ICRR's negligence was established, ICRR became liable for all damages caused by its negligence, even if the ultimate

harm of hip osteoarthritis was not reasonably foreseeable by ICRR. Thus, contrary to ICRR's suggestion, Niemann was not required to specifically prove that it was reasonably foreseeable that conductors might develop hip osteoarthritis by dismounting moving trains.

¶ 39 ICRR argues that *Gallick* does not help Niemann. It points out that the above quoted language in *Gallick* stating that a defendant "need not foresee the particular consequence of his negligent acts," pertains only to the proofs of foreseeability as it related to computing *damages* and compensating the injured plaintiff, rather than the proofs of foreseeability as it related to establishing *negligence*. As such, ICRR asserts that Niemann was required to, but failed to, present any evidence linking hip osteoarthritis to the practice of dismounting moving trains. We find ICRR's arguments to be unpersuasive.

¶ 40 "[R]easonable foreseeability of harm is an essential ingredient of [FELA] negligence." *Gallick,* 372 U.S. at 117. *Gallick* specified that negligence is "the failure to observe that degree of care which people of ordinary prudence and sagacity would use under the same or similar circumstances," and that the defendant's duty was measured by what "a reasonably prudent person would anticipate as resulting from a particular condition—by *** what is reasonably foreseeable under like circumstances—by what in the light of the facts then known, should or could reasonably have been anticipated." *Id.* at 118. Likewise, *McBride,* citing *Gallick,* specified that if a person "has no reasonable ground to anticipate that a particular condition would or might result in a mishap and injury, then the party is not required to do anything to correct the condition." *McBride,* 131 S. Ct. at 2643; *Williams v. Nat'l R.R. Passenger Corp.*, 161 F.3d 1059, 1062-63 (7th Cir. 1998) (reasonable foreseeability of harm refers to whether the railroad had actual or constructive notice that a potential hazard exists); *McGinn*, 102 F.3d at 300 (to establish that a railroad beached its duty to provide a safe workplace, the employee must

show circumstances which a reasonable person would foresee as creating a potential for harm). Foreseeability under FELA does not require proof of prior similar incidents. *Gallick*, 372 U.S. at 121 (although the jury might have determined that since there had been no similar incidents at this pool in the past, the railroad had no specific reason for anticipating a mishap or injury, such concept of foreseeable harm is "far too narrow" to negate negligence under the FELA). Thus, to the extent that ICRR argues that negligence was not established because Niemann failed to present evidence of a link between cumulative trauma injuries such as hip osteoarthritis and the practice of dismounting moving trains, we find that the supreme court has not set forth such a narrow standard. In the case at bar, the foreseeability of harm requirement to establish negligence was satisfied. Niemann presented evidence that ICRR had actual knowledge that its employees were *injured* when dismounting from moving railcars. Fulks testified that ICRR reported to the Federal Railroad Administration, injuries suffered by its employees who disembarked moving railcars. ICRR's own witness, Keane, acknowledged at trial that he was aware of the findings in the Barbre report, which criticized the practice of embarking and disembarking moving trains as unsafe, but did not share the information with the committee members that was tasked with revising ICRR's safety rule book in 2001 and 2002. Because ICRR was aware of a condition—the dismounting of moving railcars—that it knew would result, and has resulted, in mishap and injury, the jury could find that it was unreasonable for ICRR not to correct the condition when it had the chance to do so.

¶ 41 ICRR argues that the foreseeability component to the element of negligence required Niemann to prove that ICRR foresaw or should have foreseen that its conductors could develop *cumulative trauma injuries* (such as hip osteoarthritis), rather than *acute injuries* (such as a broken femur), in dismounting moving railcars. We reject this contention. Nothing in *Gallick* or

McBride allows for such a hair-splitting distinction. Rather, as discussed, in establishing negligence, Niemann was only required to prove that it was reasonably foreseeable for ICRR to anticipate that dismounting from moving railcars would or might result in a mishap or injury, and that ICRR was required to do something to correct the condition. Thus, ICRR's argument cannot stand on this basis. In reviewing the trial court's denial of ICRR's motion for a JNOV, we must view all of the evidence and all reasonable inferences in its aspect most favorable to Niemann. *Lawlor*, 2012 IL 112530, ¶ 37. Based on this standard, we cannot conclude that the evidence "so overwhelming favors" ICRR that "no contrary verdict based on that evidence could ever stand." *Id.* Accordingly, we hold that the trial court did not err in denying ICRR's motion for a JNOV. Nor did the trial court abuse its discretion in denying ICRR's motion for a new trial on the jury's liability finding against ICRR, where we cannot conclude that the verdict was against the manifest weight of the evidence—that is, we cannot conclude that an opposite result is clearly evident. See *id.* ¶ 38.

¶ 42 We next determine whether the trial court erred in refusing to instruct the jury on ICRR's proposed jury instruction on negligence.

¶ 43 At trial, the trial court instructed the jury on IPI Civil 10.01 and 10.02 on the definitions of negligence and ordinary care, respectively. The trial court refused ICRR's proposed nonpattern Jury Instruction No. 13 on negligence, which was based on the Eighth Circuit's Model Rule 15.22. In denying ICRR's posttrial motion, the trial court specifically found that IPI Civil 10.01 (negligence) and 10.02 (ordinary care) instructions adequately addressed the issue of foreseeability, and that "a separate foreseeability instruction [as proposed by ICRR] is unnecessary unless the issue of notice, or constructive notice, is inherent in the case."

¶ 44 IPI Civil 10.01 on negligence states the following:

> "When I use the word 'negligence' in these instructions, I mean the failure to do something which a reasonably careful person would do, or the doing of something, which a reasonably careful person would not, under the circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide." IPI Civil (2006) No. 10.01.

¶ 45 IPI Civil 10.02 on ordinary care states the following: "When I use the words 'ordinary care,' I mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide." IPI Civil (2006) No. 10.02.

¶ 46 ICRR's proposed non-IPI Jury Instruction No. 13 provides as follows:

> "The term 'negligent' or 'negligence' as used in these Jury Instructions means the failure to use ordinary care. The phrase 'ordinary care' means that degree of care that an ordinarily careful person would use under the same or similar circumstances. The degree of care used by an ordinarily careful person or corporation depends upon the circumstances which are known or should be known and varies in proportion to the harm that person or corporation reasonably should foresee. In deciding whether a person or corporation was negligent or failed to use ordinary care you must consider what that person or corporation knew or should

> have known and the harm that should reasonably have been foreseen." Eighth Circuit Model Instruction 15.22.

¶ 47 ICRR argues that the trial court abused its discretion in rejecting ICRR's proposed non-IPI Jury Instruction No. 13 on negligence, claiming that it included a "foreseeability component" that was absent from the IPI Civil 10.01 and 10.02 instructions given by the trial court. ICRR highlights the portion of the proposed jury instruction stating that "the circumstances which are *known or should be known*," and argues that it embodied the required foreseeability of harm language required as an essential ingredient of FELA negligence that was missing from IPI Civil 10.01 and 10.02 instructions. By not instructing the jury on the proposed non-IPI instruction, ICRR claims, the jury was misinformed on the essential proofs necessary for establishing ICRR's breach of duty of reasonable care. Thus, ICRR urges, the error likely caused an improper verdict and a new trial is warranted.

¶ 48 Niemann counters that the trial court did not abuse its discretion in giving the IPI Civil 10.01 and 10.02 instructions on negligence to the jury, arguing that the proposed non-IPI jury instruction did not accurately state the law on foreseeability in a FELA case. Niemann points out that the proposed non-IPI jury instruction fails to state, as required by *Gallick*, that a negligent railroad is liable for all injuries caused by its negligence, even if those injuries are unforeseeable. He argues that the trial court was also justified in rejecting the proposed instruction because the language therein is only used when, unlike in the case at bar, there is a genuine dispute as to whether a railroad had actual or constructive notice of a hazardous condition. Any error in refusing to give the proposed instruction, Neimann argues, was harmless because ICRR had actual knowledge that employees were injured when dismounting from moving railcars.

¶ 49 A trial court is required to use an Illinois Pattern Jury Instruction when it is applicable in a civil case after giving due consideration to the facts and the prevailing law, unless the court determines that the instruction does not accurately state the law. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 273 (2002); Ill. S. Ct. R. 239(a) (eff. Jan. 1, 2011). If the pattern instruction does not accurately state the law, the court may instruct the jury pursuant to a nonpattern instruction. *Schutz*, 201 Ill. 2d at 273. The trial court has discretion to determine which instructions to give the jury and that determination will not be disturbed absent an abuse of that discretion. *Id.* The standard for deciding whether a trial court abused its discretion is whether, taken as a whole, the instructions fairly, fully, and comprehensively apprised the jury of the relevant legal principles. *Id.* at 273-74. A reviewing court ordinarily will not reverse a trial court for giving faulty instructions unless they clearly misled the jury and resulted in prejudice to the appellant. *Id.* at 274; *Hestie v. Roberts*, 226 Ill. 2d 515, 543 (2007).

¶ 50 We find that the trial court did not abuse its discretion in refusing to instruct the jury on ICRR's proposed non-IPI jury instruction. As discussed, a plaintiff wishing to demonstrate that a railroad breached its duty of care must show circumstances that a reasonable person would foresee as creating a potential of harm. See *McGinn*, 102 F.3d at 300. Reasonable foreseeability of harm refers to whether the railroad had actual or constructive notice that a potential hazard exists. *Williams*, 161 F.3d at 1062-63. In *Pryor v. Nat'l R.R. Passenger Corp.*, 301 Ill. App. 3d 628, 633 (1998), in holding that the trial court abused its discretion in giving a burden of proof instruction which focused on the foreseeability of unsafe working conditions, this court specifically found that the foreseeability element is already adequately addressed by the definition of negligence (IPI Civil No. 10.01) and definition of ordinary care (IPI Civil No. 10.02).

¶ 51 ICRR attempts to distinguish *Pryor*, and instead urges this court to follow the Texas Supreme Court's decision in *Union Pacific R.R. Co. v. Williams*, 85 S.W.3d 162, 169-70 (Tex. 2002), in which the Texas Supreme Court found that the trial court erred in rejecting the railroad's proposed instruction which included foreseeability of harm language as to whether the railroad had "actual or constructive notice" of the dangerous condition. We find *Union Pacific R.R. Co.* to be distinguishable, where a genuine dispute existed as to whether the railroad knew or should have known about a dangerous condition. *Id.* at 169. In the instant case, however, there was no dispute that ICRR had actual knowledge that the practice of dismounting from moving railcars resulted in employee injuries. Rather, the question for the jury, which was properly explained by the IPI Civil 10.01 and 10.02 instructions, was whether a reasonably careful railroad would have prohibited its employees from dismounting from moving railcars. Thus, we decline to follow the Texas court's holding in *Union Pacific R.R. Co.* Therefore, we hold that the trial court did not abuse its discretion in rejecting ICRR's proposed non-IPI jury instruction (which included language regarding circumstances "known or should be known"), and instructed the jury on IPI Civil 10.01 and 10.02. In light of our holding on this issue, we need not address Niemann's alternative arguments on whether the proposed instruction erroneously failed to state that a negligent railroad is liable for all injuries caused by its negligence, and on the issue of harmless error.

¶ 52 We next determine whether the trial court erred in permitting Niemann to present trial evidence of lost earning capacity that included projected railroad wages and in barring ICRR from presenting evidence relating to Niemann's termination from ICRR's employ. We review this issue under an abuse of discretion standard. See *Citibank, N.A. v. McGladrey & Pullen, LLP*, 2011 IL App (1st) 102427, ¶ 13.

¶ 53 Prior to trial, in April 2014, ICRR filed a motion *in limine*, asking the trial court to bar Niemann from offering evidence of any impaired earning capacity based on his projected railroad wages beyond the date of employment termination or, in the alternative, to permit ICRR to present evidence of Niemann's termination and that as a result of his termination, he would not have been able to obtain any other employment in the railroad industry. The trial court denied ICRR's motion *in limine*, permitting Niemann to use his railroad wages at the time he last worked for ICRR as a calculation of future earnings, but barring admission into evidence the issue of his termination and the circumstances surrounding his termination. At trial, Smith, an economist retained by Niemann's counsel to calculate Niemann's lost earning capacity, concluded to a reasonable degree of economic certainty that, due to Niemann's inability to resume employment, his lost earning capacity, through age 67, would be $1,869,695. In calculating lost earning capacity, Smith included projected wages for both railroad earnings and non-railroad earnings. Following deliberations, the jury returned a verdict in Niemann's favor for $1,818,446, which included a total of $1,018,446 in loss of earnings and benefits. The trial court later denied ICRR's posttrial motion, finding, *inter alia*, that Niemann was not precluded from seeking damages for loss of future earnings due to his injury.

¶ 54 ICRR argues that a new trial is warranted because the trial court abused its discretion by permitting Niemann to present evidence of lost future railroad wages and barring ICRR from presenting any evidence of Niemann's termination in rebuttal. ICRR asserts that evidence of Niemann's termination was also independently relevant and admissible for the purpose of impeaching Niemann's claim that his medical condition was work-related. It argues that the individual and cumulative effects of the trial court's errors deprived it of a fair trial and likely affected the verdict.

¶ 55 Niemann counters that the trial court's rulings on ICRR's motion *in limine* is forfeited for review on appeal because ICRR failed to contemporaneously object to Smith's testimony and failed to make any offers of proof at trial on the evidence of termination. He argues that ICRR failed to establish that the trial court's decisions on the admissibility of evidence were illogical or unreasonable, where Niemann's termination was not relevant as to whether ICRR's negligence caused him to suffer a loss of earning capacity, the probative value of the evidence was substantially outweighed by prejudice to Niemann, and the court found persuasive one of "two conflicting lines of cases" regarding whether a railroad should be permitted to present evidence of termination in a FELA case.

¶ 56 Initially, Niemann argues that ICRR forfeited appellate review of the trial court's rulings on ICRR's motion *in limine* by failing to make a contemporaneous objection to Smith's testimony and failing to make an offer of proof at trial. We disagree. Attached to ICRR's motion *in limine* were several exhibits, including Niemann's letter of termination and a written decision by the Public Law Board (PLB) upholding the termination decision. At the hearing on the motion *in limine*, the trial court heard the parties' arguments on the motion. In denying ICRR's motion *in limine*, the court considered the arguments, the motion, as well as the supporting documents. The proffered evidence of Niemann's termination, including the date and circumstances underlying his termination, were presented to and considered by the court in connection with ICRR's motion *in limine*. Under these circumstances, we cannot conclude that ICRR's failure to make an offer of proof at trial resulted in forfeiture of this issue. See *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 494-95 (2002) (an offer of proof was not required because the trial court clearly understood the nature and character of the evidence sought to be introduced); *Reuter v. Korb*, 248 Ill. App. 3d 142, 154 (1993) (issue of whether trial court erred in granting

motion *in limine* to bar expert testimony was preserved for review, despite plaintiffs' failure to make offer of proof at trial, where trial court considered arguments and motions of parties, complete with supporting documents in reaching its decision, and plaintiffs could have reasonably presumed that trial court's ruling was conclusive and that raising it again at trial would prove futile). Nor did the failure to make a contemporaneous objection to Smith's testimony result in forfeiture, where, by conducting a pretrial hearing on the motion *in limine*, the trial court was given a full and fair opportunity to consider and rule upon the issue. See *People v. Denson*, 2014 IL 116231, ¶13 (defendant did not forfeit appellate review of the admissibility of contested statements by failing to make a contemporaneous trial objection). Even if forfeited, we note that forfeiture is a limitation on the parties and not on the court. See *Seitz-Partridge v. Loyola University of Chicago*, 409 Ill. App. 3d 76, 88 (2011). Thus, we address the merits of this issue.

¶ 57 In denying ICRR's motion *in limine*, the trial court primarily relied upon three cases—*Kulavic v. Chicago & Illinois Midland Ry. Co.*, 1 F.3d 507 (7th Cir. 1993); *Pothul v. Consolidated Rail Corp.*, 94 F. Supp. 2d 269 (N.D.N.Y. 2000); and *Graves v. Burlington Northern & Santa Fe Ry. Co.*, 77 F. Supp. 2d 1215 (E.D. Okla. 1999). However, we find that none of these cases help Niemann's position, as the issues in those cases pertain to whether the PLB's final arbitration decision in upholding a railroad's termination of its employee had a preclusive effect based on *res judicata* or collateral estoppel on the employee's right to seek lost future earnings in a FELA action. See *Kulavic*, 1 F.3d at 517-20 (arbitration decision upholding discharge of railroad employee did not have preclusive effect on his claim under the FELA); *Pothul*, 94 F. Supp. 2d at 269-73 (employee's FELA claim to recover future lost wages and benefits related to his personal injuries was not barred by previous internal administrative

proceedings conducted by railroad which resulted in employee's discharge for insubordination); *Graves*, 77 F. Supp. 2d at 1218-19 (plaintiff is entitled to present evidence as to his future earning capacity as it related to his injury under the FELA). Although the trial court was correct to conclude, based on those cases, that the PLB's decision to uphold Niemann's termination did not preclude him from seeking damages for loss of future earnings due to his injury in the FELA action, those cases only dealt with the legal issue of preclusion of lost future earnings and not *what* evidence would be admissible as a basis for those lost future earnings. In other words, those cases failed to make a distinction between a right to seek lost wages in a FELA action and a right to base those lost wages on the injured plaintiff's railroad wages—the specific issue raised by ICRR's motion *in limine* in asking the trial court to bar evidence of any impaired earning capacity based on Niemann's projected railroad wages beyond the date of employment termination. Rather, federal courts have held that where an unrelated condition, separate and apart from the injury that gave rise to the FELA claim, rendered a railroad employee unable to work in his prior position at the railroad, evidence of lost railroad wages beyond the point of the unrelated condition is not admissible to establish lost future earnings. See *Harris v. Illinois Central R.R. Co.*, 58 F.3d 1140 (6th Cir. 1995) (holding that where railroad employee was diagnosed with a heart condition unrelated to the accident that would have left him unable to work as a carman even if there had been no accident, "it would be error to allow testimony on his potential earnings as a carman beyond the point at which his work as a carman would have had to cease even if he never injured his leg and back"); *Parra v. Atchison, Topeka & Santa Fe Ry. Co.*, 787 F.2d 507 (10th Cir. 1986) (holding that trial court erred in permitting the jury to consider the value of future earnings from heavy labor as an element of plaintiff's damages where it was "improper for plaintiff to be compensated for future wages from having labor for

which his preexisting congenital back disorder had already disqualified him" regardless of his work-related injury). Likewise, here, Niemann's termination was a condition unrelated to his hip osteoarthritis that rendered him unable to work at ICRR beyond June 2009; thus, evidence of projected railroad wages beyond the date of his termination should not have been admissible as a basis to establish his lost future earnings. Therefore, while Niemann could seek damages for lost future earnings showing other sources of compensation that he could have earned had he not developed hip osteoarthritis, he could not use his railroad wages—projected until age 67—as a basis for computing lost future earnings. To do so would be a legal fiction that presumes that Niemann could still have worked as a conductor for ICRR beyond June 2009 until retirement age. The evidence at trial established that Niemann's injury wand subsequent surgery precluded his working as a conductor in the future.

¶ 58 Nonetheless, Niemann argues that the trial court correctly barred admission of evidence relating to his termination as irrelevant and prejudicial to Niemann. In support, he claims that there are "conflicting rulings" from other jurisdictions on this evidentiary issue and cites two Texas state appellate court cases (*Kansas City Southern Ry. Co. v. Catanese*, 778 S.W.2d 114 (Tex. App. 1989) and *Port Terminal R.R. Assn. v. Sims*, 671 S.W.2d 575 (Tex. App. 1984)) suggesting that an employee's discharge is irrelevant to the determination of his loss of future earning capacity. First, we note that Niemann makes no citation to the record as to the trial court's purported ruling on this basis. We cannot conclude from our examination of the record that the trial court based its ruling to bar evidence of Niemann's termination on the grounds cited by Niemann's argument. Second, we find Niemann's citation to cases in the Texas state appellate courts to be unavailing, as the substantive law governing FELA cases are subject to federal court interpretation, not state court interpretation. See *Dickerson*, 470 U.S. at 411. Niemann also cites

Martinez v. Union Pacific R.R. Co., 82 F.3d 223 (8th Cir. 1996), which we find distinguishable from the case at bar. *Martinez* involved an FELA plaintiff who had been terminated by defendant railroad after he allegedly sustained a work-place injury. *Id.* at 225. Although the *Martinez* court upheld the district court's denial of the railroad's motion to preclude the plaintiff from relying on his railroad wages to support his lost earnings claim, it did so only because the plaintiff presented expert evidence that, based on the plaintiff's past employment experience, he could have worked for an automotive body repair business and "would have received the same wage he had earned at the [r]ailroad." *Id.* at 227. In light of that expert testimony, the *Martinez* plaintiff's railroad wages were admissible as evidence of his non-railroad earning capacity. *Id.* Unlike *Martinez*, however, here, Niemann has presented no evidence showing he could earn the same level of railroad wages in another occupation or employment outside of ICRR's employ. In fact, Corday, as a vocational rehabilitation counselor, testified at trial that *Niemann had no transferrable skills outside the railroad industry*, that he was not marketable in the field of business in which he had earned a college degree in 1977, and no competing railroad business in the Chicago area would choose to hire him for a sedentary position because they reserve those vacancies for their own injured workers. Thus, evidence of projected railroad wages beyond the date of Niemann's termination in June 2009, such as that presented at trial by Niemann's economist, Smith, was therefore not admissible as a basis to establish Niemann's lost future earnings. As a result of the trial court's error in denying ICRR's motion *in limine*,[3] ICRR was barred from offering evidence of Niemann's termination and Niemann was able to present

[3] In denying ICRR's motion *in limine*, the trial court simultaneously granted Niemann's motion *in limine* barring ICRR's proposed economist, Gary Skoog, from testifying to computations of Niemann's economic losses that did not include loss of earnings past the date of his termination.

Smith's testimony of Niemann's lost earnings using both projected railroad wages and non-railroad wages. From this evidence, the jury was able to return a verdict awarding over $1 million to Niemann in lost earnings and benefits, which we cannot conclude was harmless. Accordingly, we reverse and remand this cause for a new trial on the issue of *damages* only. We leave up to the trial court's discretion on remand to determine what palliative measures it may impose to limit the scope of the termination evidence—including whether to only allow into evidence the fact of Niemann's termination but not the reasons behind his termination, and any other restrictions to reduce the risk of the jury's potential misuse of evidence of Niemann's discharge. See *Nat'l R.R. Passenger Corp. v. McDavitt*, 804 A.2d 275, 291 (2002) (engineer's disciplinary record was admissible on issue of future lost earning capacity, but recognizing palliative measures available to the trial court to counter the risk of jury's misuse of evidence of engineer's disciplinary record). In light of our holding, we need not address ICRR's argument in the alternative that evidence of Niemann's termination was also relevant and admissible for the independent purpose of impeachment.

¶ 59 For the foregoing reasons, we affirm in part and reverse in part the judgment of the circuit court of Cook County, and we remand the cause for further proceedings consistent with this order.

¶ 60 Affirmed in part and reversed in part; cause remanded.