

IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 19-0343

ROBERT DANNELS,
Plaintiff/Appellee,

v.

BNSF RAILWAY CO.,
Defendant/Appellant.

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, Cause No. BDV-14-001
Hon. Katherine Bidegaray

REPLY BRIEF OF DEFENDANT/APPELLANT BNSF RAILWAY CO.

Deepak Gupta
Lark Turner
GUPTA WESSLER PLLC
1900 L St. N.W., Suite 302
Washington, DC 20036
(202) 246-0572
deepak@guptawessler.com

Dennis P. Conner
Keith D. Marr
CONNER & MARR, PLLP
P.O. Box 3028
Great Falls, MT 59403
(406) 727-3550
dennis@connermarr.com
keith@connermarr.com

Attorneys for Plaintiff/Appellee

Andrew S. Tulumello
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, DC 20036
(202) 955-8500
atulumello@gibsondunn.com

Robert J. Phillips
GARLINGTON, LOHN & ROBINSON, PLLP
350 Ryman Street
P.O. Box 7909
Missoula, MT 59807
(406) 523-2500
rjphillips@garlington.com

Jeff Hedger
HEDGER FRIEND, P.L.L.C.
2800 Central Avenue, Suite C
Billings, MT 59102
(406) 896-4100
jhedger@hedgerlaw.com

Attorneys for Defendant/Appellant

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. MONTANA’S BAD-FAITH LAWS ARE PREEMPTED BY FELA.....	2
A. FELA Is Comprehensive and Exclusive.....	2
B. Montana’s Bad-Faith Regime Impermissibly Interferes With FELA’s Framework.	8
1. Montana’s Regime Extends Liability Where FELA Does Not.....	8
2. Montana’s Regime Imposes Duties That FELA Does Not.....	11
3. Montana’s Regime Punishes FELA Employers For Asserting Defenses That FELA Authorizes.	14
4. Montana’s Regime Permits State-Law Collateral Attacks On Valid FELA Releases And Coerces Employers Into Settling On Unwarranted Terms.....	16
II. <i>REIDELBACH</i> DOES NOT SAVE <i>DANNELS</i> ’ CLAIMS.....	18
CONCLUSION.....	21

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Burlington N. R.R. Co. v. Strong</i> , 907 F.2d 707 (7th Cir. 1990)	7
<i>Chi., Milwaukee & St. Paul Ry. Co. v. Coogan</i> , 271 U.S. 472 (1926).....	2, 4
<i>Clark v. Burlington N., Inc.</i> , 726 F.2d 448 (8th Cir. 1984)	7
<i>Counts v. Burlington N. Ry. Co.</i> , 896 F.2d 424 (9th Cir. 1990)	10, 16
<i>Dice v. Akron, Canton & Youngstown R.R. Co.</i> , 342 U.S. 359 (1952).....	2, 14, 16
<i>DuBray v. Farmers Ins. Exch.</i> , 2001 MT 251, 307 Mont. 134, 36 P.3d 897	11
<i>Erie R.R. Co. v. Winfield</i> , 244 U.S. 170 (1917).....	2, 7, 13
<i>Farmer v. United Bhd. of Carpenters & Joiners of America</i> , 430 U.S. 290 (1977).....	20
<i>Formicove, Inc. v. Burlington N., Inc.</i> , 207 Mont. 189, 673 P.2d 469 (1983).....	20
<i>Geier v. Am. Honda Motor Co.</i> , 529 U.S. 861 (2000).....	6
<i>Gibson v. W. Fire Ins. Co.</i> , 210 Mont. 267, 682 P.2d 725 (1984).....	14
<i>Graf v. Cont'l W. Ins. Co.</i> , 2004 MT 105, 321 Mont. 65, 89 P.3d 22	9, 11, 12, 15
<i>Int'l Ass'n of Machinists v. Allen</i> , 904 F.3d 490 (7th Cir. 2018)	5

<i>Kelsaw v. Union Pac. R.R. Co.</i> , 686 F.2d 819 (9th Cir. 1982)	7
<i>Kimble v. Marvel Entm't, LLC</i> , 135 S. Ct. 2401 (2015).....	4
<i>Kurns v. R.R. Friction Prods. Corp.</i> , 565 U.S. 625 (2012).....	5
<i>Monessen Sw. Ry. Co. v. Morgan</i> , 486 U.S. 330 (1988).....	13
<i>N.Y. Cent. & Hudson R.R. Co. v. Tonsellito</i> , 244 U.S. 360 (1917).....	2, 4, 7, 8, 10, 11, 12
<i>N.Y. Cent. R.R. Co. v. Winfield</i> , 244 U.S. 147 (1917).....	2, 7, 15
<i>New Orleans & Ne. R.R. Co. v. Harris</i> , 247 U.S. 367 (1918).....	15
<i>Norfolk & W. Ry. Co. v. Liepelt</i> , 444 U.S. 490 (1980).....	14
<i>Reidelbach v. Burlington N. & Santa Fe Ry. Co.</i> , 2002 MT 289, 312 Mont. 498, 60 P.3d 418	18, 19, 20
<i>Ridley v. Guar. Nat'l Ins. Co.</i> , 286 Mont. 325, 951 P.2d 987 (1997).....	11
<i>Safeco Ins. Co. of Ill. v. Mont. Eighth Judicial Dist. Ct.</i> , 2000 MT 153, 300 Mont. 123, 2 P.3d 834	9
<i>Sinclair v. BNSF Ry. Co.</i> , 2008 MT 424, 347 Mont. 395, 200 P.3d 46	10, 16, 19
<i>South Buffalo Railway Co. v. Ahern</i> , 344 U.S. 367 (1953).....	2, 3, 5, 8, 9, 10
<i>State Oil Co. v. Khan</i> , 522 U.S. 3 (1997).....	4

<i>Toscano v. Burlington N. R.R. Co.</i> , 678 F. Supp. 1477 (D. Mont. 1987).....	11
--	----

Statutes

7 U.S.C. § 2910(a)	6
15 U.S.C. § 78bb(a)(1).....	6
42 U.S.C. § 9614(b)	6
45 U.S.C. § 53.....	11
45 U.S.C. § 55.....	7
45 U.S.C. § 58.....	6
45 U.S.C. § 60.....	18
46 U.S.C. § 4311(g)	6
Act of June 3, 1948, Pub. L. No. 80-584, 62 Stat. 296.....	6
Act of June 14, 1921, Pub. L. No. 67-15, 42 Stat. 27	6
Mont. Code Ann. § 33-18-201	12
Mont. Code Ann. § 33-18-201(6)	4
Mont. Code Ann. § 33-18-242(5)	12
Mont. Code Ann. § 33-18-242(6)(b).....	9, 18

Other Authority

Greg Munro, <i>Continuing Development of Insurance Bad Faith in Montana</i> , Tr. Trend (2007), https://scholarship.law.umt.edu/faculty_barjournals/13/	14
--	----

INTRODUCTION

Dannels invites this Court to repudiate more than 100 years of precedent from the Supreme Court of the United States that plainly preempts his claims. In Dannels' view, the Supreme Court's leading decisions in "*Erie*, *Winfield*, and *Tonsellito do not* reflect the state of FELA law." Resp. 23 (emphasis added). Dannels does not even cite, much less deal with, *Dice v. Akron, Canton & Youngstown R.R. Co.*, which dooms his claims. BNSF Br. 27-32. Dannels engages in gymnastics to parse and evade controlling Supreme Court precedent, but the unbroken line of Supreme Court authority preempting his claims cannot be refuted.

Moreover, much of Dannels' argument is devoted to the purportedly "devastating" consequences (Resp. 38-39) of faithfully following Supreme Court precedent here. But by holding Dannels' claims to be preempted, this Court will bring Montana into *conformity* with *all* of its sister states. In Montana, and only in Montana, a FELA defendant may not litigate a FELA case to a jury without facing the threat of follow-on "bad-faith" litigation. No other State permits this type of state-law intrusion into the FELA regime.

Dannels' fallback reliance on *Reidelbach v. Burlington Northern & Santa Fe Railway Co.* is equally unpersuasive. *Reidelbach* did not address many of the Supreme Court's seminal FELA preemption cases, and it rested on the absence of a FELA release by the plaintiff. Here, notwithstanding Dannels' claims about never

signing a FELA “waiver” (Resp. 15, 34, 37), it is undisputed that Dannels did *release* his FELA claims when he settled with BNSF. For that reason, *Reidelbach* does not apply here, and if this Court concludes that it does, then the case should be overruled.

ARGUMENT

I. MONTANA’S BAD-FAITH LAWS ARE PREEMPTED BY FELA.

A. FELA Is Comprehensive and Exclusive.

Shortly after FELA’s enactment, the U.S. Supreme Court held that FELA establishes a “comprehensive” and “exclusive” federal framework governing railroads’ liability for their employees’ on-the-job injuries. *N.Y. Cent. R.R. Co. v. Winfield*, 244 U.S. 147, 151 (1917); *Erie R.R. Co. v. Winfield*, 244 U.S. 170, 172 (1917); *N.Y. Cent. & Hudson R.R. Co. v. Tonsellito*, 244 U.S. 360, 361 (1917). Because it is comprehensive and exclusive, FELA does not “leave the States free to require compensation where the act withholds it.” *Winfield*, 244 U.S. at 150; *see also Chi., Milwaukee & St. Paul Ry. Co. v. Coogan*, 271 U.S. 472, 474 (1926) (“By [FELA], Congress took possession of the field of employers’ liability to employees in interstate transportation by rail; and all state laws upon that subject were superseded.”). Rather, “only if federal law controls can [FELA] be given that uniform application throughout the country essential to effectuate its purposes.” *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361 (1952).

Dannels has no credible response to this unbroken line of precedent. Instead, he says they have been silently overruled because *South Buffalo Railway Co. v.*

Ahern, 344 U.S. 367 (1953), “refined” and “retreated” (Resp. 9) from long-established FELA preemption doctrine. That is a serious misreading of *South Buffalo*.

South Buffalo affirmatively *cites* the Supreme Court’s decision in *Erie* to describe FELA’s preemptive scope. 344 U.S. at 372. It also confirms that Dannels’ claims are preempted. There, the defendant railroad *voluntarily elected* to proceed under New York’s workers’ compensation scheme, participated “voluntarily” in proceedings before the workers’ compensation board, made payments consistent with that board’s decision, and waited until a hearing after the employee’s death to *first* raise the question of FELA preemption. *Id.* at 368-69, 371.

In holding that New York’s scheme did not trench upon FELA’s exclusive remedy, *South Buffalo* emphasized that “New York permitted the Board to render compensatory awards for employees engaged in interstate commerce *only if the parties voluntarily had so agreed* and if there has been no overreaching or fraud.” 344 U.S. at 371 (emphasis added). “The difference between coercion and permission,” the Court explained, was “*decisive*.” *Id.* at 372 (emphasis added). If New York had *coerced* the railroad to participate, its scheme would have been preempted by FELA. *Id.*

Unlike the statute in *South Buffalo*, Montana’s bad-faith laws *do* impose the coercive power of the State. BNSF cannot “voluntarily” choose to opt out of

Montana’s bad-faith scheme. Montana law forces “self-insured” FELA defendants to advance wages and settle cases when liability is reasonably clear. Mont. Code Ann. § 33-18-201(6). The bad-faith regime, and all of its duties and obligations, are mandatory.

Unsurprisingly, Dannels does not point to a single court that has questioned the viability of the U.S. Supreme Court’s FELA preemption case law or attributed such grand significance to *South Buffalo*. Congress has never deemed it appropriate to amend FELA in light of these Supreme Court decisions. *See Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015) (“[S]tare decisis carries enhanced force when a decision ... interprets a statute.”). And if this Court believes *South Buffalo* to be such a radical inflection point in the history of FELA jurisprudence, it would be for the U.S. Supreme Court—not this Court—to overrule those prior precedents. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

In addition to the *South Buffalo* gambit, Dannels says this Court is free to disregard binding U.S. Supreme Court holdings because they purportedly do not fit into the doctrinal categories used in “current preemption” cases. Resp. 18. But that is wrong: The U.S. Supreme Court’s FELA preemption cases establish that FELA governs “the field of employers’ liability to employees in interstate transportation by rail,” *Coogan*, 271 U.S. at 474, and “when, how far, and to whom carriers shall be liable on account of accidents in the specified class,” *Tonsellito*, 244 U.S. at 361-

62. FELA “displaces any state law trenching on the province of the Act.” *South Buffalo*, 344 U.S. at 371. Even if the “field” is defined as narrowly as Dannels defines it (Resp. 24), there is no question that Montana’s bad-faith regime impairs the exercise of FELA rights and intrudes on the exclusive scheme FELA enacted. BNSF Br. 20-34.

Moreover, the continuing evolution of “current preemption doctrine” (Resp. 18) does not expunge Supreme Court cases from the books. The Court’s FELA precedents remain controlling. *See Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 638 (2012) (Kagan, J., concurring) (explaining that the Court’s early preemption cases “govern[] so long as Congress lets” them, even if they might not be decided “in the same way today”); *Int’l Ass’n of Machinists v. Allen*, 904 F.3d 490, 500 (7th Cir. 2018) (citing *Kurns* and holding that “the most relevant guides” to “the preemptive scope of the Taft-Hartley Act” are “the Supreme Court’s decisions under that statute,” not “general principles of preemption from other statutory contexts”). Preemption vernacular does not control; Supreme Court holdings do.

As an alternative to his position that controlling Supreme Court cases no longer “reflect the state of FELA law” (Resp. 23), Dannels also urges this Court to adopt unsupported textual interpretations of FELA. For example, Dannels opines that FELA contains an “*anti-preemption*” clause that expressly preserves state law.

Resp. 18 (citing 45 U.S.C. § 58). It is difficult to imagine a more untenable reading of FELA. Section 58 refers to any “Act or Acts of Congress”; it says nothing about state law. 45 U.S.C. § 58. Congress has regularly used identical language to refer exclusively to federal laws. *See, e.g.*, Act of June 3, 1948, Pub. L. No. 80-584, 62 Stat. 296, 296 (permitting Hawaii territorial legislature to issue bonds with approval by another “Act or Acts of Congress”); Act of June 14, 1921, Pub. L. No. 67-15, 42 Stat. 27, 27-28 (exempting transactions, after federal review, from “any Act or Acts of Congress making the proposed transaction unlawful”). And when Congress has enacted “savings clauses” with the intent of preserving state-law remedies, it has done so expressly.¹ Moreover, the U.S. Supreme Court has held that even a provision that expressly preserves state-law claims does not “foreclose or limit the operation of ordinary pre-emption principles.” *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000).

Dannels thus has zero textual or precedential support for asserting that “FELA is a floor, not a ceiling” (Resp. 8), and that States are free to impose more liability on railroads than FELA supplies. The U.S. Supreme Court flatly rejected that view

¹ *See, e.g.*, 15 U.S.C. § 78bb(a)(1) (Securities Exchange Act, discussing jurisdiction of the securities commission “of any State”); 42 U.S.C. § 9614(b) (CERCLA, discussing “Federal or State law”); 46 U.S.C. § 4311(g) (Federal Boat Safety Act, discussing liability “under State law”); 7 U.S.C. § 2910(a) (beef promotion law, discussing obligations under “the laws of the United States or any State”).

when Justice Brandeis' *dissent* advanced it in 1917. *See Winfield*, 244 U.S. at 163-64 (Brandeis, J., dissenting) (“The scope of the act is so narrow as to preclude the belief that thereby Congress intended to deny to the states the power to provide compensation or relief for injuries not covered by it.”). Dannels’ view is the long-repudiated Brandeis view, and adopting it would sanction not just Dannels’ claims here, but a host of state-law claims—strict liability, loss of services, loss of consortium—long held by the U.S. Supreme Court and other courts to be preempted by FELA. *See, e.g., Erie*, 244 U.S. at 172 (strict liability); *Tonsellito*, 244 U.S. at 361 (loss of services); *Kelsaw v. Union Pac. R.R. Co.*, 686 F.2d 819, 821 (9th Cir. 1982) (loss of consortium).

Dannels also contends (Resp. 19-20) that 45 U.S.C. § 55—which permits a FELA defendant to set off from a verdict any sum it has previously paid to a plaintiff—contemplates preservation of state-law claims. This argument is as unpersuasive as Dannels’ other textual arguments. Several courts have recognized that Section 55’s purpose is to permit railroads to set off certain benefits, such as a voluntary disability plan, paid to a claimant in the course of employment to compensate for on-the-job injuries. *See, e.g., Burlington N. R.R. Co. v. Strong*, 907 F.2d 707, 713 (7th Cir. 1990); *Clark v. Burlington N., Inc.*, 726 F.2d 448, 451 (8th Cir. 1984). Section 55 accords with *South Buffalo*—although a FELA defendant

may *elect* to provide pre-verdict benefits, a state law may not *compel* it to do so. *See* 344 U.S. at 372 (“The difference between coercion and permission is decisive.”).

FELA is comprehensive and exclusive. The Supreme Court has never “retreated” from that unqualified statement (Resp. 9), and it certainly has never overruled those cases. Dannels cannot escape the Supreme Court’s authoritative pronouncements regarding the preemptive scope of FELA.

B. Montana’s Bad-Faith Regime Impermissibly Interferes With FELA’s Framework.

Because FELA is the comprehensive and exclusive determinant of railroads’ liability in cases arising from on-the-job injuries, Montana’s bad-faith laws are preempted.

1. Montana’s Regime Extends Liability Where FELA Does Not.

Dannels has fully litigated and recovered on his FELA claim. His bad-faith action now seeks additional damages because of the way BNSF defended the FELA action. Because “Congress ha[s] declared when, how far, and to whom carriers shall be liable,” FELA “liability can neither be extended nor abridged by common or statutory laws of the state.” *Tonsellito*, 244 U.S. at 362. These damages therefore cannot be recovered under a state-law claim. *See* BNSF Br. 21-22 (collecting cases).

Dannels attempts to separate his bad-faith claim from his FELA claim, asserting (Resp. 29-31) that the two are analytically and temporally distinct. Yet he

omits any mention or explanation of Section 242(6)(b) of the UTPA, which provides that a party may not file a bad-faith claim “until after the underlying claim has been settled or a judgment entered in favor of the claimant.” Mont. Code Ann. § 33-18-242(6)(b). The FELA action is a legal predicate for the bad-faith claim and the bad-faith claim can never exist without the FELA action (unlike Dannels’ assault example, Resp. 30). Moreover, as Dannels’ complaint and this Court’s precedent demonstrate, resolution of the claims here will require an evaluation of the merits of Dannels’ FELA claim from the perspective of BNSF as it defended the FELA claim. CR 1 ¶¶ 7-17; *Graf v. Cont’l W. Ins. Co.*, 2004 MT 105, ¶¶ 15, 17, 321 Mont. 65, 89 P.3d 22. Far from being distinct and unrelated, Dannels’ ability to bring this lawsuit depends *entirely* on, and is inextricably linked with, the resolution of the underlying FELA suit. *See Safeco Ins. Co. of Ill. v. Mont. Eighth Judicial Dist. Ct.*, 2000 MT 153, ¶ 28, 300 Mont. 123, 2 P.3d 834.

In any event, asking whether the state-law claim is “analytically distinct” from a FELA claim is the wrong question. Unless a state-law claim is for workplace negligence, it will, by definition, always be “analytically” or temporally distinct from a FELA claim. The relevant question is whether the state-law claim “trench[es] on the province of the Act.” *South Buffalo*, 344 U.S. at 371. Here, even if the “bad faith” regime is “distinct” from an underlying FELA claim, it is *still* a state law that

interferes with the FELA regime because it *directly* regulates how a FELA defendant litigates and resolves FELA claims.

Dannels recognizes that if BNSF had “tried to coerce him into signing a written waiver of his rights [under FELA],” he could not bring a state-law claim because FELA releases are governed by federal law. Resp. 34 (citing *Sinclair v. BNSF Ry. Co.*, 2008 MT 424, 347 Mont. 395, 200 P.3d 46; *Counts v. Burlington N. Ry. Co.*, 896 F.2d 424 (9th Cir. 1990)). But the state-law fraud claims at issue in *Sinclair* and *Counts* were “distinct”—both analytically and temporally—from the underlying FELA claims. Yet both state-law claims were preempted by FELA because they “trench[ed] upon the province of the Act.” *South Buffalo*, 344 U.S. at 371.

Similarly, in *Tonsellito*, the U.S. Supreme Court rejected a plaintiff’s claim for “expenses incurred for medical attention to his son and loss of the latter’s services” because the railroad’s liability for the underlying accident was strictly defined by FELA. 244 U.S. at 361. Dannels suggests that *Tonsellito* involved “whether FELA preempted a tort-law cause of action arising out of the same injury and set of circumstances that form the basis of a FELA action.” Resp. 31. But James Tonsellito’s injuries for the loss of his son’s services, by definition, arose only *after* the underlying FELA injury, and they certainly were “analytically” and temporally distinct from his son’s underlying FELA claim. The Court nonetheless considered

it “clearly settled” that “Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the state.” *Tonsellito*, 244 U.S. at 361-62.

That is precisely why the only federal court to address the question here has correctly concluded that FELA preempts bad-faith claims under the UTPA. *See Toscano v. Burlington N. R.R. Co.*, 678 F. Supp. 1477 (D. Mont. 1987). Dannels does not cite *Toscano*, but that court’s reasoning is correct: Because “FELA presents the exclusive remedy in all actions falling within the ambit of the Act,” FELA prohibits state law from “imposing liability upon [defendants] for actions relating to an FELA claim, when the liability is predicated upon a duty having its genesis in state law.” *Id.* at 1479.

2. Montana’s Regime Imposes Duties That FELA Does Not.

FELA expressly contemplates that liability will be determined through a jury trial. *See* 45 U.S.C. § 53. Yet Montana law imposes an obligation on FELA defendants to pay a plaintiff’s damages, if liability is reasonably clear, *before* a jury determines the defendant’s liability, *see DuBray v. Farmers Ins. Exch.*, 2001 MT 251, ¶¶ 14-15, 307 Mont. 134, 36 P.3d 897, 900; *Ridley v. Guar. Nat’l Ins. Co.*, 286 Mont. 325, 334, 951 P.2d 987, 992 (1997), and even if a jury *never* finds the defendant liable for the injuries, *see Graf*, ¶ 15. On top of that, although not

contemplated by FELA, Montana law requires the FELA employer to conduct a “prompt investigation” of the incident, engage in settlement negotiations, and offer to promptly settle the dispute at an “equitable” amount. Mont. Code Ann. § 33-18-201. Montana law even permits a FELA plaintiff to seek follow-on liability against a co-worker, as Dannels did here by suing claims adjuster Nancy Ahern. *See* CR 1. *But see Tonsellito*, 244 U.S. at 362.

Dannels contends (Resp. 34) that this imposition of additional duties is merely “hypothetical” because BNSF did not pay any damages prior to the verdict in his underlying FELA suit. But that is precisely the point. BNSF did not pay Dannels’ requested damages before the verdict or settlement, and Dannels is now claiming that BNSF’s failure to do so was a breach of its obligations under Montana law and entitles him to damages. CR 1 ¶ 20. This conflict is not “hypothetical”—it is the crux of this bad-faith action.

Dannels also emphasizes that the UTPA provides a defense where the defendant had a reasonable defense to liability in the FELA action. Resp. 27-28 (citing Mont. Code Ann. § 33-18-242(5)). But *FELA* does not compel pre-verdict recovery in *any* circumstance, regardless of the respective strength or reasonableness of each side’s arguments. And this “safe harbor” is illusory: no railroad can know whether a later jury will agree that its FELA defense was sufficiently “reasonable” to insulate it from “bad faith” liability. *See Graf*, ¶ 15. Most importantly, whether

a FELA defendant could comply with all of Montana law's demands in any particular case is irrelevant because Congress preempted all state laws in this "field." *Erie*, 244 U.S. at 172.

The additional duties Montana law imposes also squarely conflict with *Monessen Southwestern Railway Co. v. Morgan*, where the U.S. Supreme Court rejected the dissent's view that States are permitted under FELA to "compensate an injured rail employee fully for income lost prior to trial" by awarding "interest on [lost] income for the time the employee did not have use of it." 486 U.S. 330, 344 (1988) (Blackmun, J. dissenting). Because States cannot require FELA employers to provide retroactive compensation for interest on lost wages, *see id.* at 335-36 (majority opinion), it follows that they cannot require FELA employers to advance the wages *themselves* before the judgment. Dannels responds by saying (Resp. 33) only that *Monessen* addresses the measure of damages in a FELA action, while Montana's bad-faith regime does not. That is empty formalism. The key point is that Montana law imposes obligations on FELA defendants *in FELA litigation* that go beyond what FELA requires, and does so in a way that squarely conflicts with what the Supreme Court (in *Monessen* and other cases) has said States may not do. *See* 486 U.S. at 335.

Not only does the imposition of additional duties interfere with FELA's exclusive framework, it also disrupts the uniformity that FELA seeks to achieve.

See Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490, 493 n.5 (1980). Dannels is wrong to suggest (Resp. 4) that Montana’s bad-faith regime is not unique. Although other states permit third-party claims against *insurance companies*, in no other state does a *self-insured employer* face “bad-faith” liability for its handling of a personal-injury claim by an employee. *See* Greg Munro, *Continuing Development of Insurance Bad Faith in Montana*, Tr. Trend 25-26 (2007), https://scholarship.law.umt.edu/faculty_barjournals/13/. Indeed, Dannels’ parade of horrors (Resp. 38-39) is belied by the fact that Montana is the *only* state where FELA defendants face this array of additional duties, imposed *during* litigation of a FELA claim, not provided for in FELA itself. No other state permits this intrusion into the FELA framework.

3. Montana’s Regime Punishes FELA Employers For Asserting Defenses That FELA Authorizes.

In every State other than Montana, a FELA defendant is freely entitled to contest liability on the merits. But in Montana, the law *compels* a defendant to “settle in an appropriate case,” or face the threat of bad-faith liability. *Gibson v. W. Fire Ins. Co.*, 210 Mont. 267, 275, 682 P.2d 725, 730 (1984). As the Supreme Court expressly held in *Dice*, state law cannot burden the defenses an employer may raise in a FELA case. *Dice*, 342 U.S. at 361. Dannels does not address this point at all or cite *Dice*. And Dannels nowhere explains how the Montana-specific “bad faith” regime can be squared with *Dice* or the paramount principle that FELA is to be

implemented pursuant to uniform federal standards. *See Winfield*, 244 U.S. at 149 (“[T]he controlling law should be uniform and not change at every state line.”). That alone is sufficient reason to reverse.

Montana’s bad faith regime also undermines the FELA principle that negligence, as adjudicated by a jury, is a prerequisite to recovery. *See New Orleans & Ne. R.R. Co. v. Harris*, 247 U.S. 367, 371 (1918). Dannels erroneously asserts (Resp. 35) that this is a “repackaging” of a jury trial argument BNSF pursued below. But while there is a colorable argument that Montana law violates the right to a jury trial, that is not BNSF’s argument here. Rather, the point is that Montana’s bad-faith regime contravenes FELA’s comprehensive, negligence-based framework by permitting recovery even where there has been no finding of negligence by a jury. *See Graf*, ¶ 15 (holding that a defense verdict is not a complete defense to a bad-faith claim). FELA predicates liability on negligence, and Montana law intrudes on that framework.²

² BNSF’s request to exclude evidence of damages that FELA does not permit from the FELA trial (Resp. 35) is consistent with its views of the statute. Dannels cannot recover damages in his underlying FELA case for BNSF’s decision to defend on the merits, and he cannot recover them in a follow-on action either.

4. Montana’s Regime Permits State-Law Collateral Attacks On Valid FELA Releases And Coerces Employers Into Settling On Unwarranted Terms.

Dice also holds that the validity of a FELA release is a *federal* issue decided according to federal law. *See* 342 U.S. at 361. In *Counts*, the Ninth Circuit followed *Dice* to reject a claim materially indistinguishable from the claims Dannels asserts here. The plaintiff in *Counts* sought damages against the railroad for fraud in inducing him to release his FELA claim. 896 F.2d at 425. The Ninth Circuit held that this state-law fraud claim was preempted by FELA because it would necessarily call into question the validity of the underlying release, and “the validity of a FELA release for fraud raises a federal question to be determined under federal rather than state law.” *Id.* Thus, “[t]o permit independent state-law actions for fraud in including FELA releases would lead to results that would vary from state to state.” *Id.*; *see also Sinclair*, ¶¶ 33-35 (agreeing with and applying *Counts*).

Although he ignores *Dice*, Dannels attempts (Resp. 34) to “distinguish” *Counts* and *Sinclair* on the ground that “BNSF never tried to coerce him into signing a written waiver of his rights,” arguing (Resp. 37) that he never executed a “waiver.” Whether there was a “waiver” of his FELA claim is irrelevant, because it is undisputed that Dannels executed a *release* of his FELA claim, accepting \$1.7 million from BNSF in full satisfaction of his FELA claim in a “Release and Settlement Agreement” executed on June 26, 2013. And in this case, he alleges that

BNSF’s conduct in securing that release—including BNSF’s assertion of FELA defenses and its refusal to settle—was unlawful, seeking damages for that conduct. That was the precise circumstance in which *Counts* and *Sinclair* held that state-law remedies were preempted. Allowing Dannels’ claims to proceed would conflict with both *Dice* and *Counts*.

Moreover, Dannels has no answer to the troubling practical consequences of allowing his claims to proceed. Even if a FELA defendant *does* settle with a plaintiff prior to a verdict, there is nothing to stop that plaintiff from bringing a follow-on bad-faith suit, alleging that the settlement should have been higher or should have come earlier. As this case demonstrates, any bad-faith claim has adverse consequences for a defendant. Dannels has obtained access to BNSF’s documents that would not be discoverable in any other context. *See* Order, No. OP 18-0693, at 8 (McKinnon, J., dissenting).³ It is not just the specter of bad-faith *liability*, but also bad-faith *litigation* that coerces FELA defendants into settlements they otherwise would not agree to if they were freely permitted to defend against claims on the merits, as they are in every other State.

³ Dannels quibbles whether these documents were “privileged.” Resp. 32 n.1. But Dannels does not dispute that they were discoverable only because he has been permitted to prosecute these claims. CR 216 at 5-6. And the district court did not conduct an “*in-camera*” review of each document—it ordered production of several classes of documents on which Dannels never filed a motion to compel. CR 272 at 35.

* * *

Dannels' claims are premised on BNSF's decision not to settle with him in the underlying FELA lawsuit and instead to defend itself on the merits and litigate the lawsuit to a jury verdict. CR 1 ¶¶ 11-25. Dannels was able to bring these claims only after settlement of the underlying FELA lawsuit. *See* Mont. Code Ann. § 33-18-242(6)(b). He seeks damages not available under FELA, CR 1 ¶¶ 27, 29, and he does so even though he voluntarily settled his FELA claim. He does not allege any violation of FELA's comprehensive rules for handling information related to accidents. *See* 45 U.S.C. § 60. The liability and damages he seeks to impose are not provided for under FELA, they are inconsistent with FELA's comprehensive and exclusive framework, and they cannot be squared with what the U.S. Supreme Court has said for more than a century is FELA's preemptive scope. Dannels' claims are preempted.

II. *REIDELBACH* DOES NOT SAVE DANNELS' CLAIMS.

Reidelbach cannot save Dannels' claims. In *Reidelbach*, the critical distinction from *Dice* was that "Reidelbach did not enter into a release agreement with BNSF." *Reidelbach v. Burlington N. & Santa Fe Ry. Co.*, 2002 MT 289, ¶ 44, 312 Mont. 498, 60 P.3d 418. Unlike Reidelbach, Dannels executed a *release* of his FELA claims. As this Court has explained, while a FELA plaintiff "may challenge the validity of [a] release under federal law, FELA does not permit [the plaintiff] to

affirm that release, and then separately sue for state law damages.” *Sinclair*, ¶ 35. That is precisely what Dannels is attempting to do by collecting the full amount of his FELA verdict from BNSF through a settlement and release, and then suing BNSF on the theory that BNSF should have settled sooner and offered more.

In an attempt to evade this “critical distinction,” *Reidelbach*, ¶ 44, Dannels asserts (Resp. 37) that he “never executed a FELA waiver and thus makes no waiver-related claims.” *See also* Resp. 15 (“Dannels did not execute a FELA waiver in any relevant sense.”). But *Reidelbach* says nothing about “waiver” of FELA claims; it distinguished cases involving the *release* of FELA claims, an agreement that “actually defines and potentially compromises the amount of damages” and that “establishes negligent liability and assigns a monetary value to the work-related injury.” *Reidelbach*, ¶ 44. Here, Dannels indisputably released his FELA claim when he settled with BNSF “for the entire jury award.” Resp. 34.

Dannels insists that he settled with BNSF after “litigat[ing] his FELA claim in front of a jury.” Resp. 34. But he does not explain why that timing would make a difference. In this case, just like in *Sinclair* and *Counts*, the parties reached an agreement that established BNSF’s FELA liability and assigned a value to Dannels’ FELA claim. Dannels cannot affirm the validity of that settlement and then use state law to seek additional damages on the theory that BNSF should have settled sooner or offered more. *See Sinclair*, ¶ 35.

Even if *Reidelbach* were not distinguishable, it would still be “manifestly wrong.” *Formicove, Inc. v. Burlington N., Inc.*, 207 Mont. 189, 194-95, 673 P.2d 469, 472 (1983). *Reidelbach* imported an irrelevant analytical framework—the *Farmer* test for preemption under federal labor statutes—and transplanted it into the FELA context. See *Reidelbach*, ¶ 45 (citing *Farmer v. United Bhd. of Carpenters & Joiners of America*, 430 U.S. 290 (1977)). Tellingly, Dannels does not assert that *Reidelbach* was correct in applying the *Farmer* test. The three prongs of the *Farmer* test do not align with what the U.S. Supreme Court has said are the relevant considerations for FELA preemption. BNSF Br. 40-41. Dannels does not suggest otherwise.

Moreover, Dannels cannot dispute that *Reidelbach* failed to consider the array of Supreme Court cases holding that FELA’s framework is comprehensive and exclusive. As Justice McKinnon correctly noted, “there is ample federal authority, not discussed in *Reidelbach*, which appears to provide FELA is the exclusive remedy for injured railroad workers; that Congress intended FELA to ‘occupy the field’; and that FELA preempts state-law claims based on injuries arising from a railroad’s conduct.” Order, No. OP 18-0693, at 8. *Reidelbach*’s preemption analysis does not engage at all with *Erie*, *Winfield*, *Tonselitto*, *Coogan*, or *South Buffalo*. It also suggests that states may impose liability even where FELA does not provide for it, *Reidelbach*, ¶ 53, in the face of more than a century of Supreme Court precedent to

the contrary. If it cannot be distinguished, *Reidelbach* cannot survive under the Supreme Court's FELA precedents.

CONCLUSION

This Court should reverse the orders denying summary judgment and entering final judgment and should direct entry of judgment in favor of BNSF.

Dated: January 13, 2020.

By: /s/ Robert J. Phillips
Robert J. Phillips
GARLINGTON, LOHN & ROBINSON, PLLP

Andrew S. Tulumello
GIBSON, DUNN & CRUTCHER LLP

Jeff Hedger
HEDGER FRIEND, P.L.L.C.

Attorneys for BNSF Railway Co.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Reply Brief of BNSF Railway Co. is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count as calculated by Microsoft Word is 4,909 (not more than 5,000) words, excluding the Table of Contents, Table of Authorities, Signature Block, Certificate of Compliance, and Certificate of Service.

DATED this 13th day of January, 2020.

/s/ Robert J. Phillips
Robert J. Phillips

CERTIFICATE OF SERVICE

I, Robert J. Phillips, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 01-13-2020:

Keith D. Marr (Attorney)
PO Box 3028
Great Falls MT 59403
Representing: Robert Dannels
Service Method: eService

Timothy Charles Fox (Prosecutor)
Montana Attorney General
215 North Sanders
PO Box 201401
Helena MT 59620
Representing: State of Montana
Service Method: eService

Deepak Gupta (Attorney)
1900 L Street NW, Suite 312
Washington DC 20036
Representing: Robert Dannels
Service Method: eService

Anthony Michael Nicastro (Attorney)
27 Shiloh Road, Ste 10
Billings MT 59106
Representing: Association of American Railroads
Service Method: eService

Mark D. Parker (Attorney)
401 N. 31st St., Ste. 805
P.O. Box 7212
Billings MT 59103
Representing: Washington Legal Foundation
Service Method: eService

Samantha A Howard (Attorney)
401 N 31st St, Suite 805
PO Box 7212

Billings MT 59103
Representing: Washington Legal Foundation
Service Method: eService

Jeffrey Wayne Hedger (Attorney)
2800 Central Ave., Suite C
Billings MT 59102
Representing: BNSF Railway Company
Service Method: E-mail Delivery

Dennis P. Conner (Attorney)
520 3rd Ave. N.
P.O. Box 3028
Great Falls MT 59403-3028
Representing: Robert Dannels
Service Method: E-mail Delivery

Andrew S. Tulumello (Attorney)
1050 Connecticut Avenue, N.W.
Washington DC 20036
Representing: BNSF Railway Company
Service Method: E-mail Delivery

Electronically signed by Dawn Hanninen on behalf of Robert J. Phillips
Dated: 01-13-2020