

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Appellate Court No.: _____
Court File No.: 27-CV-17-145

Scott Kowalewski,

Respondent,

v.

BNSF Railway Company,

Appellant.

**APPELLANT'S
STATEMENT OF THE CASE**

Date Judgment Entered:
April 4, 2018

1. Court or agency of case origination and name of presiding judge or hearing officer.

Hennepin County District Court, Fourth Judicial District; Hon. Amy Dawson,
District Court Judge.

2. Jurisdictional statement.

A. Appeal from district court.

(1) Statute, rule or other authority authorizing appeal:

Minn. R. Civ. App. P. 103.03(a) & (d).

(2) Date of entry of judgment or date of service of notice of filing of order from which appeal is taken:

Judgment on the verdict was entered on April 4, 2018, which incorporates, among other matters, BNSF's challenges to the district court's September 13, 2017 order on Plaintiff's motion to compel; the February 5, 2018 order granting Kowalewski's motion for sanctions and denying BNSF's motion to exclude expert testimony; rulings on motions in limine; the evidentiary rulings made during the damages trial, including precluding

BNSF from presenting evidence on Kowalewski's preexisting conditions; and the April 2, 2018 order denying BNSF's post-trial motions.

(3) Authority fixing time limit for filing notice of appeal (specify applicable rule or statute):

Minn. R. Civ. App. P. 104.01, subd. 1 & 2.

(4) Date of filing any motion that tolls appeal time:

N/A

(5) Date of filing of order deciding tolling motion and date of service of notice of filing:

N/A

B. Certiorari Appeal.

(1) Statute, rule or other authority authorizing certiorari appeal:

Not applicable.

(2) Authority fixing time limit for obtaining certiorari review (cite statutory section and date of event triggering appeal time, *e.g.*, mailing of decision, receipt of decision, or receipt of other notice):

Not applicable.

C. Other appellate proceedings.

(1) Statute, rule or other authority authorizing appellate proceeding:

Not applicable.

(2) Authority fixing time limit for appellate review (cite statutory section and date of event triggering appeal time, *e.g.*, mailing decision, receipt of decision, or receipt of other notice):

Not applicable.

D. Finality of order or judgment.

- (1) Does the judgment or order to be reviewed dispose of all claims by and against all parties, including attorneys' fees? *Yes (Plaintiff's pending claim for fees is based solely on sanctions, not any statute or contract).*
- (a) If yes, provide date of order/judgment: *April 4, 2018.*
- (b) If no, did the district court order entry of a final partial judgment for immediate appeal pursuant to Minn. R. Civ. App. P. 104.01? *Not applicable.*
- (i) If yes, provide date of order: *Not applicable.*
- (ii) If no, is the order or judgment appealed from reviewable under any exception to the finality rule? *Not applicable.*

E. Criminal Only

- (1) Has a sentence been imposed or imposition of sentence stayed? *Not applicable.*
- (a) If no, cite statute or rule authorizing interlocutory appeal. *Not applicable.*

3. State type of litigation and designate any statutes at issue.

Personal injury lawsuit alleging violations of the Federal Employers Liability Act (45 U.S.C. § 51, *et seq.*), as well as violations of the Federal Safety Appliance Act (49 U.S.C. § 20302, *et seq.*) and unspecified federal safety regulations.

4. Brief description of claims, defenses, issues litigated and result below. For criminal cases, specify whether conviction was for a misdemeanor, gross misdemeanor, or felony offense.

Scott Kowalewski claimed to have sustained permanent injuries as the result of an alleged momentary exposure to "hazardous chemicals" while working next to a specific railcar in BNSF's yard on January 19, 2014. BNSF's immediate

investigation, which included the Fridley Fire Department, BNSF's hazmat responder, and two emergency-response contractors, revealed no odors, signs of leakage, or abnormalities with regard to the railcar identified by Kowalewski—or anywhere else in the yard. Accordingly, BNSF denied liability.

Three years later, after litigation commenced, Kowalewski for the first time declared that his alleged injuries were the result of an exposure to “hydrocarbons” leaking from one of eleven different railcars, located on a different track in the yard—as opposed to a chemical exposure from the car previously identified by Kowalewski and his crew during the original investigation. BNSF does not own or lease any of these newly identified eleven railcars and, although BNSF made significant efforts to obtain those cars to comply with Kowalewski's inspection requests, BNSF was unable to obtain those cars for an inspection. Despite the fact that BNSF did not have possession, custody, or control over those foreign cars, the district court nevertheless granted Kowalewski's motion to compel the production of the eleven newly identified railcars by order dated September 13, 2017.

On September 13, 2017, BNSF filed a petition for writ of prohibition with the court of appeals to prevent the enforcement of the order to compel on the grounds that BNSF could not produce the cars because it did not have control over them. That writ was denied and the Minnesota Supreme Court denied BNSF's petition for further review.

In December 2017, Kowalewski moved for sanctions as a result of BNSF's failure to produce the railcars in accordance with the district court's order to compel. The motion was not limited to alleged discovery violations, but also included broad claims of spoliation of evidence and other alleged misconduct, without supporting evidence. The district court did not respond to BNSF's request for an evidentiary hearing on that motion. BNSF filed voluminous affidavits refuting the factual bases for the claims of spoliation and misconduct.

On February 5, 2018, one week before trial was scheduled to commence, the district court granted Kowalewski's sanctions motion, striking BNSF's liability and causation defenses and ordered judgment to be entered in favor of Kowalewski on liability and causation. The district court ordered that trial would commence one week later, solely on the issue of damages.

On February 8, 2018, BNSF filed a petition for writ prohibition with the court of appeals to prevent the enforcement of the sanctions order on the grounds that it was not supported by the evidence, violated BNSF's constitutional and statutory rights and was disproportionately severe. The writ was denied.

The district court subsequently issued additional evidentiary rulings, premised upon the erroneous sanctions order, that excluded critical damages testimony, evidence, and argument that, among other things, Kowalewski's condition was the result of natural causes and not related to the alleged exposure to any

chemicals. In that connection, the district precluded BNSF's testimony concerning Kowalewski's pre-existing conditions.

The jury returned a verdict in Kowalewski's favor, awarding \$15,343,753.00.

On March 22, 2018, BNSF filed and served a Notice of Motion and Motion for a new trial on liability, causation, and damages, and judgment as a matter of law. BNSF's post-trial motions challenged the September 13, 2017 order to compel and the February 5, 2018 sanctions order on the grounds that those orders violated BNSF's constitutionally and statutorily protected rights, and sought a new trial based upon the subsequent erroneous and prejudicial evidentiary rulings that stemmed from the sanctions order, were far removed from any alleged discovery abuses, and violated BNSF's due process rights.

On April 2, 2018, without a hearing or receipt of any response by Kowalewski to the post-trial-motions, the district court summarily denied BNSF's post-trial motions. Judgment entered on April 4, 2018.

This appeal followed.

5. List specific issues proposed to be raised on appeal.

- A. Was the district court's September 13, 2017 order to compel erroneous and an abuse of discretion where the uncontroverted evidence established that BNSF did not control the eleven railcars and, despite good faith efforts, could not produce them for inspection?
- B. Did the district court's February 5, 2018 sanctions order, essentially granting partial summary judgment in favor of Kowalewski on liability and causation based upon affidavits and disputed facts, violate BNSF's constitutional and statutory rights?
- C. Was the district court's February 5, 2018 order erroneous and an abuse of discretion because it (1) violated BNSF's due process rights by imposing punitive sanctions without affording BNSF the criminal procedural protections those sanctions require; (2) resolved genuine issues of material facts without an evidentiary hearing and in a manner that was not supported by any admissible evidence; and (3) denied BNSF's motion to exclude Plaintiff's expert witnesses?
- D. Did the district court abuse its discretion in denying BNSF's motions in limine and precluding BNSF from introducing relevant evidence in the trial on damages?
- E. Did the district court abuse its discretion in denying BNSF's motion for a new trial based upon a multitude of trial errors that severely prejudiced BNSF?
- F. Did the district court's rulings, individually and in combination, demonstrate that the court exercised its will, not its judgment?

G. Such other issues as are determined by the course of trial court proceedings and the nature of the appeal.

6. Related appeals.

A. List all prior or pending appeals arising from the same action as this appeal. If none, so state. *A17-1435 (writ; closed); A-18-0227 (writ; closed).*

B. List any known pending appeals in separate actions raising similar issues to this appeal. If none known, so state. *None known.*

7. Contents of record.

A. Is a transcript necessary to review the issues on appeal? *Yes.*

(1) If yes, full or partial transcript? *Full.*

(2) Has the transcript already been delivered to the parties and filed with the trial court administrator? *No.*

(3) If not, has it been ordered from the court reporter? *No, but it will be in accordance with Rule 110.02 [10 days from filing NOA].*

B. If a transcript is unavailable, is a statement of the proceedings under Rule 110.03 necessary? *Not applicable.*

8. Is oral argument requested? *Yes.*

A. If so, is argument requested at a location other than that provided in Rule 134.09, subd. 2? *No.*

(1) If yes, state where argument is requested:

9. Identify the type of brief to be filed.

- A. Formal brief under Rule 128.02 (X)
- B. Informal brief under Rule 128.01, subd. 1 (must be accompanied by motion to accept unless submitted by claimant for reemployment benefits) ()
- C. Trial memoranda, supplemented by a short letter argument, under Rule 128.01, subd. 2. ()

10. Names, addresses, zip codes and telephone numbers of attorneys for appellant and respondent.

BRIGGS AND MORGAN, P.A.
 Sam Hanson (#41051)
 Tara Reese Duginske (#389450)
 2200 IDS Center
 80 South 8th Street
 Minneapolis, MN 55402
 612-977-8400

JOSSART LAW OFFICE, LLC
 Paula M. Jossart (#295292)
 200 W. Highway 13, Suite 110
 Burnsville, MN 55337
 (952) 777-4277

and

and

HKM, P.A.
 Daniel A. Haws (#193501)
 30 E. Seventh Street, Suite 3200
 St. Paul, MN 55101-4919
 (651) 227-9411

BOLT HOFFER BOYD LAW FIRM
 Joseph M. Saylor (#388895)
 2150 Third Avenue North, Suite 350
 Anoka, MN 55303
 (763) 406-7000

Attorneys for Scott Kowalewski

and

SWEENEY LAW FIRM
 Patrick Sweeney (#191164)
 332 Minnesota Street, Suite W1410
 St. Paul, MN 55101
 (651) 223-8000

Attorneys for BNSF Railway Company

Dated: April 6, 2018

BRIGGS AND MORGAN, P.A.

s/ Sam Hanson
Sam Hanson (#41051)
Tara Reese Duginske (#389450)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: (612) 977-8400
Email: shanson@briggs.com
tduginske@briggs.com

and

HKM, P.A.

Daniel A. Haws (#193501)
30 E. Seventh Street, Suite 3200
St. Paul, MN 55101-4919
Telephone: (651) 227-9411
Email: dhaws@hkmlawgroup.com

and

SWEENEY LAW FIRM, PA

Patrick Sweeney (#191164)
332 Minnesota Street, Suite W1410
St. Paul, MN 55101
Telephone: (651) 223-8000
Email: sweeney@slfirm.net

Attorneys for BNSF Railway Company

10641287