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## *Tyrrell & Nelson v. BNSF*: Is Montana Tied to the Daimler Tracks for Personal Jurisdiction?

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***Tyrrell & Nelson v. BNSF: Is Montana Tied to the Daimler Tracks for Personal Jurisdiction?***

**Marin Keyes**

No. DA 14-0825 Montana Supreme Court

Oral Argument: Wednesday, December 9, 2015 at 9:30 a.m. in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, Montana.

I. QUESTION PRESENTED

Does Montana have the ability and authority to exercise general personal jurisdiction over a foreign corporation conducting some business in Montana?

II. FACTUAL AND PROCEDURAL BACKGROUND

In this consolidated appeal, both plaintiffs brought action against BNSF under the Federal Employer's Liability Act (FELA).<sup>1</sup> The plaintiffs alleged BNSF's negligence led to Tyrrell's death and to Nelson's knee injury.<sup>2</sup> Plaintiffs in these cases share one crucial feature: neither has lived, worked, or was injured in Montana.<sup>3</sup> The only tenuous link the plaintiffs assert with Montana is the transitory locational nature of the railroad worker, who may face the possibility of being sent to work in Montana.<sup>4</sup>

Despite their lack of connection with Montana, the plaintiffs both filed in Yellowstone District Court in 2014.<sup>5</sup> In response to each case, BNSF moved for dismissal claiming it is not subject to general personal jurisdiction in Montana under the new test formulated by the United States Supreme Court in *Daimler AG v. Bauman*.<sup>6</sup> The resulting court orders were opposite: Judge Moses denied the motion in *Tyrrell*, while Judge Baugh granted the motion in *Nelson*.<sup>7</sup> Judge Moses rejected *Daimler*'s test for general personal jurisdiction, holding *Daimler* was not applicable in this case.<sup>8</sup> He then found BNSF's substantial business activities in Montana rendered it susceptible to general personal

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<sup>1</sup> Opening Br. of BNSF Railway Co., 2, Apr. 15, 2015, DA 14-0825.

<sup>2</sup> *Id.* at 5-6.

<sup>3</sup> *Id.* at 8-9.

<sup>4</sup> Tyrrell/Nelson's Consol. Answer Br., 4, July 15, 2015, DA 14-0825.

<sup>5</sup> Opening Br. BNSF 1-2.

<sup>6</sup> *Id.* at 2; *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014).

<sup>7</sup> *Id.* at 5-7.

<sup>8</sup> *Id.* at 5-6.

jurisdiction.<sup>9</sup> Contrary to Judge Moses' ruling, in *Nelson* Judge Baugh followed *Daimler* and declared BNSF's business activities inadequate to allow for the exercise of general personal jurisdiction.<sup>10</sup> Additionally, Judge Baugh believed the holding in *Daimler* called for a reexamination of personal jurisdiction in cases such as the ones brought by Tyrrell and Nelson.<sup>11</sup> As support for a post-*Daimler* reexamination, Judge Baugh cited the numerous cases filed in Montana where the plaintiff had no link to Montana – indeed, there were 12 such cases pending in Montana at the time of Judge Baugh's Order.<sup>12</sup>

Subsequent to the contradictory court orders, BNSF filed a consolidated appeal of *Nelson* and *Tyrrell*. BNSF argues the *Daimler* test for general personal jurisdiction controls in all cases, and by using the *Daimler* test BNSF would not be subject to general personal jurisdiction in Montana. Tyrrell and Nelson base their counter on the inapplicability of *Daimler*, and without *Daimler* BNSF's business activities are so extensive BNSF is "at home" in Montana. Further additional arguments center around BNSF's possible consent to personal jurisdiction and the question of whether FELA expands traditional state personal jurisdiction.

### III. ARGUMENT

#### *A. Whether BNSF Consented to Personal Jurisdiction in Montana by Doing Business in the State*

The easiest solution for this case would be to find BNSF consented to personal jurisdiction in Montana. Courts have found personal jurisdiction to be an individual right a party can waive by consent.<sup>13</sup> As with any other argument on appeal, however, it must have been raised in the proceedings below; a party not raising an issue of consent will waive their own right to the argument.<sup>14</sup>

#### *1. Arguments*

Appearing for the first time in the appellees' response brief, Tyrrell and Nelson proclaim BNSF consented to personal jurisdiction in Montana by obtaining a certificate of authorization to transact business in Montana and by placing an agent in Montana to accept service of process.<sup>15</sup> In doing so, the appellees argue BNSF is to be treated as a

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 7–8.

<sup>11</sup> Opening Br. BNSF 6.

<sup>12</sup> *Id.* at 6–7.

<sup>13</sup> Tyrrell/Nelson Br. 11–12 (citing *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982)).

<sup>14</sup> Reply Br. of BNSF Railway Co., 3, Sept. 11, 2015, DA 14-0825.

<sup>15</sup> Tyrrell/Nelson Br. 16.

domestic corporation, which includes being liable to a lawsuit.<sup>16</sup> Appellees also rely on other courts which have found foreign corporations with certificates of authorization consented to a state's personal jurisdiction.<sup>17</sup>

In its reply brief, BNSF argues the appellees waived the consent issue by not raising it at the district court level.<sup>18</sup> Alternatively, BNSF states merely complying with Montana's business registration statutes does not waive a right to personal jurisdiction because Montana's statutes expressly deny personal jurisdiction based solely on a registered agent.<sup>19</sup> BNSF argues the cases the appellees cite only found consent because those states do not have the same statutory provision as Montana.<sup>20</sup>

## 2. Analysis

The Montana Supreme Court will most likely find the appellees failed to raise the issue of consent and will therefore refuse to address the issue. At the district court level, the motions to dismiss for lack of personal jurisdiction centered on BNSF's business activities, with no mention of consent.<sup>21</sup> In the interest of judicial economy, the Court will likely save the issue of consent through business registration for a later appeal when the issue is properly raised.

### *B. Whether FELA Provides for the Exercise of Personal Jurisdiction over BNSF*

Under FELA, a common carrier is liable for an employee's injuries resulting from the employer's negligence.<sup>22</sup> A FELA action "may be brought in a district court of the United States . . . in which the defendant shall be doing business at the time of commencing such action."<sup>23</sup>

#### 1. Arguments

BNSF starts the FELA discussion by noting the relevant FELA provision grants the ability to bring suit in any United States district court, *i.e.*, a federal court.<sup>24</sup> BNSF also argues the provision allows for

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<sup>16</sup> *Id.* at 12–13 (citing MONT. CODE ANN. § 35–1–115(1) (2015)).

<sup>17</sup> *Id.* at 13–16.

<sup>18</sup> Reply Br. BNSF 3.

<sup>19</sup> *Id.* at 5 (citing MONT. CODE ANN. § 35–7–115)).

<sup>20</sup> *Id.* at 5–6.

<sup>21</sup> *Id.* at 3–4.

<sup>22</sup> 45 U.S.C. § 51 (2012).

<sup>23</sup> 45 U.S.C. § 56.

<sup>24</sup> Reply Br. BNSF 36.

concurrent subject matter jurisdiction, not personal jurisdiction.<sup>25</sup> Using a plain meaning interpretation of the provision, BNSF explains that for FELA litigants to bring an action in state court, the state court must have a separate ground for personal jurisdiction, which Montana does not have in the Tyrrell and Nelson cases.<sup>26</sup> In its reply brief, BNSF ended the FELA discussion by stating the federal statute could not force a state to exercise personal jurisdiction where it did not otherwise exist.<sup>27</sup>

The appellees utilize a more holistic interpretation of the relevant FELA provision and look to the history of the Act. The appellees argue FELA is a remedial provision to be liberally interpreted to most help the injured railroad worker.<sup>28</sup> The appellees deny BNSF's argument that FELA cannot be a separate basis for personal jurisdiction and look to the authority of Congress to pass FELA under the Commerce Clause, concluding an interstate railroad such as BNSF is undoubtedly subject to FELA's regulations.<sup>29</sup>

## 2. Analysis

Though FELA may potentially serve as a separate basis for personal jurisdiction, the Court will not necessarily want to hear full arguments on the interpretation and history of FELA. The Court can reserve for its own time the plain meaning or liberal interpretation of the relevant portion. Moreover, the justices will likely not be concerned with appellees' historic plea for the injured worker; the argument does not seem to carry much weight in a case where conceivably the injured worker would have an easier time bringing suit in his state of residence or where the injury occurred. The Court may find a more important issue to be whether FELA can truly be an independent basis for personal jurisdiction when the state court does not provide for personal jurisdiction itself, hence the parties will likely argue this point more than others in the FELA discussion.

### *C. Whether Montana State Law Provides for the Exercise of Personal Jurisdiction over BNSF*

Without consent or a basis for personal jurisdiction from FELA, a state court exercise of personal jurisdiction must be provided for by state law. According to Montana common law, general personal jurisdiction exists when a foreign corporation "maintains 'substantial' or

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 36–37.

<sup>27</sup> *Id.* at 18–19.

<sup>28</sup> Tyrrell/Nelson Br. 18–19.

<sup>29</sup> *Id.* at 22–23.

‘continuous and systematic’ contacts with the forum state.”<sup>30</sup> Specific personal jurisdiction may be found when a claim stems from the corporation’s business transactions in Montana.<sup>31</sup>

### *1. Arguments*

BNSF promptly dispels with specific personal jurisdiction in its opening brief by noting the express wording of Montana’s civil procedure rules only allows for this type of jurisdiction when the claim arose from the Montana business transactions.<sup>32</sup> Neither appellee alleged any residence, employment, or injury in Montana.<sup>33</sup> As for general personal jurisdiction, BSNF argues the U.S. Supreme Court’s decision in *Daimler AG v. Bauman* sets the test.<sup>34</sup> As clarified in an amicus brief: “*Daimler*’s holding is unambiguous: general jurisdiction over a corporation is virtually always restricted to its ‘place of incorporation and principal place of business.’ ”<sup>35</sup> Under exceptional circumstances a state may exercise general personal jurisdiction over a corporation even if the state is not in the above two categories, but the exceptional circumstances must be such that “the forum [state] has become ‘a surrogate’ for the defendant’s ‘place of incorporation or head office.’ ”<sup>36</sup> BNSF points out just doing business in a state is not enough to provide general personal jurisdiction over a foreign corporation.<sup>37</sup> Additionally, when looking at business activities, a court is to take into account the entirety of the corporation’s business, not just the business conducted in the forum state.<sup>38</sup> When looking at the entirety of BNSF’s business, the portion conducted in Montana is relatively small: BNSF has minimal percentages of facilities, employees, and generated revenue in Montana.<sup>39</sup> BNSF lastly lists the multiple other courts, including the Ninth Circuit, which have chosen to follow *Daimler* and have found there to be no general personal jurisdiction in cases like this one.<sup>40</sup>

As aforementioned, appellees argue there is specific personal jurisdiction because BNSF transacts business in Montana.<sup>41</sup> Appellees cite precedent which held the claim did not need to arise out of the

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<sup>30</sup> Tackett v. Duncan, 334 P.3d 920, 925 (Mont. 2014) (citing Simmons Oil Corp. v. Holly Corp., 796 P.2d 189, 194 (Mont. 1990)).

<sup>31</sup> Mont. R. Civ. P. 4(b)(1)(A).

<sup>32</sup> Opening Br. BNSF 12.

<sup>33</sup> *Id.* at 8–9.

<sup>34</sup> *Id.* at 17.

<sup>35</sup> Amicus Br. of the Montana Chamber of Commerce, 6, July 31, 2015, DA 14-0825 (citing *Daimler*, 134 S.Ct. at 760).

<sup>36</sup> *Id.* at 11 (citing *Daimler*, 134 S.Ct. at 756 n.8).

<sup>37</sup> Opening Br. BNSF 17.

<sup>38</sup> *Id.* at 21.

<sup>39</sup> *Id.* at 3–4.

<sup>40</sup> Opening Br. 27–28.

<sup>41</sup> Tyrrell/Nelson Br. 36–37.

business transaction if other factors were met.<sup>42</sup> Beyond this, appellees argue Montana has general personal jurisdiction over BNSF because BNSF conducts a substantial amount of business in Montana.<sup>43</sup> Appellees support their argument by referencing the amount of revenue, workforce, and BNSF's future expansion in comparison to other Montana railroad companies.<sup>44</sup> Appellees maintain BNSF's substantial and continuous business activities subject it to personal jurisdiction, despite the *Daimler* ruling. *Daimler* is inapplicable, appellees state, because it was a non-FELA case; it involved parent and subsidiary corporations; and most importantly, the defendant corporation was international.<sup>45</sup> Appellees focus on the U.S. Supreme Court's desire for stability in international corporations and strengthening international understanding of U.S. law.<sup>46</sup>

## 2. Analysis

The Court will most likely focus on the question of general personal jurisdiction, rather than specific personal jurisdiction. The Court will probably not ask as many questions concerning specific personal jurisdiction because the Court can conduct its own interpretation of the explicit wording of the pertinent statute. Any questions about specific personal jurisdiction will most likely revolve around the soundness of the precedent the appellees cited which held a claim did not necessarily need to arise from the physical business transactions in Montana. As for general personal jurisdiction, the Court will probably have a greater interest in this issue because determining the extent of Montana's general personal jurisdiction will have the most impact on Montana courts. The bulk of both parties' arguments will most likely be whether *Daimler* applies in this case. Appellees may benefit by arguing that even though the U.S. Supreme Court set forth a test in *Daimler*, it is well-known that Montana will "refuse to 'march lock-step' with the United States Supreme Court. . ."<sup>47</sup> when it feels it is necessary to do so. Appellant will most likely want to spend time reiterating how *Daimler* is meant to apply in all courts. The Court may have a particular interest in a case where the Ninth Circuit "recently and explicitly rejected the argument that general jurisdiction can be justified by the fact that the defendant corporation 'engages in a substantial, continuous, and systematic course of business in a state.'"<sup>48</sup> It is uncertain whether the appellant will include in its

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<sup>42</sup> *Id.* at 37 (citing *Simmons Oil Corp.*, 796 P.2d at 195).

<sup>43</sup> *Id.* at 30.

<sup>44</sup> *Id.* at 5-7.

<sup>45</sup> *Id.* at 32, 35-36.

<sup>46</sup> *Id.* at 36.

<sup>47</sup> *State v. Johnson*, 719 P.2d 1248, 1254 (Mont. 1986).

<sup>48</sup> *Opening Br. BNSF 27* (citing *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014)).

argument warnings from the Montana Chamber of Commerce. Appellant could bolster its argument by describing the decline in foreign investment, a loss of employment, and stymied economic growth the Chamber of Commerce forecasted if *Daimler*'s test is not adopted in Montana.<sup>49</sup>

*D. Whether the Federal Constitution Allows Montana's Potential Exercise of Personal Jurisdiction over BNSF*

Regardless of whether state law grants personal jurisdiction over a defendant, the state still must have the authority to do so under the federal Constitution. The Fourteenth Amendment Due Process Clause governs personal jurisdiction.

*1. Arguments*

Much of the appellant's and appellees' arguments involving whether personal jurisdiction in Montana comports with the Due Process Clause has already been addressed. BNSF states Montana will run afoul of the Due Process Clause if it does not follow *Daimler*, and if it allows FELA to serve as an independent basis for personal jurisdiction. Appellees state the opposite: *Daimler* is not universal and thus refusing to follow it here will not violate the Due Process Clause, and FELA is an independent basis, which will violate the Constitution if it is not allowed to serve as such.

*2. Analysis*

As predicted above, the Court will most likely focus more on Montana's state law. There are bound to be solid arguments on both sides advocating how their approach comports with Due Process, but the Court will likely rather hear how Montana specifically does or does not provide for personal jurisdiction in the case. Appellant even recognized in its opening brief that a court will only look to the federal Constitution after finding a state ground for personal jurisdiction.<sup>50</sup>

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<sup>49</sup> Amicus Br. 20–21.

<sup>50</sup> Opening Br. BNSF 9.