COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2038 **Cir. Ct. No. 2006CV5762**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

JAMES N. KROON,

PLAINTIFF-RESPONDENT,

V.

WISCONSIN CENTRAL, LTD., A CORPORATION AND CANADIAN NATIONAL RAILWAY COMPANY, A CORPORATION,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Wisconsin Central, Ltd. and Canadian National Railway Company ("Railroad") appeal from a judgment[1] entered after a jury found in favor of James N. Kroon on his complaint asserting two claims against the Railroad for personal injuries he sustained while working for the Railroad. The Railroad raises seven claims for us to consider on appeal: (1) the trial court erroneously exercised its discretion in ruling that the jury's damage award was not excessive; (2) there was insufficient evidence to support the jury's finding on causation; (3) the trial court erroneously exercised its discretion when it declined to conduct an evidentiary hearing on the claim that a juror was biased against the Railroad; (4) the trial court should have conducted an evidentiary hearing on the Railroad's claim that the jurors reached a verdict based in part on extraneous prejudicial information; (5) the trial court should have conducted an evidentiary hearing on whether the jurors improperly utilized the quotient method in calculating the damage award; (6) there was insufficient evidence to establish that Canadian National Railway Company was Kroon's employer; and (7) the trial court erroneously exercised its discretion when it denied the Railroad's request to apply the defense of equitable estoppel. The trial court denied each of the Railroad's post-verdict claims in a particularly thorough and well-reasoned analysis. We affirm the trial court and uphold the judgment.

[1] The judgment was amended on August 20, 2008 to include the Bill of Costs. The amendment does not affect issues in this appeal.

BACKGROUND

¶2 On July 3, 2003, Kroon was working as a conductor for Wisconsin Central, a wholly owned subsidiary of Canadian National Railway.[2] He had been employed by the Railroad since 1993. He was working in the rail yard in the City of Fond du Lac. After tying down hand brakes, he attempted to open the front cab door of the train. As he did so, the door came off its hinges and caused injury to Kroon's shoulder.

¶3 Kroon did not report the injury immediately to the Railroad because he thought they would fire him on the spot. It was his first trip after returning to work from a previous injury. Kroon and the engineer hoisted the door back in place, taped it, secured it and reported the defective condition to the dispatcher. Kroon continued to report to work until November 2003. On November 6, 2003, Kroon sought treatment for shoulder pain from Dr. David Romond. Dr. Romond's medical records do not reflect that Kroon mentioned the July 3rd incident to the doctor. Kroon did testify, however, that about the same time he sought treatment, he did advise Railroad personnel that he was seeking medical treatment for shoulder pain, which began following the defective door incident. He asked about whether he should apply for worker's compensation or just go through the Railroad insurance. He stated he was advised it would be easier just to go through the insurance. As a result, he submitted a request for medical leave forms, which indicated that the leave was "for illness or injury that is not work related." He

[2] Wisconsin Central is a wholly owned subsidiary of Wisconsin Central Transportation Corporation, which is a wholly owned subsidiary of Grand Trunk Corporation, which is a wholly owned subsidiary of Canadian National Railway.

applied for and received short-term disability during the time he was off of work due to the injury.

¶4 Kroon's medical records reflect a medical history documenting his previous pain and treatment involving the shoulder, including: a January 1991 injury after a 100-pound drive shaft fell on Kroon; a February 1991 football injury; a 1995 motorcycle accident; and another shoulder injury in 2002. After treatment relating to some or all of these injuries, including shoulder surgery, Kroon was cleared to return to work without restrictions in May 2003. As of June 9, 2003, however, Kroon had not been allowed to come back to work due to the employer's concerns about his ability to go up and down the train ladder. Subsequently, Kroon did return to work and reinjured his shoulder on July 3, 2003, when the door fell on him. In August 2003 he began to have recurrent discomfort in the right shoulder, which had progressively worsened. In November 2003, Kroon sought medical treatment for the shoulder pain. Physical therapy did not change his pain.

¶5 Dr. Romond then performed shoulder surgery on Kroon in December 2003. In May 2004, Dr. Romond cleared Kroon to return to work without restrictions. Kroon re-injured his shoulder when he fell down the stairs in his home in 2005. In June 2005, Kroon was examined by Dr. Etinne Mejia and the July 3, 2003 incident appeared in the medical records for the first time. On April 21, 2005, the Railroad advised Kroon he could not return to work because he had failed a functional capacity evaluation. In April 2006, Kroon underwent another surgery on the shoulder. The surgery was helpful but left Kroon with permanent restrictions, which disqualified him from returning to his job at the Railroad.

¶6 In June 2006, Kroon filed the complaint in this case. The first cause of action alleged that Wisconsin Central and Canadian National had violated the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 by failing to provide Kroon with a safe place to work. The second cause of action alleged that Wisconsin Central had violated the Locomotive Inspection Act ("LIA"), 49 U.S.C. § 20701 by allowing a defective and unsafe door to be used on their locomotive. Kroon alleged that as a result of the violations of these acts, he was injured, in whole or in part. The Railroad's pretrial motions seeking to dismiss the case were denied and the case was tried to a jury April 21-24, 2008. The jury returned a verdict in favor of Kroon, awarding damages as follows: $549,166 for future pain, suffering and disability; $818,333 for future loss of earning capacity; $221,666 for past loss of earning capacity; and $51,250 for past pain, suffering and disability.

¶7 The Railroad filed motions after verdict on May 7, 2008 raising the same seven issues contained in this appeal. On July 18, 2008, the trial court denied the motions and rendered an oral ruling on July 30, 2008 explaining why it denied the motions. Judgment was entered. The Railroad now appeals.

DISCUSSION

I. Was the verdict excessive because there was insufficient evidence to support it?

¶8 The Railroad argues that the trial court erroneously exercised its discretion when it denied its postverdict motion alleging that the damage award was excessive. The Railroad asserts that there was no objective evidence to connect any permanent injury to the July 3rd injury because the medical records show pre-existing shoulder injuries and/or because the medical records show

Kroon was fully recovered as of May 2004. Kroon responds that there was sufficient evidence to support the jury's damage award. The trial court ruled:

> With regard to the first argument that there was undisputed evidence for which the jury compensated Mr. Kroon pre-existed his fall or were caused by a different fall or had healed by May of 2004, I believe that Dr. Mejia's opinion gave the jury sufficient evidence from which it could conclude that Mr. Kroon's July 2003 injury had not healed by the time he returned to work in May 2004 and that it was not superseded by a spring 2005 rotator cuff tear.
>
> Dr. Mejia was asked whether the incident of July 3rd, 2003 caused in whole or in part an injury to Mr. Kroon's right shoulder. He said "there was some level of injury to his shoulder, yes." He also said that the permanent restriction on Mr. Kroon's ability to work in the future was "a result, at least in part, from the incident on July 3rd, 2003" and he said that was "within medical probability."
>
> A jury could conclude from these answers that the doctor had reviewed the evidence of Mr. Kroon's symptoms and had reviewed evidence of the fall in 2005 and concluded that the 2003 shoulder injury was a cause of Mr. Kroon's damages that continued past May 2004 when he returned to work, that the 2003 shoulder injury prevented him from returning to work ever as a train conductor, and that the past and future pain and suffering and past and future lost wages were a result of the 2003 accident.

The trial court further addressed the Railroad's attempt, during the cross-examination of Dr. Mejia, to suggest that Kroon had fully recovered from the July 3rd injury as of May 2004, and that the 2005 fall was the cause of any continuing permanent injuries. The trial court then explained:

> On redirect examination Dr. Mejia told Mr. Kroon's lawyer that there were a number of different possible causes for Mr. Kroon's injuries. Mr. Kroon himself testified that he believed he injured his shoulder in the 2005 fall.

> But that is all the [Railroad] accomplish[es], doubt. The [Railroad] did not ask Dr. Mejia to retract his opinion or even retreat from it or modify it. They just offered the jury other evidence to consider.
>
> So after it was all done and said, the jury still had Dr. Mejia's initial opinion to weigh along with the other evidence presented by the defendants and on redirect examination by Mr. Kroon himself.

The trial court found that there was credible evidence to support the jury's damage award. We uphold the trial court's decision.

¶9 When reviewing issues relating to a challenge to the jury's verdict, our review is limited:

> If there is any credible evidence which under any reasonable view fairly admits of inferences which support the jury's verdict, the verdict must be sustained, and neither the trial court nor this court may tamper with it .... The evidence must be considered in the light most favorable to the jury verdict .... Furthermore, the trial judge and this court are only to consider the evidence which supports the jury's verdict .... The evidence supporting the verdict must be accepted by the court unless it appears that the evidence is patently incredible.

Balz v. Heritage Mut. Ins. Co., 2006 WI App 131, ¶22, 294 Wis. 2d 700, 720 N.W.2d 704 (citations omitted; ellipses in ***Balz***). Further, it does not matter if there is contradictory evidence in the record or if the contradictions present stronger evidence. ***Id.*** We are bound by the "any credible evidence" standard.

¶10 Here, as the trial court aptly explained in its ruling on postverdict motions, there is credible evidence to support the jury's damage award—Dr. Mejia's opinion. Dr. Mejia offered the opinion that the July 3rd injury was a cause, at least in part, of Kroon's ongoing pain in his shoulder even beyond the May 2004 date. As suggested by the trial court:

> The jury well could have concluded as Dr. Mejia explained on redirect examination that Mr. Kroon and his doctor thought he was healed in 2004 and that he tried to work, but only after coming back to work discovered that, in fact, he was not healed ….
>
> The jury also had testimony of Mr. Kroon's coworker, Paul Aird whose testimony corroborates the conclusion that it became evident after Mr. Kroon came back to work that his previous injury had not healed.
>
> Further, the jury could have concluded that the 2005 fall was just one of a number of injuries suffered to that shoulder but it did not supersede the effect of the 2003 injury.

¶11 We agree with and adopt the trial court's analysis on this issue. There is credible evidence to support the jury's verdict, and therefore we affirm the trial court.

II. Was there sufficient evidence on causation to support the jury verdict?

¶12 The Railroad argues that the trial court erroneously exercised its discretion when it denied its postverdict motion alleging that there was insufficient evidence on causation to support the jury's verdict. The Railroad, however, does not make any argument in this section of its brief, stating only that the arguments in support of the excessive damages claim apply to the causation issue as well.

¶13 Unfortunately for the Railroad, we have rejected its arguments supporting the excessive damage claim, and must also reach the same result on the causation argument. We apply the same standard of review to the causation claim: if there is any credible evidence to support the jury's verdict on causation, we will not disturb that finding. We conclude that there is credible evidence to uphold the jury's verdict on causation, namely Dr. Mejia's opinion that the July 2003 injury

was a cause, in part, of the ongoing pain Kroon had in his right shoulder. Accordingly, we affirm the trial court's decision on this issue as well.

III. Should the trial court have held an evidentiary hearing on the Railroad's juror bias claim?

¶14 The Railroad submitted an affidavit in support of its postverdict motions from Sean A. McShane, a paralegal employed by the law firm representing the Railroad. McShane indicated that he had spoken with a juror, Cheryl Sobczak, who had served on the jury in this case. Sobczak told him that Juror Jennifer Maynard "had particularly negative perceptions of the Defendants, which [Maynard] described as big, bad companies," and talked about her (Maynard's) own surgeries and problems she had with the company for which she worked. The affidavit states that Maynard "claimed to know how all corporations work, and she stated they are all the same with regard to the manner in which they treat employees." On the basis of this affidavit, the Railroad makes the argument that Maynard harbored a bias against the Railroad as a corporate employer and that she was required to disclose her bias during *voir dire*. The Railroad argues that the trial court should have granted its request for an evidentiary hearing to explore Maynard's bias. The trial court, noting the prohibitions of WIS. STAT. § 906.06(2) (2007-08),[3] (barring the court from probing a juror's mental processes), ruled that the questions asked during *voir dire* would not have prompted a response from Maynard based on the information submitted in the McShane affidavit. The trial court, as a result, could not find "that [Maynard] was untruthful in her answers or concealed material information." We affirm.

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶15 WISCONSIN STAT. § 906.06(2) guards against prying into the mental processes of jurors after a verdict is rendered. It provides:

> [A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict … or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.

Id. The statute makes testimony by jurors as to what happened in the deliberation room and any testimony as to the juror's mental processes incompetent and inadmissible. *See* ***State v. Marhal***, 172 Wis. 2d 491, 495-96, 493 N.W.2d 758 (Ct. App. 1992). However, there are exceptions to § 906.06(2) prohibitions, one of which is juror prejudice. ***Marhal***, 172 Wis. 2d at 497. This exception applies when a party can show that a juror's prejudice was of such substantial magnitude that it "'offend[ed] fundamental fairness.'" ***Id.*** (citations omitted). Here, the Railroad argues that Maynard was biased against large corporations and she failed to disclose this bias during *voir dire*. It sought an evidentiary hearing to establish that Maynard's bias interfered with its ability to receive a fair trial.

¶16 In these circumstances, we are guided by a two-part test. To warrant a hearing, the Railroad must demonstrate that: (1) Maynard "'incorrectly or incompletely responded to a material question on voir dire; and if so, (2) that it is more probable than not that under the facts and circumstances surrounding the particular case, [Maynard] was biased'" against the Railroad. *See* ***State v. Messelt***, 185 Wis. 2d 254, 268, 518 N.W.2d 232 (1994) (citation omitted). Our review is

deferential to the trial court as its assessment involves ascertaining juror credibility and honesty. *See* ***id.*** at 270.

¶17 In analyzing the Railroad's contention, the trial court noted that:

> [The Railroad is] unable to identify any question put to Ms. Maynard individually which she answered untruthfully.
>
> Nor [is the Railroad] able to identify any question that was put to the panel as a whole about any bias against railways or other large corporations or employers.
>
> ….
>
> The [Railroad] rest[s] their concern about Ms. Maynard's candor on Ms. Maynard's lack of answer to my catch-all question at the end of jury selection. At the end of jury selection I asked whether any of [the] prospective jurors had any lingering concerns about whether they could be fair and impartial in this case.
>
> Ms. Maynard did not speak up about any concerns she had about how corporations treat employees who are injured on the job or who have a need to be away from their jobs because of surgery or recuperation.
>
> But the question I asked at the end of the jury selection would not necessarily require Ms. Maynard to voice her beliefs whatever they may be. First of all, such a belief was not salient, based on the information that had been shared with the jury about the case.
>
> The[] jury was told that the case involved an injury on the job and that the parties disputed whether there was an injury and what caused it. The jury was not told that there was any dispute about whether the railroad was fair to Mr. Kroon in giving him time off to have surgery or to recuperate for surgery or the like.
>
> Furthermore, the question would not have called for an answer from Ms. Maynard unless she was concerned about her impartiality and given what little information she was given about the case, she did not necessarily have a reason to be concerned.
>
> Consequently, I cannot say that she was untruthful in her answers or concealed material information ….

Based on the trial court's assessment, we cannot conclude that it erroneously exercised its discretion. The affidavit did not provide sufficient information to satisfy the two-part test referenced above. There is nothing in the record to suggest that Maynard incompletely or incorrectly responded to the *voir dire* questions. If a *voir dire* question had asked: "Does anyone think all big corporations treat their employees poorly?" and Maynard did not respond, that would be a closer call based on the content of the affidavit. But, the Railroad fails to identify a specific question that would have required Maynard to disclose her alleged bias against big corporations.

¶18 Moreover, the affidavit does not provide any specific information which would overcome WIS. STAT. § 906.06(2)'s general prohibition against the type of inquiry the Railroad seeks here. The affidavit does not contain statements "where juror prejudice is so strong and pervasive that fundamental fairness requires that the rule of testimonial incompetency give way." *See* ***Marhal***, 172 Wis. 2d at 497. The comments attributed to Maynard in the affidavit do not rise to the level necessary for us to conclude that the verdict was fundamentally unfair.[4] Rather, the comments attributed to Maynard reveal her personal experiences in life, which we expect jurors to bring into deliberations.

[4] The Railroad makes a brief reference to Maynard's behavior as "improper conduct" during deliberations. It is unclear whether this reference was attributed to Maynard's alleged bias or whether it was attributed to Maynard's other conduct referenced in the facts section of the Railroad's brief and contained in the affidavit, which described Maynard as "exceedingly disruptive, forceful, harassing, and intimidating to other jurors," "got in the face of other jurors," and "was loud and would not let others speak." The trial court addressed the latter as a separate claim, ruling that exploring these allegations would delve into an area that is out of bounds pursuant to WIS. STAT. § 906.06(2). We agree with the trial court's assessment but need not specifically address Maynard's alleged "improper behavior" because the argument was not adequately briefed. *See* ***Vesely v. Security First Nat'l Bank***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985) (issues inadequately briefed need not be addressed).

IV. Should the trial court have held an evidentiary hearing on the Railroad's claim that extraneous information adversely influenced the jurors?

¶19 The Railroad argues that the trial court erroneously exercised its discretion by refusing to hold an evidentiary hearing on its claim that certain jurors brought extraneous information into the jury deliberations. Specifically, the extraneous information was comments by certain jurors that the City of Fond du Lac was a small town and if Kroon had told anyone that his injury was work related, this information would have gotten back to the Railroad and he would have been fired. The trial court denied the Railroad's claim that these comments constituted extraneous prejudicial information, instead holding that the comments constituted something within the realm of common knowledge. We agree.

¶20 As noted above, WIS. STAT. § 906.06(2) bars jurors from testifying except when the juror is going to testify about "whether extraneous prejudicial information was improperly brought to the jury's attention." The standard for finding a juror's testimony to be competent under this exception requires the moving party to show three things: "'(1) that the juror's testimony concerns extraneous information (rather than deliberative process of the jurors), (2) that the extraneous information was improperly brought to the jury's attention, and (3) that the extraneous information was potentially prejudicial.'" ***Manke v. Physicians Ins. Co.***, 2006 WI App 50, ¶19, 289 Wis. 2d 750, 712 N.W.2d 40 (citation omitted). In reviewing a motion for a new trial on this basis, we apply the erroneous exercise of discretion standard. ***Id.***, ¶17. We affirm if the trial court considers the pertinent facts, applies the correct law and reaches a reasonable determination. ***Id.***

¶21 We conclude that the trial court did not erroneously exercise its discretion when it denied the Railroad's motion on this issue. The trial court considered the pertinent facts, applied the correct law and reached a reasonable conclusion. The facts pertinent to this issue, as alleged in the affidavit, are that two jurors told the rest of the jury that Fond du Lac was a small town and that if Kroon would have told anyone about his injuries, the Railroad would have found out and fired him. The Railroad contends that these facts constituted extraneous prejudicial information because there was no evidence introduced that Kroon would have been fired (except Kroon's own belief) or how fast word travels in Fond du Lac. The trial court disagreed, concluding that these facts were simply common-knowledge-type facts characterized as "conventional wisdom" that in a small town, "word travels fast."

¶22 We conclude that the trial court's decision was correct. Extraneous evidence is: "information which a juror obtains from a non-evidentiary source, other than the 'general wisdom' we expect jurors to possess. It is information 'coming from the outside.'" ***Messelt***, 185 Wis. 2d at 275 (citations omitted). A juror's life experiences, common sense or expertise on a certain subject does not constitute extraneous evidence. *See* ***State v. Heitkemper***, 196 Wis. 2d 218, 225-26, 538 N.W.2d 561 (Ct. App. 1995).

¶23 The alleged extraneous information here—that word travels fast in a small town (and specifically in Fond du Lac), and the belief that Kroon would have been fired if he disclosed his injuries, is the type of information within the life experience and common sense knowledge of the jurors. Because we conclude that the information involved here was not extraneous, we need not address this issue further. There was no need for the trial court to conduct an evidentiary hearing because the Railroad failed to satisfy its burden of proving that the

proffered subject matter falls within the extraneous evidence exception of WIS. STAT. § 906.06(2).

V. Did the trial court erroneously exercise its discretion by failing to hold an evidentiary hearing to determine whether the quotient method was used to calculate damages?

¶24 The Railroad argues that the trial court should have conducted an evidentiary hearing to determine whether the jury inappropriately used the quotient method to set the damages awarded in this case. A quotient verdict involves each juror writing down a number and then averaging those numbers to determine the amount of damages to be awarded. *See* ***Suhaysik v. Milwaukee Cheese Co.***, 132 Wis. 2d 289, 300, 392 N.W.2d 98 (Ct. App. 1986). Utilizing the quotient method is impermissible only when there is "proof that the jurors bound themselves to the [damage amount resulting from] the quotient method before each juror communicated his figure." ***Id.*** at 301. If the "jurors deliberately assent to and accept the [averaged] amount as a just verdict" after utilizing the quotient method to come up with a figure, the verdict "is not rendered bad." ***Id.***

¶25 The trial court denied the Railroad's motion on this issue because there was no *admissible* evidence to support the claim that the jury impermissibly used the quotient method. We agree with the trial court's assessment. To be entitled to a hearing, the Railroad must allege facts, which if true, would entitle it to a new trial. *See* ***Marhal***, 172 Wis. 2d at 497.

¶26 The Railroad has failed to satisfy that burden. It alleged in the McShane affidavit that the jurors each came up with a damage figure, added them together and divided by twelve. That allegation, even if true, is insufficient because as noted above, using the quotient method itself does not render a verdict void. Rather, the quotient method is impermissible only if the jury agrees to be

bound by the end figure *ahead of time* without independently reviewing the final number to determine whether it is a fair amount. There is nothing submitted in the affidavit alleging that to be the case.

¶27 As noted in ***Suhaysik***, "jurors are required to deliberate in secret and are not allowed to impeach their own verdict by disclosing the methods employed in reaching it." ***Id.***, 132 Wis. 2d at 301. Bringing jurors in to testify regarding their methods employed in calculating damages runs contrary to the general prohibition contained in WIS. STAT. § 906.06(2), which "advances the institutional goal that litigation, whether civil or criminal, must ultimately end; it discourages juror harassment by disappointed litigants; [and] it furthers open and unhindered juror discourse." ***Marhal***, 172 Wis. 2d at 495.

¶28 These principles prevent us from being persuaded by the Railroad's assertion that questioning the jurors about the quotient method does not really delve into their mental processes. The Railroad suggests that all the court would have to ask the jurors is "whether a quotient verdict was used and whether the jurors each agreed to the total after it was used …. The jurors would not need to reveal the substance of their deliberations." In theory, the Railroad's argument sounds reasonable, but in practice, even these questions impinge on the deliberative process and the reasoning behind the statutory prohibition. How jurors arrive at their verdict and the methods employed or considered in order to reach the verdict are off limits. If we open the door for the quotient method inquiry to ascertain whether a certain method was used, we would be treading into areas governed by the public policies referenced above. We would not do so in ***Suhaysik*** and we will not do so here. The sanctity and secrecy of jury deliberations must be preserved.

VI. Is there sufficient evidence to support the finding that Canadian National was Kroon's employer and that it was negligent?

¶29 The Railroad next argues that there is insufficient evidence to support the jury's finding that Kroon had an employee-employer relationship with Canadian National and that Canadian National was negligent. It points out that Wisconsin Central is a "thrice-removed" subsidiary of Canadian National. The trial court rejected the Railroad's argument and referred to all the documentary evidence bearing the "CN" trademark, "Canadian National Railway," or "Canadian National Medical Services." It noted that this documentary evidence suggested that Canadian National exercised control over Kroon's job duties and performance, his medical leave, and whether he could either return to work or was medically disqualified to work. The trial court found that a "reasonable jury could infer that Canadian National Railway had a say over Mr. Kroon's workplace and his duties, in particular whether excused from work, and therefore that he was employed by Canadian National Railway."

¶30 In reviewing whether a verdict is supported by sufficient evidence, we give great deference to the trial court's decision and "will not overturn the jury's verdict unless 'there is such a complete failure of proof that the verdict must be based on speculation.'" ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶21, 256 Wis. 2d 848, 650 N.W.2d 75 (citation omitted).

¶31 Based on this standard, we affirm the trial court. Although it was undisputed that Kroon was directly employed by Wisconsin Central, the jury heard testimony that Wisconsin Central was a subsidiary of Canadian National. It saw all the documentation referred to by the trial court suggesting the reasonable inference that Canadian National exercised "the power to direct, control, and supervise the plaintiff in the performance of his work at the time he was injured."

See ***Ward v. Atlantic Coast Line R. Co.***, 362 U.S. 396, 399 n.1 (1960) (defining an employee of a railroad under FELA). The Railroad's attempt to explain away the "CN" trademark on all of this documentation comes too late. If it did not want the jury to find Canadian National responsible under the FELA, it should have tried to convince the jury that Canadian National was not Kroon's employer. To the extent it did attempt to convince the jury that Canadian National was not negligent, the jury verdict demonstrates that the jury was not convinced. Accordingly, because there is credible evidence to support the jury's finding that Canadian National was a responsible party for the damages Kroon sustained in this case, we affirm.

VII. Should the trial court have found that Kroon was equitably estopped from asserting his claims against the Railroad?

¶32 The Railroad contends that Kroon should be equitably estopped from pursuing claims against it because he repeatedly represented that his injuries were not incurred "on-the-job." It argues the trial court should have set aside the verdict based on equitable estoppel. The trial court rejected the Railroad's request, finding that the Railroad had not suffered any detrimental reliance due to Kroon's misstatements, and observing that "the railroad will be seeking reimbursement from Mr. Kroon for benefits that were paid previously on the presumption that his absence from work was not work-related."

¶33 Equitable estoppel is a doctrine of fairness and operates as a defense to a claim when "the action or nonaction of one party induces another party's reliance thereon, either in the form of action or nonaction, to the latter party's detriment." ***Peterman v. Midwestern Nat'l Ins. Co.***, 177 Wis. 2d 682, 699, 503 N.W.2d 312 (Ct. App. 1993). The party asserting the defense of equitable

estoppel must "prove by clear, satisfactory and convincing evidence" the elements listed above. ***Village of Hobart v. Brown County***, 2007 WI App 250, ¶21, 306 Wis. 2d 263, 742 N.W.2d 907.

¶34 The Railroad complains that Kroon's representation on the medical leave forms that he was not injured at work satisfied the "action" element. It then argues that it relied on that action to its detriment because it was not able to investigate the July 3rd incident and it was unable to mitigate Kroon's injuries because it did not know he was injured. The Railroad asserts it "would not have allowed him to continue in his job had it known that he was severely injured on the job."

¶35 We agree with the trial court's assessment that any reliance was not detrimental. First, as noted by the trial court "the railroad makes no showing that an investigation would have turned up any evidence that would have made a difference to the outcome of the trial." Second, it is undisputed that the Railroad is seeking to recover all of the medical benefits it paid out to Kroon based on his representations that the injuries were not work related. Third, although Kroon did not report his injury immediately, there is evidence in the record that the incident itself was reported to the dispatcher. Further, Kroon testified that when he sought medical treatment in November 2003, he told Railroad personnel that he believed the injury originated from the door incident and inquired as to whether he should mark "work" or "non-work related" on the leave forms. He was advised to mark "non-work related."

¶36 Based on the foregoing, we conclude that the trial court did not err when it denied the Railroad's request to set aside the verdict on the basis of

equitable estoppel. The facts and circumstances presented here are insufficient to apply the doctrine.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.