SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No.: A-000142-23 T1

VIRIGLIO M. CALING
Plaintiff/Appellant,

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.
Defendant/Respondent.

APPELLANT'S AMENDED BRIEF AND APPENDIX

On Appeal from Final Judgment of the
Superior Court, Law Division, Essex County

Sat Below:
Hon. Jeffrey B. Beacham, J.S.C.
Superior Court of New Jersey, Essex County
Law Division, Civil Part
Docket No. ESX-L-00319-21
Motion for Summary Judgment argued August 8, 2023

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Submitted November 14, 2023

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PRELIMINARY STATEMENT

This matter is pursued under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq*. The FELA places an affirmative duty on railroad employers such as defendant to provide employees with a reasonably safe workplace. As a jury trial is an integral part of the statute's remedial purpose, a court should grant dismissal only under circumstances where there is zero possibility that a jury could find in the injured employee's favor.

The trial court denied Mr. Caling's right to a jury trial, putting itself in the place of a jury by determining that the evidence produced, which included expert opinion, prior criminal activity, failure to adhere to industry standards, and previous attacks on employees of New Jersey Transit, failed to show negligence or that the subject attack was foreseeable. The trial court erred in finding there was no genuine issue of material fact and there was zero possibility a jury could find in the employee's favor.

PROCEDURAL HISTORY

Plaintiff, Virgilio M. Caling, filed a Complaint against his employer New Jersey Transit Rail Operations, Inc. (NJT), pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. §51 *et seq.*, on January 14, 2021. (9a). NJT filed an Answer with a Third-Party Complaint against Deborah Bailey on April 21, 2021. (17a). NJT filed a Request for Default against Deborah Bailey on

September 14, 2021. (29a). NJT filed a Motion for Summary Judgment on July 6, 2023. (37a). Mr. Caling filed his opposition to NJT's Motion for Summary Judgment on July 25, 2023. (228a). NJT filed a Reply on July 31, 2023. (Omitted (R. 2:6-1(a)(2)). An Order granting NJT's Motion for Summary Judgment was signed and filed on August 4, 2023, however oral argument was not held until August 8, 2023, the same date the Order was entered. (1a). Plaintiff filed a timely Notice of Appeal on September 15, 2023. (3a). Third Party Defendant Deborah Bailey was dismissed for lack of prosecution on October 14, 2023. (36a).

STATEMENT OF FACTS

Virgilio M. Caling is an employee of defendant New Jersey Transit working as an electrician out of Hoboken, New Jersey. (53a). On January 19, 2018, Mr. Caling was working in his capacity as an electrician for NJT at the Newark Broad Street Station, waiting to board a train back to Hoboken, New Jersey. (54a). A homeless woman, Deborah Bailey, approached Mr. Caling and asked for a cigarette, however Mr. Caling told her he did not smoke. (54a). Ms. Bailey left the area, however she returned shortly thereafter and struck Mr. Caling from behind in the back of the head while he was waiting to board the train, causing him to fall forward onto the train. (55a). Ms. Bailey was taken

away by EMS as a mentally disturbed person. (96a). Mr. Caling rode the train back to Hoboken and reported the incident to his supervisor. (58a). He then went to Hoboken Hospital for treatment. (58a). He has since had multiple cervical surgeries and has not returned to work for NJT. (60a).

Per New Jersey Transit Police Officer Joseph Ragazzo, Broad Street Station is known for drug activity, and as a place to loiter and obtain drugs, and has been for his entire career, which began in 2003. (239a, 238a). Per New Jersey Transit Police Officer Alan Imperiale, homeless people gather and loiter at the Broad Street Station. (266a).

In the two years before the attack on Mr. Caling, the New Jersey Transit Police issued at least sixty (60) citations and/or arrests for crimes including panhandling, drug possession, disorderly conduct, theft, simple assault, fighting and aggravated assault. (276a – 757a). These citations include ten (10) for violent crimes. (159a). During this same timeframe, at least one other conductor was punched in the head by a non-employee at Broad Street Station. (758a). New Jersey Transit Assistant Superintendent Anthony Arroyo became aware of assaults at the Broad Street Station from speaking with train crews. (253a).

Litter and debris surround the Newark Broad Street Station. (148a – 152a). Graffiti is also found in and around the Broad Street Station. (153a). In December 2016, approximately 13 months before the attack on Plaintiff, his

attacker, Deborah Bailey, was issued a citation for disorderly conduct by the New Jersey Transit Police at Newark Broad Street Station, the location of the attack on Mr. Caling. (765a).

As admitted in their discovery responses, New Jersey Transit does NOT adhere to the industry standard for security in relation to mass transit stations, failing to follow the American Public Transportation Association guidelines. (767a; 162a).

LEGAL ARGUMENT

Standard of Review

An appellate review of a case dismissed on summary judgment is de novo. "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference, and, hence, an 'issue of law is subject to de novo plenary appellate review.'" *Estate of Hanges v. Metropolitan Property & Cas. Ins. Co.,* 202 N.J. 369, 382-83 (2010).

Because this appeal arises in the context of Defendant's summary judgment application, the facts should be reviewed in the light most favorable to Plaintiff. *Hanges* at 374. To prevail on a summary judgment motion, Defendants must show that Plaintiff's claim was so deficient as to warrant dismissal of the action. *Butkera v. Hudson River Sloop "Clearwater," Inc.,* 300 N.J.Super. 550, 557 (App.Div.1997). In ruling on a Motion for Summary

Judgment "the 'Judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Brill v. Guardian Life Ins. Co. of Am.,* 142 N.J. 520, 540 (1995) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L. Ed.2d 202, 212 (1986)) (alteration in original).

In evaluating summary judgment, the court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995). "If there are materially disputed facts, the motion for summary judgment should be denied. *Id*. To grant a motion for summary judgment, the Court must find the record "so one-sided that one party must prevail as a matter of law." *Id*. (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

The inquiry in a FELA case rarely presents for practical purposes more than a question of whether the negligence of the railroad or its supervisors or its employees played any part, however small, in causing the Plaintiff's personal injuries. The question becomes simply whether the evidence justifies with reason the conclusion that Defendant's negligence played any part, even the slightest, in causing Mr. Caling's personal injuries for which he seeks damages.

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500 (1957); *CSX Transportation, Inc. v. McBride*, 131 S.Ct. 2630 (2011).

Plaintiff's burden of proof in a FELA case is much less than is required for a Plaintiff to sustain a recovery in an ordinary negligence action brought under the state tort law. *Boeing Company v. Shipman*, 411 F.2d 65 (11th Cir. 1969). The Plaintiff does not have to prove the Defendant's negligence was a substantial contributing factor in causing a Plaintiff's injuries. Rather, in a FELA case, the Plaintiff is only required to prove that the railroad's negligence, in whole or in part, caused Plaintiff's injuries. The obvious purpose of the FELA is to enlarge the remedy of railroad employees injured as a result of the hazards in their workplace. *Metropolitan Coal Company v. Johnson*, 265 F.2d 173 (1st Cir. 1959).

"A trial court is justified in withdrawing…issues from the jury's consideration ***only in those extremely rare instances where there is a zero probability either of employer negligence or that any such negligence contributed to the injury of an employee***." *Hines v. Conrail*, 926 F.2d 262, 268 (3d Cir.1991)(emphasis added). FELA actions are commonly submitted to juries on "evidence scarcely more substantial than pigeon bone broth." *Harbin v. Burlington N. R.R. Co.*, 921 F.2d 129, 132 (7th Cir.1990). "The right to a jury determination is part and parcel of the liberal remedy afforded the working

person under the FELA." *Id*. 921 F.2d at 131.

I. The Trial Court erroneously invaded the province of the jury by weighing evidence and determining the evidence presented did not constitute negligence. (T15 – T19)

While State and Federal courts have concurrent jurisdiction over claims raised under the Federal Employer's Liability Act (FELA), claims in State courts are subject to State procedural rules but all substantive issues of law are governed by Federal law. 45 U.S.C. 56; *St. Louis Railway Co. v. Dickerson*, 470 U.S. 409 (1985); *Poleto v. Conrail,* 826 F.2d 1270 (3rd Cir. 1987); *Donavan v. Port Authority Trans Hudson Corp,* 309 N.J. Super. 340 (App. Div. 1998).

The FELA was enacted by the United States Congress in 1908 and Congress and the United States Supreme Court have, over the years, consistently stated that the purpose of the FELA is to protect and benefit railroad employees injured on the job. The FELA is to be liberally construed to allow railroad employees, such as Mr. Caling, injured in the course and scope of their employment to recover from the railroad even where the railroad's negligence is minimal. *Rodriguez v. Delray Connecting R. R.*, 473 F.2d 819, 820 (6th Cir. 1973).

If Plaintiff's personal injuries were caused or contributed to, in whole or in part, by the negligent acts or omissions of a fellow employee, foreman, supervisor, or agent of the railroad, then the railroad is responsible for the

negligent actions or omissions of the fellow employee, foreman, supervisor or agent. *Sinkler v. Missouri Pacific Railway Company*, 356 U.S. 326 (1958). The negligence of a supervisor, foreman, employee or agent of the railroad is imputed to Defendants under the FELA.

A railroad, such as New Jersey Transit Rail Operations, has a non-delegable duty to provide employees with a reasonably safe place to work. *Shenkler v. Baltimore & O. R. Co.,* 374 U.S. 1 (1963). Because of the integrity of the jury's function in the FELA, the purpose of the FELA, and the liberal construction, courts are justified in removing these claims from the jury "only in the extremely rare" incidences where there is "zero probability" either on employer negligence or any employer negligence contributed to the injury. *Pehowic v. Erie Lackwanna Railroad Co.,* 430 F.2d 697 (3rd Cir. 1970). Direct evidence is not essential. Circumstantial evidence is sufficient. *Rogers v. Missouri Pacific R. Co*., 302 U.S. at 508.

"To deprive railroad workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress had afforded them." *Bailey v. Central Vermont Railway,* 319 U.S. 350, 354 (1943). Only the most frivolous claims can the court deny an injured railroad employee his qualified right to a jury trial. *Ciarolla v. Union Railroad Co.,* 338 A.2d 669 (Pa. Super. 1975). The FELA is to be liberally construed on behalf of injured

workers with the result that often the recovery will be proper under the FELA when it would not be under the common law of negligence. *Ignacic v. Penn Central Transport Co.,* 436 A.2d 192 (Pa. Super. 1981).

The FELA is "liberally construed," *Conrail v. Gottshall*, 512 U.S. 532, 543, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994), and its language regarding causation is "as broad as could be framed." *CSX Transportation, Inc. v. McBride*, 131 S. Ct. at 2636. In order to recover under the FELA, plaintiff must present more than a scintilla of evidence. *Aparicio v. Norfolk & W. Ry.,* 84 F.3d 803, 810 (6th Cir., 1996). However, due to the low threshold on both negligence and causation "precious little more" than a scintilla, or "not much more" is required. *Id.*

If "with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death [,]" the question must be determined by the jury under appropriate instructions. *Rogers*, supra, 352 U.S. at 506-07. The Supreme Court has described the test for causation under FELA as "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury. . .." *Ibid.* Therefore, the case must be submitted to the jury "when there is even slight evidence of negligence," *Harbin,* supra, 921 F.2d at 131, whether or not the evidence would also reasonably permit the jury to attribute the injury to other

causes as well. *Rogers*, 352 U.S. at 506. "Consequently, 'the quantum of evidence required to establish liability in [a] FELA case is much less than in an ordinary negligence case.'" *Kapsis v. Port Auth. of New York and New Jersey*, 313 N.J. Super. 395, 403, 712 A.2d 1250 (App.Div.1998).

Under the FELA, "the role of the jury is significantly greater…than in common law negligence actions" and "the right of the jury to pass upon the question of the employers' fault and causation must be most liberally viewed." *Johnannessen v. Gulf Trading and Transp. Co*., 633 F.2d 653, 656 (2d Cir. 1980); *Gallose v. Long Island RR*, 878 F. 2d 80, 84 (2d Cir 1989). Indeed, "trial by jury is part of the remedy." *Johnannessen, 633 F.2d at 656.*

Whereas here, there is credible evidence supporting the contested element of Plaintiff's case and given the established doctrine under the FELA that summary judgment is only appropriate where there is "zero probability either of employer negligence or that any such negligence contributed to the injury of an employee," *Pehowic*, supra, summary judgment is not available to Defendant and the trial court granted defendant's motion erroneously.

Plaintiff presented multiple disputed facts below and summary judgment should not have been granted. Mr. Caling testified at deposition that vagrants frequented the Broad Street Station daily between the hours of 10:00 a.m. and noon because there was no police presence at that time. (55a). Security expert

Dr. Kevin Gotham opined that NJT allowing the station itself to deteriorate with litter and graffiti was negligence and contributed to the criminal activities at the station. An action as simple as keeping the premises clean can deter criminals.

> Promoting a positive image and routinely maintaining the built environment ensures that the physical environment continues to function effectively and transmits positive signals to all users. The significance of the physical condition and image of the built environment and the effect this may have on crime and the fear of crime has been acknowledged for decades by scholars, and an extensive body of research exists.
>
> In sum, criminological research has shown that a poorly maintained urban space and visible signs of disorder – loitering, litter, graffiti, etc. – can attract crime and deter use by legitimate users. A dirty and unkempt space can give criminals the idea that here is a space where they can get away with their illegal behaviors.
>
> (147a).

Dr. Gotham also notes that New Jersey Transit does not follow the American Public Transportation Association recommendations and/or guidelines. "To the extent that the NJT did not follow APTA standards, then the defendant's conduct fell below the standard of care." (162a).

> I understand that the New Jersey Transit Police Department has no policies, training materials, rules, or any other documents regarding police procedures and/or security specific to the Newark Broad Street Station.
>
> I have not seen evidence that the defendant reviewed prior crime incidents at the Newark Broad Street

> Station and/or in the surrounding area to determine whether security at the transit station was commensurate with the level of crime risk.
>
> (162a).

New Jersey Transit itself admitted to not following the APTA guidelines in their Answers to Plaintiff's Supplemental Security Interrogatories. (767a). This admission is also evidence of negligence.

Judge Beacham stated, "And New Jersey Transit's failure to adhere to plaintiff's preferred standards is not evidence of negligence." (T19). This is patently false. These were not "plaintiff's preferred standards," they are industry standards for security/safety at public rail stations as recommended by the American Public Transportation Association. It was for a jury to determine whether NJT's failure to adhere to these industry standards constituted negligence, not the trial court.

Enough evidence has been uncovered via discovery to present a genuine issue of material fact for the jury regarding NJT's negligence. Rather than evaluate whether or not a genuine issue of material fact existed for a jury, the trial court wrongly weighed the evidence and determined it did not constitute negligence, explicitly invading the province of the jury.

II. Under the Federal Employer's Liability Act (FELA) questions of foreseeability and causation are for the jury to decide. Therefore, the trial court erred in granting defendant's motion for summary judgment on these questions. (T16 – T19)

As set forth by the United States Supreme Court in *CSX Transportation v. McBride*, foreseeability in FELA cases does not import case law originating in common-law actions. Foreseeability under the FELA is based upon the statute, as explained in *McBride*:

> "[R]easonable foreseeability of harm," we clarified in *Gallick v. Baltimore & Ohio R. Co.,* 372 U.S. 108 (1963), is indeed "an essential ingredient of [FELA] *negligence*." 372 U.S. at 117, 83 S. Ct. 659, 9 L. Ed. 2d 618 (emphasis added). The jury, therefore, must be asked, initially: Did the carrier "fai[l] to observe that degree of care which people of ordinary prudence and sagacity would use under the same or similar circumstances" *Id*., at 118, 83 S. Ct. 659, 9 L. Ed. 2d 618. In that regard, the jury may be told that "[the railroad's] duties are measured by what is reasonably foreseeable under like circumstances." *Ibid.* (internal quotation marks omitted). Thus, "[i]f a person has no reasonable ground to anticipate that a particular condition . . . would or might result in a mishap and injury, then the party is not required to do anything to correct [the] condition." *Id.,* at 118, n. 7, 83 S. Ct. 659, 9 L. Ed. 2d 618 (internal quotation marks omitted).[12] If negligence is proved, however, and is shown to have "*played any part, even the slightest, in producing the injury*," *Rogers*, 352 U.S. at 506, 77 S. Ct. 443, 1 L. Ed. 2d 493 (emphasis added), then the carrier is answerable in damages even if the extent of the [injury] [***34] or the manner in which it occurred" was not "[p]robable" or "foreseeable." *Gallick*, 372 U.S. at 120-121, 83 S. Ct. 659, 9 L. Ed. 2d 618 (internal quotation marks

> omitted); *see* 4 F. Harper, F. James, & O. Gray, Law of Torts § 20.5(6), p. 203 (3d ed. 2007); 5 Sand 89-21
>
> *McBride*, 131 S.Ct. at 2643.

Under the FELA, a plaintiff is not required to establish that the railroad's negligence was an immediate cause for the injury sustained. Under the FELA, this argument of immediacy is irrelevant. *Rogers*, 352 U.S. at 503; *McBride*, 131 S.Ct. at 2638. Under *Rogers* and *McBride*, Virgilio M. Caling simply must establish that Defendant's negligence played any part, even the slightest in bringing about or causing his injuries.

A railroad may be liable under the FELA for the failure to provide a safe workplace when it knew or should have known of a potential hazard in the workplace and yet fails to exercise reasonable care to inform and protect its employees. *Gallose v. Long Island R.R.,* 878 F.2d 80, 84-85 (2nd Cir 1989). Reasonable care is determined in the light of whether or not a particular danger was foreseeable. *Gallick,* 372 U.S. at 117. This is a question of fact for a jury. *Gallose,* 878 F.2d at 85. Thus, the question for the jury will be whether the railroad knew or should have known there was a possibility that there would be a vagrant who could attack or otherwise interfere with an employee that could result in injury. *Gallose*, 878 F.2d 80 at 85. These types of foreseeability questions are jury questions under the FELA. *Id*. See also *Gallick v. Baltimore & Ohio R. Co.,* 372 U.S. 108, 113-114 (1963).

In *Gallick*, the injured employee claimed that his gangrene injuries were caused by an insect bite that because infected and that the railroad was responsible because he worked around stagnant pools of water and had seen insects there. The matter proceeded to trial and the jury found that the insect bite had been caused by the employer's breach of duty to provide a reasonably safe workplace. The court upheld the verdict and stated the issue before the jury was whether an insect could have come from or been attracted by the pool of stagnant water. *Gallick v. Baltimore & Ohio R. Co.,* 372 U.S. 108 (1963).

Foreseeability has a more nuanced meaning under FELA law than a normal state law-based tort. While reasonable foreseeability is an essential ingredient of a FELA claim, the fact that the foreseeable danger was from intentional or reckless or even criminal misconduct is irrelevant, the railroad has a duty to make reasonable provisions against it. *Harrison v. Missouri Pacific Railroad Co.,* 372 U.S. 248 (1963). In this case, the foreseeable danger was a vagrant, loitering at the train station, would attack an NJT employee. Under the FELA, the test of foreseeability does not require the railroad as the negligent entity to have foreseen the injury in the precise form in which it occurred. Rather, it is sufficient if a reasonable person could have foreseen that an injury might occur. *Mullahon v. Union Pacific Railroad Co.,* 64 F.3d 1358 (9th Cir.

1995). Could a jury find that a vagrant allowed to loiter at a train station could attack an employee possibly causing injury? The answer is yes.

Tellingly, even while claiming that it is impossible to foresee the criminal actions of a third party at the Broad Street Station, New Jersey Transit produced police reports/paperwork regarding over sixty (60) separate incidents investigated by the New Jersey Transit Police in the two years preceding Plaintiff's attack and injury, for crimes ranging from public smoking/drinking to aggravated assault. (156a-157a; 276a – 757a). Deborah Bailey, the individual who struck Plaintiff, was cited approximately thirteen (13) months before attacking Mr. Caling for disorderly conduct by the New Jersey Transit Police at Newark Broad Street Station. (765a). In June 2016 a different conductor was punched in the face by a passenger at the same station. (758a). While the majority of the citations issued at Newark Broad Street Station are for non-violent crimes, Dr. Gotham speaks to how non-violent crimes can escalate into violence at p. 35-36 of his report. He states:

> Importantly, disorder and property crimes can pose a risk of violent physical harm to people. Nonviolent crimes like panhandling, disorderly conduct, and criminal trespassing bring the theoretical potential for physical harm given that these crimes can sometimes escalate to violent crimes. Incidents involving disorderly conduct and panhandling, for example, may turn violent if a confrontation ensues.
>
> (156a).

New Jersey Transit's own records overwhelmingly show that they had notice of ongoing criminal activity at the Broad Street Station. NJT Police Officer Joseph Ragazzo testified that the Broad Street Station was known for drug activity the entire 19 years he had been a NJT police officer:

> Q. Okay. Does Broad Street Station have a you know, a reputation for violence or for drugs or anything at all, any type of you know, this is a place that we need to keep our eye on, anything like that?
>
> A. Traditionally a long time. There's drug activity in and around that station, it's been known for people to utilize our trains to try to loiter, to obtain drugs, to maybe use the bathroom, it's been a constant, my whole career.

(239a).

The NJT Police Department was not the only arm of NJT with notice of assaults at the Broad Street Station. Assistant Superintendent Anthony Arroyo also testified that he had heard about assaults at the station by simply talking to various train crews. (253a). All this evidence shows that NJT had notice of criminal activity at the Broad Street Station, including previous violent acts against their employees. The trial court erred when it determined that NJT could not have foreseen this incident, foreseeability was for a jury to determine.

III. Criminal conduct of a third party can still give rise to a duty under the FELA, the Trial Court finding such conduct unforeseeable was error. (T16)

Railroads have long been held liable under the FELA for criminal attacks on employees by third persons. In *Syverson v. Consolidated Rail Corp.*, 19 F.3d 824 (2d Cir.1994) it was determined that a genuine issue of fact existed for a jury as to whether the railroad was negligent by allowing vagrants to congregate in an area of weeds around a railyard. The plaintiff was sitting in his work vehicle completing paperwork when he was stabbed multiple times and bitten by a vagrant. The district court initially granted Conrail's motion for summary judgment saying the unprovoked third-party attack was unforeseeable. In grating summary judgment, the district court pointed out that even plaintiff Syverson, who, like Mr. Caling, actually spoke to his assailant before the attack, had no "reason to anticipate the danger that this man posed, or that an assault was about to occur." *Syverson*, 19 F.3d at 827.

However, the Second Circuit found that the district court applied an incorrect standard, more appropriate for a state law negligence claim than for an FELA action. *Syverson,* 19 F.3d at 828. The Second Circuit continued, "under a statute where the tortfeasor is liable for death or injuries in which his negligence played any part, even the slightest…the case must not be dismissed at the summary judgment phase unless there is absolutely no reasonable basis

for a jury to find for the plaintiff." *Id.* Conrail was aware of previous criminal incidents involving these transients, and ultimately the Second Circuit determined there was enough evidence for a jury to consider whether Conrail provided a reasonably safe workplace.

In addition to *Syverson*, liability was found in actions with ties to the railroad far more removed than the instant action. Foreseeability in a FELA case was found in *Dalka v. Wisconsin Central, Ltd.*, 811 N.W.2d 834 (Ct.App.Wis.2012). The plaintiff conductor was working in a railyard when a co-worker's personal vehicle was stolen out of the parking lot. The car thief (later found to also be intoxicated) then drove the car onto the rail yard and directly at the plaintiff, who jumped out of the way and injured himself on either a rail or railroad tie. The railroad argued it was not foreseeable that an intoxicated third party would steal a car, drive onto railroad property, and injure the plaintiff. The appellate court determined that evidence of trespassers, the fact that crimes were previously committed by the trespassers, and a lack of security cameras created a genuine issue of material fact for the jury.

Another case demonstrating the low bar for foreseeability in FELA matters is *Burns v. Penn Central Co.*, 519 F.2d 512 (2d Cir.1975). In *Burns*, a brakeman was riding in an open doorway as the train approached a train station and was *shot and killed by a sniper*. Prior to the employee being shot, there had

been reports of three stonings of passenger cars within three blocks of the slaying, and four additional stonings within 24 blocks. The Second Circuit reversed the initial grant of summary judgment, "Based on the railroad's actual knowledge of stonings in the vicinity in recent months and its constructive (and indubitably actual) knowledge of the generally dangerous conditions prevailing in the neighborhood in which the fatality transpired, the jury would have acted well within its authority under the FELA by returning a verdict for Mrs. Burns." *Burns*, 519 F.2d at 514-15.

The instant matter is analogous to the facts from *Syverson*, above. Mr. Caling's attacker approached him and asked for a cigarette calmly before leaving, only to return and strike him from behind. The trial court found this unforeseeable, stating that NJT could not be held liable for "the impulsive unpredictable actions of a mentally disturbed person." (T16). FELA caselaw explicitly shows otherwise, however the trial court ignored the more relaxed foreseeability standards under the FELA and erroneously granted summary judgment.

CONCLUSION

In sum, for the reasons and law set forth above, it is respectfully urged that the Order dated August 4, 2023 granting summary judgement be vacated and the matter remanded for trial on all issues.

Respectfully submitted,

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VIRGILIO M. CALING	:	
	:	SUPERIOR COURT OF NEW JERSEY
Plaintiff/Appellant,	:	APPELLATE DIVISION:
	:	App. Div. Docket No.: A-000142-23
	:	
v.	:	On Appeal From:
	:	
	:	**SUPERIOR COURT OF NEW JERSEY**
NEW JERSEY TRANSIT RAIL	:	**LAW DIVISION**
OPERATIONS, INC.,	:	**ESSEX COUNTY**
	:	Docket No.: ESX-L-000319-21
	:	
Defendants/Respondents.	:	*Civil Action*
	:	**Sat Below:**
	:	**Hon. Jeffrey B. Meacham, J.S.C.**
	:	
	:	
	:	

BRIEF IN OPPOSITION TO PLAINTIFF/APPELLANT'S APPEAL

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TABLE OF JUDGMENTS

Respondents adopt and incorporate Appellant's Table of Judgments and offer no supplement.

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RULES AND STATUTES

Preliminary Statement

In the present matter, Defendants/Respondents, New Jersey Rail Operations, Inc. ("NJT" or "Respondents") are accused of negligently causing an injury to Plaintiff/Appellant Virgilio Caling ("Caling" or "Appellant"), an employee. Appellant was waiting to board a New Jersey Transit train in Newark Broad Street Station when he was suddenly and unexpectedly attacked by an emotionally disturbed homeless woman (later identified as Deborah Bailey, "Bailey"). Appellant was knocked down by the blow, but quickly recovered and attempted to confront Bailey. Within minutes of the attack, two New Jersey Transit Police Officers responded to the scene. The officers intervened and prevented Appellant from confronting Bailey. Appellant did not press charges against Bailey. Witnesses to the incident, including the Appellant, have all agreed that, prior to the attack, Bailey was not acting unusually or aggressively towards Appellant or any other person. Bailey was taken from the scene by EMS and determined to be emotionally disturbed.

After the incident, Appellant boarded his train and returned to the Hoboken station where he reported the incident to his supervisor. Appellant was taken to Hoboken Hospital where he received an x-ray and a CT scan. Neither

test showed anything significant, and Appellant was released from the hospital that same day.

The attack on Appellant was the result of the unprovoked and unpredictable actions of an emotionally disturbed person. The nature and manner of the attack was completely unprecedented and happened despite an active police presence at the station. NJT takes all necessary precautions to protect all of its employees, including Appellant. Nothing NJT did makes it responsible for the unpredictable, out of control actions of an emotionally disturbed person. At both the Trial Court and in the present appeal Appellant has failed to show how any negligence on the part of NJT that led to any injury. Appellant has merely pointed out alleged problems that are completely unrelated to the matter at hand. Importantly, Appellant has not shown how any of these alleged problems, even if proven, led to Appellant's injury. It is not enough to show a problem and an injury, Appellant must also link the two, and he has failed to do that. The trial court rightly considered the facts at summary judgment and determined that Appellant could not reasonably prevail.

Procedural History

The present matter was initiated by way of a Complaint filed by Appellant on January 14, 2021 alleging a cause of action under the Federal Employers'

Liability Act, 45 U.S.C. § 51 ("FELA"). An answer was filed by NJT on April 21, 2021. Discovery closed on October 23, 2022.

The parties attended Non-Binding Arbitration on April 18, 2023. Respondents filed for trial de novo on May 12, 2023. On July 6, 2023, Respondents filed a motion for summary judgment. Oral Argument on that motion was held before the Honorable Jeffery B. Beacham, J.S.C. on August 8, 2023. That same day, Judge Beacham issued his order granting the motion and dismissing Appellant's complaint with prejudice.

Counterstatement of Facts

The facts relevant to the current appeal are as follows:

The incident that is the subject matter of the present case took place on January 19, 2018. (Pa 10) On that date, Appellant was employed by NJT as an electrician, working out of Hoboken New Jersey. (Pa 53) On the date in question, Deborah Bailey was a homeless woman present in the NJT Newark Broad Street Station. (Pa 120) At approximately 12:11 PM, Appellant was waiting on the platform to board a train to Hoboken.(Pa54) Bailey approached Appellant and asked him for a cigarette. (Id) Appellant responded to Bailey, telling her he did not smoke. (Id.) Bailey walked away from Appellant. (Id.) Shortly thereafter, Bailey punched Appellant from behind, in the head. (Pa 55) Appellant fell forward on to the train. (Id.) A very short time after falling, Appellant stood up

and "tried to get [Bailey]" By that time, two New Jersey Transit Police Officers had interceded. (Id.)

Prior to the incident, Appellant did not observe Bailey to be acting unusually or in a threatening manner. (Id.) The incident was witnessed by the NJT conductor who, likewise, did not observe any threatening behavior from Bailey prior to the incident. (Pa 82) Appellant had seen Bailey at the station before, but never reported any violent or unusual behavior about her to anyone. (Pa 55) Appellant did not file charges against Bailey. (Pa 58)

After the incident, Bailey was removed from the station by EMS and was determined to be "emotionally unstable." (Pa 109) After the incident, Appellant boarded his train to Hoboken. (Pa 58) Upon arrival in Hoboken, Appellant reported the incident to his supervisor. (Id.) Appellant then went to Hoboken Hospital for treatment. (Pa 59) Appellant was given an x-ray and a CT scan at the hospital. (Id.) Neither scan showed anything significant. (Id.)

Legal Argument

Standard of Review

When reviewing a grant of summary judgment, the Appellate Court uses the same standard as the trial court. Globe Motor Co. v. Igdaley, 225 N.J. 469, 479 (2016). A party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories and admissions on file, together with

affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law." R. 4:46-2. Although a non-moving party is entitled to have the evidence reviewed "in the light most favorable to" him, summary judgment is appropriate if "the evidence is so one-sided that one party must prevail as a matter of law." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (App. Div. 1995).

The Appellate Court is called to first decide whether there was a genuine issue of fact, and if there was not, then it must decide whether the lower court's ruling on the law was correct. Walker v. Alt. Chrysler Plymouth, 216 N.J. Super. 255, 258 (App. Div. 1987). In reviewing, the Appellate Court may only consider evidence that was also submitted to the Trial Court. Middle Dep't Insp. Agency v. Home Ins. Co., 154 N.J. Super. 49, 56 (App. Div. 1977), certif. denied, 76 N.J. 234 (1978).

POINT I THE TRIAL JUDGE CORRECTLY GRANTED SUMMARY JUDGMENT AS APPELLANT HAS NOT ESTABLISHED ANY NEGLIGENCE ON THE PART OF NJT.

The Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60 provides, in pertinent part, that "[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 or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier....” 45 U.S.C. § 51. FELA is not a workers compensation statute. Under FELA, an employer can only be found liable where negligence resulted in an injury, mere injury alone will not result in liability. See Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 543 (l994) (“We have insisted that FELA ‘does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.’”) (quoting Ellis v. Union Pac. R.R. Co., 329 U.S. 649, 653 (1947)); See also, Polizzi v. New Jersey Transit, 364 N.J.Super. 323, 332 (App. Div. 2003).

When presenting a claim under FELA, a plaintiff is “required to prove the traditional common law elements of negligence: duty, breach, foreseeability, and causation.” Robert v. Consolidated Rail Corp., 832 F.2d 3, 6 (1st Cir. 1987)(see also Stevens _v. New Jersey Transit Rail Operations, 356 N.J.Super. 311, 319 (App. Div. 2003). The causation standard under FELA is a relaxed standard. Rather than the common-law proximate cause standard, a FELA Plaintiff need only demonstrate that the railroad's negligence played a part, no matter how small, in bringing about the injury, or, in other words, that the railroad's negligence played any part, even the slightest, in producing the injury. CSX Transp., Inc. v. McBride, 564 U.S. 685, 695-96 (2011). If negligence is proven

and is shown to have played any part in producing an injury, the carrier is answerable in damages even if "the extent of the [injury] or the manner in which it occurred" was not "[p]robable" or "foreseeable." McBride, 564 U.S. at 703-04 (citations omitted).

Railroads have "a duty to furnish employees with a 'reasonably safe place in which to work and such protection [against the hazard causing the injury] as would be expected of a person in the exercise of ordinary care under those circumstances.'" Aparicio v. Norfolk & Western Ry. Co., 84 F.3d 803, 810 (6th Cir. 1996) (quoting Urie v. Thompson, 337 U.S. 163, n.16 (1949). The phrase "reasonably safe place to work ... does not mean they have an absolute duty to eliminate all dangers..." Raudenbush v. Baltimore & Ohio R.R., D.C., 160 F.2d 363, 367 (3rd Cir. 1947). The scope of the railroad's duty is limited to hazards it can foresee. Gallose v.Long Island R.R. Co., 878 F.2d 80, 85 (2nd Cir. 1989).

"In FELA cases, the burden is on the plaintiff to produce evidence of employer negligence." Stevens, 356 N.J. Super. at 318 (citing Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500, 508 (1957). In short, plaintiff must come forward with evidence to establish the existence of an element essential to his case. In so doing, he must establish negligence under the FELA. His task is relatively simple: to show that defendant's negligence played any part, even the slightest [,] in producing the injury for which damages are sought. Having said

that, however, it is well to remember that speculation, conjecture and possibilities are still not enough. Id. (quoting Beeber v. Norfolk Southern Corp., 754 F.Supp. 1364, 1368 (N.D.Ind.1990)(citations omitted in the original). The essential element of reasonable foreseeability in FELA actions requires proof of actual or constructive notice to the employer of the defective condition that caused the injury in order to satisfy the element of breach. Sinclair v Long Island R.R., 985 F.2d 74, 76-77 (2d Cir. 1993)(citations omitted).

The Third Circuit's interpretation of FELA is consistent with the above interpretations "before [an] employer can be charged with negligently failing to provide a safe workplace [in violation of FELA], he must have actual or constructive knowledge of the defective condition." See Sano v. Pa. R. Co., 282 F.2d 936, 938 (3d Cir. 1960); see also De Pascale v. Pa. R. Co., 180 F.2d 825, 827 (3d Cir. 1950) (stating that "proximate cause and knowledge" are vital elements of a FELA claim); see also Wisowaty v. Port Authority Trans-Hudson Corp., 2013 WL 103385 at *3 (D.N.J. 2013) ("Most other circuits are in agreement and 'equate foreseeability with notice, either actual or constructive.'") (citations omitted).

Plaintiff proposes that Newark Broad Street Station ("NBS") is unsafe, and prone to criminal activity based on an "apples and oranges" analogy. His

own expert opines that "the platforms," the location of every event that forms the basis of Appellant's complaint, "offer ample amounts of surveillance for patrons." (Pa 142) He then goes on to offer an evaluation of the "portal beneath the rail lines." And declaring these areas unsafe because of low lighting, low ceilings, and blind corners. This expert claims that these conditions afford potential criminals the opportunity to commit premeditated crimes in these areas. (Id.) That is not what happened here. The incident in question did not take place in the portal beneath the rail lines, and it was not the result of the premeditated actions of a person with criminal intent. It was the result of the impulsive, unpredictable actions of a mentally disturbed person. The implication that her actions were the result of poorly lit hallways in another part of the building, or that convex mirrors downstairs would have somehow prevented this incident is a stretch of the imagination that borders on ridiculous. This is analogous to saying that poor visibility at an intersection is likely to cause someone to drive too fast on a different street.

Appellant also relies on the 14 photographs attached to his expert report that purport to show "problem areas." (PA 143-44,148-153) What is noticeably absent from these photographs is any pictures of the actual scene of the incident. This only leads to the logical conclusion that Appellant's expert could not find

any "problems" at the scene of the incident and had to look elsewhere to find evidence to support his preconceived conclusion.

Appellant must show that NJT's negligence led to his injury. It is not enough to just show that there was an injury. Nor is it enough to just find an alleged flaw in the building or the neighborhood. Appellant must connect the two. Even accepting all of Appellant's concerns about the building and neighborhood surrounding NBS Station, Appellant has not shown how any of these concerns led to any injury.

Appellant then focuses on NJT's alleged failure to follow the American Public Transportation Association ("APTA") guidelines. Appellant claims that NJT's failure to follow APTA Guidelines somehow constitutes negligence that caused his injuries. It should first be noted that Appellant provides no authority to show that NJT is under any obligation to follow these guidelines. Also, Appellant fails to indicate any specific provision of these guidelines that NJT has violated, or how that violation led to Appellant's injury. Appellant's expert merely reaches the broad, unsubstantiated conclusion that since NJT does not consciously follow APTA guidelines, they must be in violation of those guidelines, and because Appellant was injured, NJT must be negligent. There is nothing in this report to support that conclusion, and it is nothing more than a net opinion (see, Townsend v. Pierre, 221 N.J. 36 (2015) An expert must provide

the "why and wherefore" to support an opinion. Unsupported conclusions constitute inadmissible "net opinion").

Appellant's expert's opinions regarding NJT's security procedures are likewise unsupported by the facts. Appellant's expert mentions that he "has not seen evidence" of NJT's security protocols. (Pa 161) This is not because such procedures do not exist, but because Appellant failed to explore the procedures in depositions and discovery (see Pa 225). NJT performs regular evaluations of crime reports and statistics and assigns its officers accordingly. As the statistics show, crime, violent crime in particular, decreased considerably at NBS Station over the years leading up to this incident. NJT's policies are obviously effective at deterring and responding to criminal activity.

POINT II-THE TRIAL COURT CORRECTLY RULED THAT APPELLANT HAS SHOWN NO EVIDENCE OF FORESEEABILITY.

"Claimants must at least offer some evidence that would support a finding of negligence." Sinclair v. Long Island R.R., 985 F.2d 74, 76-77 (2d Cir. 1993) (citations omitted). Liability under FELA arises not from an injury, but from the negligence which causes the injury. Brady v. Southern Ry. Co., 320 U.S. 476, 483 (1943).

Appellant now asks the question, "[c]ould a jury find that a vagrant [sic] allowed to loiter at a train station could attack an employee possibly causing

injury?" (Pb 16). Appellant first overlooks a critical point. NBS is a public transit station. By law, NJT cannot remove a person from a station just because that person is or appears to be homeless. Nor can they bar a person from a station without a court order. (Pa 95) There is no reasonable way that a single disorderly conduct citation, 13 months prior, would have allowed NJT to obtain a court order barring Bailey from the building or allowed them to remover her on sight.

Appellant has brought up more than 60 "criminal" incidents over the 2 years prior to this incident and includes such unrelated offenses as smoking and open container violations. (Pa 157) Even with the net cast this wide, it still averages one alleged offense approximately every two weeks. Looking, more appropriately, at incidents of violence, Appellant can only cite 10 examples of violent incidents over the prior two years. Of those 10 incidents, only three took place in the year prior to this incident. (Pa 159) This works out to one approximately every four months. These numbers show that despite being a busy commuter hub, there is very little crime at NBS, and that crime had decreased significantly in the years leading up to this incident.

Once again, in citing these statistics, Appellant cannot point to any negligence on the part of NJT regarding these statistics. Correlation does not equal causation. Appellant is advocating for a standard whereby NJT would be strictly liable for any third-party criminal activity on any of its properties. It is

undisputed that this incident was the result of the spontaneous, unpredictable actions of an emotionally disturbed person. Appellant interacted with this person moments before the incident and saw no signs of violent behavior. The NJT Police were on the scene within minutes of the incident. Appellant has not identified a single flaw in the safety of the platform at NBS station, nor has he identified a single flaw in NJT's policies or procedures that led to his injuries.

POINT III- THE TRIAL COURT CORRECTLY RULED THAT NJT CANNOT BE HELD RESPONSIBLE FOR BAILEY'S UNPREDICTABLE AND UNFORESEEABLE ACTIONS.

Appellant cites to Syverson v. Consol. Rail Corp., 19 F.3d 824 (2d Cir. 1994)t his case is easily distinguished from the matter at hand. The incident in Syverson was the result of an assault by someone living in an illegal camp on railroad property. The railroad was faulted for being aware of the camp and failing to clear the residents off their property. As was noted above, NJT had no authority to remove or bar Bailey from NBS. NJT cannot be found liable in the same manner as the defendant in Syverson.

The Trial Court never held that a railroad could not be found liable for the criminal acts of a third party. Rather, the Court held that NJT could not be held liable for Bailey's actions in this matter. The Trial Court properly evaluated the case and was correct in granting summary judgment to NJT.

CONCLUSION

The Trial Court properly reviewed the law and facts in the present matter and was correct in granting summary judgment in favor of New Jersey Transit. The Appellate Court should affirm that well-reasoned ruling.

Respectfully submitted,

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Attorneys for
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Dated: December 13, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No.: A-000142-23 T1

VIRIGLIO M. CALING
Plaintiff/Appellant,

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.
Defendant/Respondent.

APPELLANT'S REPLY BRIEF

On Appeal from Final Judgment of the
Superior Court, Law Division, Essex County

Sat Below:
Hon. Jeffrey B. Beacham, J.S.C.
Superior Court of New Jersey, Essex County
Law Division, Civil Part
Docket No. ESX-L-00319-21
Motion for Summary Judgment argued August 8, 2023

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Submitted December 27, 2023

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INTRODUCTION

New Jersey Transit's (NJT) response brief fails to acknowledge that Plaintiff has produced evidence of foreseeability and negligence in this matter. This evidence created a genuine question of material fact, and rather than allowing a jury to decide if such evidence is sufficient, the trial judge supplanted the jury and made those determinations himself. While NJT argues that the evidence is insufficient, making that determination is the province of the jury, not the trial judge. Mr. Caling has presented enough evidence to show the existence of a genuine question of material fact for a jury, and summary judgment was improper.

I. APPELLANT HAS PRODUCED EVIDENCE OF NEGLIGENCE, CREATING A QUESTION FOR THE JURY.

As outlined in great detail in Mr. Caling's initial filing, the evidence of negligence required to sustain an FELA matter is vastly different than what would be required for a state-law negligence claim. "Consequently, 'the quantum of evidence required to establish liability in [a] FELA case is much less than in an ordinary negligence case.'" *Kapsis v. Port Auth. of New York and New Jersey*, 313 N.J. Super. 395, 403, 712 A.2d 1250 (App.Div.1998).

Under the FELA, "the role of the jury is significantly greater…than in common law negligence actions" and "the right of the jury to pass upon the

question of the employers' fault and causation must be most liberally viewed." *Johnannessen v. Gulf Trading and Transp. Co*., 633 F.2d 653, 656 (2d Cir. 1980); *Gallose v. Long Island RR*, 878 F. 2d 80, 84 (2d Cir 1989). Indeed, "trial by jury is part of the remedy." *Johnannessen, 633 F.2d at 656.*

Plaintiff has produced expert opinion which outlines in detail the ways NJT has failed to ensure that the Broad Street Station is a reasonably safe place to work. Dr. Gotham opined that poor maintenance of the facility attracts crime. (147a). NJT admitted to not following industry standards, failing to adhere to the American Public Transportation Association recommendations, which Dr. Gotham also opines fell below the standard of care. (767a; 162a).

Both Mr. Caling and NJT police officers testified that vagrants are known to loiter at the Broad Street Station, and illicit drug use at that location is a problem and had been for years. (55a; 239a).

This evidence creates a genuine issue of material fact for the jury. The trial judge erroneously invaded the province of the jury by determining that this was not evidence of negligence, rather than recognizing the presentation of this evidence was a question for the jury.

II. APPELLANT PRODUCED EVIDENCE THAT HIS INJURY WAS FORESEEABLE, CREATING A QUESTION FOR THE JURY.

A railroad may be liable under the FELA for the failure to provide a safe workplace when it knew or should have known of a potential hazard in the workplace and yet fails to exercise reasonable care to inform and protect its employees. *Gallose v. Long Island R.R.,* 878 F.2d 80, 84-85 (2nd Cir 1989). Reasonable care is determined in the light of whether or not a particular danger was foreseeable. *Gallick,* 372 U.S. at 117. This is a question of fact for a jury. *Gallose,* 878 F.2d at 85. Thus, the question for the jury will be whether the railroad knew or should have known there was a possibility that there would be a vagrant who could attack or otherwise interfere with an employee that could result in injury. *Gallose*, 878 F.2d 80 at 85. These types of foreseeability questions are jury questions under the FELA. *Id*. See also *Gallick v. Baltimore & Ohio R. Co.,* 372 U.S. 108, 113-114 (1963).

NJT has long had notice of the conditions at the Broad Street Station which could produce an injury such as Mr. Caling's. The voluminous criminal records NJT has produced during litigation (156a - 157a; 276a - 757a), the fact that another NJT employee was punched in the face at the same station (758a), and Dr. Gotham's testimony about non-violent crimes escalating to violent confrontations are all evidence of foreseeability. (156a).

NJT Police officer Joseph Ragazzo testified that the Broad Street Station was known for drug activity for the entirety of his 19-year career. (239a). The dangerous condition of Broad Street Station was no secret, assistant superintendent Anthony Arroyo also testified that he knew of assaults simply by talking to the various train crews. (253a).

Again, all of this was evidence of foreseeability which created a genuine issue of material fact for a jury to decide. The trial judge erroneously determined that despite these facts, Mr. Caling's injury was not foreseeable, again invading the province of the jury.

III. IT IS BLACK LETTER FELA LAW THAT A RAILROAD CAN BE LIABLE FOR THIRD PARTY CRIMINAL ACTIONS.

In their response, NJT focuses on the facts of the *Syverson* case, in which a railroad employee was stabbed by a vagrant in a rail yard, an area generally not open to the public. They aver that *Syverson* is inapplicable because Mr. Caling was attacked in a public space. However, NJT completely ignores the fact pattern of *Burns v. Penn Central Co.*, 519 F.2d 512 (2d Cir.1975).

In *Burns*, a brakeman was riding in an open doorway as the train approached a train station and was *shot and killed by a sniper*. Prior to the employee being shot, there had been reports of three stonings of passenger cars within three blocks of the slaying, and four additional stonings within 24 blocks. The Second Circuit reversed the initial grant of summary judgment, "Based on

the railroad's actual knowledge of stonings in the vicinity in recent months and its constructive (and indubitably actual) knowledge of the generally dangerous conditions prevailing in the neighborhood in which the fatality transpired, the jury would have acted well within its authority under the FELA by returning a verdict for Mrs. Burns." *Burns*, 519 F.2d at 514-15.

There is no indication that the railroad even knew where the sniper was in the *Burns* case, however the 2nd Circuit still determined that summary judgment was inappropriate. Just as in the instant matter, the "generally dangerous conditions" of the neighborhood, and the railroad's knowledge of those conditions, precluded summary judgment. Dr. Gotham has provided ample evidence of the conditions of the station itself along with the area surrounding the station, and how that contributes to the unsafe conditions for NJT employees. (130a – 165a).

Under the FELA, a railroad can be held liable for the criminal actions of a third party, and it was for a jury to determine whether NJT was negligent for the actions of Ms. Bailey in this matter. The trial judge erred by invading the province of the jury and determining that NJT could not be held liable for the actions of Ms. Bailey.

CONCLUSION

In sum, for the reasons and law set forth above and in appellant's initial filing, it is respectfully urged that the Order dated August 4, 2023 granting summary judgement be vacated and the matter remanded for trial on all issues.

Respectfully submitted,

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