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Tyrrell & Nelson v. BNSF: Jumping the Tracks Between FELA, Daimler, and Consent

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**Recap; *Tyrrell & Nelson v. BNSF*: Jumping the Tracks Between
FELA, *Daimler*, and Consent**

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.

For purposes of oral argument, the Court stated BNSF would be the appellee and Tyrrell & Nelson the appellants. This is a change from the designations used in the appellate briefs and despite a motion made by BNSF.¹

I. CHRISTOPHER MORELAND FOR APPELLANTS

Mr. Moreland started his opening argument by repeating a key fact: Tyrrell and Nelson brought their claims under the Federal Employers' Liability Act (FELA). Mr. Moreland did not advance too far in his argument before the justices launched into a thorough examination of § 56 of FELA.² The justices began by asking Mr. Moreland to address BNSF's argument that § 56 is a venue statute conferring only concurrent subject matter jurisdiction to states. Mr. Moreland opined there is a fundamental disconnect in a statute conferring both subject matter and personal jurisdiction to federal courts but conferring only subject matter jurisdiction to state courts. He went on to say § 56 is a venue statute, but jurisdiction is assumed in a location where venue is proper. In a point Mr. Moreland made several times, no one is disputing this case could have been filed in Montana federal court, thus it is a situation akin to one where forum non conveniens is used. In other courts, forums non conveniens is available when jurisdiction and venue are present in a court, but a different forum is more appropriate for the disposition of the case.

Mr. Moreland espoused the view that BNSF would be subject to general personal jurisdiction even if § 56 did not apply. At various times in his argument and rebuttal Mr. Moreland referenced BNSF's substantial and expanding business activities in Montana. The Court

¹ Mot. to Consolidate and Set Briefing Schedule, 4, Mar. 3, 2015, DA 14-0825.

² 45 U.S.C. § 56 (2012) (stating "[u]nder this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.").

questioned how Mr. Moreland distinguished this case from *Martinez v. Aero Caribbean*,³ a Ninth Circuit case where general personal jurisdiction was not to exercised over a corporation conducting substantial business in the jurisdiction. Mr. Moreland replied BNSF is essentially a monopoly in Montana, dominating the competition posed by Montana Rail Link, a domestic railroad business.

Branching off of this discussion, Mr. Moreland shifted to his consent argument. Immediately, the justices brought up the fact that consent was not raised as an issue below. Mr. Moreland admitted it was not explicitly argued, but consent is one of the bases for jurisdiction, and the general facts supporting consent were in the district court arguments. Counsel continued his argument, citing *Otsuka Pharm. Co. v. Mylan Inc.*,⁴ a New Jersey case where a court found consent through the company's business registration. Next, Mr. Moreland was asked how Montana's registered agent statute fit into the consent argument.⁵ Mr. Moreland responded it was not just a registered agent that provided consent, but the service agent in conjunction with other actions a corporation takes when it wants to be a registered business in Montana.

II. RANDY COX FOR APPELLEE

Though Mr. Cox began his argument with the applicability of *Daimler AG v. Bauman*,⁶ where the U.S. Supreme Court held corporations are typically only subject to general personal jurisdiction in the state of incorporation and the principal place of business, the Court quickly moved to preliminary questions. First the Court sought to clarify BNSF's beliefs about specific personal jurisdiction. Mr. Cox assured the Court cases could still be brought in any state in which injury occurred. Next, Justice Shea posed a hypothetical involving a worker employed in Montana but injured in Idaho. Mr. Cox affirmed in such a situation the worker would not be able to bring suit in Montana state court under BNSF's interpretation of specific jurisdiction, unless he or she could prove a part of the railroad's negligence occurred in Montana. The Court wondered how BNSF can be prejudiced by defending a case in Montana, where BNSF has thousands of miles of railroad track, yet not prejudiced in Delaware, it's state of incorporation, which has zero miles of track. Mr. Cox used this question to transition back to *Daimler*. Mr. Cox declared the nationwide applicability of *Daimler* in all cases, and the U.S. Supreme Court's intention to do so.

³ *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014).

⁴ *Otsuka Pharm. Co. v. Mylan Inc.*, No. 14-4508, 2015 WL 1305764 (D.N.J. Mar. 23, 2015)

⁵ MONT. CODE ANN. § 35-7-115(1) (2015) (stating "[t]he appointment or maintenance in this state of a registered agent does not by itself create the basis for personal jurisdiction over the represented entity in this state.").

⁶ *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014).

Despite Mr. Cox's turn to the applicability of *Daimler*, the Court seemed more eager to analyze the interaction between FELA and *Daimler*. Mr. Cox denied § 56's ability to compel a state to exercise personal jurisdiction over a defendant. He proclaimed it would be unconstitutional to extend personal jurisdiction so far and cited cases where the state court at issue refused to do so. Using this as a cue, the justices initiated a barrage of questions concerning *Miles v. Illinois Cent. R.R. Co.*,⁷ a case where a Missouri state court had been forced to take a FELA case. Mr. Cox distinguished *Miles* as a case concerning subject matter jurisdiction, not personal jurisdiction. Ultimately, Mr. Cox argued, even though *Miles* is factually alike the case here, it was decided before *Daimler* and is no longer good precedent.

In his remaining time, Mr. Cox expressed a wish to discuss the consent argument. Mr. Cox informed the Court the registration form to conduct business in Montana is one page. He expressed doubt that signing a paper and registering an agent was enough to grant personal jurisdiction over a business. Mr. Moreland's cases finding consent could not be used in Montana, Mr. Cox argued, because other states do not have the same statutes as Montana. Further on, he cited Ninth Circuit cases where consent jurisdiction had not been upheld over a registered corporation.

III. MR. MORELAND'S REBUTTAL

The Court directed Mr. Moreland to begin his rebuttal with another look at the consent argument. Mr. Moreland bolstered the cases he cited earlier, while discounting the Ninth Circuit cases BNSF cited by saying one of the cases, *N. Butte Mining Co. v. Tripp*,⁸ was decided when a different statute was in effect. Mr. Moreland reiterated that consent is an independent basis for personal jurisdiction, and even without § 56, BNSF is subject to personal jurisdiction since it conducts business in Montana.

Mr. Moreland also rehashed his argument that if § 56 confers personal jurisdiction to federal courts, it must be understood to confer the same jurisdiction to state courts. By arguing otherwise BNSF is mounting a constitutionality challenge to § 56; both sides, plus the justices, agree Congress had the ability to enact FELA under the commerce power.

At the end of rebuttal, the Court returned to *Daimler*, referencing the comment that a lack of logic exists if a corporation is "at home" in every state in which it does business.⁹ Mr. Moreland responded it is not an overextension by hitting on two of his main points: *Daimler* is a non-

⁷ *Miles v. Illinois Cent. R.R. Co.*, 315 U.S. 698 (1948).

⁸ *N. Butte Mining Co. v. Tripp*, 128 F.2d 588 (9th Cir. 1942).

⁹ *Daimler*, 134 S.Ct. at 761.

FELA case; and BNSF has been subject to personal jurisdiction in Montana for the past one hundred years, hence there cannot be an extension if the jurisdiction was exercised historically.

IV. PREDICTIONS

Two critical queries likely must be resolved before the Court reaches the practical issues in the case. First, the Court will likely decide how FELA impacts a state's exercise of personal jurisdiction. Second, the Court will likely determine the scope of applicability for *Daimler*'s test regarding general personal jurisdiction. The Court will likely reserve a discussion of consent and whether BNSF is subject to general personal jurisdiction in Montana until after these two questions have been settled.

The discussion concerning FELA will likely be the primary issue because it potentially may change or render moot the *Daimler* discussion. The Court faces a new issue here, because as both sides admitted, there does not seem to be any case dealing with the interaction of FELA and *Daimler*. Moreover, the Court appeared neutral in its consideration of the breadth and intent of § 56. The Court asked both sides multiple questions about § 56 which highlighted each position's weak points. However, since the justices spent a large amount of time questioning both sides about other issues, it seems unlikely the Court will find the FELA argument dispositive.

During Mr. Cox's argument the justices seemed unconvinced that *Daimler* created a bright line rule. *Daimler*, which involved a defendant international corporation, is factually distinguishable from the defendant corporation here, but the justices did make sure to note the definition of a foreign corporation includes not only international corporations, but sister state corporations as well. There may be a divide in the justices regarding *Daimler* and its effects on Montana. Mr. Cox's answer to the hypothetical presented during his argument seemed to disappoint Justice Shea, as Mr. Cox's answer means a Montana worker cannot bring suit in Montana if he was not injured here. Nevertheless, another justice countered an argument put forth by Mr. Moreland by stating there is a continuing availability of state and federal forums, even if the Montana forum is lost in these types of cases.

Though Tyrrell & Nelson did not raise the consent argument below, it seems likely the Court will address it in its decision. The justices were amendable to hearing consent arguments from both sides, and they even asked Mr. Moreland to address it in his rebuttal. Interestingly, the Court did not ask any questions about consent, except for one concerning Montana's registered agent statute. This may signal the justices' belief that consent does not grant jurisdiction in this particular case.

Lastly, the Court must decide whether BNSF is subject to general personal jurisdiction in Montana. When looking at BNSF's business activities, the Court may compare BNSF's activities in Montana to those nationwide or to domestic Montana businesses, such as Montana Rail Link. The Court will likely compare BNSF to domestic businesses, as Mr. Moreland argued for this comparison, and Mr. Cox failed to reintroduce the *Daimler* concept of looking at nationwide business activities. Still, the Court did bring up the *Martinez* case decided by the Ninth Circuit, where substantial business was not enough for personal jurisdiction. The Court may ultimately be more swayed by the Ninth Circuit precedent than by other arguments presented by counsel.