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NOTE

GETTING BACK ON TRACK: *BNSF RAILWAY CO. V. TYRRELL* CLARIFIES FELA JURISDICTION AND VENUE IN STATE COURT

Molenda L. McCarty*

If the appearance of justice, the integrity of the profession, and public confidence in the judicial system means anything, we should move away from the view that shopping for juries and laws are “rights.”¹

I. INTRODUCTION

The Federal Employers’ Liability Act² (“FELA”) holds a railroad common carrier liable for injuries sustained by employees during their course of employment.³ Likewise, railroad carriers are liable to an employee’s personal representative for the death of an employee during the course and scope of employment.⁴ Section 56 of FELA establishes that FELA claims can be brought in the district where: the defendant railroad resides, the action arose, or the defendant railroad conducts business. It also establishes that federal jurisdiction shall be concurrent with that of the

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1. Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 305–06 (1996).

2. 45 U.S.C. §§ 51–60 (2016). The FELA also applies to actions by or on behalf of a seaman during the course and scope of his employment. Although railroad employers and employees are discussed herein, for the purposes of this note it is understood that the application of *BNSF* would not differ for a maritime employer.

3. *Id.* § 51.

4. *Id.* § 51.

States.⁵ Although the United States Supreme Court had previously addressed Section 56, it made clear in *BNSF Railway Company v. Tyrrell*⁶ (“*BNSF*”) that Section 56 is a venue statute, and state courts must comport with the Due Process Clause when asserting jurisdiction over corporations, including railroads. This note provides historical context of how Montana asserted jurisdiction over out-of-state railroad defendants and what the *BNSF* decision means for future FELA parties. Part II discusses the factual and procedural background of the Montana Supreme Court’s decision in *Tyrrell v. BNSF Railway Company*⁷ (“*Tyrrell*”) and the parties’ certiorari arguments to the United States Supreme Court.⁸ Part III summarizes the United States Supreme Court’s decision in *BNSF*.⁹ Part IV analyzes how Montana continued to allow railroad defendants to be haled into the State when the cause of action was unrelated to Montana, discusses the further implications of the decision, and notes one critical question left unanswered. Section V concludes the note.

II. BACKGROUND

A. *Tyrrell v. BNSF Railway Company Factual & Procedural Background*

In 2011, Robert Nelson, a North Dakota resident, sued Burlington Northern and Santa Fe Railway Company (“*BNSF*”) in Montana’s Thirteenth Judicial District Court, Yellowstone County, to recover damages for knee injuries he allegedly sustained while employed with *BNSF*.¹⁰ In his complaint, Nelson did not assert that he had ever worked in Montana or that his injuries were sustained in Montana.¹¹

In 2014, Kelli Tyrrell (“*Tyrrell*”), Special Administrator of the Estate of Brent Tyrrell (“*Brent*”), also sued *BNSF* in Yellowstone County after Brent died from kidney cancer, allegedly due to exposure to various carcinogenic chemicals during his employment with *BNSF*.¹² The complaint did

5. *Id.* § 56.

6. ___ U.S. ___, 137 S. Ct. 1549 (2017).

7. 373 P.3d 1 (Mont. 2016).

8. *See* Pet. for Writ of Cert., *BNSF Ry. Co. v. Tyrrell*, 2016 WL 5462798 at *4 (U.S. Sept. 28, 2016) (No. 16-405) [hereinafter *Petition*]; Resp’ts’ Br. in Opp’n, *BNSF Ry. Co. v. Tyrrell*, 2016 WL 7011423 at *1 (U.S. Nov. 28, 2016) [hereinafter *Opposition*].

9. *See BNSF*, ___ U.S. ___, 137 S. Ct. 1549.

10. Complaint and Jury Demand, *Nelson v. BNSF Ry. Co.*, 2017 WL 816724 at *15–16 (Mont. Dist. Ct. Mar. 11, 2011) (No. DV-11-0417).

11. *See Id.* at *16.

12. Complaint and Jury Demand, *Tyrrell v. BNSF Ry. Co.*, 2017 WL 816724 at *20–21 (Mont. Dist. Ct. Apr. 16, 2014).

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not include a statement that Brent ever worked in Montana or that any chemical exposure occurred in Montana.¹³

BNSF is a Delaware corporation with its principal place of business in Texas.¹⁴ It operates railroad lines in 28 states and has 6% of its total track mileage in Montana, employs less than 5% of its total work force in the state, generates less than 10% of its total revenue in Montana, and maintains one of 24 automotive facilities in the state.¹⁵

Nelson and Tyrrell both pleaded violations of FELA, and BNSF moved to dismiss both cases for lack of personal jurisdiction.¹⁶ Relying on *Daimler AG v. Bauman*,¹⁷ Judge Baugh granted BNSF's motion to dismiss in Nelson's case.¹⁸ Judge Moses denied BNSF's motion in Tyrrell's case on the basis that BNSF was found within Montana and "ha[d] substantial, continuous and systematic activities within Montana for general jurisdiction purposes."¹⁹ BNSF appealed Judge Moses's order, and Nelson appealed Judge Baugh's order.²⁰

B. Lower Court Majority Holding

In an opinion authored by Justice Shea, the majority held that Montana courts have general personal jurisdiction over BNSF under both the FELA and Montana law.²¹ The order granting BNSF's motion to dismiss was reversed, the order denying BNSF's motion to dismiss was affirmed, and both cases were remanded for further proceedings.²²

I. Federal Employers' Liability Act

The majority based its holding on the United States Supreme Court's interpretation of 45 U.S.C. § 56.²³ The majority understood the interpretation to allow state courts to hear FELA cases, even when the only basis for

13. *See Id.* at *19–22.

14. *Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 3 (Mont. 2016).

15. *BNSF Ry. Co. v. Tyrrell*, ___ U.S. ___, ___, 137 S. Ct. 1549, 1554 (2017).

16. *Tyrrell*, 373 P.3d at 3.

17. 571 U.S. ___, ___, 134 S. Ct. 746, 761–62 (2014) (holding that a state may only assert general jurisdiction over out-of-state corporations where "their affiliations with the [forum] [s]tate are so 'continuous and systematic' as to render them essentially at home" there (quoting *Goodyear v. Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011))). The "paradigm" forums where a corporation is "at home" are its place of incorporation and principal place of business. *Id.*

18. *Tyrrell*, 373 P.3d at 3.

19. *Id.* at 3; *see* M. R. Civ. P. 4(b)(1) (2015) (Montana's long-arm statute).

20. Opening Brief of BNSF Railway Co., *Tyrrell v. BNSF Railway Co.*, *1–2 (Mont. Apr. 15, 2015) (No. DA 14-0825, DA 14-0826).

21. *Tyrrell*, 373 P.3d at 9.

22. *Id.*

23. *Id.* at 4–5; *see also* 45 U.S.C. § 56 (A FELA "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

general jurisdiction is the railroad conducting business in the forum state.²⁴ The Montana Supreme Court rejected BNSF's contention that *Daimler* superseded the Supreme Court's previous interpretations of Section 56.²⁵ The majority held that "*Daimler* did not present novel law." Rather, *Daimler* merely reinforced *Goodyear Dunlop Tire Operations, S.A. v. Brown*, in which the Supreme Court held that general jurisdiction over foreign corporations requires affiliations so "continuous and systematic" as to render the corporation "at home" in the forum state.²⁶ Moreover, the majority concluded that Congress drafted FELA to render a railroad "at home" for jurisdiction purposes wherever it is "doing business."²⁷ Because BNSF undisputedly was "doing business" within Montana, the majority concluded that FELA confers general personal jurisdiction to Montana state courts.²⁸

2. Montana Law

Montana applies a two-prong test to decide whether it may assert personal jurisdiction over a non-resident.²⁹ Jurisdiction must be consistent with Montana's long-arm statute,³⁰ and the exercise of personal jurisdiction must comport with the Due Process Clause of the Fourteenth Amendment of the United States.³¹ The majority held jurisdiction is proper under the long-arm statute because BNSF is "found within the state of Montana" when it conducts business, owns real estate, maintains facilities, has a telephone listing, and directly advertises in Montana.³² The majority transitioned to the constitutionality prong by emphasizing that Montana has previously held that "[t]he District Courts of Montana clearly have jurisdiction" to hear FELA

which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States . . . shall be concurrent with that of the courts of the several States.").

24. *Tyrrell*, 373 P.3d at 4–5; see, e.g., *Pope v. Atlantic Coast Line R.R. Co.*, 345 U.S. 379 (1953) (holding that a plaintiff has the right to sue where the railroad is doing business and that the state forum where the injury occurred is without the power to enjoin prosecution of the suit in the state where the railroad is doing business); *Miles v. Illinois Cent. R.R. Co.*, 315 U.S. 698 (1942) (holding that the FELA prevents a state court from enjoining, on the ground of the inconvenience to the railroad, a resident citizen of the state from furthering an action in a state court of another state which has jurisdiction under the FELA).

25. *Tyrrell*, 373 P.3d at 6; see *Daimler AG v. Bauman*, 571 U.S. ___, 134 S. Ct. 746, 751 (2014) (holding that "a court may assert [general] jurisdiction over a foreign corporation 'to hear any and all claims against [it]' only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.'" (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011))).

26. *Tyrrell*, 373 P.3d at 6 (quoting *Goodyear*, 564 U.S. at 919 (2011)).

27. *Id.* at 6 (citing *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49–50 (1941)).

28. *Id.* at 7.

29. *Id.* at 8.

30. *Id.*; see Mont. R. Civ. P. 4(b)(1).

31. *Tyrrell*, 373 P.3d at 8.

32. *Id.* at 8; see Mont. R. Civ. P. 4(b)(1) ("All persons found within the state of Montana are subject to the jurisdiction of Montana courts.").

cases.³³ Further, the Court held the constitutionality of Montana's personal jurisdiction over BNSF comported with the Montana Constitution's provision that "courts of justice shall be open to every person"³⁴ Therefore, the majority held that Montana has general personal jurisdiction over BNSF under both Montana's long-arm statute and the Due Process Clause.³⁵

C. Lower Court Dissent

Justice McKinnon authored the dissent, stating that Montana district courts lack general personal jurisdiction over BNSF under the Due Process Clause.³⁶ The dissent emphasized that the United States Supreme Court has made "clear" that state courts may only assert general personal jurisdiction when foreign corporations are "essentially at home" in the forum state.³⁷ The United States Supreme Court instructed that a corporation is "essentially at home" where it is incorporated or has its principal place of business.³⁸ Because BNSF is neither incorporated under the laws of Montana nor has its principal place of business in Montana, Justice McKinnon contended that there is "no dispute" that BNSF is not "at home" in Montana.³⁹ She concluded that BNSF's contacts are inadequate to satisfy the due process standards set forth by the Supreme Court.⁴⁰

D. Petition for Certiorari

On January 13, 2017, the United States Supreme Court granted certiorari "to resolve whether [FELA] §56 authorizes state courts to exercise personal jurisdiction over railroads doing business in their States but not incorporated or headquartered there, and whether the Montana courts' exercise of personal jurisdiction in these cases comports with due process."⁴¹ The following sections summarize the arguments of the parties, providing context for the Supreme Court's decision to grant certiorari.

33. *Tyrrell*, 373 P.3d at 8 (quoting *Labella v. Burlington N.*, 595 P.2d 1184, 1186 (Mont. 1979)) (internal quotation marks omitted).

34. *Id.* at 9 (quoting MONT. CONST. art II, § 16).

35. *Id.* at 9.

36. *Id.* at 9 (McKinnon, L. dissenting).

37. *Id.* at 9 (citing *Daimler AG v. Bauman*, 571 U.S. ___, 134 S. Ct. 746, 751 (2014); *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

38. *Tyrrell*, 373 P.3d at 10 (quoting *Daimler*, 571 U.S. at ___, 134 S. Ct. at 751, 761).

39. *Id.* at 10 (Mont. 2016) (McKinnon, L. dissenting) (internal quotation marks omitted).

40. *Id.* at 11.

41. *BNSF Ry. Co. v. Tyrrell*, ___ U.S. ___, ___, 137 S. Ct. 1549, 1555 (2017).

1. BNSF's Argument

BNSF argued that the Montana Supreme Court erred in asserting jurisdiction over BNSF because the United States Constitution places limitations on when state courts can assert personal jurisdiction.⁴² Overall, BNSF maintained that the United States Supreme Court had previously held that the Due Process Clause of the Fourteenth Amendment “sets the outer boundary of a state tribunal’s authority” to assert personal jurisdiction over a defendant.⁴³ BNSF urged certiorari was necessary to address Montana’s refusal to apply the *Daimler* test to the FELA cases at issue and to resolve the split on whether FELA confers general personal jurisdiction on state courts.⁴⁴ Finally, BNSF contended that certiorari was appropriate because the case involved “extremely important due process protections.”⁴⁵

a. Eleven Federal Circuits or State Courts Have Refused to Limit *Daimler*

BNSF asserted that the Montana Supreme Court created an 11-1 split as to whether *Daimler* applies to “purely domestic cases.”⁴⁶ Both the Second Circuit and the Colorado Supreme Court explicitly rejected attempts to distinguish the application of *Daimler* on the ground that it was based on a transnational case.⁴⁷ Three other federal circuits have unquestioningly refused Montana’s decision by applying *Daimler* in “purely domestic” cases.⁴⁸ Finally, BNSF identified at least six state courts that applied *Daimler* in “cases involving domestic parties and events.”⁴⁹ As a result, BNSF argued that certiorari was appropriate in this case to avoid confusion as to whether *Daimler* should be applicable over “purely domestic cases.”⁵⁰

42. Petition, *supra* note 8, at *4.

43. *Id.* at *4 (quoting *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011)).

44. *Id.* at *11, *16.

45. *Id.* at *23.

46. *Id.* at *11.

47. *Id.* at *11–12 (citing *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 629–30 (2d Cir. 2016) (holding that *Daimler* “made explicit reference to ‘sister-state’ corporations and drew no distinction in its reasoning between those and foreign-county corporations.”); *Magill v. Ford Motor Co.*, 379 P.3d 1033, 1038 (Colo. 2016) (holding that “[w]hether a nonresident corporate defendant is a resident of another country or another state is irrelevant to the general jurisdiction inquiry.”)).

48. Petition, *supra* note 8, at *12 (citing *Kipp v. Ski Enter. Corp. of Wis., Inc.*, 783 F.3d 695, 698 (7th Cir. 2015); *First Metro. Church of Hous. v. Genesis Grp.*, 616 F. App’x 148, 149 (5th Cir. 2015); *Jones v. ITT Sys. Div.*, 595 F. App’x 662 (8th Cir. 2015)).

49. *Id.* at *13 (citing *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 883 (Cal. 2016); *ClearOne, Inc. v. Revolabs, Inc.*, 369 P.3d 1269, 1282–83 (Utah 2016); *Genuine Parts Co. v. Cepac*, 137 A.3d 123, 127–38 (Del. 2016); *Catholic Diocese of Green Bay, Inc. v. John Doe*, 349 P.3d 518, 519–20 (Nev. 2015); *First Cmty. Bank, N.A. v. First Tenn. Bank, N.A.*, 489 S.W.3d 369, 386–87 (Tenn. 2015); *Sioux Pharm., Inc. v. Summit Nutritionals Int’l Inc.*, 859 N.W.2d 182, 194–95 (Iowa 2015)).

50. *Id.* at *13.

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b. The Opinion Heightened the Split on Personal Jurisdiction in FELA Cases

BNSF argued that authority was split regarding personal jurisdiction in FELA cases, emphasizing three different states that disagreed with Montana.⁵¹ The Mississippi Supreme Court “explicitly rejected” the notion that the FELA provides a basis for personal jurisdiction without a due process analysis.⁵² Following the same reasoning, the Supreme Court of Appeals of West Virginia held that personal jurisdiction cannot be asserted in FELA cases until the Due Process standard under *International Shoe Company v. Washington*⁵³ is applied and the additional limitations of Section 56 are applied.⁵⁴ Finally, the Supreme Court of Missouri rejected the contention that a state court can assert personal jurisdiction based on FELA when it applied *International Shoe* and concluded that the railroad’s business within the state did not satisfy the due-process test.⁵⁵ Thus, BNSF argued that the holdings in these three states represented the majority in the split of authority, and the United States Supreme Court needed to resolve this personal jurisdiction split in FELA cases on certiorari.⁵⁶

c. This Case Involves Exceptionally Important Due Process Issues

BNSF argued that if the United States Supreme Court did not grant certiorari, every domestic corporation—railroads in particular—doing business within Montana would be haled into Montana state courts.⁵⁷ Moreover, BNSF argued that Montana’s removal of railroads from the due process analysis would allow courts to similarly exclude any statutory cause of action from the due process analysis.⁵⁸ BNSF further contended that Montana has “repeatedly subjected railroad defendants to plaintiff-friendly procedural rules and substantive FELA standards.”⁵⁹ BNSF provided the example that Montana has explicitly disagreed with the First, Second, Third, Fourth, Fifth, Sixth, and Seventh Circuits by extending the statute of limitations for

51. *Id.* at *17–18 (citing *Southern Pac. Transp. Co. v. Fox*, 609 So. 2d 357, 362–63 (Miss. 1992)).

52. *Id.* at *17 (citing *Southern Pac. Transp. Co. v. Fox*, 609 So. 2d 357, 362–63 (Miss. 1992)).

53. 326 U.S. 310, 316 (1945) (holding that “due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

54. Petition, *supra* note 8, at *17 (citing *Norfolk S. Ry. Co. v. Maynard*, 427 S.E.2d 277, 280–81 (W.Va. 1993)).

55. *Id.* at *17–18 (citing *Hayman v. Southern Pac. Co.*, 278 S.W.2d 749, 751 (Mo. 1955)).

56. *Id.* at *17–18.

57. *Id.* at *23.

58. *Id.* at *24.

59. *Id.* at *24.

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FELA claims “longer than any other court.”⁶⁰ BNSF concluded its argument, asserting that “[t]he Montana Supreme Court must not be allowed to ignore [the United States Supreme Court’s] decisions and deny due process to out-of-state defendants in Montana’s courts.”⁶¹

2. *Nelson and Tyrrell’s Argument*

Nelson and Tyrrell (“Respondents”) argued that the petition for a writ of certiorari should be denied for three reasons. First, no cases cited by BNSF, including *Daimler*, addressed whether the Fourteenth Amendment limits Congress’s power to establish where defendants can be sued for a federal claim.⁶² Second, although BNSF asserted a split in authority, the cited cases failed to show such conflict.⁶³ Third, the Montana Supreme Court’s decision was correct because “Congress has broad power to permit state courts to exercise personal jurisdiction over U.S.-based defendants for the adjudication of federal claims.”⁶⁴

a. *Congress Has the Power to Confer Personal Jurisdiction*

As an initial matter, Respondents contended that *Daimler* was not at issue because “the Montana Supreme Court did *not* hold that Montana state courts could exercise general jurisdiction, as that term is used in [the United States Supreme Court’s] case law, over BNSF.”⁶⁵ Instead, Respondents argued, “the question at issue was whether BNSF was ‘subject to suit *under the FELA* by way of “doing business” in Montana,’” and whether Congress may authorize states to exercise personal jurisdiction over domestic defendants for federal claims.⁶⁶ Respondents contended that none of the cases cited by BNSF held that the Fourteenth Amendment precluded Congress from allowing state courts to assert personal jurisdiction over domestic corporations to adjudicate federal claims.⁶⁷

60. Petition, *supra* note 8, at *24 (citing *Anderson v. BNSF Ry. Co.*, 354 P.3d 1248, 1259–61 (Mont. 2015), *cert denied*, 136 S. Ct. 1495 (2016)).

61. *Id.* at *26.

62. Opposition, *supra* note 8, at *1 (emphasis in original).

63. *Id.* at *2.

64. *Id.* at *2.

65. *Id.* at *8 (emphasis in original).

66. *Id.* at *9, *10 (emphasis in original) (internal citation omitted).

67. *Id.* at *12.

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b. No Split of Authority

Respondents claimed that each case BNSF contended was inconsistent with *Tyrrell*, was “easily reconcilable.”⁶⁸ The Supreme Court of Mississippi held that the state’s long-arm statute did not permit the assertion of personal jurisdiction over an out-of-state FELA defendant doing business within Mississippi.⁶⁹ Respondents argued that Mississippi’s holding denying jurisdiction was “‘wholly independent of constitutional due process concerns . . . flowing from *International Shoe*’ and its progeny,” and as such, did not address whether Mississippi “could” constitutionally subject the railroad to personal jurisdiction.⁷⁰

Next, Respondents addressed *Hayman v. Southern Pacific Company*, another FELA case holding that jurisdiction could not be asserted over an out-of-state defendant. Respondents distinguished this case from the case at hand by asserting the Missouri Court interpreted the state long-arm statute and not federal law.⁷¹ Finally, Respondents argued that *Norfolk Southern Railway Company v. Maynard*, was “even further afield” than the other two cases BNSF relied upon.⁷² In that case, the railroad’s subsidiary had insufficient activity to find that Norfolk Southern Railway Co. was doing business in the state.⁷³ The *Norfolk* Court cited *International Shoe* in dicta to describe the scope of the long-arm statute and distinguish between a suit under the long-arm statute and one under the FELA “doing business” standard.⁷⁴ Respondents thus disagreed with BNSF’s contention that an authority split existed as to whether FELA authorizes state courts to assert jurisdiction in claims unrelated to the state.

c. Montana’s Decision is Correct

Finally, Respondents argued that the United States Supreme Court had reviewed FELA cases involving out-of-state plaintiffs, defendants, and events, but had not questioned the personal jurisdiction issue.⁷⁵ Further, the Court has continuously held that the inconvenience and cost to FELA defendants in any state where they are doing business was “contemplated by

68. Opposition, *supra* note 8, at *13–15; *see also* *Southern Pac. Transp. Co. v. Fox*, 609 So.2d 357 (Miss. 1992); *Hayman v. Southern Pac. Co.*, 278 S.W.2d 749 (Mo. 1955); *Norfolk S. Ry. Co. v. Maynard*, 437 S.E.2d 277 (W. Va. 1993).

69. *Fox*, 609 So.2d at 362–63.

70. Opposition, *supra* note 8, at *13 (emphasis in original) (citing *Fox*, 609 So. 2d at 359, 361).

71. *Id.* at *14.

72. *Id.* at *14.

73. *Id.* at *14.

74. *Id.* at *14–15.

75. *Id.* at *15–16.

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Congress and is permissible.”⁷⁶ Although the cases the Court previously decided did not involve personal jurisdiction, Respondents argued that this case was consistent with the underlying liberal interpretation of FELA in favor of injured plaintiffs.⁷⁷ Thus, Respondents concluded that Montana’s decision was consistent with past United States Supreme Court decisions.⁷⁸

Respondents disagreed with BNSF’s argument that plaintiffs would flood state courts with FELA claims against defendants with no connection to the state other than doing business there.⁷⁹ Respondents contended that the Montana Supreme Court did not allow state courts to adjudicate every claim against railroads based on the doing business standard.⁸⁰ Rather, it held that courts may adjudicate FELA claims like the case at hand only when state law permits the jurisdiction.⁸¹ Further, Respondents addressed BNSF’s claim of unfairness by concluding that Congress had considered narrowing plaintiffs’ forum choices, but instead gave plaintiffs broad discretion to choose where to bring their claims.⁸²

III. THE UNITED STATES SUPREME COURT’S DECISION

On May 30, 2017, an 8-1 opinion, authored by Justice Ginsburg, reversed the Montana Supreme Court’s decision in *Tyrrell*, and the cases were remanded for further proceedings.⁸³ The United States Supreme Court held that the first sentence of 45 U.S.C. § 56 (“Section 56”) does not address personal jurisdiction over railroads; rather, it is a venue statute governing proper locations for FELA suits filed in federal courts.⁸⁴ Additionally, the second sentence of Section 56 refers to subject-matter jurisdiction, confirming that federal courts do not have exclusive jurisdiction over FELA cases.⁸⁵ Finally, Montana’s reliance on its long-arm jurisdiction does not comport with the Due Process Clause of the United States Constitution when the defendant is not “at home” within the state and the underlying issue did not occur in another state.⁸⁶

76. Opposition, *supra* note 8, at *16.

77. *Id.* at *16–17.

78. *Id.* at *17–18.

79. *Id.* at *20.

80. *Id.* at *20.

81. *Id.* at *20.

82. Opposition, *supra* note 8, at *20–21.

83. BNSF Ry. Co. v. Tyrrell, ___ U.S. ___, ___, 137 S. Ct. 1549, 1560 (2017).

84. *Id.* at ___, 137 S. Ct. at 1553.

85. *Id.* at ___, 137 S. Ct. at 1553.

86. *Id.* at ___, 137 S. Ct. at 1553 (quoting Daimler AG v. Bauman, 571 U.S. ___, 134, ___ S. Ct. 746, 760 (2014)).

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A. *First Sentence of Section 56 Does Not Refer to Personal Jurisdiction*

The first sentence of Section 56 states in part that “an 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.”⁸⁷ Generally, the United States Supreme Court explained, Congress uses the expression “may be brought” to describe proper venue for an action.⁸⁸ In *Baltimore & Ohio Railroad Company v. Kepner*, the Supreme Court interpreted Section 56 as “establish[ing] venue” for a federal court action.⁸⁹ Contrary to Montana Supreme Court’s interpretation of the cases analyzing Section 56, neither *Kepner* nor any other decision suggests that Section 56 might affect personal jurisdiction.⁹⁰

The Court contrasted venue statutes from personal jurisdiction statutes, pointing out that venue statutes generally use the language, “where suit ‘may be brought,’”⁹¹ and personal jurisdiction statutes are Congress’s method of allowing for service of process.⁹² Despite Respondents’ contention that the 1888 Judiciary Act provision that “prompted [Section] 56’s enactment” concerned both personal jurisdiction and venue, the Court has long interpreted Section 56 to concern only venue.⁹³ The Court did concede that if the provision had been read as a personal jurisdiction statute, it would have “yielded an anomalous result: In diversity cases, the provision allowed for suit ‘in the district of the residence of either the plaintiff or the defendant.’”⁹⁴ The United States Supreme Court noted that interpreting this to be a personal jurisdiction provision would have allowed the plaintiff to

87. 45 U.S. § 56. This is the first sentence of the second paragraph of Section 56 but is referred to as the “first sentence” by the Court.

88. *BNSF Ry. Co.*, ___ U.S. at ___, 137 S. Ct. at 1555 (quoting 28 U.S.C. § 1391(b) (2017) (general venue statute specifying where “[a] civil action may be brought”).

89. 314 U.S. 44, 52 (1941).

90. *BNSF Ry. Co.*, ___ U.S. at ___, 137 S. Ct. at 1555 (quoting *Baltimore & Ohio Railroad Company*, 314 U.S. 44, 52 (1941)).

91. *Id.* at ___, 137 S. Ct. at 1555 (quoting 28 U.S.C. § 1391(b) (general venue statute specifying where “[a] civil action may be brought”)); J. Oakley, ALI, *Fed. Judicial Code Rev. Project* 253–290 (2004) (listing special venue statutes, many with similar language); *see also* *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 56 (1941) (Frankfurter, J., dissenting) (“The phrasing of [Section 56] follows the familiar pattern generally employed by Congress in framing venue provisions.”).

92. *BNSF Ry. Co.*, ___ U.S. at ___, 137 S. Ct. at 1555–56; *see, e.g.*, 15 U.S.C. § 22 (Clayton Act provision stating that “all process in [cases against a corporation arising under federal antitrust laws] may be served in the district of which [the defendant] is an inhabitant, or wherever [the defendant] may be found”); *see also* *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 106–07 (1987) (discussing statutes that authorize (or fail to authorize) nationwide service of process). *But cf.* *Schlanger v. Seamans*, 401 U.S. 487, 490 n.4 (1971) (though “Congress has provided for nationwide service of process” in 28 U.S.C. 1391(e) (1964 ed., Supp. V), that statute was meant to expand venue, not personal jurisdiction).

93. *BNSF Ry. Co.*, ___ U.S. at ___, 137 S. Ct. at 1556.

94. *Id.* at ___, 137 S. Ct. at 1556.

hale the defendant into her home district, even if the defendant or action had no connection to that district.⁹⁵ However, the Court clarified that the first sentence of Section 56 refers to venue and not jurisdiction.⁹⁶

B. Second Sentence of Section 56 Grants Concurrent Jurisdiction to the States

The second sentence of Section 56 provides that “[t]he jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States.”⁹⁷ Respondents claimed this sentence extended their argument of personal jurisdiction to the state courts.⁹⁸ However, as the United States Supreme Court held, the first sentence of Section 56 does not confer personal jurisdiction in any court and only concerns federal court venue.⁹⁹

The United States Supreme Court has continuously interpreted Section 56’s second sentence to provide for concurrent subject-matter jurisdictions over FELA actions.¹⁰⁰ The opinion notes that Respondents acknowledged in their brief that Congress added the provision to confirm subject-matter jurisdiction after the Connecticut Supreme Court held that Congress had intended to confine FELA litigation to federal courts.¹⁰¹ The United States Supreme Court, quoting Justice McKinnon’s dissent from the Montana Supreme Court’s decision, stated “[t]he phrase ‘concurrent jurisdiction’ is a well-known term of art long employed by Congress and courts to refer to subject-matter jurisdiction, not personal jurisdiction.”¹⁰² In *Mims v. Arrow Financial Services, LLC*,¹⁰³ the Court held that federal and state courts have “concurrent jurisdiction” over suits arising under the Telephone Consumer Protection Act of 1991. Additionally, in *Clafin v. Houseman*,¹⁰⁴ the Court held that state courts retain “concurrent jurisdiction” over “suits in which a bankrupt” party is involved, notwithstanding federal court’s exclusive jurisdiction over bankruptcy matters. Therefore, in order for Montana to retain concurrent jurisdiction, personal jurisdiction must have existed.

95. *Id.* at ___, 137 S. Ct. at 1556.

96. *Id.* at ___, 137 S. Ct. at 1555–56.

97. 45 U.S.C. § 56.

98. *BNSF Ry. Co.*, ___ U.S. at ___, 137 S. Ct. at 1556.

99. *Id.* at ___, 137 S. Ct. at 1556.

100. *Id.* at ___, 137 S. Ct. at 1557; *see* Second Emp’rs Liab. Cases, 223 U.S. 1, 55–56 (1912).

101. *BNSF Ry. Co.*, ___ U.S. at ___, 137 S. Ct. at 1557; *see* Brief for Resp’ts, *BNSF Ry. Co. v. Tyrrell*, 2017 WL 1192088 at *23 (U.S. March 29, 2017) (No. 16-405).

102. *BNSF Ry. Co.*, ___ U.S. at ___, 137 S. Ct. at 1557 (quoting *Tyrrell v. BNSF Ry. Co.*, 436 P.3d 1, 13 (Mont. 2016)) (McKinnon, J., dissenting) (internal quotation marks omitted).

103. 565 U.S. 368, 372 (2012).

104. 93 U.S. 130, 133–34 (1876).

C. *The Four Key Cases Cited by Respondents*

The United States Supreme Court then analyzed the four cases the Montana Supreme Court cited to show that the United States Supreme Court has consistently “‘interpreted [Section] 56 to allow state courts to hear cases brought under FELA even where the only basis for jurisdiction is the railroad doing business in the forum [s]tate.’”¹⁰⁵ The four cases the Montana Supreme Court interpreted to reach this conclusion were: *Pope v. Atlantic Coast Line Railroad Company*, *Miles v. Illinois Central Railroad Company*, *Baltimore Ohio Railroad Company v. Kepner*, and *Denver & Rio Grande Western Railroad Company v. Terte*.¹⁰⁶ The United States Supreme Court cautioned against the Montana Court’s reliance on cases “decided in the era dominated” by the “territorial thinking” of *Pennoyer v. Neff*,¹⁰⁷ noting that the only case decided after *International Shoe* was *Pope*.¹⁰⁸

The United States Supreme Court further noted that none of the decisions Montana relied on “resolved a question of personal jurisdiction.”¹⁰⁹ In *Terte*, although the FELA plaintiff could bring suit in a Missouri state court after being injured in Colorado, and the railroad was incorporated in Delaware, the overall dispute hinged on the Dormant Commerce Clause and not personal jurisdiction.¹¹⁰ In both *Kepner* and *Miles*, the United States Supreme Court held that state courts may not enjoin their residents from bringing a FELA suit in another state’s federal or state courts based on inconvenience to the railroad defendant.¹¹¹ Finally, the *Pope* Court held that the statutory “provision for transfer from one federal court to another did not bear on the question decided in *Miles*: A state court still could not enjoin a FELA action brought in another state’s courts.”¹¹² Therefore, the Court distinguished all four of the key cases relied on by the Montana Su-

105. *BNSF Ry. Co.*, ___ U.S. at ___, 137 S. Ct. at 1557 (quoting *Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 4–5 (2016)).

106. 284 U.S. 284 (1932).

107. 95 U.S. 714 (1878).

108. *BNSF Ry. Co.*, ___ U.S. at ___, 137 S. Ct. at 1557–58; see *Daimler AG v. Bauman*, 571 U.S. ___, ___ n. 18, 134 S. Ct. 746, 761 n.18 (2014) (noting that cases “decided in the era of *Pennoyer*’s territorial thinking should not attract heavy reliance today” (internal citation omitted)).

109. *BNSF Ry. Co.*, ___ U.S. at ___, 137 S. Ct. at 1557.

110. *Id.* at ___, 137 S. Ct. at 1557; see *Denver & Rio Grande W. R.R. Co. v. Terte*, 284 U.S. 284, 286, 287 (1932) (“The alleged residence in Missouri of persons whose testimony plaintiff supposed would be necessary to prove his claim was not enough to justify retention of jurisdiction by the Circuit Court. While this circumstance might enable plaintiff to try his cause there with less inconvenience than elsewhere, it would not prevent imposition of a serious burden upon interstate commerce. And, we have held, it is the infliction of this burden that deprives the courts of jurisdiction over cases like this.”).

111. *BNSF Ry. Co.*, ___ U.S. at ___, 137 S. Ct. at 1557 (citing *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 54 (1941); *Miles v. Illinois Cent. R.R. Co.*, 315 U.S. 698, 699–700 (1942)).

112. *BNSF Ry. Co.*, ___ U.S. at ___, 137 S. Ct. at 1557 (citing *Pope v. Atlantic Coast Line R.R. Co.*, 345 U.S. 379, 383–84 (1953)).

preme court, noting they had not held that Section 56 could be interpreted as a personal jurisdiction statute.¹¹³

D. Montana's Long-Arm Statute

The United States Supreme Court discussed that the history of Section 56 does not authorize state courts to exercise personal jurisdiction over a railroad on the basis that it does business in the state.¹¹⁴ Thus, Montana's assertion of personal jurisdiction must comport with the state's long-arm statute.¹¹⁵ Since BNSF did not dispute it was "found within" the State of Montana, the Court focused on whether the exercise of personal jurisdiction violated BNSF's Due Process rights under the Fourteenth Amendment.¹¹⁶

The *International Shoe* Court rationalized that a state court may exercise personal jurisdiction over out-of-state defendants who have "certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" ¹¹⁷ Following *International Shoe*, the Court distinguished between specific jurisdiction¹¹⁸ and general jurisdiction.¹¹⁹ Because there was no allegation that either Respondent's underlying incident occurred in Montana, specific jurisdiction was not at issue.¹²⁰

In *Daimler*, the Court simplified its prior holding that "a court may assert jurisdiction over a foreign corporation 'to hear any and all claims against [it]' only when the corporation's affiliations with the [s]tate in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum [s]tate.'" ¹²¹ The Court explained that the "paradigm" forums include the corporation's place of incorporation and its principal place of business.¹²² Although the paradigm forums are not the limitation of personal jurisdiction, a corporate defendant's operations may *only*

113. *Id.* at ___, 137 S. Ct. at 1555–58.

114. *Id.* at ___, 137 S. Ct. at 1555–58.

115. *Id.* at ___, 137 S. Ct. at 1555–58; see M. R. Civ. P. 4(b)(1) ("All persons found within the state of Montana are subject to the jurisdiction of Montana courts.")

116. *BNSF Ry. Co.*, ___ U.S. at ___, 137 S. Ct. at 1558 (quoting M. R. Civ. P. 4(b)(1)).

117. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

118. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) ("Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant 'purposefully directed' his activities at the residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities" (internal citations omitted)).

119. See *Goodyear Dunlop Tires Operations, S.A., v. Brown*, 564 U.S. 915, 924 (2011) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as home.")

120. *BNSF Ry. Co. v. Tyrrell*, ___ U.S. ___, ___, 137 S. Ct. 1549, 1558 (2017).

121. *Damiler AG v. Bauman*, 571 U.S. ___, ___, 134 S. Ct. 746, 751 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 919).

122. *Id.* at ___, 134 S. Ct. at 760.

“be so substantial and of such a nature as to render the corporation at home in that state” in an “exceptional case.”¹²³

Although Montana had distinguished *Daimler* on the ground that it did not include a FELA claim or a railroad defendant,¹²⁴ the Court held that the Fourteenth Amendment Due Process constraint in *Daimler* applies to all state-court assertions of general jurisdiction regardless of the type of claim or corporate defendant.¹²⁵ The Court reiterated that BNSF is not incorporated in Montana and does not maintain its principal place of business in Montana. Further, BNSF does not heavily engage in business activities in Montana so “as to render [it] essentially at home” there.¹²⁶ The Court concluded that even though BNSF has over 2,000 miles of railroad track and more than 2,000 employees in Montana, *Daimler* observed that “the general jurisdiction inquiry does not focus solely on the magnitude of the defendant’s in-state contacts.”¹²⁷ The Court held that BNSF can “scarcely be deemed at home” in all of the states that it operates, and the in-state business does not permit general jurisdiction over claims such as Respondents’ that are unrelated to any activity in Montana.¹²⁸ Accordingly, the United States Supreme Court reversed the Montana Supreme Court’s decision and remanded the matters for further proceedings consistent with the opinion.¹²⁹

E. Justice Sotomayor’s Concurrence and Dissent

Justice Sotomayor concurred in the conclusion that Section 56 does not confer personal jurisdiction over railroads in state courts.¹³⁰ She further agreed that the Montana Supreme Court erred in holding that the nature of the claim comports with the Due Process Clause to allow personal jurisdiction over BNSF.¹³¹ Despite her concurrence in the result, Justice Sotomayor’s dissent focused on her continued disagreement “with the path the Court struck with *Daimler* . . . which limits general jurisdiction over a

123. *BNSF Ry. Co.*, ___ U.S. at ___, 137 S. Ct. at 1558; see *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447–48 (1952) (held as the “textbook” exceptional case of general jurisdiction on the basis that the foreign defendant maintained an office in Ohio, kept corporate files there, and oversaw the company’s activities from Ohio during a time of war).

124. *Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 6 (Mont. 2016).

125. *BNSF Ry. Co.*, ___ U.S. at ___, 137 S. Ct. at 1558–59.

126. *Id.* at ___, 137 S. Ct. at 1559.

127. *Id.* at ___, 137 S. Ct. at 1559 (quoting *Daimler AG.*, 571 U.S. at ___ n. 20, 135 S. Ct. at 762 n. 20).

128. *Id.* at ___, 137 S. Ct. at 1559 (quoting *Daimler AG.*, 571 U.S. at ___ n. 20, 135 S. Ct. at 762 n. 20).

129. *Id.* at ___, 137 S. Ct. at 1559.

130. *Id.* at ___, 137 S. Ct. at 1560 (Sotomayor, J., concurring).

131. *BNSF Ry. Co. v. Tyrrell*, ___ U.S. ___, ___, 137 S. Ct. 1549, 1560 (2017) (Sotomayor, J., concurring).

corporate defendant only to those States where it is ‘essentially at home.’”¹³²

Justice Sotomayor opined that the United States Supreme Court would do well to adhere to its decision in *International Shoe*, where it held that the question is whether the benefits the corporation attained in the state “warranted the burdens associated with general jurisdiction.”¹³³ The dissent suggested that the approach from *Daimler* creates a “jurisdictional windfall” for corporations that operate across a number of jurisdictions.¹³⁴ As a result, it is “virtually inconceivable” that these large corporations will ever be haled into court in a state other than their principal place of business or incorporation.¹³⁵ Therefore, it is the plaintiffs who will “bear the brunt of the majority’s approach and be forced to sue in distant jurisdictions with which they have no contacts or connection.”¹³⁶

Moreover, Justice Sotomayor predominantly disagrees with the majority’s decision not to treat the case at hand as a possible “exceptional case.”¹³⁷ The majority did not remand the case to Montana, where the due process question could be analyzed under the proper legal question; in Justice Sotomayor’s opinion, this created a situation where the only “exceptional case” would have to have facts on point with *Perkins v. Benguet Consolidated Mining Company*.¹³⁸

IV. ANALYSIS: THE TRACK TO RAILROAD PLAINTIFFS’ FORUM SHOPPING

A. History of FELA

FELA enables railroad employees to recover damages for injuries resulting from a railroad equipment deficiency or from the negligence of the agents or employees of the railroad.¹³⁹ Although it seems anomalous today that only railroad workers have a federal remedy for workplace injuries rather than a state workers’ compensation remedy,¹⁴⁰ the roots of FELA stem from the unique role of the American railroad employee. In the late nineteenth century, “the average life expectancy of a switchman was seven years, and a brakeman’s chance of dying from natural causes was less than

132. *Id.* at ___, 137 S. Ct. at 1560 (quoting *Daimler AG*, 571 U.S. at ___, 135 S. Ct. at 761).

133. *Id.* at ___, 137 S. Ct. at 1560 (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 317–18 (1945)).

134. *Id.* at ___, 137 S. Ct. at 1560.

135. *Id.* at ___, 137 S. Ct. at 1560.

136. *Id.* at ___, 137 S. Ct. at 1561.

137. *BNSF Ry. Co. v. Tyrrell*, ___ U.S. ___, ___, 137 S. Ct. 1549, 1561–62 (2017).

138. *Id.* at ___, 137 S. Ct. 1561–62; *see* 342 U.S. 437 (1952).

139. 45 U.S.C. § 51.

140. *See id.* §§ 51–60.

one in five.”¹⁴¹ In 1907, President Theodore Roosevelt urged Congress to pass FELA: “The practice of putting the entire burden of loss to life and limb upon the victim or the victim’s family is a form of social injustice in which the United States stands in unenviable prominence.”¹⁴² In response to the dangers of railroad working conditions, and perhaps President Roosevelt’s advocacy, Congress first enacted FELA in 1908.¹⁴³

Prior to FELA, injured railroad workers found legal recourse difficult due to common-law tort principles.¹⁴⁴ FELA served public policy objectives of doing away with the fellow-servant rule, the doctrine of assumption of risk, and the principle of contributory negligence as a complete defense.¹⁴⁵ Enacted in New York in 1910, the first workers’ compensation law was almost immediately struck down as unconstitutional.¹⁴⁶ Since workers’ compensation was not a viable legislative option in the early twentieth century, FELA was revolutionary and ensured compensation for injured railroad workers.¹⁴⁷

The courts have liberally construed the FELA “to further Congress’[s] remedial goal.”¹⁴⁸ Federal and state courts are protective of “broad venue rights” for FELA plaintiffs.¹⁴⁹ Since general federal venue statutes “worked injustices to employees,” FELA plaintiffs are allowed a broader venue choice than those granted under general venue statutes.¹⁵⁰ Moreover, the United States Supreme Court has held that a plaintiff’s right to select a *venue* granted under Section 56 is a “substantial right.”¹⁵¹ Although FELA is liberally construed, the Court noted that it is not an “attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure.”¹⁵²

B. History and Policy of Forum Shopping

Forum shopping “occurs when a party attempts to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict.”¹⁵³ The modern American judicial system

141. Thomas E. Baker, *Why Congress Should Repeal the Federal Employers’ Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79, 81 (1992).

142. 45 Cong. Rec. 4041 (1910).

143. Railroad Employers’ Liability, Pub. L. No. 60–100, 35 Stat. 65 (1908).

144. Baker, *supra* note 141, at 82.

145. *Id.* at 82.

146. *Ives v. South Buffalo Ry. Co.*, 201 N.Y. 271, 319 (N.Y. 1911).

147. Baker, *supra* note 141, at 82–83.

148. *Consolidated Rail Corp. v. Carlisle*, 512 U.S. 532, 543 (1994).

149. *Rule v. Burlington N. & Santa Fe Ry. Co.*, 106 P.3d 533, 536 (Mont. 2005).

150. *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 53 (1941).

151. *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 266 (1949).

152. *Second Emp’rs Liab. Cases*, 223 U.S. 1, 56 (1912).

153. *Norwood*, *supra* note 1, at 268 (quoting Black’s Law Dictionary 655 (6th ed. 1990)).

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did not create forum shopping. In the Later Roman Empire and into the Byzantine period, a plaintiff did not have the right to choose his jurisdiction but often found ways to effectively bypass the rules to select a forum of his choice.¹⁵⁴ During the Later Roman Empire, one of the most basic of tactics used by plaintiffs seeking a venue change was the manner in which a plaintiff shaped his claim.¹⁵⁵ For example, the *Theodosian Code 2.1.8*, from 395 A.D., refers to plaintiffs who deliberately framed suits “under the guise of criminal action” to allow a certain Imperial magistrate to hear cases.¹⁵⁶ In the modern judicial system, selection of venue, personal jurisdiction, and general jurisdiction are all different vehicles for forum shopping. This section focuses primarily on venue-driven forum shopping since the United States Supreme Court labeled Section 56 as a venue statute rather than a personal jurisdiction statute.

Venue statutes by their nature create an opportunity for a plaintiff to forum shop by providing numerous courts in which venue is proper.¹⁵⁷ The Court is unclear whether the purpose of venue statutes is to provide choice of forum for the plaintiff or to “further judicial management by protecting against unreasonable venue choices.”¹⁵⁸ The 1941 decision in *Kepner* provided a prime example of the plaintiff’s-choice approach to venue. In *Kepner*, the plaintiff selected a forum with no relation to the events that gave rise to his claim.¹⁵⁹ Possibly, the plaintiff chose this forum because the jury would likely award higher damages.¹⁶⁰ The United States Supreme Court upheld the plaintiff’s choice of venue because “venue is a privilege created by federal statute,” and that privilege “cannot be frustrated for reasons of convenience or expense.”¹⁶¹ Notably, Justice Frankfurter questions in his dissent whether the venue statute at issue was “intended to give a plaintiff an absolute and unqualified right to compel trial of his action in any of the specified places he chooses.”¹⁶²

*Leroy v. Great Western United Corporation*¹⁶³ serves as a leading case establishing the judicial-management principal of venue statutes. The Supreme Court noted that, “[i]n most instances, the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial.”¹⁶⁴ The *Leroy* Court held

154. CAROLINE HUMFRESS, *RULERS & ELITES, LAW AND EMPIRE* 234–35 (2013).

155. *Id.* at 235.

156. *Id.* at 235–36 (internal citation omitted).

157. Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 170 (2000).

158. *Id.* at 171.

159. *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 48 (1941); Ryan, *supra* note 157, at 171.

160. Ryan, *supra* note 157, at 171.

161. *Kepner*, 314 U.S. at 53–54.

162. *Id.* at 57 (Frankfurter, J., dissenting).

163. 443 U.S. 173 (1979).

164. *Id.* at 183–84 (emphasis in original).

that the current venue statute that made venue proper in “the judicial district . . . in which the claim arose,” should be narrowly construed so only in “unusual case[s]” could the claim arise in more than one judicial district.¹⁶⁵ Ultimately, the United States Supreme Court based its decision on the foundation that “Congress did not intend . . . to give [plaintiffs] an unfettered choice among a host of different districts.”¹⁶⁶ The *Leroy* decision furthered the judicial-management policy by limiting proper venues to where the claim arose, the defendant’s residence, or, in the case of corporations, where the corporation was rendered “at home.”¹⁶⁷

C. Montana’s Continuous Pro-Plaintiff Choice Holdings

Plaintiffs bringing FELA claims in Montana against railroads that merely did business in the state when the underlying action has no relation to the state is not a novel issue. Many of these earlier cases did not challenge jurisdiction on the same basis as *Tyrrell* because *Goodyear* and *Daimler* had not been decided. At first, the railroads often claimed improper jurisdiction based on *forum non conveniens*.¹⁶⁸ The rule of *forum non conveniens* is rooted in equity and allows the court discretion to decline to exercise jurisdiction over a case when it believes the case may be more “appropriately and justly” tried elsewhere.¹⁶⁹ Ultimately, the court would rule in favor of the injured railroad employees, leaving the railroads to raise other arguments.¹⁷⁰

In the late 1950s, Nathaniel H. Bracy, a resident of Washington, sued Great Northern Railway Company, a Minnesota corporation, in Silver Bow County, Montana for injuries he sustained while working in a railroad yard in Washington.¹⁷¹ Great Northern filed a motion to dismiss based on *forum non conveniens* twice before trial and once at the close of the case—all motions were denied.¹⁷² The Montana Supreme Court held that the district court had not abused its discretion and denied the motions based on *forum non conveniens*.¹⁷³ Because the Montana Supreme Court affirmed the dis-

165. *Id.* at 184–85 (quoting 28 U.S.C. § 1391(1) (amended in 1990 to remove the language “in which the claim arose”)).

166. *Id.* at 185.

167. *Id.* at 185; see also *Daimler AG v. Bauman*, 571 U.S. ___, ___, 134 S. Ct. 746, 760 (2014); *BNSF Ry. Co. v. Tyrrell*, ___ U.S. ___, ___, 137 S. Ct. 1549, 1554 (2017); Ryan, *supra* note 157, at 172.

168. See, e.g., *Bracy v. Great N. Ry. Co.*, 343 P.2d 848, 849–50 (Mont. 1959).

169. *Labella v. Burlington N.*, 595 P.2d 1184, 1185 (Mont. 1979) (quoting *Leet v. Union Pac. R.R. Co.*, 155 P.2d 42, 44 (Cal. 1944)).

170. See, e.g., *Bracy*, 343 P.2d at 850; *Montana ex rel. Great N. Ry. Co. v. District Court*, 365 P.2d 512, 514 (Mont. 1961); *Labella*, 595 P.2d at 1187.

171. *Bracy*, 343 P.2d at 850.

172. *Id.* at 849–50.

173. *Id.* at 850.

trict court, plaintiffs not related to Montana would continue to bring cases against the railroad in Montana.¹⁷⁴

In 1961, a Washington resident again haled Great Northern Railway Company into Silver Bow County, Montana under a FELA claim for an alleged injury that occurred in Spokane, Washington while the plaintiff worked for Great Northern.¹⁷⁵ The railroad filed an original proceeding for an appropriate writ, contending that the district court had abused its discretion in denying the railroad's motion to dismiss based on the ground of *forum non conveniens*.¹⁷⁶ The Montana Supreme Court did not feel compelled to establish the rule as it related to FELA claims, because there did not appear to be a trend of these types of cases—only eighteen were filed in the previous eleven years.¹⁷⁷ Therefore, the Court did not adopt a rule at that time, but warned that if a “substantial increase” in this type of litigation occurred, it would “reexamine the situation.”¹⁷⁸

With the Montana Supreme Court yet to address the relationship between *forum non conveniens* and FELA claims, plaintiffs continued to sue railroads in Montana when the underlying incident had no relation to the State. In 1979, Michael A. Labella, Jr., a resident of Washington sued Burlington Northern, Inc., a Minnesota corporation, in Lewis and Clark County, Montana for injuries he sustained while working at one of Burlington's rail yards in Washington.¹⁷⁹ Burlington moved to dismiss on the ground of *forum non conveniens*.¹⁸⁰ The district court dismissed Labella's case. For the first time, the Montana Supreme Court stated it was “squarely faced” with the issue of the relationship between *forum non conveniens* and FELA.¹⁸¹ The Court found the policy of liberally construing FELA to favor injured railroad workers to be “highly persuasive” and rejected *forum non conveniens* in FELA actions.¹⁸² The Court again gave the warning: “[I]f a substantial increase in this type of litigation is called to our attention in the future we will reexamine the situation in light of what we have herein stated.”¹⁸³ To date, the Court has not reversed its position on *forum non conveniens* in FELA actions. However, this type of litigation continued,

174. See, e.g., *Montana ex rel. Great N. Ry. Co.*, 365 P.2d at 512; *Labella*, 595 P.2d at 1184.

175. *Montana ex rel. Great N. Ry. Co.*, 365 P.2d at 512.

176. *Id.*

177. *Id.* at 514.

178. *Id.* at 514. Specific statistics of cases against railroads in Montana of this sort from 1961 to date are unavailable. As such, within the scope of this note, whether a “trend” actually occurred in Montana cannot be assessed.

179. *Labella*, 595 P.2d at 1185.

180. *Id.* at 1185.

181. *Id.* at 1185.

182. *Id.* at 1187.

183. *Id.* at 1187 (quoting *Montana ex rel. Great N. Ry. Co. v. District Court*, 365 P.2d 512, 514 (Mont. 1961)).

ultimately resulting in the current *BNSF* decision by the United States Supreme Court.¹⁸⁴

Although BNSF focused on a split of authority regarding personal jurisdiction as applied to a FELA cause of action, Montana has taken their pro-FELA plaintiff stance further than other states. Including the decision in *Anderson v. BNSF Railway*,¹⁸⁵ which BNSF argued extended the statute of limitations for FELA plaintiffs in Montana longer than any other court,¹⁸⁶ Montana has a long history of broadly construing FELA in favor of plaintiffs.¹⁸⁷ As seen in *Bracy*, *Great Northern*, and *Labella*, Montana disagreed with the railroad defendants, and by 1979 it had created greater opportunity for railroad plaintiffs to forum shop by ultimately rejecting *forum non conveniens* arguments in FELA cases.¹⁸⁸

In 1995, Montana justified its rejection of *forum non conveniens* in FELA cases for four reasons.¹⁸⁹ First, courts should construe FELA liberally in favor of injured railroad employees “so that it may accomplish its humanitarian and remedial purposes.”¹⁹⁰ Second, the Court found the policy of a worker’s choice of forum to be “highly persuasive,” “even if that choice of forum involves forum shopping.”¹⁹¹ Third, the Montana Constitution requires its courts to remain open to every person regardless of residence or citizenship.¹⁹² Fourth, United States citizens who are not Montana citizens are statutorily entitled to the same rights and duties as Montana citizens.¹⁹³ Montana also emphasized that it had committed to “the strong national policy favoring a plaintiff’s selection of forum in actions brought

184. See *BNSF Ry. Co. v. Tyrrell*, ___ U.S. ___, 137 S. Ct. 1549 (2017).

185. 354 P.3d 1248, 1262 (Mont. 2015) (holding that Montana is not bound to follow federal circuit court precedents and the discovery rule applies in FELA cases for statute of limitations purposes).

186. Petition, *supra* note 8, at *24.

187. See *Bracy v. Great N. Ry. Co.*, 343 P.2d 848, 850 (Mont. 1959) (holding the district court did not abuse its discretion thrice denying *forum non conveniens* arguments); *Montana ex rel. Great N. Ry. Co.*, 365 P.2d at 514 (holding there was not a trend of cases not related to the state arguing *forum non conveniens* and as such, it was not at liberty to articulate a rule); *Labella v. Burlington N.*, 595 P.2d 1184, 1187 (Mont. 1979) (holding that railroad defendants are barred from asserting *forum non conveniens* arguments in FELA cases).

188. See *Bracy v. Great N. Ry. Co.*, 343 P.2d 848, 850 (Mont. 1959) (holding the district court did not abuse its discretion thrice denying *forum non conveniens* arguments); *Montana ex rel. Great N. Ry. Co.*, 365 P.2d at 514 (holding there was not a trend of cases not related to the state arguing *forum non conveniens* and as such, it was not at liberty to articulate a rule); *Labella v. Burlington N.*, 595 P.2d 1184, 1187 (Mont. 1979) (holding that railroad defendants are barred from asserting *forum non conveniens* arguments in FELA cases).

189. *Montana ex rel. Burlington N. R.R. v. Dist. Court*, 891 P.2d 493, 498–99 (Mont. 1995)

190. *Id.* at 498.

191. *Id.* at 499 (internal quotation marks omitted).

192. *Id.* at 499.

193. *Id.* at 409 (citing MONT. CODE ANN. § 49–1–204).

under [FELA].”¹⁹⁴ Thus, Montana enforced its intention to continue to liberally construe FELA in favor of plaintiffs, regardless of the forum shopping opportunities it created.

Montana opined that *Ford v. Burlington Northern Railroad Company* emphasized the national policy favoring plaintiff’s forum choice in FELA cases.¹⁹⁵ The *Ford* plaintiffs, residents of Wyoming, claimed they were injured in Wyoming while working for Burlington Northern.¹⁹⁶ Plaintiffs filed the complaint in Yellowstone County, Montana against the railroad that was incorporated in Delaware and had its principal place of business in Texas.¹⁹⁷ The district court denied the railroad’s motion to transfer venue to Hill County, Montana. Burlington argued, on appeal, Hill County was its Montana headquarters.¹⁹⁸ Relying on Montana’s venue statute, which the Court had consistently interpreted to allow a foreign corporation to be sued in any county selected by the plaintiff, the Montana Supreme Court affirmed the denial and emphasized its interpretation that plaintiff’s-choice forum was a “national policy, dating back to 1910” in FELA cases.¹⁹⁹ Although the United States Supreme Court affirmed *Ford*, it held that Montana’s venue rules could be understood as rationally furthering a legitimate state interest, but it did not emphasize that plaintiff’s-choice forum in FELA cases was a strong national policy.²⁰⁰

While it is clear courts should construe FELA statutes liberally in favor of injured railroad employees,²⁰¹ it is less clear if a national policy exists for plaintiff’s-choice of forum for FELA claims. By rejecting the doctrine in FELA cases,²⁰² but accepting it in other cases,²⁰³ Montana is the only state that questions whether federal *forum non conveniens* is generally applicable to *all* defendants.²⁰⁴ By 2015, thirty-seven states and the District

194. *Id.* at 409 (citing *Ford v. Burlington N. R.R. Co.*, 819 P.2d 169, 175 (Mont. 1991) (internal quotation marks omitted); *aff’d*, *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648 (1992)).

195. *Montana ex rel. Burlington N. R.R. v. Dist. Court*, 891 P.2d 493, 498–99 (Mont. 1995) (citing *Ford*, 819 P.2d at 175).

196. *Ford*, 819 P.2d at 170.

197. *Id.* at 170.

198. *Id.* at 170.

199. *Id.* at 174.

200. *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 654 (1992).

201. *Brady v. Terminal R.R. Assoc.*, 303 U.S. 10, 15 (1938) (“The [FELA] has been liberally construed ‘so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the Act.’” (internal citation omitted)).

202. *Labella v. Burlington N.*, 595 P.2d 1184, 1187 (Mont. 1979) (rejecting *forum non conveniens* in all FELA cases).

203. The federal common law doctrine has not been outright rejected in Montana and has been applied in non-FELA instances. *See San Diego Gas & Elec. Co. v. Ninth Judicial Dist. Court*, 329 P.3d 1264, 1271–72 (relying on a mandatory contractual forum selection clause to conclude that noncontractual issues should be dismissed under *forum non conveniens*).

204. *See infra* notes 205–08.

of Columbia had adopted the federal *forum non conveniens* doctrine or a similar principle.²⁰⁵ Hawaii, Oregon, and Virginia had not adopted the doctrine but expressed willingness to do so in the future.²⁰⁶ One state has yet to adopt a specific interpretation, six states have adopted limited versions, and two states restrict the doctrine to a limited scope of cases.²⁰⁷ However, even the two states that restrict the application of *forum non conveniens* to a limited scope of cases do not restrict the application in FELA cases like Montana.²⁰⁸ Although forum shopping is not limited to *forum non conveniens*, the fact that Montana is the only state to increase plaintiff's-choice of forum in FELA cases suggests Montana's argument of a strong national policy (on some fronts) may not be accurate.

Furthermore, the United States Supreme Court opined that defendants could move for *forum non conveniens* in FELA suits after Congress revised Title 28 of the United States Code.²⁰⁹ The current Code provides that, "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."²¹⁰ The reviser's notes that accompany each section of the Code provides:

Subsection (a) was drafted in accordance with the doctrine of *forum non conveniens*, permitting transfer to a more convenient forum, even though venue is proper. As an example of the need of such a provision, see *Baltimore & Ohio R. Co. v. Kepner*, which was prosecuted under the [FELA] The new subsection requires the courts to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so.²¹¹

As such, the drafters of the Code explicitly note that a *forum non conveniens* provision was necessary for FELA claims, which further contra-

205. Brian J. Springer, *An Inconvenient Truth: How Forum Non Conveniens Doctrine Allows Defendants to Escape State Court Jurisdiction*, 163 U. PA. L. REV. 833, 843, App. Table 1 (2015) (citing the following jurisdictions: Alaska, Arizona, Arkansas, California, Connecticut, D.C., Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin).

206. *Id.* at 845 n. 55.

207. *Id.* at 845.

208. See *Miller v. American Dredging Co.*, 595 So. 2d 615, 617 (La. 1992) (holding *forum non conveniens* arguments are only applicable to federal causes of action and are not applicable under the Jones Act or federal maritime law); *Gonzalez v. Department of Transp.*, 610 S.E.2d 527, 528–29 (Ga. 2005) (holding that the doctrine is limited to cases in which it is authorized by statute and cases when nonresident bring suits for injuries occurring outside the United States.)

209. *Ex parte Collett*, 337 U.S. 55, 57–58 (1949).

210. 28 U.S.C. § 1404 (a).

211. *Id.* § 1404 (Prior Law and Revision).

dicts the national policy asserted by Montana.²¹² Yet Montana continued to uphold its pro-plaintiff venue and jurisdiction policies in FELA actions.²¹³

In 1961, the Montana Supreme Court held that Congress established a “clearly defined rule of action” under Section 56, where it “definitively authorized” plaintiffs to bring actions in Montana, where the railroad was doing business, and where trial court was vested with jurisdiction.²¹⁴ Noting that the purpose of the FELA was to shift the burden of the loss resulting from injuries to the railroads, who can “measurably control their causes,” the Montana Supreme Court held that according to Section 56, “[t]he District Courts of Montana clearly have jurisdiction.”²¹⁵ This holding circumvented the United States Supreme Court’s holding from 1941, which stated that Section 56 was a venue statute, not a jurisdiction statute.²¹⁶

In *Kepner*, the plaintiff chose to file a FELA claim in the Eastern District of New York for injuries that occurred in Ohio, despite the facts that the chosen forum was seven hundred miles from the plaintiff’s residence and the presentation of the case would require the transportation of at least twenty-five witnesses, at a cost estimated to exceed the presentation of the case.²¹⁷ The Court stated that there was “no resulting benefit to the injured employee” from selecting the New York forum,²¹⁸ but practitioners later claimed that the forum choice was for a potentially higher damage recovery.²¹⁹ Because “venue is a privilege created by federal statute” and “cannot be frustrated for reasons of convenience or expense,” the Court upheld the plaintiff’s choice.²²⁰ The Court explained the basis of its decision was “in the terms of the *venue* provision of the [FELA]”, or Section 56.²²¹ Even though the United States Supreme Court labeled Section 56 as a venue statute, Montana held that Section 56 “definitively authorized” jurisdiction, creating a different vehicle of forum shopping not privileged by the federal stat-

212. *Id.*; *contra* Montana *ex rel.* Burlington N. R.R. v District Court, 891 P.2d 493, 499 (Mont. 1995) (committing to a “strong national policy” in favor of railroad plaintiffs (citing *Ford v. Burlington N. R.R. Co.*, 819 P.2d 169, 175 (Mont. 1991))).

213. *See, e.g.*, Montana *ex rel.* Great N. Ry. Co. v. District Court, 365 P.2d 512 (Mont. 1961).

214. *Id.* at 521.

215. *Labella v. Burlington N.*, 595 P.2d 1186, 1186 (Mont. 1979) (internal quotation marks omitted).

216. *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 52 (1941).

217. *Id.* at 48.

218. *Id.* at 48.

219. Ryan, *supra* note 157, at 171.

220. *Kepner*, 314 U.S. at 52, 54.

221. *Id.* at 56 (emphasis added) (comparing the phrasing of the section to other venue provisions, *see, e.g.* 28 U.S.C. § 112 (suits based upon diversity of citizenship); 28 U.S.C. § 53 (suits by or against China Trade Act corporations); 28 U.S.C. § 104 (suits for penalties and forfeitures); 28 U.S.C. § 105 (suits for recovery of taxes); 28 U.S.C. § 41(26)(b) (interpleader)).

ute.²²² This interpretation prevailed in Montana until 2017, when the United States Supreme Court explicitly stated in *BNSF* that the first sentence of Section 56 provided for venue privileges and not jurisdiction for purposes of the FELA.²²³

Without *forum non conveniens*, railroad defendants did not have a clear argument for lack of personal jurisdiction until the 2011 *Goodyear* decision and the narrower 2014 *Daimler* decision.²²⁴ It is unclear how many causes of action unrelated to the state were brought in Montana between 1961 and 2017; however, Montana did not consider the eighteen cases brought between 1950 and 1961 a “trend.”²²⁵ Yet plaintiffs’ tendency to bring FELA cases unrelated to Montana continued, and Montana encouraged forum shopping when it advanced the plaintiff’s-choice policy.²²⁶ Ultimately, it was not only railroad defendants that took note of Montana’s assertion of jurisdiction in FELA cases, and another state refused to follow suit.²²⁷

In Oregon, Christopher S. Barrett filed a FELA claim against Union Pacific Railroad Company after he allegedly sustained injuries in Idaho while working as a spike machine operator.²²⁸ Union Pacific is a Delaware corporation with its principal place of business in Nebraska.²²⁹ At the time, Union Pacific operated in 23 states including Oregon, in which it owned 3.4% of its tracks.²³⁰ Barrett contended he could bring the cause of action in Oregon because Section 56 provided for general jurisdiction in that state. Further, he argued, Oregon had general jurisdiction because Union Pacific’s actions in the state were “so substantial and of such a nature as to justify

222. *Montana ex rel. Great N. Ry. Co. v. District Court*, 365 P.2d 512, 521 (Mont. 1961); *see Labella v. Burlington N.*, 595 P.2d 1184, 1185–86 (Mont. 1979) (under Section 56 “District Courts of Montana clearly have jurisdiction”).

223. *BNSF Ry. Co. v. Tyrrell*, ___ U.S. ___, ___, 137 S. Ct. 1549, 1549, 1555 (2017) (“Section 56’s first relevant sentence concerns venue . . .”).

224. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (“A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so “continuous and systematic” as to render them essentially at home in the forum state.” (internal citation omitted)); *Daimler AG. v. Bauman*, 571 U.S. ___, ___, 134 S. Ct. 746, 761 (2014) (“[T]he inquiry under *Goodyear* is not whether a foreign corporation’s in-forum contacts can be said to be in some sense ‘continuous and systematic,’ it is whether the corporation’s ‘affiliations with the state are so “continuous and systematic” as to render [it] essentially at home in the forum state.’” (internal citation omitted)).

225. *See Montana ex rel. Great N. Ry. Co.*, 365 P.2d at 514.

226. *See, e.g., Montana ex rel. Burlington N. R.R. v. Dist. Court*, 891 P.2d 493, 499 (1995) (finding the policy favoring plaintiff’s choice of forum “highly persuasive, . . . even if that choice of forum involves forum shopping”).

227. *See, e.g., Barrett v. Union Pac. R.R. Co.*, 390 P.3d 1031 (Or. 2017).

228. *Id.* at 1032.

229. *Id.*

230. *Id.*

suit against [Union Pacific] on causes on actions arising from dealings entirely distinct from those activities.”²³¹

Similar to the plaintiffs in *Tyrrell*, Barrett relied on Section 56 and *Miles v. Illinois Central Railway Company*, to show that courts had “consistently” upheld jurisdiction in FELA cases in states unrelated to the cause of action, headquarters, or principal place of business of the railroad.²³² Barrett argued that the courts had “consistently done so because of the ‘exceptional’ nature of interstate railroads.”²³³ Barrett viewed FELA cases as falling into the category of “exceptional” cases that *Daimler* noted in its footnote 19, and thus would give rise to general jurisdiction in a forum other than a corporate defendant’s place of incorporation or principal place of business.²³⁴

The Oregon Supreme Court found fault with Barrett’s argument because Section 56 “addresses venue and subject matter jurisdiction. It does not address personal jurisdiction.”²³⁵ Moreover, the basis for Barrett’s assertion of personal jurisdiction over out-of-state corporations applied to all corporations and did not survive the *Daimler* decision.²³⁶ Oregon continued its analysis, which resembles the United States Supreme Court’s analysis in *BNSF*, holding that the fact that a corporation does business within a state is not sufficient to give rise to general jurisdiction.²³⁷ Oregon noted that it “accordingly reach[ed] a different conclusion from the Montana Supreme Court, which relied on earlier ‘doing business’ cases in upholding general jurisdiction over a railroad.”²³⁸ Thus, Oregon’s refusal to broadly interpret Section 56 eliminated one vehicle of forum shopping for railroad plaintiffs in that state.

D. Further Implications

Although Montana has not marched lockstep with other jurisdictions, the *BNSF* decision limits how future courts can construe Section 56 and likely limits the forum shopping possibilities for FELA plaintiffs in the fu-

231. *Id.* at 1033 (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011) (internal quotation marks omitted) (internal citations omitted)).

232. *Barrett*, 390 P.3d at 1037–38 (quoting Pl.-Adverse Party’s Answering Br., *Barrett v. Union Pac. R.R. Co.*, 2016 WL 6156509 at *32 (Or. Aug. 29, 2016) (No. S063914)).

233. Pl.-Adverse Party’s Answering Br., *supra* note 232 at *32.

234. *Barrett*, 390 P.3d at 1038 (internal quotation marks omitted); *see Daimler AG v. Bauman*, 571 U.S. ___, ___ n. 19, 134 S. Ct. 746, 761 n. 19 (2014).

235. *Id.* at 1038; *contra Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 2, 7 (Mont. 2016) (“Montana Courts have personal jurisdiction over BNSF under [Section 56]. . . . [Section 56] does not specify whether the ‘concurrent jurisdiction’ conferred upon the state and federal courts refers only to subject-matter jurisdiction or personal jurisdiction . . .”).

236. *Barrett*, 390 P.3d at 1038.

237. *Id.* at 1039–40.

238. *Id.* at 1040 (citing *Tyrrell*, 372 P.3d at 7).

ture. The controversy of forum shopping “implicates more than just selecting a courthouse; it is a dispute about how to determine when a particular state government may demand obedience from a particular person.”²³⁹ This case impacts injured plaintiffs and railroad defendants directly. Further, the contention that Montana has jurisdiction over a railroad simply because it does business within the state becomes more difficult to argue.

The *BNSF* decision limits where plaintiffs may bring a FELA case in state courts. To comport with the due process analysis set forth in *Daimler*, a plaintiff may file suit where the railroad is incorporated or headquartered.²⁴⁰ Although Justice Sotomayor stated in her dissent that plaintiffs will “be forced to sue in distant jurisdictions with which they have no contacts or connection,”²⁴¹ plaintiffs may still sue where the injury occurred under specific jurisdiction.²⁴² As a result, plaintiffs still have at least three places to file FELA claims under the *BNSF* decision.²⁴³ Further, although only *Perkins* thus far has been held as the exceptional case to *Daimler*,²⁴⁴ FELA plaintiffs may still argue that FELA claims should also be exceptional cases. Thus, plaintiffs still have options, but those options must now comport with defendants’ due process rights.

E. Unanswered Questions

After the United States Supreme Court overruled Montana’s decision in *Tyrrell*, it became clear that Section 56 does not automatically grant Montana district courts jurisdiction simply because the railroad does business in Montana.²⁴⁵ Despite this clarity, railroads and plaintiffs face some future uncertainty.

Respondents argued that BNSF consented to jurisdiction when it registered to do business in Montana and designated a Montana agent for service

239. Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U. L. REV. 377, 378 (1985).

240. *BNSF Ry. Co. v. Tyrrell*, ___ U.S. ___, ___, 137 S. Ct. 1549, 1558 (2017).

241. *Id.* at 1561 (Sotomayor, J., dissenting).

242. *See* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (“Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this ‘fair warning’ requirement is satisfied if the defendant ‘purposefully directed’ his activities at the residents of the forum, and the litigation results from alleged injuries that ‘arise out of or relate to’ those activities” (internal citations omitted)).

243. *BNSF Ry. Co.*, ___ U.S. at ___, 137 S. Ct. at 1552 (general personal jurisdiction provides two forums); *Burger King Corp.*, 471 U.S. at 472 (specific personal jurisdiction provides one forum).

244. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447–48 (1952) (held as the “textbook” exceptional case of general jurisdiction on the basis that the foreign defendant maintained an office in Ohio, kept corporate files there, and oversaw the company’s activities from Ohio during a time of war); *see* *Daimler AG v. Bauman*, 571 U.S. ___, ___, 134 S. Ct. 746, 749 (2014).

245. *See* *BNSF Ry. Co.*, ___ U.S. at ___, 137 S. Ct. at 1555–58.

of process;²⁴⁶ the United States Supreme Court stated that since this issue was not raised before the Montana Supreme Court it would not be addressed.²⁴⁷ However, numerous courts have addressed this issue, holding that a corporation does not consent to a state's jurisdiction when it registers a business and appoints an agent in a state.²⁴⁸ The Second Circuit opined that to equate business registration with consent to general jurisdiction "would raise constitutional concerns prudently avoided absent a clearer statement by the state legislature or the [state appellate court]."²⁴⁹ This interpretation makes sense to some practitioners: "After all, because every state has some sort of registration requirement, the practical result of equating registration with consent to [general] jurisdiction would be that a business operating in a state would necessarily be subject to general jurisdiction there."²⁵⁰ While it is difficult to perceive that by declining to address this issue, the United States Supreme Court adopted a theory that would render the clear due-process analysis from *Daimler* "wholly meaningless," no well-defined ruling has been articulated.²⁵¹ Although, the concept is difficult to perceive, future arguments are not yet resolved.

Since neither the Montana Supreme Court nor the U.S. Supreme Court addressed the issue, practitioners will likely continue to raise the issue of consent to personal jurisdiction in FELA cases with no relation to Montana. Until there is a definitive ruling on the consent theory, railroad defendants run the risk of being haled into court on the presumption that they consented to general jurisdiction with their business registration. On the other hand, injured railroad employees may potentially argue to have FELA cases heard in the venue and jurisdiction of their choice in Montana under the exceptional standard noted in *Diamler*, regardless of ties to the state. Even though the United States Supreme Court wrote a seemingly straightforward opinion in *BNSF Railroad Company v. Tyrrell*, the issue of expanded jurisdiction shopping in actions against corporations is not settled.

246. Brief for Resp'ts, *supra* note 101, at *50.

247. *BNSF Ry. Co.*, ___ U.S. at ___, 137 S. Ct. at 1559.

248. Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1345 (2015) (citing the following examples: *Consolidated Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286 (11th Cir. 2000); *Wench Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 180–84 (5th Cir. 1992); *In re Mid-Atl. Toyota Antitrust Litig.*, 525 F. Supp. 1265, 1277–78 (D. Md. 1981), *aff'd* 704 F.2d 125 (4th Cir. 1983); *Freeman v. Second Jud. Dist. Ct. ex rel. Cty. of Washoe*, 1 P.3d 963, 965–68 (Nev. 2000); *Byam v. National Cibo House Corp.*, 143 S.E.2d 225, 231 (N.C. 1965); *Washington Equip. Mfg. Co., Inc. v. Concrete Placing Co., Inc.* 931 P.2d 170, 172–73 (Wash. Ct. App. 1997)).

249. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 623 (2d. Cir. 2016).

250. Michael Manning, *When Can an Employer Be Sued in Montana?* 22 MONT. EMP'T LAW LETTER 6 (July 2017).

251. *See id.* at 6.

Yellowstone County, Montana has already addressed the issue and provided a possible trend for future decisions. Relying on the Montana Supreme Court's order remanding the consolidated cases in *Tyrrell*, BNSF moved to dismiss cases unrelated to Montana on the basis that Yellowstone County lacks jurisdiction.²⁵² In response, the plaintiffs contended that *BNSF* is not the "final word on jurisdiction," because the case did not specifically address consent to jurisdiction.²⁵³ Plaintiffs requested jurisdictional discovery based on two theories: 1) BNSF consented to personal jurisdiction in Montana when it registered to conduct, and conducted, business in Montana; and 2) equitable arguments that BNSF should be estopped from contesting jurisdiction.²⁵⁴ Judge Russell Fagg denied plaintiffs' requests for jurisdictional discovery and granted BNSF's motion to dismiss for lack of personal jurisdiction in at least three cases.²⁵⁵ The orders concluded that asserting registration-based jurisdiction over BNSF would violate due process, and BNSF's due process rights trump the equitable argument presented by the plaintiffs.²⁵⁶

Although some courts have interpreted their registration statutes as conferring jurisdiction over a corporate defendant,²⁵⁷ Montana has not yet considered this issue.²⁵⁸ Some practitioners have predicted that registration-based jurisdiction is "'ripe for invalidation by the Supreme Court'" because

252. See Mot. to Lift Stay, Dismiss for Lack of Personal Jurisdiction, and Declare Prior Orders Void, *DeLeon v. BNSF Ry. Co.*, *1–2 (Mont. 13th Jud. Dist. Aug. 14, 2017) (No. DV 13-0729).

253. Pl.'s Resp. to BNSF's Mot. to Lift Stay and Dismiss for Lack of Personal Jurisdiction and Mot. for Jurisdictional Discovery, *DeLeon v. BNSF Ry. Co.*, *1–2 (Mont. 13th Jud. Dist. Sept. 22, 2017) (No. DV 13-0729) [hereinafter Pl.'s Resp.].

254. *Id.* at *1–3.

255. Order and Dec., *DeLeon v. BNSF Ry. Co.*, *1 (Mont. 13th Jud. Dist. Oct. 16, 2017) (No. DV 13-0729); Order and Dec., *Beck v. BNSF Ry. Co.*, *1 (Mont. 13th Jud. Dist. Oct. 16, 2017) (No. DV 14-0167); Order and Dec., *McNutt v. BNSF Ry. Co.*, *1 (Mont. 13th Jud. Dist. Oct. 16, 2017) (No. DV 14-1089).

256. Order and Dec., *DeLeon*, *supra* note 255 at *5, *8; Order and Dec., *Beck*, *supra* note 255, at *5, *8; Order and Dec., *McNutt*, *supra* note 255, at *5, *8.

257. See Monestier, *supra* note 248, at 1345 (citing the following examples: *Bane v. Netlink, Inc.*, 925 F.2d 637, 640–41 (3d Cir. 1991); *Kowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199–2000 (8th Cir. 1990); *Bohreer v. Erie Ins. Exch.*, 165 P.2d 186, 191–94 (Ariz. Ct. App. 2007); *Sternberg v. O'Neil*, 550 A.2d 1105, 1109–16 (Del. 1988); *Confederation of Can. Life Ins. Co. v. Vega y Arminan*, 144 So. 2d 805, 808–10 (Fla. 1962); *Allstate Ins. Co. v. Sklein*, 422 S.E.2d 683, 864–65 (Ga. 1992); *Merriman v. Crompton Corp.*, 146 P.3d 162, 170–77 (Kan. 2006); *Rykoff-Sexton v. American Appraisal Assoc., Inc.*, 469 N.W.2d 88, 89–91 (Minn. 1991); *Read v. Sonat Offshore Drilling, Inc.*, 515 So. 2d 1229, 1230–31 (Miss. 1987); *Allied-Signal Inc. v. Purex Indus., Inc.*, 574 A.2d 942, 943–45 (N.J. Super. Ct. App. Div. 1990); *Werner v. Wal-Mart Stores, Inc.*, 861 P.2d 270, 272–74 (N.M. Ct. App. 1993); *Augsbury Corp. v. Petrokey Corp.*, 470 N.Y.S.2d 787, 789 (N.Y. App. Div. 1983); *Simmers v. American Cyanamid Corp.*, 576 A.2d 376, 382 (Pa. Super. Ct. 1990); *Green Mountain Coll. v. Levine*, 139 A.2d 822, 824–25 (Vt. 1958)).

258. Two Yellowstone County cases have been appealed to the Montana Supreme Court but have not yet been briefed. See Notice of Appeal, *DeLeon v. BNSF Ry. Co.* (Mont. Oct. 23, 2017) (No. DA 17-0627); Notice of Appeal, *Beck v. BNSF Ry. Co.* (Mont. Oct. 23, 2017) (No. DA 17-0634).

it is unconstitutional.²⁵⁹ Moreover, *Goodyear, Daimler*—and now *BNSF*—“sound the death knell for doing business as a basis for general jurisdiction.”²⁶⁰ Therefore, while plaintiffs may continue to argue that consent-based jurisdiction allows them to bring unrelated cases in Montana, Yellowstone County shows a possible trend that Montana will follow until the Supreme Court likely invalidates registration-based jurisdiction.

V. CONCLUSION

In the words of Justice McKinnon, “A defendant does not forfeit liberty or have a diminished liberty interest merely because the plaintiff brings a FELA action. Nor does a defendant forfeit constitutional protection by operating a railroad.”²⁶¹ The Fourteenth Amendment due process constraint applies to all state-court assertions of general jurisdiction; “the constraint does not vary with the type of claim asserted or business enterprise sued.”²⁶² Although Montana has historically construed FELA liberally to favor injured plaintiffs and created opportunities for railroad employees to forum shop in Montana, the decision in *BNSF* diminished forum shopping opportunities for plaintiffs. Plaintiffs may still bring a FELA claim in at least three jurisdictions, while allowing for the due process rights of the railroad to be upheld. While *BNSF* did leave one critical question unanswered, it serves as a pivotal case lessening the chance of forum shopping in Montana just by filing a FELA claim.

259. Monestier, *supra* note 248, at 1346 (quoting Charles W. “Rocky” Rhoades, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 444 (2012)).

260. Monestier, *supra* note 248, at 1357–58.

261. *Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 12 (Mont. 2016) (McKinnon, J., dissenting).

262. *BNSF Ry. Co. v. Tyrrell*, ___ U.S. ___, ___, 137 S. Ct. 1549, 1559–59 (2017).

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