2017 IL App (1st) 170814-U

FOURTH DIVISION
June 14, 2018

No. 1-17-0814

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DEBBIE FERRARI,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellant,	)	
	)	11 L 10061
v.	)	
	)	Honorable
UNION PACIFIC RAILROAD COMPANY,	)	James P. Flannery and Thomas E. Flanagan,
Defendant-Appellee.	)	Judges Presiding

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Burke and Justice Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: Where plaintiff presented evidence that her employer failed to use padding during a training test, but presented no evidence that its failure to do so was negligent, the trial court did not abuse its discretion in refusing to instruct the jury on that theory of negligence, and the trial court did not abuse its discretion in denying plaintiff's motion for a new trial based on the refusal to give the proposed instruction.

¶ 2 Plaintiff, Debbie Ferrari, brought suit to recover damages for personal injuries against her employer, Union Pacific Railroad Company (the Railroad) pursuant to the Federal Employers'

Liability Act (FELA), 45 U.S.C. § 51 et seq., after she fell during a training test in Chicago. Plaintiff requested that the jury be instructed regarding several ways in which she believed that the Railroad was negligent, and the trial court refused to instruct the jury on one of those theories—specifically that the Railroad was negligent in not providing padding during the test—finding that there was no evidence elicited at trial to support that theory. The jury returned a unanimous verdict in favor of the Railroad, and plaintiff now appeals, alleging that the trial court erred in refusing to submit her proposed jury instruction regarding the failure to provide padding.

¶ 3 The record shows that on September 27, 2011, plaintiff filed a complaint against the Railroad, alleging that on June 27, 2011, she was injured while engaged in "on the job testing as a trainee" for the Railroad. Specifically, plaintiff alleged that she was performing a "hang test" at the instruction of the Railroad, and that during the course of the hang test, plaintiff lost her grip and fell to the ground injuring her back, neck, head, right shoulder and arm. In her complaint, plaintiff further alleged that she "sustained injuries and damages" resulting from the Railroad's negligence in "one or more of the following respects":

> "(a) [The Railroad] failed to provide reasonably safe conditions for work in that [the Railroad] required Plaintiff to ride on steps generally prohibited by [the Railroad]'s safety rules, even though Plaintiff had already passed the test when riding on steps specifically designated by [the Railroad]'s safety rules;
> (b) [The Railroad] failed to provide reasonably safe conditions for work and failed to provide safe equipment in that [the Railroad] would not allow Plaintiff to use safety gloves during the test that were correctly sized for her hands, and instead required her to use gloves that were too large;
> (c) [The Railroad] failed to provide reasonably safe conditions for work in requiring Plaintiff to complete a test that it knew or should have known could place her at injury when said test does not correspond to any task Plaintiff could reasonably have been required to perform in her position as a conductor or brakeman;
> (d) [The Railroad] failed to provide reasonably safe conditions for work and failed to provide reasonably safe equipment in that it required Plaintiff and other employees to complete a 'hang test' that it knew or should have known could result in employees not successfully completing said test, without providing netting, padding or any other device to prevent or lessen injuries to employees

who did not successfully complete said test."

¶ 4 As a result, plaintiff alleged that she "suffered an injury to her back, neck, head, right shoulder and arm" which caused her "extreme pain." Plaintiff stated that she had undergone, and would continue to undergo, "necessary medical, hospital, and therapeutic care and treatment." Plaintiff further stated that she had been unable to work, and had "lost wages, benefits and earning capacity because of her injuries." Accordingly, plaintiff "pray[ed] for judgment in her favor and against [the Railroad] in an amount in excess of the jurisdictional amount."

¶ 5 On November 16, 2011, the Railroad filed an answer, denying that it was negligent in any way, and denying that plaintiff was injured or sustained damages as a result of any negligent acts or omissions by the Railroad. The Railroad also alleged three affirmative defenses. First, it alleged that plaintiff had a duty to exercise ordinary care for her own safety, and that she engaged in certain "careless and negligent acts or omission[s]" which were "either the sole or a contributing cause, in whole or in part, of" her fall and injuries. The Railroad also alleged that plaintiff failed to mitigate her alleged injuries or damages. Finally, the Railroad stated "on information and belief, that plaintiff suffered from certain preexisting physical problems and conditions to some or all of the various parts of her body to which she now claims injuries as a result of this occurrence." Accordingly, the Railroad requested that judgment be entered in its favor, or alternatively, that the damages be limited.

¶ 6 The matter proceeded to a five-day jury trial. The evidence at trial showed that on June 27, 2011, plaintiff was participating in training to become a conductor for the Railroad in Chicago. During the training, plaintiff and other trainees were required to complete a "hang test," during which they hung from the side of a stationary rail car in an outdoor rail yard in order to continue in their employment with the Railroad. The assistant vice president of operations for

Union Pacific's northern region testified that the purpose of the hang test was to determine whether the trainees "have the basic strength and endurance and dexterity to be able to safely execute their responsibilities when they get in the field" and "to be able to safely execute the next part of their training and ultimately become a conductor." Another employee described the purpose of the test as "to make sure [the trainees] can hang on the side of a car before they go out and do it when the car is moving. *** You don't want it to be the first time hanging onto a car when it's moving."

¶ 7 During the hang test, trainees were required to hang from a ladder rung on the side of the stationary rail car for five minutes—alternating between using one and both hands—while simulating hand signals that would be given to the train's engineer. To complete the test, the trainee stood on the lowermost step, called the "sill step," which was about two feet off the ground and positioned slightly under the rail car. Trainees were instructed to step down from the equipment if at any time they felt that they were losing their grip or they could not complete the test, and they would be given a second opportunity to complete the hang test. Evidence was presented that the hang test had been conducted in a similar fashion for approximately eight years, and approximately 400 trainees had taken the test in that time. The hang test resulted in an approximately 30% failure rate, but no other trainee had ever been injured during the test.

¶ 8 The parties presented conflicting testimony and evidence regarding the safety of the hang test. Specifically, plaintiff presented evidence that the Union Pacific Human Resources Department had sent out an email with instructions to suspend the hang test shortly before plaintiff's training. The Railroad, however, presented evidence that the instructions were not intended to apply to the "Chicago service unit," which was responsible for administering the hang test in Chicago, and, in any event, that the decision to suspend the test was not made

because the test was unsafe. The parties also provided conflicting evidence and testimony regarding the safety of standing on the sill step, and of holding on with hands only rather than also using arms for additional support.

¶ 9 Richard Campos testified that he is a conductor for the Railroad who was a peer trainer at the time that plaintiff underwent the hang test. Campos was working as a "spotter" at that time, watching the trainees to make sure that they were doing the hang test properly, and instructing them to step down or helping to guide them down if they were not able to hang on. Campos was spotting plaintiff and another trainee who were taking the hang test at the same time on adjacent rail cars. Campos was standing between the two cars watching them, about 15 feet away from plaintiff, when he saw her come off the ladder. Campos saw plaintiff fall on her backside, and he ran over to her and asked her if she was okay. Plaintiff said she was okay, "bounced up real quick and dusted herself off."

¶ 10 James Roe testified that he had been a peer trainer at the Railroad for 12 years, and was there on June 27, 2011, when plaintiff was taking the hang test. That morning, he met with everyone at the yard office to provide a safety briefing to the trainees regarding what they were going to be doing that day, including making sure that everyone had the proper equipment. Roe informed the trainees that everyone needed to be wearing company-issued gloves for the day's activities. Roes testified that if the trainee did not have company-issued gloves, there were gloves available in small, medium, large and extra-large. Additionally, if a trainee got a pair of gloves that did not fit, there was an opportunity to exchange them for the correct size. Roe testified that plaintiff never told him that her gloves did not fit. Roe also testified that the trainees are instructed that during the hang test, "if you feel your grip going, you just step down. The [sill step] is only two feet off the ground. It's an easy step down. It's not a complex movement, you

just step down." Roe explained that they conducted the hang test from the sill step because "it's safe and low, and that's where we ride cars. *** Because it's closer to the ground, and if you have to step off, the chances of you twisting an ankle or anything is greatly reduced." Roe testified that the Railroad "d[id] the hang test the way that we did" because "it's a safe way to judge the capability of the individual before they get in a situation where they are on a moving car *** and to test them on a little more forgiving environment." When Roe saw plaintiff fall, he walked toward her and asked her if she was okay. Plaintiff said that she "was fine" and did not appear to be injured.

¶ 11 John Maeda testified that in June 2011, he was involved in training, and was present while plaintiff took the hang test. Before arriving at training, Maeda picked up extra supplies in the event that the trainees lost something or did not have company-approved equipment to use at training. Maeda told the trainees that they were required to use Union Pacific approved gloves, and if they did not have them, they could either get gloves from him or go get them from a vending machine in an office 20 or 30 feet away. Maeda testified that plaintiff, who had brought gloves that were not Union Pacific approved, complained about not being able to use the gloves that she brought. Plaintiff never told him that the Union Pacific approved gloves did not fit, and if she had, he would have made sure that she got a pair of gloves that fit properly. During the hang test, Maeda saw plaintiff "fall to her rear end, hop up and initiate a conversation with somebody who was there." Maeda did not recall plaintiff telling anyone that she was injured, and stated that if "there was an injury reported, paperwork would be filled out. And at that time, there was no paperwork that [he] recall[ed] being filled out."

¶ 12 Stephen Timko testified as an expert witness for plaintiff. He testified that he had worked for railroads for 43 years. In Timko's opinion, the hang test that was performed by the

Railroad in June 2011 was not reasonably safe. Timko believed that "there was no reason to do the hang test in the first place" because "conductors don't ride on the side of a car for five minutes at a time in modern times *** and there's no need for an employee to be hanging on the side of a car for a long distance." Timko believed that the hang test did not "accurately reflect the trainee's ability to do the job of a railroad conductor or brakeman." Timko also alleged that if the railroad was going to use a hang test, the trainee should be "able to use their forearm or their hands, however they want to do it, as long as they are in a safe and comfortable position." Timko further opined that the use of gloves should not have been necessary, and, assuming trainees had to wear gloves, they should have been allowed to wear any gloves that they chose, "[a]s long as they fit properly and allowed for the free use of their hands." Additionally, if the Railroad was going to provide gloves, it should have "provide[d] proper sizes so the employee would have a proper fit."

¶ 13 Plaintiff testified that on June 27, 2011, she was in training at the Railroad to become a conductor, and she brought a pair of Union Pacific approved gloves with her to training. Before the hang test, she and the other trainees met Maeda, who "opened up a package of gloves and *** started handing them out to everybody." When the trainees protested that they had their own gloves, Maeda said "well, we're going to make this a level playing field, everybody's going to use the same gloves." Plaintiff testified that she put on the gloves, went up to Maeda, and said "John, these are too big for me." Maeda then responded "too F'ing bad, we're just going to make it even for everybody." Plaintiff testified that she put on the oversized gloves, and began the hang test. Plaintiff's hand slipped out of the glove, and she fell back and landed "on [her] back, side, basically, on the ground."

¶ 14 Specifically regarding the Railroad's failure to use padding, the following question and answer occurred during plaintiff's direct examination:

> "PLAINTIFF'S COUNSEL: Did the railroad have any sort of pads or anything on the ground beneath the test area to maybe help in case somebody fell?
>
> PLAINTIFF: No."

¶ 15 Plaintiff stated that she retested ten minutes later, but she "lost a lot of [her] strength," and "just couldn't do it any more so [she] just stepped down." After she failed the second time, she received a termination letter and was told that she "failed the test so [the Railroad was] terminating [her]." Plaintiff denied that anyone instructed the trainees to step down if they felt they were losing their grip in any of the meetings before she took the hang test.

¶ 16 At the jury instruction conference, plaintiff proposed the following jury instruction, entitled "Issues Made by the Pleadings." The instruction stated that plaintiff claimed that the Railroad:

> "violated the [FELA] in that:
>
> a. an officer, agent or other employee of the railroad was negligent in
>
> (1) requiring Plaintiff to stand on the 'sill step' during the hang test;
> (2) preventing Plaintiff from relying on her arms to provide support during the hang test;
> (3) refusing to allow Plaintiff to use the safety gloves of her choice during the hang test;
> (4) requiring Plaintiff to use gloves that were too large for her hands during the hang test;
> (5) requiring Plaintiff to pass a hang test during a time when hang tests had been suspended in other Union Pacific divisions and locations;
> (6) failing to provide padding or any other protection to prevent or lessen injuries to employees who did not successfully complete the hang test[.]"

¶ 17 After going through and agreeing to instruct the jury on the first five of plaintiff's theories of negligence, the court arrived at the sixth theory—the padding instruction. The following exchange occurred:

> "COURT: *** Six, failing to provide padding. I don't know what that is.

> PLAINTIFF'S COUNSEL: That was in -- it might have flown by yesterday, but when Ms. Ferrari was up on the stand she was asked, okay, during this test was there padding or anything provided to you so that if you fell you'd land on the padding instead of the ballast, and of course she said no, because the evidence is all that's out there is ballast.
>
> COUNSEL FOR THE RAILROAD: There's absolutely no testimony that there should have been padding or anything like that. Their expert witness didn't provide that opinion, and no one in this case, other than Ms. Ferrari, said, oh, there was no padding. No one has said there should have been padding at all. That shouldn't be one of these.
>
> PLAINTIFF'S COUNSEL: But I don't necessarily need a safety expert to support every one of my allegations in the case. The plaintiff said there was no padding. There clearly was no padding. We're free to argue there should have been.
>
> COUNSEL FOR THE RAILROAD: No, not on the issue instruction.
>
> COURT: I don't remember anything coming up -- although I'm not saying it didn't, I'm just saying I don't remember it -- during the course of the trial that anybody actually was willing to raise their right hand and say that safety required that there was padding in case anybody fell off. What I got out of it was simply that there was no padding, but I think the missing link is somebody had to come up with a reliable and a reasonable opinion that there should have been instead of just saying there wasn't any. I mean, you can -- you can come up with something that you generate. How about a safety rope or strap? You could have it around your waist and put it up on the roof and attach it up there on the top of the boxcar? Anybody say that?
>
> PLAINTIFF'S COUNSEL: No.
>
> THE COURT: You could think of something else. How about if you put everybody and padded their body, pad their body up a little bit? Nobody said that. There's got to be somebody who says that it should have been, I think. I mean, otherwise you're telling the jury, ooh, here's a new one. I don't think you can do that."

¶ 18 Accordingly, the trial court found that the trial evidence did not support the giving of the padding instruction, and denied Plaintiff's request to include that instruction. The parties then presented closing arguments and, after deliberation, the jury returned a verdict finding for the Railroad and against plaintiff.

¶ 19 Thereafter, the judge who presided over trial—Judge Flanagan—retired, and Presiding Judge Flannery took over this case for post-trial matters.

¶ 20 Plaintiff filed a motion for a new trial on September 28, 2015. In that motion, plaintiff argued, among other things, that the court erred in refusing to submit the padding instruction to the jury. The Railroad responded on November 6, 2015, contending that the trial court's decision was proper because the only evidence on this topic was a single question to plaintiff about whether there was "any sort of pads or anything on the ground," to which she answered "No." The Railroad argued that plaintiff had the burden to introduce, not just evidence that there was no padding, but "some evidence that not having padding created an unsafe environment that caused Plaintiff to become injured."

¶ 21 The trial court denied plaintiff's motion for a new trial on February 21, 2017. It stated:

> "as to the jury instruction and the need for padding, what has been argued at this time is that the plaintiff fell from a—the bottom step during a test, her spotter did not catch her, and she was injured. That evidence, the Court feels, is not sufficient to give the [tendered] instruction. The Court is not saying that there need be expert witness testimony on this issue, nor is this Court saying that anyone need testify to a duty on the part of the defendant. But what the Court is saying that a fall with a spotter and an injury and the absence of padding is insufficient to support the tendered instruction."

¶ 22 This appeal followed in compliance with Illinois Supreme Court Rule 303 (eff. Jan. 1, 2015) with a timely notice of appeal filed on March 22, 2017. Accordingly, this court has jurisdiction of this appeal under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 23 In this court, plaintiff appeals from the denial of her motion for a new trial, raising a single issue—whether the trial court erred in refusing her request to instruct the jury regarding the failure to provide padding as a possible theory of negligence.

¶ 24 A circuit court's ruling on a motion for new trial is afforded considerable deference and will only be reversed in those instances where it is affirmatively shown that the court clearly

abused its discretion. *Wardwell v. Union Pac. R.R. Co.*, 2017 IL 120438, ¶ 11. This is because the trial court is in a superior position to consider any errors that occurred, the fairness of the trial to all parties, and whether substantial justice was accomplished. *Colella v. JMS Trucking Co. of Illinois*, 403 Ill. App. 3d 82, 90 (2010). When reviewing a circuit court's ruling on a motion for new trial, "an abuse of discretion will be found where there is no recognizable basis in the record to support" the order entered by the circuit court. *Slovinski v. Elliot*, 237 Ill. 2d 51, 60 (2010), citing *Snelson v. Kamm*, 204 Ill. 2d 1, 41 (2003). The "relevant question for the appellate court ***[is] whether or not there was a basis in the record to support the circuit court's order." *Slovinski*, 237 Ill. 2d at 60.

¶ 25 A jury instruction is justified if it is supported by some evidence in the record, and the trial court has discretion in deciding which issues are raised by the evidence. *LaFever v. Kemlite Co., a Div. of Dyrotech Indus.*, 185 Ill. 2d 380, 406 (1998); *Demos v. Ferris–Shell Oil Co.*, 317 Ill. App. 3d 41, 56 (2000). Accordingly, a trial court's decision to grant or deny a jury instruction is also reviewed for abuse of discretion. *Mikus v. Norfolk and Western Ry. Co.*, 312 Ill. App. 3d 11, 28 (2000); see also *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 505 (2002); *People v. McDonald*, 2016 IL 118882, ¶ 42 ("when the trial court, after reviewing all the evidence, determines that there is insufficient evidence to justify the giving of a jury instruction, the proper standard of review of that decision is abuse of discretion."). Abuse of discretion is a highly deferential standard, and this court will find an abuse of discretion only when the trial court's ruling is arbitrary, fanciful, unreasonable, or when no reasonable person would adopt the trial court's view. *Roach v. Union Pacific Railroad*, 2014 IL App (1st) 132015, ¶ 19-20. In determining whether there has been an abuse of discretion, this court "does not substitute its own judgment for that of the trial court, or even determine whether the trial court exercised its

discretion wisely." *Id*. When reviewing a trial court's decision to grant or deny a jury instruction, "a new trial should be granted only if a party's right to a fair trial has been seriously prejudiced." *Demos*, 317 Ill. App. 3d at 56.

¶ 26 Plaintiff's complaint was brought pursuant to FELA, which "provides a federal remedy for railroad workers who suffer personal injuries because of the negligence of their employers or their fellow employees." *Myers v. Illinois Cent. R. Co.*, 323 Ill. App. 3d 780, 784 (2001). This remedy is the exclusive remedy for a railroad employee injured due to his or her employer's negligence. *Myers*, 323 Ill. App. 3d at 785 (citing *Wabash R.R. Co. v. Hayes*, 234 U.S. 86, 89 (1914)). Under FELA, railroad employers have a duty to provide a reasonably safe work place, and an injured railroad employee can recover all of his or her damages from the employer if the employer's negligence caused any part of the employee's injury. *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 165–66 (2003); 45 U.S.C. § 51 (2006). In order to recover damages under FELA, a plaintiff must show that the railroad was engaged in interstate commerce, that the plaintiff was an employee in interstate commerce acting in the scope of employment, that the employer was negligent, and that the plaintiff's injury resulted "in whole or in part" from the employer's negligence. *Id.*; see, *e.g.*, *Myers v. Illinois Central R.R. Co.*, 629 F.3d 639, 642 (7th Cir. 2010) ("[A]n employee must prove that the railroad was negligent and that the railroad's negligence caused the injury at issue.").

¶ 27 As a general matter, FELA actions adjudicated in state courts are subject to federal substantive law, but the law of the forum governs procedural matters. *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985). This includes state procedural rules governing pleadings, verdicts, the form of the jury instructions, and the admissibility of evidence, unless the

application of a state rule diminishes, destroys, or interferes with a right or obligation created by FELA. *Myrick v. Union Pac. R.R. Co.*, 2017 IL App (1st) 161023, ¶ 23.

¶ 28 Plaintiff argues that the trial court committed "reversible error" by failing to give her proposed padding instruction, and that "the critical issue is whether there is any 'record evidence' in support of [the padding] theory."

¶ 29 Generally, all parties are entitled to jury instructions on their respective theories, provided that there is some evidence to support each theory. *Lundquist v. Nickels*, 238 Ill. App. 3d 410, 431 (1992). Specifically, in FELA cases, "a party is entitled to an instruction based on his theory of the case if there is record evidence to support it." *Brown v. Chicago and North Western Transp. Co.*, 162 Ill. App. 3d 926, 932 (1987). Although this has been described as a low threshold (see *Harbin v. Burlington Northern Railroad Co.*, 921 F.2d 129, 132 (7th Cir. 1990) ("numerous FELA actions have been submitted to a jury based upon far more tenuous proof—evidence scarcely more substantial than pigeon bone broth"), the evidence must be reliable and grounded in more than mere possibilities (*LaFever*, 185 Ill. 2d at 408, 414), and it is error to give an instruction not based on the evidence. *(Leonardi v. Loyola Univ. of Chicago*, 168 Ill. 2d 83, 100 (1995)). As plaintiff points out, "[a] plaintiff's burden under FELA is significantly lighter than in a common law negligence case; a railroad will be held liable where 'employer negligence played any part, even the slightest, in producing the injury.' (Emphasis in original). *Morris v. Union Pac. R. Co.*, 2015 IL App (5th) 140622, ¶ 33 (citing *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506 (1957)). However, a plaintiff must still present some evidence of negligence—"the basis of the employer's liability is negligence, not the mere fact of the employee's injuries." *Id.*, citing *Ellis v. Union Pacific R.R. Co.*, 329 U.S. 649, 653 (1947). "Therefore, to survive a motion for summary judgment, a plaintiff must offer evidence that could

prove 'the common law elements of negligence, including duty, breach, foreseeability, and causation.' " *Id.*, citing *Williams v. National R.R. Passenger Corp.*, 161 F. 3d 1059, 1061–62 (7th Cir. 1998). Accordingly, to receive a jury instruction on the padding issue, defendant had the burden of presenting some evidence in the record to support such a theory.

¶ 30 Plaintiff contends that the single question and answer during her direct examination regarding whether padding was used during the hang test, as well as the other evidence presented showing that she fell on the ground and not onto padding, qualifies as " 'record evidence' to support this theory." The distinction that plaintiff does not appreciate, however, is that there must be evidence—not only that no padding existed—but that the Railroad was negligent in failing to provide padding. While plaintiff presented evidence, and, in fact, there was no dispute, that padding was not used during the hang test, plaintiff did not present any evidence that the Railroad's failure to provide padding was negligent. There was no testimony that the Railroad was required to use padding during the hang test, that it should have or could have used padding, or that that the use of padding would have affected the outcome of plaintiff's fall.

¶ 31 We find the cases relied on by plaintiff to be distinguishable from the case at bar. Several cases that plaintiff relies on found that a defendant was entitled to a mitigation instruction when the defendant had presented some evidence to support that theory. Specifically, in *Dixon v. Union Pacific Railroad Co.*, 383 Ill. App. 3d 453, 467 (2008), we found that the trial court did not abuse its discretion in allowing a mitigation instruction where there was testimony presented that defendant was capable of working "at a medium-level job," that plaintiff admitted that he had no interest in returning to work for the railroad and that he had not worked since the day of the accident, and that there were medium- and light-duty jobs available that would pay minimum wage. Similarly, in *Mikus v. Norfolk & W. Ry. Co.*, 312 Ill. App. 3d 11, 31 (2000), this court

found that defendant presented sufficient evidence to warrant submitting a mitigation instruction to the jury and the trial court erred in not giving such an instruction to the jury, where there was evidence that plaintiff had not received treatment for his injuries in some time, and that he had not worked, tried to work, or sought work since the 1992 accident giving rise to the lawsuit. Also, in *Brown v. Chicago & N. W. Transp. Co.*, 162 Ill. App. 3d 926, 932–33 (1987), the trial court's failure to give a proposed mitigation instruction was reversible error where testimony at trial "raised a factual question concerning [the plaintiff]'s alleged failure to mitigate from which a jury might reasonably conclude that [the plaintiff]was indifferent to finding alternative employment" where he refused to cooperate with the employer's efforts to place him in another position within the company, to provide him with free rehabilitation and counseling services or vocational or scholastic training to assist him in obtaining alternative employment.

¶ 32 Specifically as to *Dixon*, the procedural posture of this case is different, as the court in *Dixon* reviewed the trial court's decision to allow an instruction for an abuse of discretion, whereas here we are reviewing the trial court's decision to refuse an instruction with the same deferential standard. More importantly however, we find the above cases to be distinguishable because the evidence in the case at bar showed that the Railroad failed to provide padding, but there was no evidence presented to support a finding that the failure to do so was negligent. By contrast, in *Dixon*, *Mikus*, and *Brown*, there was evidence presented to support the proposed mitigation instructions. Moreover, unlike here, the above cases reviewed the trial court's decision to allow or refuse a mitigation instruction proposed by the defendant. Accordingly, we do not find these cases to support plaintiff's contentions.

¶ 33 We also find plaintiff's reliance on *Wind v. Hy-Vee Food Stores, Inc.*, 272 Ill. App. 3d 149, 158 (1995), to be meritless. In *Wind*, the Third District Appellate Court found that the trial

court erred in failing to give plaintiff's proposed jury instruction regarding Hy-Vee's alleged negligent acts or omissions when installing and maintaining the floor mats on which the plaintiff tripped and fell, "where the evidence at trial squarely presented the issue of whether Hy–Vee was negligent when it installed and maintained its floor mats" and the determination of the issues turned on "an evaluation of the witnesses' credibility and the weight to be given their testimony." *Id*. See also *N.W.I. Int'l, Inc. v. Edgewood Bank*, 291 Ill. App. 3d 247, 258 (1997) (finding that the failure to allow the jury to decide whether an instrument was a "demand note," and to instruct them accordingly, was erroneous. Where the note was "at least ambiguous, the jury should have been given a full opportunity to resolve this ambiguity—to decide whether the note was a demand or time instrument.")

¶ 34 Here, by contrast, plaintiff's theory of negligence based on the absence of padding was not presented at all, let alone "squarely presented" at trial. In the absence of any evidence supporting a finding of negligence, we find no abuse of discretion by the trial court in refusing plaintiff's proposed jury instruction, or in denying plaintiff's motion for a new trial for the court's failure to give such an instruction.

¶ 35 Plaintiff, however, contends that requiring such witness testimony is "prohibited" because such testimony "pertains to legal conclusions" and "[i]t is the province of the trier of fact to *** draw ultimate conclusions from the facts." Citing *Harrison v. Chicago and Northwestern Transp. Co.*, 264 Ill. App. 3d 857, 864 (1994). Our decision, however, does not require a witness to testify regarding his or her opinion as to a legal conclusion, by opining that the Railroad was negligent. Instead, plaintiff was required to present some testimony or other evidence from which such a finding could be made by the trier of fact.

¶ 36 We also reject plaintiff's assertion that the "idea that padding can break a fall and prevent or at least lessen injuries is a common sense inference" that could have been made by the jury, particularly here, where the evidence showed that plaintiff fell from a step approximately two feet off the ground during a training exercise in which no other trainee had been injured previously. Moreover, even if such an inference could have been made, plaintiff would still be required to present evidence that the employer's failure to provide padding was negligent; it is not enough to show that there is some chance, however slight, that an injury could have been avoided. Under FELA, an employer has a duty to furnish its employees with a reasonably safe place to work, but that duty does not require the employer to provide employees with absolute safety. *Stevens v. Bangor & Aroostook R. Co.*, 97 F.3d 594, 598 (1st Cir. 1996). The rule does not contemplate absolute elimination of all dangers, but only elimination of those dangers that can reasonably be avoided in light of the normal requirements of the job. *Id*. As the trial court noted in refusing to grant the instruction, if this were not the case, a plaintiff could, in hindsight, imagine a multitude of precautions that could have possibly prevented the injury, unsupported by any evidence that the employer could have or should have taken them, and claim that the jurors should just use their "common sense." In the circumstances presented here, plaintiff did not present evidence supporting a theory of negligence for failure to provide padding when she established only that it was not present.

¶ 37 Finally, plaintiff asserts that the trial court relied on an erroneous rationale in refusing to give the instruction, because "expert testimony is not required to support the submission of a theory of negligence, particularly under the FELA." We note, however, that the Railroad conceded at trial and on appeal that expert testimony was not necessary, and the trial court

explicitly stated when denying her motion for a new trial that it was "not saying that there need be expert witness testimony on this issue."

¶ 38 We agree that expert testimony is not required. However plaintiff here presented no evidence or testimony, expert or otherwise, from which a finding of negligence could be made. Such evidence could have been presented in a number of ways, including through lay witness testimony. As the Railroad states:

> "At no time did Plaintiff's counsel elicit testimony from anyone, including Plaintiff, that [the Railroad] was required to use pads during testing, that it should have used padding, or that the use of pads would have affected the outcome of [plaintiff]'s fall on June 27, 2011. No witness testified that [the Railroad] had a duty to provide padding during the testing. No witness, not even Plaintiff, was asked a single question regarding the necessity or reasonableness of providing padding, or even whether padding would have been able to have been placed under the trainees. No medical provider opined that the presence of padding would have caused or altered Plaintiff's medical outcome. Plaintiff's counsel never inquired of any witness whether [the Railroad] had a duty to provide such padding, whether not having padding caused Plaintiff's injuries, or whether having padding somehow may have alleviated Plaintiff's alleged complaints of injury."

¶ 39 At oral argument in this case, counsel for plaintiff responded that testimony from a medical provider that padding would have affected the outcome of her fall was not required, because the type of padding that should have been used by the Railroad was one that would have prevented plaintiff from falling in the first place, instead of merely cushioning her fall.

Specifically, plaintiff's counsel described an "upright" padding, akin to a "mat" that would be used on a wall on a basketball court, that should have been placed within "arm's reach" of a trainee as he or she took the hang test. Such an argument is improperly raised for the first time at oral argument in violation of Supreme Court Rules, and is rebutted by the record. See Ill. Sup. Ct. R. 341 ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). Counsel for plaintiff also pointed to the complaint's reference to the Railroad's failure to provide "netting, padding or any other device." Counsel acknowledged that the word "netting" does not appear in the record other than in the complaint, but contended that the jury should have been able to decide whether there was "something to prevent her from falling."

¶ 40 As stated previously, the only direct question asked at trial about padding was whether "the railroad ha[d] any sort of pads or anything *on the ground beneath the test area* to maybe help in case somebody fell." (Emphasis added). There was no evidence presented at trial that any type of padding could have or should have been used by the Railroad, let alone that it would have been possible to provide some kind of upright padding within arm's reach of the trainees as they took the hang test on a rail car in a rail yard. Similarly, there was no evidence presented at trial about "netting" whatsoever, or any other type of "device" that would have prevented her from falling.

¶ 41 Nonetheless, if plaintiff wished for the jury to be instructed on such a theory, she was required to provide some evidence supporting it. Because she did not do so, we find no abuse of discretion by the trial court in refusing to give the proposed instruction, and no abuse of discretion in denying plaintiff's motion for a new trial.

¶ 42 Alternatively, the Railroad contends that we should affirm the jury verdict because "there is no evidence that the submission of the padding instruction to the jury would have 'affected the outcome of the trial.' " As our supreme court stated in *Heastie v. Roberts*, 226 Ill. 2d 515, 543 (2007):

> "While the threshold for permitting an instruction in a civil case is modest, the standard for reversing a judgment based on failure to permit an instruction is high. The decision as to which jury instructions to use falls within the discretion of the trial court. A reviewing court will not disturb the trial court's determination unless the trial court has abused its discretion, *and a new trial will be granted only when the refusal to give a tendered instruction results in serious prejudice to a party's right to a fair trial.*" (Emphasis added).

¶ 43 The Railroad asserts that the jury considered, and rejected, five other issues to determine whether it had failed to provide plaintiff with a reasonably safe place to work, and returned a verdict in favor of the Railroad and against plaintiff. The Railroad thus contends that given "the single question and answer that the jury heard related to padding, it strains credulity to imagine that the jury would have reached a different conclusion simply because they had a sixth issue to discuss." In her reply, plaintiff contends that the padding theory was different than the other theories that were rejected by the jury, because the jury may have agreed that the hang test was necessary to screen potential employees fitness for employment, but believed that "regardless of how [the Railroad] administered these tests, it should have taken the minimal precaution of providing padding or some other kind of protection. This precaution would have required minimal expense or effort."

¶ 44 In so arguing, plaintiff attempts to inject evidence that does not exist in the record. There is nothing in the record to suggest that requiring padding to be provided during the hang test would have been a "minimal precaution" that "required minimal expense or effort." Such evidence is precisely the kind that was lacking in the trial court. Nonetheless, in light of our conclusion that there was no evidence presented that would support a finding of negligence for the Railroad's failure to provide padding, we likewise find no evidence that the submission of the proposed jury instruction would have affected the outcome of the trial.

¶ 45 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 46 Affirmed.