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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A18-0559, A18-1214, A18-1406**

Scott Kowalewski,  
Respondent,

vs.

BNSF Railway Company,  
Appellant.

**Filed April 22, 2019  
Affirmed in part, reversed in part, and remanded  
Worke, Judge**

Hennepin County District Court  
File No. 27-CV-17-145

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Considered and decided by Worke, Presiding Judge; Cleary, Chief Judge; and  
Slieter, Judge.

## **UNPUBLISHED OPINION**

**WORKE**, Judge

Appellant-railroad challenges the district court's imposition of discovery sanctions and other adverse decisions that the district court made in the course of a Federal Employers' Liability Act (FELA) action brought by a former employee. We affirm in part, reverse in part, and remand.

### **FACTS**

Respondent Scott Kowalewski was working for appellant BNSF Railway Company in Fridley at the Northtown railyard on January 19, 2014, when workers were exposed to a strong smell, and at least two workers experienced physical symptoms. Kowalewski was taken to the hospital. Kowalewski was diagnosed with reactive airways disease syndrome, vocal cord dysfunction, posttraumatic stress disorder, and Parkinsonism. Kowalewski believed that he was exposed to toxic gas emitted from one or more of 11 hydrocarbon tank cars carrying "casing head gasoline." The tank cars were not identified as the likely source of the leak on the date of the incident and they were routinely added to trains that left the yard within a few days thereafter.

Kowalewski sued BNSF in December 2016. Kowalewski's counsel gave notice that an expert would inspect the railyard and tank cars on July 11, 2017. BNSF objected on the 30th day and indicated that date would not work, but agreed that the inspection could take place on July 19. BNSF's counsel explained that BNSF did not own the tank cars, but was working with the owners to get them back to Minnesota for inspection. The district court

specifically asked whether the cars would be available on July 19, and BNSF's counsel indicated that railroad staff "believe[d] so."

BNSF failed to produce the tank cars for inspection on July 19. On August 11, the district court indicated that BNSF's counsel had given the impression that BNSF was able to get the cars for Kowalewski to inspect. The district court acknowledged that BNSF had not made any promises, but said it was trying to get the cars.

At a second hearing concerning discovery on September 11, 2017, BNSF's counsel indicated that it had been trying to get the cars, but the owners were not cooperating. The district court, expressing frustration, stated that BNSF's previous explanations of the process it was following to obtain the cars, including representations it was working on it "every day," was inconsistent with BNSF's assertion. The district court explicitly ordered that "all 11 hydrocarbon cars be produced for inspection in the Northtown yard" during the week of September 24-29, 2017. In a September 18, 2017 order, the district court found that BNSF "has the ability to comply with the [c]ourt's order because [it] has control over the 11 cars." The district court also found that "BNSF has the practical ability to produce the cars for inspection at the Northtown railyard if and when it so desires."

In late 2017 and early 2018, the parties filed several motions. Kowalewski moved for sanctions, alleging discovery violations, spoliation, and misconduct. BNSF moved to exclude certain expert testimony. On February 5, 2018, the district court (1) granted Kowalewski's motion for sanctions, struck BNSF's defenses on liability and causation, and entered judgment for Kowalewski on those issues, plus costs and attorney fees; (2) limited the upcoming trial to damages only; (3) denied BNSF's motion to exclude expert

testimony; and (4) scheduled a hearing on contempt and monetary sanctions against BNSF and its counsel.

In its February 5 order, the district court condemned BNSF's discovery conduct. The district court stated that "BNSF misled Kowalewski by representing that he was exposed to sulfur dioxide," "failed to produce any information or documentation related to the seven related release incidents," and "attempted to obscure the true source of the chemical release by focusing on cars other than the 11 hydrocarbon cars." The district court found that, as a result, Kowalewski was deprived of an accurate diagnosis and appropriate treatment.

The district court also found that BNSF spoliated evidence by failing to inspect and preserve evidence at the scene and by destroying or intentionally failing to secure field and yard audio-video evidence, and documents associated with the 11 hydrocarbon cars. Finally, the district court found "Kowalewski also presented evidence that BNSF suppressed the identity of a critical witness . . . . BNSF had initially identified a different employee as the hump tower operator on the date of exposure, and disclosed [the actual tower operator] only after reaching a confidential settlement with him," and "[f]ollowing its *in camera* review of [the BNSF claims manual], the [c]ourt learned that BNSF had produced a version of this document that was revised after the incident." The district court found that these actions prejudiced Kowalewski on the issues of liability and causation. The district court concluded:

The [c]ourt finds that BNSF has engaged in a pattern of misconduct throughout this case characterized by late production of documents and witnesses, production of

inaccurate or inconsistent documents, and by the outright failure to produce relevant evidence. The [c]ourt finds that BNSF's behavior constitutes a deliberate effort to frustrate Kowalewski's ability to bring his claim, and that this behavior constitutes misconduct. Kowalewski and his experts have been prejudiced by this behavior, as it has significantly inhibited their ability to establish issues of liability and causation in a trial before a jury.

Following a February 2018 trial on the issue of damages, a jury found in favor of Kowalewski in the amount of \$15,343,753. BNSF moved for a new trial. The district court denied the motion without comment.

On June 27, 2018, the district court issued an order for financial sanctions in the amount of \$1,153,507.50 in attorney fees, \$89,649.25 in costs and expenses, and \$4,600,000 in post-judgment interest lost by Kowalewski "as a result of the three-year delay caused by [BNSF]'s misconduct." On July 27, 2018, the district court issued an order for offsets. This appeal followed.

## **DECISION**

### ***Sanctions***

A district court may issue orders compelling discovery and imposing sanctions for failure to properly answer discovery. Minn. R. Civ. P. 37.01 (b), (d), .02. "The district court's discovery-related orders will not be disturbed absent an abuse of discretion." *Frontier Ins. Co. v. Frontline Processing Corp.*, 788 N.W.2d 917, 922 (Minn. App. 2010), *review denied* (Minn. Dec. 14, 2010). "A district court abuses its discretion if its decision is against the facts in the record or if its ruling is based on an erroneous view of the law."

*State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet Cty. Bd. of Comm'rs*, 799 N.W.2d 619, 625 (Minn. App. 2011) (quotation omitted).

BNSF disputes the district court's finding that it had control over the 11 hydrocarbon cars, stating that the district court admittedly misinterpreted statements made by BNSF's counsel. BNSF argues that Minnesota has not extended the reach of sanctions to a party who fails to produce evidence over which it does not have control. We disagree with BNSF's characterization of the district court's reasoning and the circumstances that formed the basis for this finding.

The record shows that, while the district court may have initially misunderstood BNSF's counsel's statements, it had a clear understanding of them at the time of the September 18 order. After finding that BNSF had the ability to comply with the court's order because it had "control over the 11 cars," the district court explicitly stated that "[t]his finding is based on multiple representations" by BNSF's counsel, "including the representation that BNSF would do its best to have all 11 cars available for inspection on August [sic] 19, 2017 at the Northtown railyard." The district court went on to find that "BNSF has employed every opportunity to delay inspection of the cars," and recounted several of BNSF's delay tactics.

BNSF's discovery misconduct was pervasive in this case. Failure to produce the 11 cars after three orders to compel is merely one example of this misconduct. Further, the district court's sanctions for spoliation are designed to rectify BNSF's failure to preserve and inspect the 11 cars on the date of the incident, not just BNSF's failure to produce the cars several years later. While the district court may have been frustrated at BNSF's failure

to produce the cars after implying that it had the ability to do so, that does not mean that the sanctions order, which covers a wide range of discovery misconduct, constitutes an abuse of discretion.

### ***Right to jury trial***

Sanctions for failing to comply with a discovery order may include dismissal of all or part of a claim. Minn. R. Civ. P. 37.02(b)(3); *see also* Minn. R. Civ. P. 16.06 (“If a party or party’s attorney fails to obey a scheduling or pretrial order, . . . the court, upon motion or upon its own initiative, may make such orders with regard thereto as are just, including any of the orders provided in Rule 37.02(b)(2), (3), (4).”). When a party has willfully and persistently failed to comply with a discovery order without justification or excuse, that party has forfeited the right to a trial on the merits. *Frontier*, 788 N.W.2d at 922.

“We review a district court’s decision to impose spoliation sanctions for abuse of discretion.” *Miller v. Lankow*, 801 N.W.2d 120, 127 (Minn. 2011). “A party challenging the district court’s choice of a sanction has the difficult burden of convincing an appellate court that the district court abused its discretion.” *Id.*

Although the choice of sanctions for failure to comply with discovery is within the district court’s discretion, a sanction “must be no more severe . . . than is necessary to prevent prejudice to the movant.” *Chicago Greatwestern Office Condo. Ass’n v. Brooks*, 427 N.W.2d 728, 730-31 (Minn. App. 1988) (quotation omitted). An appellate court examines five factors to determine whether a district court abused its discretion in imposing discovery sanctions:

(1) if the [district] court set a date certain by which compliance was required, (2) if the [district] court gave a warning of potential sanctions for non-compliance, (3) if the failure to cooperate with discovery was an isolated event or part of a pattern, (4) if the failure to comply was willful or without justification, and (5) if the moving party has demonstrated prejudice.

*Frontier*, 788 N.W.2d at 923.

Here, the district court set dates for compliance. In its September 18, 2017 order, the district court indicated that it was contemplating holding BNSF in contempt if it failed to comply with the order. Based on the record, BNSF's failure to cooperate with discovery was not an isolated event in this case or in others. The district court also stated many times in its February 5, 2018 order that BNSF's conduct was "deliberate," "willful," and "purposeful." The district court found that these actions prejudiced Kowalewski on the issues of liability and causation. Therefore, the district court did not abuse its discretion by its choice of sanction.

BNSF further argues that the district court abused its discretion by deciding factual issues in its sanctions order. While true that certain disputed facts were effectively resolved by the district court in its sanctions order striking BNSF's defenses on liability and causation, BNSF attempts to narrow the focus of the district court's sanctions to the 11 cars and the factual disputes that surround them. However, the district court outlined numerous examples of BNSF's misconduct or misdirection throughout the pretrial process. The district court found that BNSF's misconduct prejudiced Kowalewski to such a degree as to require striking BNSF's defenses on liability and causation. We agree.

Insofar as the district court decided factual disputes, it did so to prevent BNSF from being rewarded for its own misconduct. These disputes included whether the 11 cars were the source of the toxic chemicals that led to Kowalewski's injury and whether the chemicals could have caused Kowalewski's injury. These factual inquiries were tainted by BNSF's misconduct. BNSF failed to preserve the 11 cars on the day of the incident, preserve shipping papers regarding the contents of the cars, preserve video of the incident, or produce the actual cars for inspection. These failures severely inhibited Kowalewski's ability to prove issues such as whether the 11 cars contained the source of his injury and whether the materials within the car could have caused his injury.

The district court contemplated "the factors considered by Minnesota courts in sanctioning spoliation," and found "that all factors support sanctions in the present case." The district court stated that "[t]he degree of prejudice suffered by Kowalewski as a result of BNSF's conduct throughout the present case is substantial, and severely inhibits his ability to fully present liability and causation claims to a jury." The district court outlined BNSF's "misconduct . . . perpetrated in bad faith," and found that this behavior "placed Kowalewski at a tremendous disadvantage." It is important that BNSF not be allowed to benefit from its misconduct because "the destruction of evidence, especially intentional, should not be condoned because it violates the spirit of liberal discovery [and] manifests a shocking disregard for orderly judicial procedures and offends traditional notions of fair play." *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 439 (Minn. 1990) (quotation omitted). Therefore, the sanctions were appropriate and not any more severe than necessary.

As such, the district court did not abuse its discretion or violate BNSF's constitutional rights when it ordered sanctions and resolved factual disputes in Kowalewski's favor in an effort to rectify BNSF's misconduct.

### ***Evidence***

"The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted).

BNSF challenges the district court's ruling that prevented the presentation of certain evidence at the damages trial, such as emergency-room records and medical-expert testimony. However, BNSF's argument fails to recognize the district court's attempts to remedy BNSF's pretrial misconduct.

The district court found that this evidence was tainted by BNSF's misconduct in informing "Kowalewski and his doctors . . . that he 'was, at most, exposed to sulfur dioxide.'" Similarly, the opinion of BNSF's medical experts, based on the medical report of one of BNSF's experts, was defectively founded on BNSF informing those experts that Kowalewski was exposed to sulfur dioxide or natural gasoline. As previously stated, evidence regarding liability or causation was clearly excluded based on the district court's order striking these defenses.

Because we conclude that the district court did not abuse its discretion by striking BNSF's defenses on causation and liability, we likewise conclude that the district court did

not abuse its discretion in denying these pretrial motions in an attempt to prevent BNSF from benefitting from its misconduct.

### ***New trial***

“[An appellate court] review[s] a district court’s new trial decision under an abuse of discretion standard.” *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 892 (Minn. 2010). An appellate court “will not set aside a jury verdict on an appeal from a district court’s denial of a motion for a new trial unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict.” *Navarre v. S. Wash. Cty. Sch.*, 652 N.W.2d 9, 21 (Minn. 2002) (quotations omitted). We generally defer to the district court’s denial of a new trial on the grounds that the evidence justifies the verdict because “[a] district court is in a better position than an appellate court to assess whether the evidence justifies the verdict.” *Clifford v. Geritom Med, Inc.*, 681 N.W.2d 680, 687 (Minn. 2004).

BNSF urges us to conclude that the district court abused its discretion when it denied BNSF’s motion for a new trial without comment. However, the issues raised in BNSF’s motion for a new trial were simply a recitation of previous arguments already settled by the district court, and BNSF cites no caselaw that requires the district court to provide analysis on issues that it has already decided. Among these arguments were familiar ones such as, “[t]he February 5, 2018 Sanctions Order Was Erroneous,” because of the district court’s findings regarding BNSF’s misconduct, “BNSF Was Prejudiced By Erroneous Evidentiary Rulings,” “BNSF Was Prejudiced By The Erroneous Admission of

[Kowalewski]’s Expert Testimony,” and “BNSF Was Prejudiced By The Exclusion of All Evidence Regarding the Incident.”

Because BNSF’s motion for a new trial raised no new issues, and because the district court is in a better position than this court to assess whether the evidence presented at trial justifies the verdict, the district court did not abuse its discretion in denying BNSF’s motion for a new trial without comment.

### ***Expert testimony***

BNSF argues that its motion to exclude Kowalewski’s expert testimony was denied as moot by the district court in its February 5, 2018 order because it went to the issue of causation, which was decided as a matter of law. BNSF contends that if the February 5 order is reversed as an abuse of discretion, then the denial of its motion to exclude expert testimony should also be reversed.

BNSF again fails to acknowledge the effect of its own misconduct, including its failure to preserve evidence regarding the amount or makeup of the contents in the hydrocarbon cars, on the district court’s ruling. However, because we do not determine the February 5, 2018 order to be an abuse of discretion, the issue of expert testimony regarding causation is indeed moot.

### ***Due-process rights***

BNSF argues that the district court’s monetary sanctions were punitive and therefore violated BNSF’s due-process rights because it was not afforded criminal contempt procedural protections. BNSF further contends that the district court overstated attorney fees and faulted BNSF for delay in reaching judgment.

BNSF's arguments are misguided. In its own briefing, BNSF cites the proposition that a sanction is compensatory, and therefore civil, "only if it is calibrate[d] to [the] damages caused by the bad-faith acts on which it is based." *See Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) (quotation omitted). Here, the district court's imposition of monetary sanctions repeatedly cites BNSF's "misconduct" as the reason for awarding fees and costs. The award of \$4,600,000 as post-judgment interest was an attempt to remedy what the district court found to be a three-year delay in the proceeding at the hands of BNSF. The district court's award of attorney fees was based on an estimate of hours worked on the issues of causation and liability and on an hourly rate that were both approved by the district court as reasonable.

Additionally, despite BNSF's assertion that the sanctions amounted to criminal contempt, the district court never held BNSF or its counsel in contempt, criminal or otherwise. BNSF argues that the district court awarded these monetary sanctions in order to "punish" it and "deter future misconduct"; however, the district court's award is an attempt to remedy BNSF's misconduct in the present case, which is entirely within the district court's authority. *See Patton v. Newman Corp.*, 538 N.W.2d 116, 118 (Minn. 1995) (stating that a district court's inherent authority permits it to deliver "remedies for wrongs"). We note that caselaw contemplates deterrence as one reason for imposing sanctions. *Miller*, 801 N.W.2d at 132.

Accordingly, and given this court's deference to the district court, the monetary sanctions did not violate BNSF's due-process rights or constitute an abuse of discretion.

### ***Post-judgment interest rate***

BNSF argues that the district court incorrectly used the Minnesota interest rate rather than the federal rate to calculate post-judgment interest. “We review de novo whether FELA preempts state law.” *Alby v. BNSF Ry.*, 918 N.W.2d 562, 569 (Minn. App. 2018), *review granted* (Minn. Oct. 16, 2018). In *Alby*, this court recently affirmed the application of the federal rate in FELA cases. *Id.*<sup>1</sup> We therefore reverse and remand on this issue with instructions to the district court to apply the federal interest rate to its post-judgment award.

### ***Offsets and costs***

In a FELA action, BNSF is allowed to setoff “any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee.” *See* 45 U.S.C. § 55 (2012).

BNSF argues that the district court erroneously declined to setoff medical expenses it helped pay through a group health insurance plan. But BNSF was not granted these amounts because it offered no proof of the bills it claimed to have paid. Instead, when asked to provide such bills, BNSF simply stated that Kowalewski should submit his bills to BNSF to be paid. Accordingly, the district court did not abuse its discretion by denying BNSF’s motion for offsets with regard to past medical expenses, because BNSF failed to provide adequate proof to support its request.

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<sup>1</sup> Our precedent in *Alby* binds us here, but we note that review has been granted in that case.

BNSF further argues that Kowalewski's entire award should be taxed as earned income and that amounts be withheld to satisfy taxes required by the Railroad Retirement Act (RRTA). FELA damages for lost wages qualify as taxable compensation under the RRTA. *See BNSF Ry. v. Loos*, No. 17-1042, 2019 WL 1005830, at \*8 (U.S. Mar. 4, 2019). In this case, however, the jury awarded Kowalewski \$15,343,753, but none of that amount was designated as wage loss on the special-verdict form. As such, none of the award need be withheld.

**Affirmed in part, reversed in part, and remanded.**