ORAL ARGUMENT – 01/01/02
01-0231
UNION PACIFIC RR V. WILLIAMS

WILSON: This was a trial regarding an injury to a Union Pacific employee, a RR employee, and, therefore, took place under the federal employer liabilities act, which is also more commonly known as FELA.

The act is the sole law regarding how a RR employee is entitled to sue to recover for damages for injuries he suffers during his employment.

O'NEILL: In proffering the foreseeability instruction at trial, the charge conference, is it ever brought to the court's attention that somehow the foreseeability instruction should be limited to the duty question as opposed to the causation question? Was that ever specifically set out? Because under Mitchell it would be improper if it would confuse foreseeability in the causation analysis. And if that's the case, unless it's pointed out by the court that this instruction is segregable(?) to the duty question, how could the TC have possibly abused its discretion under clearly established SC _____?

WILSON: I can't tell you specifically if that was discussed. But my position would be in responding to your question is that it wouldn't need to be discussed because the charge that was presented to the court was satisfactory. The charge was a question of whether or not it was foreseeable if the RR saw any harm in this situation, if it had constructive or actual knowledge of intentional harm.

O'NEILL: Let's say for purposes of argument it was the same instruction that was proffered in Mitchell. And the court in Mitchell said that it could cause confusion with the jury, because to the extent it could be construed to relate to causation it would be improper. And so to me it would seem that unless it's focused to the piece of the jury charge that would be relevant to duty, that just generically giving that instruction would be error.

WILSON: I respectfully disagree. I believe the charge that was presented to the court was tailored to the duty.

O'NEILL: How? Because the instructions that I saw in the record were just 5-6 general instructions and they don't pertain to a particular question?

WILSON: What was offered was an instruction that before you may find a RR liable for an injury of an employee resulting from a defective condition, equipment or his place of work, you must be satisfied that the RR had either actual or constructive notice of the defective condition, and that it had a reasonable opportunity to remove or repair the defect...

O'NEILL: Okay. The same instruction as Mitchell. And Mitchell said because it could be construed by the jury to relate to causation, it's confusing.

WILSON: That is what the majority opinion in Mitchell said.

O'NEILL: And how could a TC abuse its discretion then in rejecting such an instruction? I mean I - let's say we agree that foreseeability should be submitted to the jury as a duty element. How was it brought to the court's attention that that instruction was intended to be limited to the duty element as opposed to possibly causing confusion as in Mitchell that it applied to causation?

WILSON: The way it's worded, and we say it's similar to the jury charge in Mitchell, is that on its face relates to the duty issue. It's not one of questioning: did Union Pacific foresee this particular injury? This result? That relates to the causation issue. It relates to did they foresee a harm. Was there a harm in this workplace that reasonably should have been foreseen by this employee?

O'NEILL: You're saying the language itself indicates that it related to the duty question?

WILSON: Yes.

O'NEILL: Then we would have to overrule Mitchell if that is the case in order to go your way.

WILSON: To the extent that Mitchell is read the way that you're presenting it to me, yes.

HANKINSON: Well why can't this case be reconciled with Mitchell? Mitchell did deal with foreseeability in the context of causation in a FELA claim, which is different than foreseeability with respect to the duty issue? Do you think it's wrong with respect to that aspect?

WILSON: No, I do not think it's wrong.

HANKINSON: So why would Mitchell have to be overruled then, since Mitchell dealt with the question of submitting an instruction on foreseeability in connection with causation?

WILSON: First off, I didn't say necessarily it had to be overruled. I said if you read it in the way that Justice O'Neill has presented that question, then the answer is...

O'NEILL: My understanding was that that's the way you defined it. You're saying the instruction itself, the way it's worded, indicates that it's necessary for a negligence determination and that that was enough to alert the TC it was limited to the duty piece? And if that's the case, the court in Mitchell said no, as far as it going to causation it's improper. I was doing it the way you were defining it I thought.

WILSON: If you follow the court's analysis in Mitchell, or you follow the way it was applied in this particular case, the result is that there is no instruction given regarding foreseeability as to the duty. Which means there is no instruction given to the jury in a case where I think the parties...

O'NEILL: And that was my original question. Where did you ask the TC to submit it on the duty element? Did you say, we realize if this were just given it could cause confusion, that it relates to causation it would be error under Mitchell? So Judge, we really want it limited to the duty question. Was that ever done?

WILSON: Candidly, I don't know.

BAKER: Did UP specifically ask for a question to be submitted to the jury along with that instruction - foreseeability in the duty aspect?

WILSON: What Union Pacific asked for is the proposed jury instruction...

BAKER: But no question?

WILSON: No.

BAKER: If I understood your briefing, it's your view that the foreseeability issue is a disputed fact question.

WILSON: That is correct.

BAKER: And that therefore the jury should have had the opportunity to make that decision.

WILSON: That is correct.

BAKER: How can they make that decision if you don't submit a fact question for them to answer, and just give them a naked instruction like you propose here?

WILSON: Well if we give the naked instruction as you define it that Union Pacific is responsible for its negligence for - if there's a harm that it should have reasonably foreseen the jury therefore takes that into account in its deliberations here.

BAKER: Well but that gets you right back to Justice O'Neill's question. That's a generic request for an instruction without applying it to a disputed fact issue. And the jury could find themselves in the same position that the Mitchell case found: confused and making the plaintiff have a higher burden to prove causation than FELA contemplates?

WILSON: There could be that confusion. The other option is to not instruct the jury at all on a necessary element...

BAKER: But I think what we are trying to find out here is, why is it error in this case that you didn't get your instruction, and what does it take or did it take at the time to preserve that error based on your theory of your defense?

WILSON: My position would be, that to preserve the error we needed to present the issue of instructing the jury regarding foreseeability at a time prior to the case was given to the jury.

BAKER: But you do agree that your position is that foreseeability in this case in your view was a disputed fact question?

WILSON: I agree.

BAKER: So that even under Mitchell the court acknowledged that if that's the circumstance, then a question should be submitted to the jury to answer and resolve the dispute?

WILSON: In Mitchell, the court did say that. If you read through the Mitchell opinion it says that there was a disputed issue, there should be an instruction regarding foreseeability presented to this jury, but since it might get confusing we're going to suggest you use this pattern jury charge that didn't include instruction regarding foreseeability.

BAKER: Because it was only talking about causation, and you just indicated that you agreed with the previous question that foreseeability is not a factor in the causation issue in the FELA cases. Do you agree with that?

WILSON: Yes.

PHILLIPS: Here's what Mitchell says. We hold that the question of an employer's knowledge may be one for the jury. However, in this case the instruction confused the issue of foreseeability relating to duty with the concept of causation. Doesn't that suggest as Justice Baker has been saying, that if foreseeability is hotly contested then there ought to be a separate question, and not an instruction that could be related back to a particular question, because the question of duty is one of law, not of fact.

WILSON: My position would be that we have preserved the error by offering this proposed jury instruction.

BAKER: But was it enough to just offer the instruction under your view of the factual disputes in the case?

WILSON: Yes.

BAKER: So somehow the jury is not going to answer this question of the disputed fact question: Was it foreseeable that this incident would happen? And would you then say it would be the TC's prerogative to resolve that dispute, and that's what he did here when they submitted the case and refused your instruction?

WILSON: No, I don't believe it would be the TC's prerogative to decide that dispute, because FELA, the substantive law says foreseeability is an element of the offense.

BAKER: As far as the duty is concerned?

WILSON: Yes.

HANKINSON: Is it your position then that in a FELA case the jury should be asked a duty question?

WILSON: Not in every single FELA case.

HANKINSON: If there is disputed evidence on foreseeability as it relates to duty, then should the jury be asked whether or not the employer owed a duty to the employee as a question and part of the plaintiff's burden of proof?

WILSON: Yes.

BAKER: Did you ask for the question in this case?

WILSON: We asked for this particular jury instruction.

BAKER: No, did you ask for a question?

WILSON: No, we didn't ask for a question.

RODRIGUEZ: How is a determination of foreseeability as it relates to duty different from the fact finder's determination of foreseeability as it relates to causation?

WILSON: The arguments back and forth in this brief is that the FELA says that a RR employer is liable for its negligence that contributes in whole or in part to the injury of one of its employees. The whole or in part that applies to the causation element is sometimes confused with the negligence part.

RODRIGUEZ: I guess my question is, let's assume foreseeability is an issue even in the FELA case as to causation. Is there a way to describe to us how a jury could find it is not foreseeable with respect to causation, but is foreseeable with respect to duty? Once a jury makes that determination does it apply to both duty and causation and, if not, why not?

WILSON: No, I don't think it does. And I think one of the cases that both sides have cited, that I read, is Gallick v. Baltimore & Ohio RR. In that case there was an instruction regarding foreseeability as to duty. The jury found for the plaintiff in that case. The RR on intermediate appeal won a reversal on the basis that in that case the situation had been that this employee suffered some insect bites from a _____ pool, and had some serious complications from that. The RR said that we were entitled, the plaintiff had a duty to show that we should have reasonably foreseen this particular type of injury. On ultimate appeal, the court said no, you were entitled to your instruction regarding whether or not there was foreseeability of the duty. Because that would be foreseeability regarding cause. And ultimately the case was reversed in favor of the plaintiff.

But I point it out, because in that case the RR was given the same jury instruction or substantially similar jury instruction that we are asking for here.

In many states duty can be a question for a jury. In taking this out of the FELA situation, it would be a case such as this court decided in Boles v. Kerr, that there is not a duty regarding negligent infliction of emotional distress. In this situation, what is substantive law regarding the FELA is a federal standard. It needs to be uniform across different states. I don't see a conflict between that situation...

ENOCH: Let's take this out of the abstract. The jury would never be asked, did the RR have a duty to its employee? What the jury would get asked is, was there a condition that injured the employee that was known or should have been known to the employer? That's the fact question isn't it because it's the fact upon which the duty is based? So the question in this case to the jury would have been, was there a condition of this derailment that the RR knew or should have known about that caused this injury? That's where the duty would come from. Was there a condition they knew or should have known about, and they failed to repair. Now the RR has a policy that you're supposed to stand back some amount of feet. The argument it seems to me that if you preserve error is that the plaintiff failed to get a finding that supports the judgment. They failed to get a finding of a disputed fact, which is this knew or should have known about a condition that the RR failed to repair. That's your point.

WILSON: Yes.

ENOCH: They failed to ask this question. And you say you preserved the error by submitting a general instruction on foreseeability and therefore you are entitled to argue that we're missing a finding on an element. That's where we're going. So my question for you, what is it that was disputed in the facts about what the RR knew or didn't know? Was it they did not know that in the case of a derailment a pipe cap, some piece of equipment as they are moving this heavy stuff, might break free and be thrown a certain distance and injure an employee. Are you saying they didn't know that would happen, or are you saying that what they didn't know is that this piece of equipment could be thrown as far as it was thrown?

WILSON: If I had to choose between the two that you are saying, it's the latter. We didn't know it could be thrown as far as it's thrown.

ENOCH: So you're thinking that what the jury should have been asked is, we know that equipment can be thrown as a result of derailment, but because this got thrown 50 ft instead of 25 ft, we're entitled to a question before the jury about whether or not that was not foreseeable.

WILSON: That's what we're asking for yes. Because you are going to have - everyone's going to agree in a FELA case that RR work is inherently dangerous. We had knowledge that cable snap, things happen in a re-railing or after a cleanup after a derailment situation.

ENOCH: In fact Union Pacific has a rule on where people are supposed to stand, because they foresee that pieces of equipment will go flying around.

WILSON: Exactly, and they have to stand even further back if they're dealing with hazardous materials. The testimony at trial showed that we were in compliance with those rules and the testimony that we were trying to illicit until Judge Parson excluded it sua sponte after overruling Mr. Berry's objection was that following those rules in derailment situations, no one had ever seen an accident that happened like this. We didn't come up with the word "freak accident". It was used by the witnesses themselves.

BAKER: That gets me to your other issue about the mid trial sua sponte statement by the trial judge. Your briefing to me indicates that you say that you base your theory on why it's preserved on looking and interpreting TRAP Rule 33.1 or Rule of Evidence 103. Is that right?

WILSON: Yes.

BAKER: What exactly did you say in your motion for new trial would have been your objection to that statement by the court if you made it then? That it was a misstatement of the law and that you wanted it corrected, or that that was improper because you are entitled to have - was it evidentiary complaint or a misstatement of the law complaint?

WILSON: A misstatement of the law.

BAKER: So is it a fair statement to say that rule 103 just applies in cases where you are complaining about either admitting or excluding evidence, and that's not the nature of your objection to what the TC said in this case?

WILSON: The nature of my objection would be that the judge also did instruct the jury to disregard the testimony from Mr. Peacock...

BAKER: But I still need to know what your objection is because I'm trying to figure out does only rule 33.1 applies and not the evidentiary rule because of the nature of your objection?

WILSON: I believe they both apply because it was a misstatement of the law and the judge instructed the jury to...

BAKER: Did you say that in your motion for new trial?

WILSON: I am not certain.

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RESPONDENT

FURLOW: I had originally intended to come here and focus strongly on the multiple and repeated waivers of the matters first alleged, first briefed, and first made the subject of a discussion of the case law in the CA, and to argue that a judge who comports with the controlling case law of the TX SC and issues jury instructions that are in accordance with those of the conservative 5th circuit, does not abuse his discretion on the FELA case.

In a situation where there is federal substantive law and there has not been a US SC decision since the time of the original consideration, and where the jury instruction comports with that of the admittedly conservative 5th circuit, I would submit that whatever might be the case with respect to stare decisis it's not - a change in the law is not warranted here.

My arguments would be that there was no abuse of discretion here, and that there has been no change in the law as enunciated by the US SC that would warrant a reconsideration of this opinion, especially of the Mitchell decision, especially given the facts that are present here.

OWEN: How do you _____ the SC says that the whole concept of negligence under the FELA is resolved by federal law not state law?

FURLOW: On substantive issues that is correct.

OWEN: We said in Mitchell, in Texas the existence of a duty is a question of law. We should not have been applying Texas law. We should have been applying federal law.

FURLOW: No, that is not correct. And the reason it was not correct is because this court in Mitchell and in the Dutton case and the other TX SC cases cited recognized as the US SC has recognized in the St. Louis Southwestern RR Co case as cited in our brief on the merits, that procedural issues of what matters are submitted to a jury...

OWEN: But what is a duty? That's not a procedural issue is it?

FURLOW: The issue of whether the jury gets a part...

OWEN: I'm not talking about the jury. I'm focusing on the language in Mitchell that says, in Texas the existence of a duty is a question of law. That's not procedural is it? That's substantive.

FURLOW: That's substantive.

OWEN: And that was a mistaken statement. It should have been decided under federal substantive law of what is a duty under FELA.

FURLOW: With respect to determination of duty traditionally, of course that has been done in Texas as opposed to other states by the judge...

OWEN: This is federal law. So federal law should govern what the duty is under a FELA case. Isn't that what the US SC has said?

FURLOW: Federal law governs the substantive requirements, but the way the Mitchell court recognized that conceivably foreseeability issues could be submitted to the jury in the right case.

OWEN: I'm asking about substantive law.

FURLOW: Substantive law, the law owed by the RR to the employee should be decided by judges as duty law, and that should indeed be federal law - substantive law.

O'NEILL: Well is it fair to say that as a matter of federal substantive law foreseeability is an element, and whether that's decided by the judge or jury is a procedural issue for the states to decide?

FURLOW: Basically except that the Gallic decision as cited by opposing counsel where this matter was actually discussed in some depth, there the US SC did not use the word element, but ingredient. And in fact, ingredient is consistent with the way this court and you, Justice Hecht, in a number of decisions have said that foreseeability is a factor or one aspect of the duty analysis: Mellon Mortgage v. Holder; Timberwalk Partners...

O'NEILL: But I guess my point is, that's the piece that would constitute the federal substantive law, whether you call it an ingredient or an element. And that how to determine that as a matter of state procedural law, whether the judge or the jury decides the foreseeability piece.

FURLOW: That is correct and that is our position. And that's the way the - there's a fuzzy line between procedural law and substantive law.

O'NEILL: So what would be wrong with - we've got some language in Mitchell that says, if the foreseeability piece of duty is factually intensive and there's a fact issue on foreseeability, that should be submitted to the jury.

FURLOW: That is within a court's discretion, a trial judge's discretion to submit to the jury. Yes. So it could occur under those circumstances...

BAKER: Isn't a trial court supposed to submit disputed fact questions to the fact finder, which would be a jury in that kind of case?

FURLOW: Well other courts dealing with these same issues and specifically the Missouri cases that I've attached to our brief on the merits as App. 9, 10 and 11. In situations where a representative or supervisor of the RR company has given testimony that reflects the RR's actual notice of the condition, of the problem there, then under those circumstances it does not go to the jury. The judge determines as a matter of law that a duty is...

BAKER: But assume and just take the facts in this case. They dispute whether this was foreseeable or not. And we say under our law that it's the court's prerogative to determine the duty issue. But we also say in Mitchell, if foreseeability is disputed, then it should be submitted to the jury. If you go the other way and say it's purely a question of law, then the TC's beginning to make credibility and factual determinations when there's two opposing views. How can we have that?

FURLOW: Here, under these facts, what the RR was doing was saying, we didn't...

BAKER: I understand what they did, but I'm a little concerned about the mechanics of what you suggest that, well the TC always decides duty as a matter of law, and even if there's a dispute well maybe the jury should get it, but he can still decide it's a - the only way he can decide it's a matter of law if there's no other evidence other than they knew everything that was going on, and in particular here, this case that this cap would go 70 ft.

FURLOW: Specifically here what we had is Wilford _____, the supervisor there, or representative of the company who was admitting that he had knowledge of these flying, breaking rails and other things, and other officers of the company saying that they had knowledge of snapping cables and other dangers indicating that the RR was amply and actually aware of the dangers of flying objects, torsion propelled at derailment sites.

HECHT: But surely it's an issue whether they go 10 ft or 10 miles. Surely it's an issue how far they go. Just because you know that a cable snaps doesn't mean that you know that somebody a long way away is going to get hurt by it.

FURLOW: The issue of that, here what we have is actually on this record: Wilford _____ saying that he had warned the people to clear away the folks before the rerailing operations occurred. It did not occur. That shows that the RR, the supervisor had actual knowledge. Not constructive knowledge, but actual knowledge of the danger presented but he didn't...

JEFFERSON: Couldn't understand question!!

FURLOW: They present that as the Hazmat issue, but Wilford _____ testimony was not specifically related to that. And the issue comes back to Justice Baker, is 1) of the RR co saying this particular freak accident and this cap flying this distance of hitting this man in this particular place was not foreseeable. But that's completely an erroneous legal analysis under the US SC Gallic decision, under this court's decisions that if the general danger is appreciated the plaintiff does not have to prove foreseeability of the specific series of sequence of...

BAKER: So then is your argument in this case their view of their defense of unforeseeability in the duty aspect as a legal theory doesn't stand up, so the TC is really just making a legal decision when he says, no it just has to be a general appreciation and they don't have to know that this cap is going to come off at that time and go 70 feet and hit a worker. Is that your view?

FURLOW: That is our view buttressed by the fact that their failure to present a complete record precludes this court from engaging in the sort of entire record harmless error analysis or abuse of discretion analysis that would be essential to any reversal of a case where the predicated harm is under an abuse of discretion standard for charge error or judicial comments. They had the opportunity and expressly declined the opportunity to request the opening statements and the closing arguments, and therefore, waived any right to show that there was indeed a harmless error analysis.

If the court will grant me the indulgence of presenting to the court the actual case dispositive, case law. This is the case law which I submit will convince this court that Union Pacific failed to submit a substantially correct charge request as required by Rule 297. That they

submitted a charge that was defective and incurredly defective as enunciated by this SC in three decisions, the TX Comm of Appeals in one decision, and two courts of civil appeals. This is not in the briefing.

BAKER: What case?

LAWYER: Specifically: J. H. Blaines v. Alman Lewis and Co., 71 TX 529, 537 9 S.W. 543, pg 545, 546 (1888 TX SC decision); Missouri Pacific RR Co. v. Bartlett, 81 Tex. 42 at 44, 16 S.W. 638, 1891 decision; Bluntzer v. Dewisse & Hinkle, 79 Tex 272 at 275, 15 S.W. 2929, 1891; Peaton Iron & Steel Co. v. James, 208 S.W. 898; and specifically here this goes to their request. Their request if you look at is an appendices to our Williams brief on the merits. If you look at it it is appendix 4. There the peculiar language of it results from Union Pacific's attempt to weigh the evidence and to impose a higher standard than the preponderance of evidence standard that is applicable in all civil cases here. This is why their request was fatally defective from the outset, and why this is not the proper vehicle that you might want to utilize in order to reconsider Mitchell.

Specifically what Union Pacific said is, to find that a RR had actual or constructive notice of a defective condition, you must be satisfied that such notice was received by an employee who is authorized to repair or remedy.

Then it comes down and he uses that language "you must be satisfied" a second time in that same proposed request. That language is fatally defective under controlling Tx SC decisions that have never been reversed or reconsidered. In the 19th century, in the 1880's people were submitting these "you must be satisfied" charges. It came up to the TX SC, and in the Blaines v. Alman Lewis & Co. decision, this court rules "there's another part of the charge complained of that is erroneous in that it required the jury to be satisfied that the appellate sold the goods to his former wife, which were claimed to have been fraudulently conveyed. It is not necessary that the evidence should have been sufficient to satisfy the jury of the facts in order to entitle opponent to a verdict. For he would have been entitled to this upon a consideration of all the evidence if the jury had been of the opinion that the facts necessary to recovery by him were established by a preponderance of the evidence. And the court said evidence is said to satisfy the mind when it is such as freeze the mind from doubt, suspense or uncertainty. The jury may have believed that the evidence preponderated in favor of the existence of the facts yet under the charge, the jury would have felt bound to render a verdict against him if their minds were not freed from doubt and uncertainty. On account of the errors noticed, the judgment will be reversed and the cause remanded"

Then two years later in the Missouri Pacific case, another RR case similar to this one, this court added and quoted on page 44, "In greenleaf on evidence it is said by satisfactory evidence, which is sometimes called sufficient evidence, is intended that amount of truth which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt." And so the judgment was reversed and remanded because the jury instruction in that case said, and if the proof satisfies you and if such facts are established by the evidence to your satisfaction. The same erroneous language that you UP stuck into its charge to raise the standard, not only above the ordinary Texas common law standard, but way above the relaxed liberal construction Teddy Roosevelt in 1908 FELA law,

which has substantially relaxed causation and foreseeability standards.

HECHT: What do you make of the instruction in the charge, a yes answer must be based on a preponderance of the evidence?

LAWYER: That a jury is going to be confused. And that's what this court and other CA's have ruled in similar situations. Because specifically, it's actually talked about in one case - Walker v. Dolly, 4 S.W.2d 159 at 161 (Tex. Civ. App. 1928, writ of error dismissed). That's where the court summarized not only the three cases from the SC, but others said "we have reached the conclusion that the TC erred in the instruction given to the effect that the burden was upon plaintiff to prove the fraud alleged to the satisfaction of the jury nor do we believe that the error was cured by the language used in other portions of the same instruction which placed the burden of proof upon plaintiff to make out his case by a preponderance of the evidence. Going back to the Alman case where there's preponderance and this satisfaction standard. They are confusing. They are different standards. Satisfaction is higher, and that means that the request that UP submitted was erroneous as a matter of law, and would require this court to find that it was acceptable to find an inaccurate state of the law would be to chuck out a number of well established, 110 year old decisions that no one has second guessed in over a century.

HECHT: And which have not been cited to us until now. If the instruction did not have that problem with it, and there were a conflict in the evidence about the foreseeability of this accident, should an instruction be given to the jury in your view?

LAWYER: No. And I am relying upon Bill Powers in his seminar to _____ about the judge and jury in Texas law where he points out the very good policy reasons that juries and jurors should not be making the policy that goes into duty determinations.

HECHT: I understand that. And the policy is, you ought not to have to exercise care if you don't know something bad is going to happen. But if there is a dispute about that, if there really is a who shot John, 2 people saying yes we knew, no we didn't know, you don't submit that to the jury?

LAWYER: It is conceivable that it could be, but it would not occur in this particular case. And this is another reason this is not an appropriate vehicle for reconsidering Mitchell, because of the admissions of the supervisor.

HECHT: I'm asking if there were that kind of dispute, does it go to the jury or is resolved by the judge?

LAWYER: I would submit that a determination of whether it is sufficient to go to a jury, whether it is sufficient to create a duty is one that _____ the discretion of the TC judge consistent with the Mitchell majority. And I understand that you might have differences with that, but I would submit that that issue should be properly raised an analyzed in a situation where somebody such as UP actually presents the entire record with the opening statements and the closing arguments and articulates their position to the TC judge.

HECHT: I understand that's your position. But I'm trying to get at an answer to a legal question. And it's an abstract legal question. And that is, in a FELA case where you have a dispute over foreseeability, does the issue go to the jury or not? And that's all I'm trying to get from you. Not this case. Not UP. Not this issue. In the abstract, does it go or not?

LAWYER: In the abstract in my opinion, no. I trust the judges to make the duty determination and the foreseeability determination. But I could understand how reasonable minds could differ.

O'NEILL: But why should it be different that foreseeability as an element of causation go to the jury if facts are disputed on foreseeability that that same question again as factually intensive wouldn't go to a jury under the duty element?

LAWYER: It is because I could conceive of a situation where someone could upon serious deliberation craft an instruction that might analyze or submit to the jury a question of what is foreseeable with respect to what duties the RR might owe to the particular party. And not tread upon the causation issue. I think it would be extremely hard. I've struggled with it. And I haven't been able to come up with one. And I would submit that if you actually look at the Gallic decision that everybody is talking about, the SC decision, if you go back to that you will see there is some two dozen interrogatories given to the jury there, because there is no general submission statute there - broad form practice there in Ohio at the time. And there the jury actually came back and said no to the two questions 22 and 24, that asked them to make a determination of foreseeability. And the SC reconciled those with the other answers and evidence there and concluded that well despite what the jury said, it was still a foreseeable injury that this person, Gallic, would suffer a bite by an insect, and that should have been foreseen by the RR under the reduced standards of negligence and causation in FELA.

HANKINSON: Is it your position that the evidence is not disputed on foreseeability as an element of duty within the appropriate legal definition, that is more of a general version of foreseeability as opposed to the specific could this incident have ever happened before? Is it your view that the evidence is undisputed under the appropriate legal standard or is it disputed under the appropriate legal standard?

LAWYER: It is my position that under the appropriate legal standard of awareness of the general danger, the admissions of not only Walter _____ but also _____ and the other fellows quoted in page 2-10 of our brief on the merits, established that they were aware of the general danger and through them a supervisor's UP RR, and that specifically a court goes off on the wrong analysis when it accepts their freak accident argument that this particular cap being popped off and flying this particular distance, a point which is disputed, whether it is 20ft or 50 ft, is the wrong analysis.

HANKINSON: So your view is that the evidence on foreseeability under the applicable legal standard is undisputed in this case?

LAWYER: That is my position.

O'NEILL: But if there is a dispute as to how far it flew, how could it be undisputed? If one person, however credible says, it only flew 20 ft., and one person says 70, isn't that some sort of jury determination that would affect the range of safety that the workers were required to stand back from?

LAWYER: I just presented accurately the statements about how far this thing flew, whether that in fact was foreseeable, whether that constituted negligence. The jury answered in the affirmative. And I would submit, in the absence of properly specific and timely objections to this trial court judge pointing out the errors that were first briefed on appeal. And more importantly, in the absence of the opening and closing statements.

O'NEILL: No, I understand all the other arguments. But there is a disputed fact issue as to how far this flew that could define the foreseeability piece of duty.

LAWYER: That is correct. There is differences of opinion expressed in the testimony. And all I would submit there is that under this court's applicable standards error preservation, a complete record review, all of those inferences must be found in support of the judgment as it stands because they didn't present you the adequate record to review the issue.

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REBUTTAL

LAWYER: I want to respond to a couple of things Mr. Furlow said. Mainly this argument that we didn't preserve error because we didn't present the opening statement and the closing arguments. This is a question as to...

O'NEILL: If what he has said is correct, that this statement in the proffered instruction is wrong as a matter of law because it incorporates an improper proof standard of satisfaction, then don't we have an unsurmountable preservation point here? In other words that would be a defective instruction, and that would not be enough to preserve error on your...

LAWYER: Not having a chance to review those cases, I'm not going to take a position of whether or not I believe it is defective. I don't believe that - the standard is UP would have to present a substantially correct jury instruction at a time before the case was presented to the jury to preserve its error. We don't believe this jury instruction as presented - we believe it was substantially correct.

O'NEILL: Well you just don't know that at this point?

LAWYER: I honestly don't know at this point. However, I do believe it is sufficient to preserve the question of substantially correct. It's sufficient to preserve the error to present to the judge...

BAKER: Would you be interested in answering those 4 cases with some law to support your viewpoint?

LAWYER: I would love to answer those 4 cases.

BAKER: I think we would appreciate a response.

LAWYER: I will respond. Thank you.

Our position is, we preserved this error that the jury needed to be instructed by law regarding the issue of foreseeability of the duty. And the court, what we can all agree on is, that the court followed what it understood to be the law in Mitchell, as a TC would do and an appellate court would do if it followed the instructions from the SC. Our position is that harking back to Justice Hecht's dissent, because he made a comment in there that if you follow the rule as Mitchell could be applied it gave you two options. Either you properly instructed the jury regarding foreseeability, a necessary element of the case of liability, or you didn't instruct the jury regarding necessary element and in effect created absent liability on the part of the RR. That's what happened in this case.

HANKINSON: Do you agree with Mr. Furlow's resuscitation of the SC's holding in Gallic that what the elements may be is a question of substantive law under FELA and a question of federal law. But the question of whether a judge or jury decides a particular question in a FELA case, such as duty, is a question of state law?

LAWYER: No, I do not.

HANKINSON: You don't think that Gallic says that?

LAWYER: I don't believe Gallic says that.

HANKINSON: What does Gallic say on that issue then? What would be your response to his argument that Gallic says that?

LAWYER: My position regarding Gallic would be, a defendant's duty is so measured by what - Gallic goes into great detail to explain what is required within a jury instruction as to the prima facie case of a claim for negligence under the FELA. And I would use that language in Gallic.

HANKINSON: But my understanding of federal law is that with respect to substantive law in a FELA case we look to federal law. With respect to procedural issues state law controls. And that in fact the question of whether a judge or jury should decide a particular issue in a FELA case is a procedural issue that is to be determined by the applicable state law. Is that a correct resuscitation of what federal courts have said in FELA cases or, am I mistaken?

LAWYER: I don't think that's an accurate resuscitation.

HANKINSON: What matters in a FELA case would be decided under state law?

LAWYER: Those substantive issues are to be standing as regarding the elements of the

claim under the FELA are to be presented to the jury.