2014 IL App (1st) 132393-U

FIFTH DIVISION
DECEMBER 31, 2014

No. 1-13-2393

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
PAUL JUNOD,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09 L 66009
	)	
ILLINOIS CENTRAL RAILROAD COMPANY,	)	
	)	Honorable
Defendant Appellant.	)	Robert J. Clifford,
	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Palmer and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the judgment of the circuit court on a jury verdict in favor of the plaintiff on a claim under the Federal Employers' Liability Act, ruling that: (1) judgment notwithstanding the verdict was not warranted on the plaintiff's claim that the defendant railroad failed to supply reasonably safe tools and equipment for changing shock absorbers on a locomotive; (2) a new trial was not warranted based on the trial judge's evidentiary rulings; and (3) the railroad was not entitled to a remittitur of the jury's award of lost future earnings.

¶ 2 Following a jury trial, the circuit court of Cook County entered judgment on a verdict in

favor of plaintiff Paul Junod (Junod) and against defendant Illinois Central Railroad Company (IC) in the amount of $704,031 on Junod's claim under the Federal Employers' Liability Act (FELA) (46 U.S.C. § 51 *et seq*. (2000)). On appeal, IC contends: (1) IC was entitled to judgment notwithstanding the verdict; (2) or, in the alternative, was entitled to a new trial based on the trial judge's evidentiary rulings; and (3) IC was entitled to a $414,524 remittitur of the jury's $558,647 award for lost earnings. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 On January 30, 2009, Junod filed a complaint against IC in the circuit court of Cook County. Junod alleged that on or about June 28, 2006, he was injured while working as a machinist in changing shock absorbers on a locomotive. Junod claimed IC breached its duties by failing to provide a reasonably safe place to work and failing to provide him with reasonably safe tools with which to perform his task.

¶ 5 The parties engaged in pretrial discovery, including the disclosure of witnesses and the subjects of their testimony. Junod disclosed he might call various acquaintances, friends, neighbors, colleagues, coworkers and IC employees "with respect to [p]laintiff's damages, the effect said injury had on him, to discuss the working environment at [IC] and the standards and practices while on the job at [IC] working as a mechanic, tool issuance, training/safety, tools requests and/or complaints and regarding the same and supervision ***." One of the individuals listed in this disclosure was named Ray Trent (Trent).

¶ 6 I. Motions *in Limine*

¶ 7 Prior to trial, the parties also filed a number of motions *in limine*. The motions pertinent to this appeal are IC's motion *in limine* No. 6, and Junod's motion *in limine* No. 33.

¶ 8 IC's motion *in limine* No. 6 claimed Junod brought the action as the result of an incident

in which he fractured his wrist while working as a machinist. According to this motion, Junod claimed he fell while removing a bolt on a vertical shock absorber with a $1\ ^{1}/_{16}$-inch end wrench and a breaker bar. Junod claimed he was given inadequate tools because he was not provided with deep well sockets or an impact gun with adequate torque. Junod claimed he requested better tools, but IC did not respond to these requests.

¶ 9 IC's motion *in limine* No. 6 sought to exclude testimony that Junod was issued new tools when he returned to work following the incident, on the grounds that: (1) IC was not required to provide the latest or best tools to Junod; and (2) such testimony would be improper evidence of a subsequent remedial measure. The trial judge ruled that Junod could not use testimony to show subsequent remedial measures and could not refer to the tools issued after the incident as "new" or "better," or use similar adjectives.

¶ 10 The trial judge granted Junod's motion *in limine* No. 33, which barred testimony, evidence, or argument that the defective tools and equipment were a cause of his injuries.

¶ 11 II. Trial

¶ 12 A. Junod's Employment

¶ 13 The trial commenced on October 10, 2012. Junod testified he began working as a journeyman machinist for IC in January 2005. The position involved inspecting locomotives and their safety features, checking the water and oil, testing the headlights, and ensuring the wheels were in good shape. Machinists would also repair and occasionally replace diesel engines, as well as the trucks and the wheels beneath the locomotive.

¶ 14 IC did not allow machinists to use their own tools. IC provided Junod with a toolbox that included wrenches, a set of chrome sockets and an impact gun, but no impact sockets. According to Junod, IC never issued him a single impact socket.

¶ 15 On June 27, 2006, Junod volunteered to come in to the shop for an overtime shift from 7 p.m. until 11 p.m. The shift required Junod to change the shock absorbers on a Wisconsin Central locomotive. Junod testified he had changed shock absorbers on locomotives on three or four prior occasions, and he would need a high-torque impact gun, a deep well socket, and a 1 $^{1}/_{8}$-inch box wrench to safely complete the task. Junod did not have the socket or wrench. Junod attempted unsuccessfully to borrow these tools from coworkers and could not find them in carts holding specific tools for locomotives. Junod had also requested these tools on multiple occasions from his usual foremen months earlier, but he never received them.

¶ 16 Junod ultimately decided to remove the shock absorbers with a three-quarter breaker bar and a 1 $^{1}/_{8}$-inch box end wrench. Junod testified that the tools were not suitable for the job because the shock absorbers were controlling the sway of a 490,000-pound locomotive and the bolts had been installed with a very heavy-duty tool and were difficult to loosen. According to Junod, IC trained him to use an impact wrench and impact socket when changing shock absorbers.

¶ 17 Junod also selected a three-step platform, approximately two to three feet square, to allow him to work on an elevation. Junod further testified the platform was not suitable, insofar as IC's safety notebook stated that all platforms were to have a guardrail and a toe board. Prior to his injury, Junod had never observed a three-step platform with guardrails made available to the machinists. As there was not sufficient room to rotate the platform 90 degrees, Junod positioned the platform with the front facing the same direction as the front of the locomotive to give him more traction.

¶ 18 Junod further testified that he first attempted to loosen the bolts on the locomotive with his impact gun and a chrome socket, but realized he needed "more sufficient" tools for the job.

Junod then switched to the three-quarter breaker bar with an adapter, and sprayed the bolts with a penetrating oil to help loosen them. Junod positioned himself on the stairs of the platform in order to obtain the most torque and pull from the breaker bar and his wrenches. Junod spread his feet apart on the stair to prepare for the release of pressure that would occur when the bolts would release. Junod had the breaker bar in his left hand and a wrench in his right hand as he worked to loosen the bolts.

¶ 19 B. Junod's Injury

¶ 20 According to Junod, when he felt the release of pressure, he flew leftward over the top of the platform. Junod testified he was unable to grab anything to break his fall and landed on his left arm. Junod regained consciousness on the ground near the platform.

¶ 21 Junod was in excruciating pain and his arm appeared to be dislocated. He informed the foreman that his arm was broken, and was transported to the hospital. Following treatment, Junod returned to the Woodcrest shop at approximately 3:30 a.m., in order to assist in a reenactment of the incident with someone employed by the IC risk management department. Junod was never informed of the results of any IC investigation of the incident.

¶ 22 According to Junod, the most difficult part of the treatment for his injury was the uncertainty of his future. Junod testified that he may require additional surgeries in the future and he may lose the use of his left wrist. As a lifelong mechanic, Junod was not sure what he would do in the future if he could not work with his hands. Junod identified his treatment from a Dr. Labana as a high point, because his initial treatment felt like "a step forward, two steps back." Dr. Labana ordered a CAT scan, identified Junod's real problem and was able to repair Junod's wrist.

¶ 23 Junod further testified that he continued to work at IC, but missed 11 months of work

after his injury. According to Junod, at the time of his injury, he was working 40 hours per week at an hourly salary of $21.34. Junod also testified, based on information from his union, he missed approximately 1,500 hours of overtime at an hourly rate of $32 during the 11 months he was not working.

¶ 24 Junod continues to experience tingling and numbness in his left arm and wrist both at work and at home. Junod's coworkers also assisted him with heavier and more difficult tasks.

¶ 25 Junod additionally testified that he began working part-time at Wood Brothers Steel Stamping (Wood Brothers), assisting in building steel dies. He worked at Wood Brothers from 2008 until 2012 and received approximately $16,000 per annum. The Wood Brothers job included using a drill press, a mill, and a lathe. Junod ceased working for Wood Brothers due to pain issues. Once Junod observed his wrist was deteriorating, he sought to extend his time employed by IC. Junod also transferred from IC's Woodcrest shop to the Glen Yard shop at approximately the same time he stopped working for Wood Brothers.

¶ 26 Moreover, Junod testified that when he returned to work, the foreman provided him two brand-new high-torque impact wrenches and a set of sockets he previously requested.

¶ 27 Junod performed similar work as a machinist during the period he worked at the Woodcrest shop, but performed more basic inspections of locomotives at the Glen Yard shop. Junod received $22.75 an hour at the Glen Yard shop, where he was the sole machinist. Junod limited his overtime to more menial jobs and avoided overtime in the truck shop at Glen Yard, where the work is more strenuous. Junod opined that avoiding work in the truck shop may inhibit his ability to advance to working aboard a locomotive in the future.

¶ 28 On cross-examination, Junod acknowledged he wrote on his incident report that he lost his balance. Junod also acknowledged his hourly pay had increased since his injury. Junod

further acknowledged his injury occurred while attempting to remove the final bolt on the final shock absorber of the locomotive. Junod additionally conceded he had not previously complained about the platform he used and he had believed he could use the platform to complete his job safely.

¶ 29 III. IC Employee Testimony

¶ 30 A. Joe Jackson

¶ 31 Joe Jackson (Jackson), who had 37 years of experience at IC, testified he was the Woodcrest shop manager on duty when line foreman Dwayne Henderson (Henderson) informed him of Junod's injury. In response, Jackson had the area of the incident tied off and transported Junod for medical care. He then conducted an investigation, which indicated Junod lost his balance and fell, breaking bones in the left wrist. According to Jackson, Junod never stated that insufficient tools caused the incident. Jackson also testified that Junod never requested the impact sockets. Jackson opined that a three-quarter breaker bar and a box wrench were safe and sufficient tools for removing the bolts on a shock absorber, and that he personally had used such tools to change shock absorbers on approximately four of five occasions.

¶ 32 On cross-examination, Jackson acknowledged that a foreman had the ability and obligation to purchase a tool for a machinist when the tool cost less than $100. Jackson also acknowledged Junod had received morphine at the time of the reenactment, but he testified he had inquired whether Junod was "up to doing the reenactment." Jackson further testified he always considered Junod to be a safe worker.

¶ 33 B. Kevin Gebhardt

¶ 34 Kevin Gebhardt (Gebhardt), a representative for IC, testified regarding work conditions for IC machinists. According to Gebhardt, in 2006, IC was responsible for providing all tools

necessary for machinists to perform their jobs. Machinists were provided a toolbox and were responsible for informing Gebhardt or their supervisors when additional tools were needed. Gebhardt testified that in 2006, IC did not keep track of which tools were issued to which machinists. Moreover, IC did not track machinists' complaints about tools unless those complaints were raised in a safety meeting.

¶ 35 According to Gebhardt, a line foreman or shop foreman might document machinists' complaints. IC did not assign foremen or other employees to conduct an inventory check at the beginning of a shift. A foreman also had the authority to order a necessary tool for a machinist. Gebhardt further testified a foreman had the obligation to stop a machinist working in an unsafe manner. Gebhardt additionally testified the use of a nonimpact socket with an impact gun could be a dangerous condition. Moreover, he agreed that IC considered Junod a competent worker and never considered him an unsafe worker before June 27, 2006.

¶ 36 Gebhardt subsequently testified he had used a three-quarter breaker bar and box wrench to loosen bolts on shock absorbers for a locomotive.

¶ 37 During cross-examination, Gebhardt testified that in 2006, he ordered tools and other materials from a company named Grainger. When Junod's counsel asked whether Gebhardt could have ordered a three-step platform with guardrails from Grainger, Gebhardt responded he purchased ladders from Fugiel Railroad Supply, not from Grainger. Gebhardt was then shown a photograph of the equipment in the area where Junod was injured and identified the "work ladder" or "stepladder" as bearing the Cotterman brand. Gebhardt denied that IC referred to the ladder as a platform, but he later acknowledged IC referred to the ladder as a platform in answering a discovery interrogatory. IC's counsel ultimately objected to the line of questioning as beyond the scope of the direct examination, because IC had not questioned Gebhardt about the

platform or ladder. The trial court overruled the objection, based on IC's pretrial reference to the ladder as a platform. IC's counsel renewed its objection when Junod's counsel sought to admit catalogs from Grainger and Cotterman into evidence, and also argued the catalogs were irrelevant. The trial court overruled IC's objection and admitted the catalogs into evidence.

¶ 38 C. Dwayne Henderson

¶ 39 Henderson, an IC line foreman on June 27, 2006, testified he would have been the direct supervisor of the machinists on that date. Henderson agreed his duties included ensuring machinists were using suitable tools for their work and stopping unsafe work. Henderson also testified he did not have the authority to purchase tools for machinists, but he would forward machinists' requests to the purchasing department. Henderson opined it could be safe to use a nonimpact socket with an impact gun. Henderson subsequently testified he had used a three-quarter breaker bar and a box wrench to change shock absorbers between a dozen and two dozen times.

¶ 40 D. Donovan Swalby

¶ 41 Donovan Swalby (Swalby), a machinist at IC's shop in Woodcrest, testified he had worked for IC since 1993 and with Junod as of 2006, prior to the incident at issue in this case. Swalby testified he would use an impact gun with an impact socket, along with a suitable wrench, to change or remove a shock absorber on a locomotive. Swalby explained he would use these tools because corrosion would cause parts to freeze, and the use of a locknut would also ensure the components remained "bone tight." Swalby also explained that using a regular socket would not be a good idea because the rattling of the impact gun would eventually cause a regular socket to shatter or break, creating flying shrapnel.

¶ 42 According to Swalby, IC did not have a tool room accessible to journeymen machinists

such as himself. When he would request a tool for a job, the foreman would demand to be provided with a list "and that's about the end of where you [saw] it."

¶ 43 Swalby opined that Junod was a very good machinist. Swalby also opined that Junod did not have the same physical capacity he had prior to the incident at issue in this case. In particular, Junod's left arm was not as strong as it had been. Junod also did not like to run impact guns for a length of time because the vibration would make his hand sore. Others occasionally were asked to assist Junod in the shop after this accident.

¶ 44 When shown a three-quarter breaker bar, Swalby testified he would not choose to use one to change a shock absorber. Swalby also would not choose to use a $1\ ^{1}/_{8}$-inch offset box wrench to change a shock absorber. Swalby explained that it would be easier to slip using the offset wrench instead of a straight combination wrench.

¶ 45 On cross-examination, Swalby agreed that he used a three-quarter breaker bar and a $1\ ^{1}/_{8}$-inch offset box wrench to loosen other bolts in the shop. Swalby also testified that IC provided him with six different impact guns (of three different sizes) during his time in the Woodcrest shop. Swalby kept his tools in a locked toolbox. Swalby would allow Junod to borrow tools, including his $^{3}/_{4}$-inch impact gun, if he was available when Junod needed the tools.

¶ 46 E. Robert Brown

¶ 47 Robert Brown (Brown), a machinist who had worked with Junod at IC, testified that IC did not issue him a full set of tools. IC issued Brown impact guns, but did not issue him impact sockets. During his time at IC, Brown had been assigned to change shock absorbers. According to Brown, he would prefer to use an impact gun with impact sockets to change a shock absorber. He testified that chrome sockets would fracture and break from the impact of the gun. Brown added that the packaging for sockets he received from IC stated, "Do not use this with an impact

gun." Brown did not have a $^{3}/_{4}$-inch impact gun while working at IC. Brown testified he never used an offset combination wrench to remove a bolt from a shock absorber. He also never used an impact gun with a nonimpact socket.

¶ 48 When Brown was assigned a job requiring the use of a tool he had not been issued, he would borrow the tool from a coworker or inform the foreman to request the tool. According to Brown, it was a common practice to borrow tools from coworkers. Brown added there were times he never received a tool from a foreman.

¶ 49 Brown additionally testified that during his time at IC, he had worked in the pit area on line 6. While working in the pit area, he would typically require a three- or four-step ladder. Brown never observed any sort of platform with railings in this area.

¶ 50 Brown did not commence working for IC until after the incident, but further testified he had assisted Junod following the incident. In particular, Brown recalled Junod struggling to break bolts loose on a power assembly. Brown testified he did the hard work of the task, while Junod did minor work.

¶ 51 F. Ray Trent

¶ 52 Trent, Junod's brother-in-law and an IC machinist, testified he recommended that IC hire Junod. Trent testified that in 2006, the work platforms used in the pit areas lacked handrails. Over IC's objection, Trent also testified that the safety handbook IC provided to machinists indicated IC requires handrails on work platforms. Provided with a copy of the safety handbook, Trent read a page stating, "[u]se only elevated platforms or scissor lifts equipped with a guardrail and toe board."

¶ 53 Trent further testified that prior to the incident, Junod assisted him in household projects, including installing hardwood floors on the main level of Trent's house. Junod had hammered,

sawed, carried materials with both hands, and used tools while installing the hardwood floors. Trent and Junod spent a week of their spare time on the project. After the incident, Trent commenced building a deck for his home, but Junod stopped assisting him after one day of mixing concrete and setting posts.

¶ 54 G. John Meske

¶ 55 John Meske (Meske) testified that he met Junod in the mid-1980s and became good friends with him. According to Meske, Junod once enjoyed activities such as snowmobiling, motorcycling, bicycling, and fishing, but Junod had not participated in them as much after the injury, due to the weakness in his left arm. Meske also assisted Junod in tasks he can no longer perform while restoring old automobiles, which is one of Junod's biggest passions. Meske testified that Junod's left arm condition appears to be worsening.

¶ 56 H. Robert Onderwater

¶ 57 Robert Onderwater (Onderwater) testified that he was an IC machinist on the same shift as Junod for three years. Onderwater had changed the shock absorbers on a locomotive between 10 and 15 times. Onderwater also testified he and other machinists were occasionally required to work atop platforms similar to the one Junod used on the date of the injury. Onderwater further testified he would not attempt to change shock absorbers from one of the lower steps on the platform. During his years as an IC machinist, Onderwater never observed a work platform in the pit with a guardrail around the surface. Based on his observation of Junod at work, Onderwater opined that after the injury, Junod did not consistently demonstrate the physical strength and stamina required of a machinist at the Woodcrest shop.

¶ 58 IV. Medical Testimony

¶ 59 A. Dr. Neal Labana

¶ 60 The testimony of Dr. Neal Labana was offered into evidence and published to the jury. In his evidence deposition, Dr. Labana testified he specialized in hand and upper extremity surgery. Dr. Labana treated Junod between October 4, 2006, and April 4, 2007. Junod had been referred to Dr. Labana by his prior physicians.

¶ 61 According to Dr. Labana, Junod had a left wrist fracture that healed after surgery with angulation. As a result, Junod sustained approximately 30 degrees of dorsal angulation and shortening. It was also apparent that Junod sustained a misunion of his distal radius, which was repaired by the surgery. Dr. Labana testified Junod had a severe injury not only because of the angulation, but also because there were cracks going into the joint, indicating breaking into the cartilage, which does not have a good ability to heal.

¶ 62 Dr. Labana performed corrective surgery on Junod's wrist, including a bone graft and the installation of metal plates and screws, on November 17, 2006. Dr. Labana, however, informed Junod that cracks in the wrist joint would create a higher risk for arthritis in the future. He also prescribed physical therapy for Junod after the surgery. Junod's condition improved while under Dr. Labana's care. According to Dr. Labana, however, Junod could not expect to have his wrist return to its condition prior to the injury. Dr. Labana additionally testified he had not observed Junod since April 2007 and was not aware of Junod's current condition. Dr. Labana opined Junod's injury was caused by his fall. Although Dr. Labana did not expressly offer that opinion based on a reasonable degree of medical certainty, he stated at the outset of his testimony he would limit his opinions to those he held with a reasonable degree of medical certainty.

¶ 63 B. Dr. Michael Treister

¶ 64 The jury viewed a video deposition given by Dr. Michael Treister, an orthopedic hand surgeon, which was offered into evidence. In his evidence deposition, Dr. Treister testified he had been practicing for approximately 40 years and had treated thousands of cases of wrist injuries caused by falls. Dr. Treister commenced treating Junod on November 18, 2011.

¶ 65 Dr. Treister testified that after his first treatment, he concluded Junod had progressive arthritis in his left wrist, along with evidence of carpal tunnel syndrome with damage to the median nerve. Dr. Treister opined that the carpal tunnel syndrome was caused by the fracture. According to Dr. Treister, Junod reported numbness in his left thumb, index finger, long finger, and half of his ring finger, extending down into the palm. Dr. Treister also testified that the progressive arthritis had caused the joint of two of the bones in Junod's wrist to become obliterated into one bone. Dr. Treister recommended Junod have additional surgery to remove the hardware in his wrist, in order to reduce nerve irritation.

¶ 66 Dr. Treister opined that it was virtually certain Junod's arthritis would deteriorate in time, requiring additional surgery. Dr. Treister also explained arthritis never progresses in a straight-line fashion, but accelerates over time. According to Dr. Treister, there were two types of surgery Junod may require, one of which would be a simple fusion of the wrist that would eliminate all movement in the joint. The second type of surgery, a proximal row carpectomy, involved removing three bones that normally abut into the wrist joint. Dr. Treister also opined that Junod's injuries are permanent. Dr. Treister further opined there was a significant likelihood Junod's wrist would deteriorate over time, where Junod would not be able to effectively use the wrist, with or without subsequent surgery. Dr. Triester additionally testified that Junod's medical care since June 2006 resulted from his injuries at work in that month. Although Dr. Triester did

not expressly offer that opinion based on a reasonable degree of medical certainty, he stated at the outset of his testimony he would limit his opinions to those he held with a reasonable degree of medical certainty.

¶ 67 On cross-examination, Dr. Treister testified he was not recommending that Junod cease working. Dr. Treister also testified that he "hoped" Junod would not have to cease working after any subsequent surgery.

¶ 68 V. Economic Assessment Testimony

¶ 69 David Gibson (Gibson), a senior analyst for Vocational Economics, Inc., testified that for the past 19 years, his primary work involved evaluating how much money in today's dollars an individual is likely to lose over a lifetime as the result of a permanent disability. Gibson is a certified public accountant, and holds master's degrees in both business administration and rehabilitation counseling. Gibson had been retained by plaintiffs' attorneys approximately 70% of the time, and defense attorneys approximately 30% of the time.

¶ 70 Gibson prepared a vocational economic assessment for Junod on May 9, 2012, which he updated on August 2, 2012. The assessment involved a consideration of tax records, data from the railroad retirement board, union records and reports, as well as a review of the evidence depositions from doctors, and medical records. Gibson relied on Junod's most current medical information to assess the future impact of Junod's condition on his future earnings from a full-time position with the railroad. The assessment estimated the difference between how much Junod would have earned with or without his current physical limitations and reduced that difference to present cash value.

¶ 71 Gibson testified Junod had a permanent disability based on the definition used by the United States Census Bureau, as he had a permanent limitation that expected to degenerate over

time, which substantially limits his ability to reach, lift or carry objects. After adjusting for pension contributions, Gibson opined that Junod had a preinjury earning capacity of $58,423 per annum. Regarding Junod's postinjury annual earning capacity, Gibson made two estimates. First, assuming Junod's condition did not deteriorate to the point where he would be required to change jobs, Junod could still earn $58,423. Second, if Junod was required to find alternate employment more conducive to his limitations, Gibson found males with a high school education and physical limitations to earn $43,000 per annum in median full-time earnings.

¶ 72 Gibson then estimated Junod's work life expectancies, which statistically account for the probability that people spend some periods of time out of the workforce due to hard economic times, caring for a sick family member, and so forth. As Junod was 51 years old, Gibson estimated Junod's preinjury work expectancy to be 10.9 years. Gibson testified the median life work expectancy for a similar male with a high school education and a nonsevere physical disability would be 5.6 years. Gibson, however, also considered Junod may be able to remain in his position with IC, in which case his postinjury work life expectancy would be estimated at 8.1 years. Gibson further testified that if Junod's postinjury work life expectancy was estimated at 8.1 years, his lifetime loss of earnings capacity would be $170,445, but if Junod's postinjury work life expectancy was estimated at 5.6 years, his lifetime loss of earnings capacity would be $414,524. Both estimates were reduced to present cash value.

¶ 73 Gibson additionally testified that while Junod had not missed work since 2007, studies have shown without exception that individuals with nonsevere limitations like Junod's find increased probabilities of absence from work due to medical care, early retirement, or other complications from the underlying injury. Moreover, based on information from Junod's treating physician, Gibson testified it was quite likely Junod's condition would deteriorate over time. In

particular, based on information from Junod's treating physician, Gibson testified Junod would likely need treatment which would be extremely limiting to Junod's ability to perform his job at the railroad. Therefore, Gibson concluded, the likelihood of Junod continuing to work at the railroad had decreased "quite a bit."

¶ 74 On cross-examination, Gibson agreed that his estimates were based on general demographic categories and did not account for Junod's particular skills and work experience. Gibson also agreed he could not say whether either of the scenarios he presented would definitely occur. Gibson further conceded his analysis did not include the $64,000 Junod earned working for Wood Brothers.

¶ 75 VI. The Renewal of Motion *in Limine* No. 6

¶ 76 Prior to closing arguments, counsel for IC renewed its motion *in limine* No. 6, arguing Junod's testimony regarding the "brand new" equipment he received upon returning to work violated the trial judge's pretrial ruling on the motion. Counsel for IC sought to bar Junod's counsel from referring to the testimony during closing argument. The trial judge inquired why counsel for IC did not object during Junod's testimony, to which counsel responded that he did not know, but he did not intend to waive the objection. Junod's counsel represented he would not refer to the disputed testimony during closing arguments and he would be agreeable to a curative jury instruction. Before moving to other issues and jury instructions, the trial judge stated he would think about the matter. The following day, prior to closing argument, the trial judge observed: (1) IC had failed to contemporaneously object to Junod's testimony; (2) a curative instruction would not be particularly beneficial; (3) IC had not sought a new trial; and (4) the trial judge did not believe a new trial would be warranted. The trial judge ruled, however, that

Junod's counsel would be barred from commenting during closing argument upon the new tools provided to Junod when he returned to work.

¶ 77 VII. The Judgment

¶ 78 Following closing arguments and jury instructions, the jury deliberated and returned a monetary verdict in favor of Junod for the following elements of damages: (1) $10,000 for disfigurement; (2) $460,000 for pain and suffering experienced and reasonably expected to be experienced in the future; (3) $71,000 for medical expenses incurred and reasonably expected to be incurred in the future; and (4) $558,647 for lost earnings incurred and the present cash value of time, earnings and benefits reasonably certain to be lost in the future. The jury also found Junod 30% contributorily negligent, reducing his recoverable damages to $704,031.

¶ 79 On October 16, 2012, the trial court entered judgment on the jury's verdict. On December 17, 2012, IC filed its posttrial motion for judgment notwithstanding the verdict or, in the alternative, a new trial. On June 27, 2013, following briefing and argument on the matter, the trial judge denied IC's posttrial motion. On July 22, 2013, IC filed its timely notice of appeal to this court.

¶ 80 ANALYSIS

¶ 81 Junod's claim against IC is based on the FELA, which dates from the heyday of American steam railroads. *Williams v. National R.R. Passenger Corp.*, 161 F.3d 1059, 1061 (7th Cir. 1998). Enacted in 1908, the FELA provides a broad, federal tort remedy for railroad workers injured on the job. See *id.*; *Wilson v. Norfolk & Western Ry. Co.*, 187 Ill. 2d 369, 372 (1999). The FELA requires railroad workers to prove negligence, but the standard of proof required to submit a case to a jury is merely whether the employer's negligence played even the slightest part in producing the employee's injury. *Williams*, 161 F.3d at 1061 (citing

Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 543 (1994)); see *Harbin v. Burlington Northern Ry. Co.*, 921 F.2d 129, 132 (7th Cir. 1990) (noting examples of FELA actions submitted to jury based only upon "evidence scarcely more substantial than pigeon bone broth"). An employer under the FELA, however, is not an insurer of employee safety. *Brzinski v. Northeast Illinois Regional Commuter R.R. Corp.*, 384 Ill. App. 3d 202, 205 (2008). A FELA plaintiff, therefore, "still must prove the traditional common law elements of negligence, including foreseeability, duty, breach, and causation." *Fulk v. Illinois Central R. Co.*, 22 F.3d 120, 124 (7th Cir. 1994). "In order to establish a cause of action under FELA, a plaintiff must prove the following four 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) (citing 45 U.S.C.A. § 51 (2000)).

¶ 82 On appeal, IC contends: (1) IC was entitled to judgment notwithstanding the verdict; (2) or, in the alternative, IC was entitled to a new trial based on the trial judge's evidentiary rulings; and (3) IC was entitled to a $414,524 remittitur of the jury's $558,647 award for lost earnings. We address these contentions in turn.

¶ 83 I. Judgment Notwithstanding the Verdict

¶ 84 IC first argues that the court erred in not granting its motion for judgment notwithstanding the verdict (judgment *n.o.v.*).[1] *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494 (1967), sets out the general standard for entering a judgment *n.o.v.*:

"In our judgment verdicts ought to be directed and judgments *n.o.v.* entered only in those

[1] Judgment *n.o.v* . is an abbreviation of the term "judgment *non obstante veredicto*." *E.g.*, *Harris v. Thompson*, 2012 IL 112525, ¶ 9.

> cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand." *Id*. at 510.

A motion for judgment *n.o.v.* presents a question of law as to whether there was a total failure to present evidence to prove a necessary element of the plaintiff's case. *York v. Rush-Presbyterian-St. Luke's Medical Center,* 222 Ill. 2d 147, 178 (2006); *Finley v. New York Central R.R. Co.*, 19 Ill. 2d 428, 434 (1960). "If the evidence is such that without weighing the credibility of the witnesses, and upon considering it in its aspects most favorable to the plaintiff, there can be but one reasonable conclusion as to the verdict, the court should direct a verdict or enter judgment notwithstanding the verdict." *Id*. "Moreover, '[c]ourts 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.' " *Hamrock v. Consolidated Rail Corp.*, 151 Ill. App. 3d 55, 61 (1986) (quoting *Tennant v. Peoria & Pekin Union Ry. Co*., 321 U.S. 29, 35 (1944)). "We apply a *de novo* standard to our review of decisions on motions for judgments notwithstanding the verdict." *McClure v. Owens Corning Fiberglas Corp*., 188 Ill. 2d 102, 132 (1999).

¶ 85 In this case, IC's arguments address certain elements of negligence, including breach of duty, foreseeability, and causation, which we address in turn.

¶ 86 A. Breach of Duty

¶ 87 IC maintains Junod failed to produce evidence that IC breached a duty owed to Junod. Under the FELA, an employer has a duty to use reasonable care in furnishing its employees with a safe place to work. See *Atchinson, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 558 (1986). This duty is not nondelegable. *Lewis v. Cotton Belt Route-Saint Louis Southwestern Ry. Co*., 217

Ill. App. 3d 94, 112 (1991). Given this duty, "the employer must use reasonable care to provide tools and equipment that are safe and suitable for the purpose of the work." *Finley,* 19 Ill. 2d at 435. The employer, however, is not required to furnish the latest, best or safest appliances or equipment. *Chicago & Northwestern Ry. Co. v. Bower*, 241 U.S. 470, 473-474 (1915); *Deckert v. Chicago & E. I. R. Co.*, 4 Ill. App. 2d 483, 490 (1955).

¶ 88 In this case, Junod testified a three-quarter breaker bar and a 1 $^{1}/_{8}$-inch box end wrench were not suitable tools for changing shock absorbers on a locomotive because the shock absorbers were controlling the sway of a 490,000-pound locomotive and the bolts had been installed with a very heavy-duty tool and were extremely tight. According to Junod, IC trained him to use an impact wrench and impact socket when changing shock absorbers. Swalby testified he would not use a three-quarter breaker bar or a 1 $^{1}/_{8}$-inch offset box wrench by choice to change a shock absorber. Swalby also explained it would be easier to slip using the offset wrench instead of a straight combination wrench. Brown testified he never used an offset combination wrench to remove a bolt from a shock absorber and never used an impact gun with a nonimpact socket.

¶ 89 In contrast, Jackson testified that a three-quarter breaker bar and a box wrench were safe and sufficient tools for removing the bolts on a shock absorber and he personally had used such tools to change shock absorbers on approximately four of five occasions. Henderson similarly testified he had used a three-quarter breaker bar and a box wrench to change shock absorbers between a dozen and two dozen times. Gebhardt also testified he had used a three-quarter breaker bar and box wrench to loosen bolts on shock absorbers for a locomotive.

¶ 90 The record thus contains conflicting evidence on the question of whether a three-quarter breaker bar and a box wrench were safe and sufficient tools for removing the bolts on a shock

absorber. It is not, however, this court's function to reweigh this evidence. *Hamrock*, 151 Ill. App. 3d at 61. If a plaintiff's evidence "makes out a *prima facie* case sufficient in itself to go to the jury, defendant's motion should be denied ***." *Hughes v. Bandy*, 404 Ill. 74, 79 (1949). Given the many witnesses who testified for Junod as to the insufficiency of the tools, we find Junod made a *prima facie* case and the motion should be denied.

¶ 91 IC relies on five decisions from other jurisdictions, but these cases are distinguishable. In each of these cases, the court granted summary judgment because the plaintiff presented insufficient evidence, not because the defendant's evidence sufficiently contradicted it. See *Walker v. Northeast Regional Commuter Railroad Corp.*, 225 F.3d 895, 899 (7th Cir. 2000); *Deutsch v. Burlington Northern R. Co.*, 983 F.2d 741, 744 (7th Cir. 1993); *Thornton v. Atchison, Topeka & Santa Fe Ry. Co.*, 11 F. Supp. 2d 1311, 1313 (D.N.M. 1997); *McKennon v. CSX Transportation, Inc.*, 897 F. Supp. 1024, 1027 (M.D. Tenn. 1995); *Duhon v. Southern Pacific Transportation Co.*, 720 So. 2d 117, 124 (La. Ct. App. 1998), *abrogated on other grounds*, *Independent Fire Insurance Co. v. Sunbeam Corp.*, 755 So. 2d 226 (La. 2000).

¶ 92 B. Foreseeability

¶ 93 IC next argues Junod failed to establish that his injury was reasonably foreseeable to IC. The reasonable foreseeability of harm is an essential part of a FELA negligence case to prove duty. *CSX Transportation, Inc. v. McBride*, ___ U.S. ___, ___, 131 S. Ct. 2630, 2643 (2011). Federal courts generally equate foreseeability with notice, either actual or constructive. *Williams*, 161 F.3d at 1062-63 (and cases collected therein). Thus, an employer has no duty if it had no reasonable way of knowing about the hazard that caused the employee's injury. *Id*. at 1062. IC observes that in this case, there was no evidence of prior similar incidents where shock absorbers were changed with a three-quarter breaker bar and a box wrench. IC also asserts there

was no probative evidence that using a platform with guardrails would have prevented the incident.

¶ 94 In a motion to cite supplemental authority, IC relies upon an unpublished opinion and order from the United States District Court for the Northern District of Indiana, *Lusher v. Norfolk Southern Railway Co.*, No. 2:12-cv-37-TLS, 2014 WL 3894347 (N.D. Ind. Aug. 8, 2014).[2] In *Lusher*, a conductor filed suit against a railway after injuring his hand when operating a hand brake. The *Lusher* court granted summary judgment in favor of the railway on the basis of foreseeability, because the plaintiff failed to provide sufficient evidence that the defendant railway knew brake sticks posed a risk. *Id*. at *4. The only evidence the plaintiff provided was his own deposition testimony. *Id*. at *2. Lusher had testified "that he thought the brake sticks were unsafe, and that '[t]hey've always tried to get the railroad not to use them.' " *Id*. at *5. The court noted the plaintiff did not provide any firsthand account or documentation regarding any requests personally made to the defendant railway, and did not provide any testimony or documentation from any coworker who had made such a request. *Id*. The plaintiff also stated that he knew of another railway employee who had been injured while using a brake stick, but again offered no supporting details regarding the alleged incident. *Id*. The *Lusher* court found the vague and unsupported statements insufficient to raise a genuine issue of material fact sufficient to withstand summary judgment. *Id*.

[2] We recognize that " '[u]npublished federal decisions are not binding or precedential in Illinois courts.' " *Solargenix Energy, LLC v. Acciona, S.A.*, 2014 IL App (1st) 123403, ¶ 39 n.10 (quoting *King's Health Spa, Inc. v. Village of Downers Grove*, 2014 IL App (2d) 130825, ¶ 63). This court, however, is not precluded from using the same reasoning and logic as that used in an unpublished federal decision where we find it to be persuasive. *Id*.

¶ 95 In this case, unlike *Lusher*, the record contained specific evidence from which IC's actual or constructive notice of the risk could be inferred. Junod testified he had requested a high-torque impact gun, a deep well socket, and a $1\ ^{1}/_{8}$-inch box wrench on multiple occasions from his usual foremen months earlier, but had never received them. Junod also testified that IC trained him to use an impact wrench and impact socket when changing shock absorbers. IC specified in its safety notebook that platforms should have guardrails. We accordingly find our supreme court's decision in *Finley* more instructive regarding foreseeability.

¶ 96 In *Finley*, the plaintiff was using a crowbar to pry shut a door which was stuck on a boxcar when the door suddenly sprang closed and the plaintiff fell to the ground on his back. *Finley*, 19 Ill. 2d at 430. The plaintiff sued his employer under FELA, alleging in relevant part that the defendant negligently failed to furnish him with reasonably suitable tools. See *id*. At the time of the injury, the plaintiff was working the night shift. See *id*. The plaintiff testified the only tool available to him on the night shift was the crowbar, but chain jacks were made available for use in closing car doors during the day shift and the second shift. *Id*. at 431-32. Two supervisory employees called by the plaintiff as adverse witnesses testified that chain jacks were kept at the repair tracks where they are used in closing car doors, and were available at another of defendant's yards. *Id*. at 432. The defendant introduced contradictory evidence that chain jacks were not furnished to car inspectors and were generally not used to close stuck doors. *Id*. at 432. An assistant foreman employed by the defendant testified that car inspectors did not use chain jacks to close stuck doors, but he also testified that a chain jack once was used to close a door when the train was made up and ready to depart. *Id*. at 433.

¶ 97 Our supreme court ruled: "there [was] sufficient evidence from which the jury could find that defendant failed to furnish tools suitable for the job plaintiff was expected to do ***." In so

doing, it noted: "Evidence that at other times a chain jack was available and was used for hard-to-close doors indicates some recognition by defendant that a bar is not sufficient; and the jury might properly infer therefrom that in providing nothing more than a bar for use during the night shift in closing damaged or stuck doors, defendant failed to furnish tools which are reasonably safe, efficient and suitable for such work." *Id*. at 435-36. Furthermore, "[t]he fact that contrary inferences would be equally supported by the evidence is not sufficient to show unreasonableness of the verdict. It is the jury's function to weigh contradictory evidence, judge the credibility of the witnesses and draw the ultimate conclusion as to the facts." *Id*. at 436.

¶ 98 In this case, IC provided impact guns and impact sockets to some of its machinists. As previously noted, IC also trained machinists to use an impact wrench and an impact socket when changing shock absorbers and specified in its safety notebook that platforms should have guardrails.[3] Similar to *Finley*, a jury could infer from this evidence that IC recognized a three-quarter breaker bar and a box wrench were insufficient to change a shock absorber and that, in providing those tools and a platform without guardrails, IC failed to furnish tools and equipment which are reasonably safe, efficient and suitable for the work. See *Finley*, 19 Ill. 2d at 435-36. The fact that contrary inferences could be supported by the evidence is not sufficient to establish the verdict was unreasonable. *Id*. at 436.

¶ 99 C. Causation

¶ 100 IC also argues Junod failed to present evidence of causation. A relaxed standard of causation applies under the FELA. *Gottshall*, 512 U.S. at 543. " '[U]nder this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer

[3] IC asserts there was no evidence that a platform with guardrails could be used to change a shock absorber in the confined space where Junod was working at the time of his injury.

negligence played any part, even the slightest, in producing the injury or death for which damages are sought.' " *Id*. (quoting *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506 (1957)).

¶ 101 IC relies upon *Wadiak v. Illinois Central R.R. Co*., 208 F.2d 925 (7th Cir. 1953), in which the plaintiff injured his back while lifting a heavy barrel. See *id*. at 926-27. The Seventh Circuit reversed a judgment for the plaintiff with directions to the trial court to enter judgment for defendant, ruling:

> "[Plaintiff] was not injured because he did not have equipment, for he had access to sufficient and adequate tools and devices. He was injured because he saw fit not to use the equipment but to ignore it and to handle the barrel manually. He was not injured because he needed help and did not have it but because he saw fit not to ask for help. He was not injured because the car had been improperly loaded and carried by defendant in such condition, but, because, when he was directed to repair the condition, without approaching his superior, he voluntarily adopted a dangerous method of doing so instead of a safe one." *Id*. at 930.

IC argues Junod's failure to request different tools or equipment on the night of the incident is similarly fatal to his claim.

¶ 102 In this case, however, Junod unsuccessfully asked coworkers to borrow these tools and could not find them in carts holding specific tools for locomotives. Junod also testified that he requested different tools on multiple occasions from his usual foremen months earlier, but he never received them. Jackson disputed that Junod ever requested impact sockets, but acknowledged a foreman had the ability and obligation to purchase a tool for a machinist where the tool cost less than $100. Henderson testified that he did not have the authority to purchase

tools for machinists, but he would forward machinists' requests to the purchasing department. According to Swalby, when he would request a tool for a job, the foreman would demand to be provided with a list "and that's about the end of where you [saw] it." Brown testified there were times he requested but never received a tool from a foreman. Gebhardt testified that in 2006, IC did not keep track of which tools were issued to which machinists and IC did not track machinists' complaints about tools unless those complaints were raised in a safety meeting. Given this record, *Wadiak* is distinguishable because the jury here may have inferred any request from Junod to his supervisors on the night of the incident would have been futile.

¶ 103 IC's supplemental authority also addresses the issue of causation. *Lusher v. Norfolk Southern Railway Co*., No. 2:12-cv-37-TLS, 2014 WL 3894347 (N.D. Ind. Aug. 8, 2014), at *6. Lusher had alleged that the ground where he was working at the time of the incident was covered in large ballast stone as opposed to smaller walking stone, and asserted that poor footing might have contributed to the accident. *Id*. In his deposition testimony, however, Lusher could not say the ballast stone caused the incident and did not recall either of his feet slipping at the time of the incident. *Id*. IC argues that Junod's testimony that he attempted to grab something as he flew over the platform is similarly speculative and did not establish that a platform railing would have prevented his fall. Junod's testimony, however, established that he attempted to grab something in the attempt to prevent a fall, which distinguishes this case from *Lusher*, in which the plaintiff could not even recall whether he slipped and the result could have been an idiopathic event.

¶ 104 In short, we are not persuaded there was a total failure to present evidence to prove causation in this case. Based on Junod's testimony, the jury could infer the only incident affecting Junod that could have caused the wrist injury was the episode occurring on June 27, 2006. The jury also heard the testimony of Dr. Labana and Dr. Triester, from which it could

infer that Junod's injury was caused by his fall. Thus, we conclude the trial judge did not err in denying IC's motion for judgment notwithstanding the verdict.

¶ 105 II. New Trial

¶ 106 IC next argues in the alternative it was entitled to a new trial based on the trial judge's evidentiary rulings. "[U]nlike motions for judgment *n.o.v.*, a court may consider errors in the exclusion or admission of evidence and grant a new trial if there were serious and prejudicial errors made at trial." *Favia v. Ford Motor Co*., 381 Ill. App. 3d 809, 816 (2008). "A trial court's decision regarding the presentation of evidence to a jury is reviewed under an abuse of discretion standard." *Troyan v. Reyes*, 367 Ill. App. 3d 729, 732 (2006). Similarly, this court will not reverse a trial court's ruling on a motion for a new trial "except in those instances where it is affirmatively shown that the trial court clearly abused its discretion." *Maple v. Gustafson*, 151 Ill. 2d 445, 455 (1992). An abuse of discretion occurs when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view. *Favia*, 381 Ill. App. 3d at 815.

¶ 107 Moreover, even when the trial court has abused its discretion, a new trial should be granted "only when evidence improperly admitted appears to have affected the outcome of the trial." *Tzystuck v. Chicago Transit Authority*, 124 Ill. 2d 226, 243 (1988). "[W]here the case is a close one on the facts, and the jury might have decided either way, any substantial error which might have tipped the scales in favor of the successful party calls for reversal." *Both v. Nelson*, 31 Ill. 2d 511, 514 (1964); *Sbarboro v. Vollala*, 392 Ill. App. 3d 1040, 1057 (2009).

¶ 108 A. IC's Motion *In Limine* No. 6

¶ 109 IC initially argues the trial judge abused his discretion in denying IC's motion *in limine* No. 6, which sought to exclude testimony that Junod was issued new equipment when he

returned to work following the incident. IC acknowledges, however, that it failed to object to Junod's testimony until shortly prior to closing arguments. "In civil cases such as this, the law is well established that the denial of a motion *in limine* does not preserve an objection to disputed evidence later introduced at trial." *Illinois State Toll Highway Authority v. Heritage Standard Bank and Trust Co.*, 163 Ill. 2d 498, 502 (1994). "The moving party remains obligated to object contemporaneously when the evidence is offered at trial." *Id.* "While there is not always a need to repeat the objection each time similar evidence is presented following denial of the motion *in limine*, one must nonetheless object the first time the evidence is introduced." *Id.* Otherwise, the objection is forfeited on appeal. *Id.*

¶ 110 IC nevertheless contends it did not forfeit the issue, as it presented the motion *in limine* and objected belatedly at trial. IC relies upon *Jarke v. Jackson Products, Inc.*, 282 Ill. App. 3d 292, 295 (1996), and *Exchange National Bank v. De Graff*, 110 Ill. App. 3d 145, 152 (1982), but our supreme court has since resolved any dispute over whether an initial contemporaneous objection is required. See *Illinois State Toll Highway Authority*, 163 Ill. 2d at 502; *supra* ¶ 109.

¶ 111 IC also relies on *Spyrka v. County of Cook*, 366 Ill. App. 3d 156, 165 (2006), even though the appeal was decided after *Illinois State Toll Highway Authority* and acknowledges the rule that a contemporaneous objection to the evidence at the time it is offered is typically required. On the issue of forfeiture, the *Spyrka* court concluded:

> "The question of whether the trial court's ruling is sufficiently definitive depends on the procedural posture of each case. Once the full context of the evidentiary issue develops at trial, such that a motion thereon no longer presents the risk of an erroneous ruling that a pretrial motion *in limine* presents, any ruling on the merits is not interlocutory, and the unsuccessful movant need not object further to

preserve the issue for review." *Id.*

IC notes that *Spyrka* was criticized as "not well reasoned" and not followed by this court in *Guski v. Raja*, 409 Ill. App. 3d 686, 696 (2011), but argues the *Guski* court misread *Spyrka*, which IC believes should be read as simply ruling the lack of a contemporaneous objection does not result in forfeiture where the objection would not have changed the trial judge's ruling. For the following reasons, we conclude the *Guski* court misread *Spyrka*.

¶ 112 The *Guski* court stated that "*Spyrka* improperly relied on the holding in *McMath v. Katholi*, 304 Ill. App. 3d 369 (1999), *rev'd on other grounds*, 191 Ill. 2d 251 (2000), which was based on an entirely different procedural posture." *Guski*, 409 Ill. App. 3d at 696. The *Guski* court observed the plaintiff in *McMath* styled her motion as a motion *in limine*, as it was actually a motion to bar testimony made on the last day of trial. *Id.* (citing *McMath*, 304 Ill. App. 3d at 375-76). The *Guski* court next observed:

> "*McMath* made clear in a section entitled, "Motions *in limine*, Contrasted With Motions To Bar," that although the plaintiff in that case styled her motion as a motion *in limine*, it was actually a motion to bar testimony, made on the last day of trial. *McMath*, 304 Ill. App. 3d at 375-76 (noting that a motion *in limine* is 'by definition a *pretrial* motion,' and a ruling thereon is interlocutory (emphasis in original)). On the other hand, the court's ruling on the merits of a motion to bar testimony made at trial was not interlocutory in nature, and, therefore, the litigant was not required to object to the introduction of the evidence 'within minutes' of the court's ruling to preserve the issue for review." *Guski*, 409 Ill. App. 3d at 696.

Thus, the *Guski* court concluded "*Spyrka* applied *McMath* for precisely the opposite legal proposition for which it stands." *Id.*

¶ 113 The *Guski* court, however, failed to observe that *Spyrka*, involved a motion styled as a motion *in limine* (*Spyrka*, 366 Ill. App. 3d at 162) which was in fact a motion to bar a video animation not presented to the opposing party or the trial court until trial had already commenced (*id*. at 165-66). Accordingly, *Spyrka* properly relied on *McMath*—but that fact does not aid IC, because the issue here is an actual pretrial motion *in limine*, not a motion to bar testimony or evidence at trial. As this case involves an actual pretrial motion *in limine*, the rule requiring at least one contemporaneous objection applies, and IC forfeited the objection on appeal.

¶ 114 B. Junod's Motion *In Limine* No. 33

¶ 115 IC next argues the trial judge abused his discretion in granting Junod's motion *in limine* No. 33, which sought to bar any testimony, evidence, or argument regarding whether any defect in Junod's tools or equipment was or was not a cause of the underlying incident. IC contends that, despite Junod's representation to the contrary, Junod was asserting defects in the tools and equipment provided, particularly in light of his claim that the platform lacked a guardrail.

¶ 116 Under the FELA, "[e]very common carrier by railroad *** shall be liable in damages to any person suffering injury while he is employed by such carrier *** for such injury *** resulting *** 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 [or] machinery." 45 U.S.C. § 51 (2000). In this case, Junod was at most alleging insufficiencies in the tools and equipment provided by IC.

¶ 117 IC again relies on *Thornton*, *Deutsch*, and *Duhon*, in which the defendants each received summary judgment in cases where there was no evidence the equipment at issue was defective. IC's argument does not account for the difference in procedural posture in this case. In order to grant summary judgment, these courts considered whether there was a genuine issue of material

fact. See *Deutsch*, 983 F.2d at 744; *Thornton*, 11 F. Supp. 2d at 1313; *Duhon*, 720 So. 2d at 121-22. A court considering summary judgment on a FELA claim thus may be obliged to consider whether there is any evidence the tools or equipment at issue are defective, as a defect may be part of a claim asserted under the FELA. See 45 U.S.C. § 51 (2000). In this case, however, Junod did not claim the tools or equipment were defective, but only insufficient and thus not reasonably safe for the job of changing a shock absorber.

¶ 118 IC further relies on *Woodruff v. Pennsylvania R. Co.*, 52 Ill. App. 2d 341, 350 (1964), which ruled the plaintiff's prior statement that his spurs were "brand new and sharp" was properly admitted because it was inconsistent with his claim at trial that his spurs looked like converted, ground down, tree climbing spurs.[4] Again, in this case, Junod did not claim the tools and equipment he used the evening of the injury were defective, but insufficient (albeit preferable, in Junod's view, to using an impact gun with nonimpact sockets). Moreover, IC's argument overlooks that an abuse of discretion occurs when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view. *Favia*, 381 Ill. App. 3d at 815. The trial judge's ruling in this case was not arbitrary, fanciful, or unreasonable, as it was based on the text of the FELA. Accordingly, the trial judge did not abuse his discretion in granting Junod's motion *in limine* No. 33.

¶ 119 C. Trent's Undisclosed Opinion

¶ 120 IC argues the trial court abused its discretion in permitting undeposed lay witness Ray Trent to testify the platform provided by IC violated the requirements stated in IC's safety notebook. Rule 213(f)(1) requires parties to disclose before trial the names of all lay witnesses and the subjects on which they will testify. Ill. S. Ct. R. 213(f)(1) (eff. Jan.1, 2007). Subjects

[4] The spurs in question were used to climb and descend from signal poles.

not disclosed in answering a Rule 213(f) interrogatory or testified to in a discovery deposition cannot be testified to at trial. Ill. S. Ct. R. 213(g) (eff. Jan.1, 2007). "[U]pon objection at trial, the burden is on the proponent of the witness to prove the information was provided in a Rule 213(f) answer or in the discovery deposition." Ill. S. Ct. R. 213(g) (eff. Jan.1, 2007). "The purpose behind Rule 213 is to avoid surprise and to discourage tactical gamesmanship." *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 111 (2004).

¶ 121 The former Rule 213 did not distinguish between lay and expert opinions, and required the same detailed disclosure for all opinion witnesses. See *Kim v. Mercedes-Benz, U.S.A., Inc*., 353 Ill. App. 3d 444, 453 n.2 (2004). Under the current version of Rule 213, however, "detailed disclosure for lay witnesses is no longer required." *Id*. at 454. Thus, only an expert opinion requires disclosure of the basis of his opinion, whereas for a lay opinion, the party has to disclose only the subject matter. *Matthews v. Avalon Petroleum Co*., 375 Ill. App. 3d 1, 12 (2007). Of course, a party cannot merely represent the lay witness will testify about the matters raised in the complaint. See *Kim*, 353 Ill. App. 3d at 454. "An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness." Ill. S. Ct. R. 213(f)(1) (eff. Jan.1, 2007).

¶ 122 In this case, Junod disclosed Trent would testify "with respect to [p]laintiff's damages, the effect said injury had on him, to discuss the working environment at [IC] and the standards and practices while on the job at [IC] working as a mechanic, tool issuance, training/safety, tools requests and/or complaints and regarding the same and supervision ***." This language is broad, but it is not a general statement that the witness would testify about the matters raised in the complaint. The trial judge concluded that this disclosure adequately informed IC that Trent would testify regarding whether IC's working environment and practices comported with IC's

standards for machinists. The trial judge's ruling was not arbitrary, fanciful, or unreasonable, based on the language of Junod's disclosure. Moreover, given that Junod provided similar testimony at trial without objection, we cannot conclude the admission of Trent's testimony affected the outcome of the trial. Accordingly, the ruling does not warrant a new trial. *Tzystuck*, 124 Ill. 2d at 243.

¶ 123 D. The Grainger and Cotterman Catalogs

¶ 124 Lastly, IC argues the trial court abused its discretion in admitting and publishing to the jury to Grainger and Cotterman catalogs, and in allowing Junod's counsel to cross-examine IC manager Gebhardt about the catalogs. IC also asserts the catalogs lacked relevancy and foundation.

¶ 125 Although IC's brief includes passing references to Illinois Supreme Court Rules 213 (eff. Jan. 1, 2007), 214 (eff. Jan. 1, 1996), and 237 (eff. Jul. 1, 2005), IC's objections at trial to the admission of the catalogs were that they were beyond the scope of the direct examination and irrelevant. "A party is required to make specific objections to evidence, based on particular grounds, and the failure to do so results in a waiver of objections as to all other grounds not specified or relied on." *Stapleton ex rel. Clark v. Moore*, 403 Ill. App. 3d 147, 156 (2010). Thus, IC's arguments regarding Illinois Supreme Court Rules 213, 214, and 237 are forfeited. *Id.* IC's brief also cites no authority in support of its one-sentence assertion regarding relevancy and foundation. Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008)) requires a party to support its argument with citations to authority. Failure to do so results in the forfeiture of the argument on appeal. *E.g.*, *In re Marriage of Hendry*, 409 Ill. App. 3d 1012, 1019 (2011). Accordingly, IC has also forfeited these arguments on appeal.

¶ 126 In short, IC has failed to demonstrate it is entitled to a new trial based on the trial judge's

evidentiary rulings, either separately or cumulatively.

¶ 127 III. Remittitur

¶ 128 In the alternative, IC argues the trial court erred in denying IC's motion for a $414,524 remittitur of the jury's $558,647 award for lost earnings. The $414,524 represents the jury's award for lost future earnings, which IC claims were speculative in this case. The recovery of future earnings is a proper element of damages to be considered by the trier of fact. *Branum v. Slezak Construction Co., Inc*., 289 Ill. App. 3d 948, 960 (1997). Recovery, however, must be limited to such loss as is reasonably certain to occur. *Id*. Testimony as to loss of earnings that is merely speculative, remote or uncertain is improper. *Id*. This court reviews a ruling on a motion for a remittitur for an abuse of discretion. *Diaz v. Legat Architects, Inc*., 397 Ill. App. 3d 13, 45 (2009).

¶ 129 Junod responds that IC forfeited this issue on appeal by failing to object to Gibson's testimony or report regarding lost future earnings as speculative or lacking foundation. *E.g*., *Johnson v. Johnson*, 386 Ill. App. 3d 522, 545 (2008). IC replies that in *Carlson v. City Construction Co*., 239 Ill. App. 3d 211, 233-34 (1992), this court ordered a partial remittitur of a future earnings award despite the lack of an objection to some of the testimony from an economist. IC also replies that this court set aside an award of lost future earnings without any noted objection to the testimony of the vocational rehabilitation expert in *Brown v. Chicago and North Western Transportation Co*., 162 Ill. App. 3d 926, 936-38 (1987). We find neither of the cases IC cites persuasive regarding forfeiture.

¶ 130 In *Carlson*, the plaintiff's decedent was killed while working for a surveying crew on a road construction project. *Carlson v. City Construction Co*., 239 Ill. App. 3d at 216. Although the decedent had dropped out of high school in his senior year, he had obtained his GED while in

the army. *Id*. at 223. An economist testified on behalf of plaintiff without objection regarding the general work characteristics of GED students. *Id*. The economist also testified regarding the decedent's lost future earnings based on his current earnings. *Id*. at 224. The economist was then asked about a college application filled out by the decedent. *Id*. The defendant objected, arguing that the economist was going to speculate regarding the decedents lost future earnings as a college graduate. *Id*. The trial court overruled the objection. *Id*. The defendant renewed the objection when the economist testified regarding his calculation of lost future earnings had the decedent obtained an engineering degree. *Id*. On appeal, this court addressed the defendant's argument regarding the allegedly speculative testimony, ultimately agreeing the testimony was speculative. *Id*. at 232. This court also ruled defendant had forfeited any objection to the economist's testimony regarding the general work characteristics of GED students by failing to object at trial. *Id*. at 234. *Carlson* thus represents a typical application of the rule that an appellant forfeits an issue on appeal by failing to object at trial. Applying the general rule in this case, IC forfeited the issue by failing to object at trial.

¶ 131 In *Brown*, this court considered whether it was reversible error for the trial court to allow the jury to award the plaintiff damages for future lost earnings without the presentation of reasonably certain proof that such damages would occur. *Brown*, 162 Ill. App. 3d at 936. The opinion in *Brown* did not indicate there was any objection to the expert testimony regarding lost future earnings. See *id*. at 937. The *Brown* decision also never discussed the question of forfeiture. See *id*. at 936-38. As *Brown* did not discuss forfeiture, it is not persuasive authority on the question of forfeiture.

¶ 132 IC contends, however, that even assuming objections based on speculation or lack of foundation were forfeited, IC may nevertheless argue the jury's award of lost future earnings was

not supported by the evidence as admitted. See, *e.g.*, *McClure v. Owens Corning Fiberglas Corp*., 188 Ill. 2d 102, 150-54 (1999); *Paul Harris Furniture Co. v. Morse*, 10 Ill. 2d 28, 37-38 (1957); *Aguilera v. Mount Sinai Hospital Medical Center*, 293 Ill. App. 3d 967, 974-76 (1997); *Wilson v. Bell Fuels, Inc.*, 214 Ill. App. 3d 868, 875-76 (1991);. "Generally, the question of damages is one of fact; courts are reluctant to interfere with the discretion of the jury in its assessment of damages." *SK Hand Tool Corp. v. Dresser Industries, Inc.*, 284 Ill. App. 3d 417, 426 (1996). Nevertheless, "reviewing courts will reverse damage awards that are based on speculation or conjecture." *Id*. (citing *Midland Hotel Corp. v. Reuben H. Donnelley Corp*., 118 Ill. 2d 306 (1987)). "Illinois courts have not hesitated to reverse damage awards based on false assumptions or data as speculative." *SK Hand Tool Corp.*, 284 Ill. App. 3d at 426-27 (and cases cited therein). The plaintiff generally must present proof that his future lost earnings are reasonably certain. See *Brown*, 162 Ill. App. 3d at 936. "Expert opinions must be supported by facts and are only as valid as the facts underlying them." *In re Joseph S*., 339 Ill. App. 3d 599, 607 (2003); see *Kleiss v. Cassida*, 297 Ill. App. 3d 165, 174 (1998).

¶ 133 IC argues that the medical testimony and evidence did not support the jury's apparent choice of Gibson's estimate that the median life work expectancy for a male similar to Junod with a high school education and a nonsevere physical disability would be 5.6 years. IC concedes that Dr. Treister opined there was a significant likelihood Junod's wrist would deteriorate to the point where Junod will not be able to effectively use the wrist, with or without subsequent surgery. IC argues, however, this testimony is insufficient because Dr. Treister did not opine that this deterioration "was likely to occur within [Junod's] anticipated 10.9 year work life, much less that it now required [Junod] to stop working for the railroad."

¶ 134 At the outset, we observe that Gibson did not opine that Junod's median life work

expectancy was 10.9 years. Rather, Gibson estimated Junod's *preinjury* work expectancy to be 10.9 years. Gibson considered Junod may be able to remain in his position with IC, in which case his postinjury work life expectancy would be estimated at 8.1 years. Gibson also testified the median life work expectancy for a similar male with a high school education and a nonsevere physical disability would be 5.6 years. Based on information from Dr. Treister, Gibson testified Junod would likely need treatment which would be extremely limiting to Junod's ability to perform his job at the railroad. Therefore, Gibson concluded, the likelihood of Junod continuing to work at the railroad had decreased "quite a bit."

¶ 135 IC's argument rests on the premise that Junod was required to prove the deterioration would occur during the estimated postinjury work life expectancy. Gibson's testimony, however, was based on the general statistical probabilities for a person similar to Junod in terms of age, education and level of disability. In terms of the statistical analysis, it is the likelihood of deterioration which could cause the jury to reasonably select the shorter postinjury work life expectancy.

¶ 136 IC also relies on Dr. Treister's testimony that he "hoped" Junod would not have to cease working after any subsequent surgery. On the other hand, Dr. Treister opined Junod's wrist would deteriorate to the point where he would not be able to effectively use the wrist, with or without subsequent surgery. Dr. Treister also opined Junod's progressive arthritis was worsening at an accelerating rate, not at a straight-line rate. This evidence formed the basis of Gibson's opinion that the likelihood of Junod continuing to work at the railroad had decreased "quite a bit." Given the medical information, Gibson's opinion was not speculative or unsupported by the data upon which he relied.

¶ 137 Moreover, Junod testified that he was working lighter duty at the Glen Yard shop and

avoided strenuous overtime opportunities. Junod had already quit his other job at Wood Brothers due to the deterioration of his wrist. Swalby and Brown both testified regarding Junod's already diminished work capacity. This testimony is entirely consistent with the opinions rendered by Dr. Treister and analysis performed by Gibson. Given this record, IC has failed to show the trial judge abused his discretion in denying IC's motion for a remittitur of the award of damages for lost future earnings.

¶ 138 CONCLUSION

¶ 139 For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 140 Affirmed.