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| **COURT OF APPEALS,**<br>**STATE OF COLORADO**<br>**2 East 14th Avenue, 3rd Floor**<br>**Denver, Colorado 80203** | |
| **District Court, City and County of Denver Colorado**<br>**Judge Anne M. Mansfield**<br>**Case Number: 2007-cv-4620** | **▲COURT USE ONLY▲** |
| **Plaintiff-Appellee: JOSEPH S. PASIONEK,**<br><br>**v.**<br><br>**Defendant-Appellant: UNION PACIFIC RAILROAD COMPANY** | **Case No.: 09-CA-2491** |
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**ANSWER BRIEF OF PLAINTIFF-APPELLEE**

Appeal from the District Court
District Court, City & County of Denver, State of Colorado
The Honorable Anne M. Mansfield, Presiding
Case No. 07CV6420

Submitted August 13, 2010

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).
Choose one:
☒ It contains 9,355 words.
☐ It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

☐ For the party raising the issue: It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. , p. _____), not to an entire document, where the issue was raised and ruled on.

☒ For the party responding to the issue: It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

*s/ Thomas L. Roberts*
Signature of attorney or party

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## I. ISSUES FOR REVIEW

1. Whether the evidence of record is sufficient to support the jury's finding that the negligence of Union Pacific Railroad Company ("UPRR"or "Defendant") played any part in causing the injuries suffered by Plaintiff?

2. Whether the trial court committed reversible error in permitting two of Plaintiff's medical expert witnesses, Doctors Hipskind and Woodcock, to testify that the explosion from detonation of the torpedoes caused Plaintiff's traumatic brain injury?

## II. STATEMENT OF THE CASE

### A. Nature of the Case.

Joe Pasionek ("Pasionek" or "Plaintiff") brought this action pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.,* in Denver District Court, seeking damages in compensation for permanent and total disability from employment resulting from a traumatic brain injury he sustained from an explosion of two railroad torpedoes while working as a UPRR switchyard conductor on February 4, 2005.

This incident occurred around 6:40 p.m. at the end of the work day just before dark at UPRR's Denver, Colorado, 36th Street rail yard. Pasionek was operating a locomotive using a remote control device in his vest to operate the locomotive as trained to do. Riding outside the cab on the lower step of the ladder at the northwest corner of the northward leading end of the locomotive, Pasionek was standing about a foot above the rail with his head approximately

102 inches above the rail. As he moved the locomotive at a slow speed alongside the east wall of a stucco-sided building, UPRR's yard office, six to seven feet from the Barona track, two railroad torpedoes placed on the track exploded, exposing Pasionek to the full direct force of the blast and secondary blast forces reflecting off of the wall of the yard office and the steel surfaces of the locomotive.

Plaintiff alleged negligence by UPRR in the implementation and structure of a 2002 one-time torpedo disposal program resulting in an unsafe work place by allowing uncollected and unsecured torpedoes to fall into wrong hands that played some part in causing his traumatic brain injury.

It is undisputed that there was no legitimate purpose for the torpedoes to be on the rail in the switch yard where they exploded underneath Pasionek and that Pasionek was performing his duties as assigned to him by UPRR at the time and place of the explosion.

**B. Course of Proceedings.**

The case was filed on May 9, 2007. (LN14784928.)[1] UPRR's motion for summary judgment on Plaintiff's claims based on violations of OSHA standards and the Colorado Explosive Act, C.R.S. § 9-6-101 *et seq.*, was granted.

[1] LN refers to the LexisNexis portions of the record on appeal. All other citations are to the paper record. Vol. refers to the trial transcripts.

(LN19851764.) Plaintiff's motion for summary judgment on UPRR's contributory negligence defense was denied. (LN25693925.) Neither ruling was appealed.

The case proceeded to trial on July 20, 2009, concluding eight days later on July 29 with the jury's verdict in favor of Plaintiff and award of $2,800,000 in damages with no reduction for contributory negligence. (Vol.8 at 56:21-59:5.) After offset for advances and a railroad retirement board lien, the court entered an amended judgment, *nunc pro tunc* to July 29, 2009, for damages in the amount of $2,775,310.50 on October 14, 2009. (LN27560600.) Judgment for costs of $112,543.57 was entered on January 6, 2010. (LN28822417.) The jury's damage award and the judgment amounts are not at issue in this appeal.

## III. STATEMENT OF FACTS

UPRR's argument that the scope of the unknown perpetrator's employment is a critical issue in this case is factually incorrect. Scope of employment of the unknown perpetrator was never a proper issue, and UPRR's argument otherwise ignores Plaintiff's theory of the case tried to the jury – direct negligence of UPRR in structuring and carrying out the one-time torpedo disposal program resulting in an unsafe workplace from foreseeable misuse of uncollected and unsecured

torpedoes by a third person. Whether the unknown wrongdoer was even an employee or a trespassing stranger was irrelevant.

**A. The 2002 Torpedo Collection and Removal Program.**

In February 2005, railroad torpedoes were antiquated and long obsolete. (Vol.4 at 58:19-59:13.) A compact explosive charge, torpedoes were used as a mainline signal designed to explode and cause a noise loud enough to be heard by personnel in an enclosed cab of a locomotive when run over by the train. (Vol.4 at 58:19-59:13, 61:10-17.) Placed on a mainline rail one and two miles before a hazard, the sound of the explosion would alert the engineer to slow the train immediately and be prepared to stop to avoid a hazard down the track. (Vol.4 at 43:9-17.) With the advent of soundproof cabs and sophisticated radio and cellular communication devices, torpedoes no longer served any useful purpose. (Vol.4 at 58:19-59:13.)

In 2002, UPRR developed a program to collect, remove and dispose of all torpedoes on premises under its control. (Vol.4 at 40:17-41:17.) Exhibits H and I (copies attached) outline the procedures to be used in carrying out the program (Ex.H; Ex.I; Vol.4 at 41:22-25) and directed that proper security measures be taken to prevent misuse by unauthorized persons for unintended purposes. (Ex.H at 1; Vol.4 at 43:21-25, 44:1-11.) UPRR documents and testimony reflected the

company's actual knowledge that misuse of these obsolete devices could cause injury. Exhibit H stated:

> ***SAFETY:***
>
> ***A TORPEDO IS AN IMPACT EXPLOSIVE AND SHOULD BE HANDLED CAREFULLY TO PREVENT INJURY. DO NOT PLAY WITH, DISMANTLE, TAKE A PART, OR REMOVE STRAPS, CLIPS, TABS, PAPER OR IN ANY WAY ALTER THE ORIGINAL CONSTURCTION.***
>
> . . .
>
> **Proper security precautions must be taken to prevent use by unauthorized persons.**

(Ex.H at 1 (emphasis added); Vol.4 at 43:18-25.) Exhibit E directs that torpedoes **"must be kept where they cannot be obtained by unauthorized person."** (emphasis added.)

The program was structured as a "one-time, comprehensive removal" of all torpedoes. (Ex.H at 1; Vol.4 at 41:4-11.) Never having inventoried or tracked its torpedoes (Vol.4 at 42:5-43:5, 63:1-21), UPRR did not know how many it had or exactly where they were but did know that they could be found in numerous unsecured locations. (Ex.H at 1-2; Ex.I at 1; Vol.4 at 42:12-43:5.) Employees were directed to check "all locomotives (both active and stored), all sheds, storage boxcars, flagging kits, etc." for torpedoes. (Ex.I at 1.) All railroad facilities were ordered to make a concerted effort to "determine the number and

location of all the torpedoes at their site as soon as possible." (Ex.H at 1.) All torpedoes were to be delivered to accumulation points by June 1, 2002. (Ex.H at 2; Vol.4 at 41:4-11.)

Cost of the 2002 one-time program was charged to UPRR's corporate Environmental Department budget. (Vol.4 at 56:19-57:15, 66:24-67:3.) After 2002, any further costs for detection, removal, and destruction of later-discovered torpedoes were chargeable to the budget of the particular facility where the devices were found (here, for example, the 36th Street Yard.) (Vol.4 at 56:19-57:15, 66:24-67:11). No structured follow up inspections were undertaken to confirm that all torpedoes had been removed. (Vol.4 at 66:9-16.)

Mark Ross, UPRR corporate representative at trial and Manager of Environmental Field Operations in 2002, oversaw the program for UPRR's Denver and Cheyenne facilities. (Vol.4 at 40:1-16.) While some 95,000 torpedoes were removed from those locations by the fall of 2002 (Ex.W), the program did not, in fact, achieve its goal of finding and disposing of all torpedoes as evidenced by the fact that torpedoes continued to be found after its termination in 2002. (Vol.4 at 44:16-45:24, 65:12-22.) Ross testified at trial that torpedoes were still being found on UPRR premises. (Vol.4 at 45:3-6, 57:19-24, 65:17-22.) Pasionek testified that he had seen torpedoes in the North Yard "all over the

floor" of an unlocked locomotive. (Vol.4 at 168:8-169:16.) Dennis Rhode, Pasionek's co-worker who worked with him at the same locations (Vol.2 at 124:4-20, 137:3-19), testified that torpedoes were commonly stored in unlocked locomotives. (Vol.2 at 134:8-135:5.)

During the winter evening of February 4, 2005, two of the uncollected and unsecured torpedoes found their way onto the Barona track in the 36th Street Denver yard and exploded underneath and just behind Pasionek less than nine feet from his head. (Vol.4 at 24:14-25:13, 107:7-21, 127:10-18.)

**B. February 4, 2005 – The Night of the Explosion**

Joe Pasionek went to work for the UPRR in 1977 as a switchman. (Vol.4 at 98:1-11.) His job required a variety of complex tasks which he likened to putting a puzzle together. (Vol.4 at 119:23-24.) Switchmen are responsible for breaking up and assembling trains by "switching" large numbers of train cars onto numerous sidetracks in a switch yard and "making up trains" by reconnecting the cars in the anticipated order of their intended destinations. (Vol.4 at 102:19-104:3.) A typical workday involved switching 30 to 60 box cars on fifteen different side tracks breaking and making up trains. (Vol.4 at 102:19-103:20, 104:9-105:12.) This activity included switching cars containing hazardous materials and explosives. (Vol.4 at 120:6-121:1.) Pasionek's duties

included operating switch engines by remote control through a unit worn on a vest. (Vol.4 at 105:25-106:8.) When operating the remote control, Pasionek would stand about a foot off the rail on the ladder at the end of the unit facing the direction of travel. (Vol.4 at 105:25-107:22.)

On February 4, 2005, Pasionek was working as a foreman conductor with another switchman in UPRR's 36th Street Yard. (Vol.4 at 108:2-22, 109:2-4.) Scott Hidalgo, yardmaster on duty that day (Vol.4 at 112:23-24), was a 35-year employee who had supervised Pasionek on a daily basis for several years. (Vol.1 at 237:5-8, 243:12-22.)

Starting his shift at 2:45 p.m. (Vol.4 at 109:5-12), Pasionek received his orders from Hidalgo (Vol.4 at 113:15-25, 116:12-117:2), collected his safety gear (work boots, earplugs, gloves, and glasses), and discussed plans for carrying out the work assignment that day with his work partner. (Vol.4 at 112:10-14, 119:9-24.) After synchronizing the remote control box with a switch engine, the men went to work. (Vol.4 at 121:2-122:3.)

Completing their assigned work near dark around 6:30 p.m. (Vol.4 at 126:5-10), Pasionek asked Hidalgo where to park the locomotive and was told to put it on the Barona track (Vol.4 at 122:19-123:3), a north-south track that travels parallel to the east side of the 36th Street yard office building. (Ex.10 & 11.)

After dropping off his co-worker, Pasionek received authority to enter the Barona track and headed north at five miles per hour (Vol.4 at 125:14-126:25), standing on the bottom step of the northward leading end of the unit, watching for people crossing the track going to and from the yard office. (Vol.4 at 124:22-127:12, 128:4-12.)

When passing the yard office building, Pasionek was startled by an unexpected and extremely loud blast and felt the direct force of an explosion from below and close behind him and as reflected from the building wall and his locomotive. (Vol.4 at 24:20-26:23, 127:14-20.) He believed that the explosion came from detonation of torpedoes. (Vol.4 at 128:17-21.) Pasionek stopped the engine (Vol.4 at 127:16-20) and summoned his partner to take control of the unit. (Vol.4 at 129:4-12.) Pasionek immediately experienced a headache, felt dizzy, had pain in his ears, and "didn't feel right." (Vol.4 at 129:18-130:4.) He went to Hidalgo's office and said that he needed to go to the hospital. (Vol.4 at 129:4-12.)

Hidalgo testified that from his vantage point inside the yard office building, six or seven feet from the locomotive and directly above and to the left of the explosion (Vol.1 at 247:15-23), the explosion was "louder than a 12-gauge shotgun." (Vol.1 at 249:12-16.) He thought that the window was going to shatter

(Vol.1 at 249:17-23), and the copy machine at which he was working moved away from the wall. (Vol.1 at 250:10-22.)

Hidalgo observed Pasionek to be agitated, confused, and "not really the same Joe." (Vol.1 at 254:15-255:4.) A little league football coach trained to identify concussions (Vol.1 at 252:6-254:14), Hildago held up three fingers and asked Pasionek how many fingers he saw. (Vol.1 at 255:5-7.) He was unable to say (Vol.1 at 255:5-9), a response indicative of an altered state of consciousness and a concussion (Vol.1 at 253:2-20) according to expert medical testimony. (Vol.2 at 219:25-220:7; Vol.3 at 99:5-24.)

The trainmaster on duty that night agreed to drive Pasionek to the hospital. (Vol.4 at 130:11-17.) While awaiting his arrival, Pasionek's headache and dizziness worsened, and his ears continued to ring. (Vol.4 at 131:7-11.)

At the hospital, Pasionek was seen by an Emergency Room physician. (Vol.4 at 133:8-16.) Pasionek told the doctor that his ears really hurt and were continuously ringing, that he was dizzy and feeling extremely nauseous, and that his head was "ready to pop." (Vol.4 at 133:8-18, 133:23-25.) The doctor examined his ears, gave him a prescription for his headache, and referred him to an ENT doctor. (Vol.4 at 134:1-14.)

### C. Evidence of Pasionek's Health Status Before and After the Explosion.

Hidalgo testified that before the explosion Pasionek was one of the best, most efficient and productive switch foreman with whom he had ever worked. (Vol.1 at 245:3-16, 246:4-12.) Pasionek got things done, never completed the work assigned to him incorrectly, nor ever exhibited confusion or inability to understand instructions. (Vol.1 at 247:2-6.) Pasionek never complained about or took time off due to headaches, vertigo, or dizziness before the torpedo explosion. (Vol.1 at 246:13-247:1.)

Although Pasionek attempted to return to light duty work, that effort failed due to difficulty concentrating, severe headaches, dizziness, and nausea. (Vol.4 at 151:22-154:14.) Pasionek's doctors have confirmed that he is permanently disabled from his railroad job and will not be able to return to any work requiring concentration and stamina. (Vol.4 at 154:15-18; Vol.2 at 48:12-49:6, 221:2-13; Vol.3 at 57:10-58:3, 134:14-25, 159:20-161:14.)

Before the explosion, Pasionek was an active and energetic husband and family man. (Vol.4 at 144:19-145:11.) He and his two children had enjoyed hiking, fishing, T-ball, and playing video games. (Vol.4 at 138:8-19, 144:19-145:3.) He was close to his kids and strove to be a good parent; his family affectionately called him "Mr. Mom." (Vol.4 at 145:4-11; Vol.2 at 140:16-25.)

Dennis Rhode, Pasionek's longtime friend and co-worker, testified that before the explosion Pasionek was full of energy and constantly active. (Vol.2 at 141:15-23.) They engaged in many activities together, including hauling hay, cutting firewood, and trimming trees around his home in Rollinsville. (Vol.2 at 138:20-22, 139:1-140:15).

After the explosion, Rhode likened Pasionek's demeanor to someone who "has the flu," sitting in his living room, worn out from headaches, and unable to perform household tasks. (Vol.2 at 142:4-143:18; Vol.4 at 148:24-149:15.)

Pasionek has been unable to resume the level of activities with his children previously enjoyed. (Vol.3 at 51:21-53:7; Vol.4 at 146:17-147:25.) He must limit daily activities or else "pay for it the next three days" (Vol.4 at 149:1-9), and spends most of his time lying on the couch with an ice pack on his head. (Vol.4 at 146:8-16, 148:21-23.) The relationship with his wife deteriorated after the explosion, and before trial, she filed for divorce and moved out of the house to another state. (Vol.2 at 50:6-51:11.) Unable to be productive, support his family, or do the things he once enjoyed, Plaintiff testified to a loss of his identity as a person. (Vol.4 at 154:7-155:11.)

### 1. Medical Testimony.

All physician witnesses called by Plaintiff testified to a diagnosis of mild traumatic brain injury ("TBI"), and all UPRR physician witnesses testified that he exhibited signs and symptoms consistent with a TBI. Important to understand is that the term "mild" does not connote "minimal" or "transient" injury. (Vol.3 at 44:7-22.) The words "mild," "moderate," and "severe," when used to describe brain injury, are medical words of art based on symptoms experienced at the time of injury. (Vol.3 at 44:7-46:7.) A TBI is "mild" if there was no loss of consciousness or alteration of mental status; "moderate" or "severe" based on the length of unconsciousness, bruising or hemorrhaging in the brain. (Vol.3 at 45:9-25.) Pasionek exhibited an altered state of consciousness as shown by Hidalgo's testimony. (Vol.1 at 254:15-256:14.) "Mild" brain injury can cause, as it did here, permanently debilitating injuries. (Vol.3 at 46:8-14.)

Pasionek suffered from no preexisting condition that could account for the symptoms experienced after the explosion. (Nitka Depo. at 14:13-16; Vol.2 at 16:22-17:3). UPRR witnesses agreed. (Vol.7 at 183:2-14; Thwaites Depo. at 14:1-10.)

**Joshua Heller, M.D.**, the ER doctor who saw Pasionek within three hours of the explosion, testified that he presented with symptoms of dizziness,

headache, vertigo, and nausea (Vol.3 at 169:15-16; Heller Depo. at 5:5-7, 8:13-9:14, 12:6-13:22), all of which are consistent with a traumatic brain injury. (Depo. Heller at 24:22-26:4.)

**Sherri Laubach, M.D.**, Pasionek's primary care physician for more than a decade (Vol.2 at 5:19-21, 14:17-15:10), testified that Pasionek was in a state of good health and with no condition prior to the explosion that might explain his symptoms of brain injury. (Vol.2 at 16:11-17:3, 45:11-25, 46:23-47:1.) Six weeks after the explosion, she noted that he reported concerns about intense headaches, ringing in his ears, hearing, dizziness, and personality changes (Vol.2 at 17:13-18:1, 36:12-37:3, 37:17-25), symptoms consistent with traumatic brain injury. (Vol.2 at 47:22-48:5.) Based on her patient's history, symptoms, and her training and experience, Dr. Laubach opined that Paionek had a mild traumatic brain injury (Vol.2 at 47:18-48:5) and probably would never be able to return to his position at UPRR or function in the work place in any capacity. (Vol.2 at 48:12-49:6.)

In March 2005, a board certified neurologist **Ernest Nitka, M.D.** (Vol.3 at 170:24-25) examined Pasionek on a referral by Dr. Laubach. (Nitka Depo. at 4:22-5:22.) He diagnosed Pasionek with a mild traumatic brain injury (Nitka Depo. at 24:24-25:9, 27:5-9, 27:25-28:9) based upon his examinations and the

medical history Pasionek provided (Nitka Depo. at 6:1-11) that included no previous history of headaches, head trauma, loss of consciousness, concussion, or symptoms of dizziness, headache, and nausea. (Nitka Depo. at 7:1-11, 7:23-25, 11:16-18, 14:13-16.) He knew of no studies that show what degree of overpressure is necessary to cause traumatic brain injury. (Nitka Depo. at 28:10-13.)

Dr. Nitka gave, without objection, his opinion that the February 2005 explosion caused Pasionek's traumatic brain injury (Nitka Depo. at 28:22-25) and that this causal determination could be made without knowing the exact forces unleashed on Plaintiff by the explosion because it was reasonable to assume that whatever their magnitude might have been, they were sufficient to cause his brain injury. (Nitka Depo. at 10:7-13, 26:1-22, 28:22-25, 29:1-4.)

Following a *Shreck* hearing (Vol.2 at 151:6-174:12), the court permitted **Gregory Hipskind, M.D.**, a nuclear neurologist specializing in brain injuries (Vol.2 at 177:10-17, 178:11-179:9), who had previously given brain injury causation testimony in over 60 cases (Vol.2 at 247:20-248:1), to express his opinion that the explosion caused Pasionek's brain injury. (Vol.2 at 169:22-25.)

He based this opinion on Pasionek's history indicating the absence of symptoms prior to the explosion (Vol.2 at 170:14-20, 215:6-25), the fact and

nature of the explosion (Vol.2 at 170:1-3), the onset of brain injury symptoms immediately following the explosion (Vol.2 at 170:4-13, 218:14-219:24), review of available medical records and expert reports (Vol.2 at 215:6-216:21), the results of SPECT Scans (Vol.2 at 206:14-208:2, 212:21-25, 165:18-166:24), and completion of a differential diagnosis. (Vol.2 at 213:6-215:12, 217:2-218:7.) This method of determining causation was an accepted, long established, reliable method by which physicians reach a diagnosis and determination of causation. (Vol.2 at 165:18-167:12, 217:2-218:13.) Determination of cause did not require knowledge of the exact forces released by the concussive blast. (Vol.2 at 163:18-23, 164:7-165:17, 216:22-217:17.) Traumatic brain injury diagnoses are always made for example, in car accidents, roadside explosions, in combat, or in football games without knowledge of specific data as to the forces acting upon a person. (Vol.2 at 167:13-169:1, 169:8-21, 217:18-218:7.)

**Jonathan Woodcock, M.D.**, a neurologist specializing in brain injuries and neurological rehabilitation with Board certifications in neurology, psychiatry, internal medicine, behavioral neurology, and neuropsychiatry (Vol.3 at 8:16-25), examined Pasionek on 15 occasions beginning in 2006. (Vol.3 at 14:4-15.) UPRR moved in limine to exclude his opinion that the explosion caused Pasionek's brain injury. (LN25664529.) Following a *Shreck* hearing (Vol.3 at

19:11-31:11), the court noted that UPRR took no issue with Dr. Woodcock's diagnosis of brain injury (Vol.3 at 31:12-33:11) and that no other witness could quantify the amount of concussive force Pasionek was subjected to or the overpressure force necessary to cause traumatic brain injury. (Vol.3 at 32:9-15.) The trial court found that reliance on a patient's history and the "constellation of symptoms recited by the patient . . . confirmed by . . . testing" was a reliable method in determining causation. Finding that Dr. Woodcock's testimony would assist the jury in determining causation, the court permitted his opinion concerning causation. (Vol.3 at 32:23-33:11.)

Dr. Woodcock testified that Pasionek suffered from a traumatic brain injury that was caused by the explosion (Vol.3 at 14:23-15:5, 34:6-10) and that it is unnecessary to know the precise magnitude of the concussive forces released by an explosive blast to make a diagnosis of brain injury causation. (Vol.3 at 15:10-15.) In his experience, such data is never available. (Vol.3 at 15:16-24.) A reliable diagnosis can be made based on the patient's medical history, including not only the patient's input but also the results of testing, observations reported by others, and review of medical records and reports. (Vol.3 at 15:25-17:18.) Determination of causation in this manner is an accepted and reliable method on which physicians have relied in diagnosing causation for thousands of years.

(Vol.3 at 17:19-18:14.) With that information, Dr. Woodcock determined that Pasionek was exposed to a level of overpressure sufficient to cause his brain injury. (Vol.3 at 22:10-23:4, 91:1-5.)

**Barbara Essses, M.D.**, an ENT doctor specializing in neuro-otology, treated Pasionek for problems with balance and dizziness. (Vol.5 at 65:15-23, 75:19-25.) Based on examination, treatment, and history (Vol.5 at 76:1-19, 76:20-78:16, 79:2-6, 80:3-81:21, 84:17-85:3), she concluded that Pasionek had a brain injury (Vol.5 at 84:8-19) and further that the source of Pasionek's balance problems was the injury to his brain, not to his inner ear. (Vol.5 at 82:1-11, 84:8-85:3.) The results of her tests were consistent with this diagnosis. (Vol.5 at 84:9-85:3.) Her determination was not based on quantitative data (Vol.5 at 97:18-21) but on observations and testing as is common in her profession. (Vol.5 at 80:3-81:21, 84:9-85:3, 85:17-21.)

**Dennis Helffestein, Ph.D.**, an expert in neuropsychology and vocational rehabilitation (Vol.3 at 103:1-12, 105:15-22), testified that Pasionek suffered from a traumatic brain injury. (Vol.3 at 106:25-107:16, 119:22-120:20.) He based his opinion on medical history (Vol.3 at 108:5-18), review of his medical records and information from his wife (Vol.3 at 109:1-4), the results of a battery of 43 neuropsychological tests (Vol.3 at 108:19-109:2, 114:14-120:5, 124:6-

125:13, 143:16-144:5), and Pasionek's ongoing problems post-explosion. (Vol.3 at 109:8-24.) He described his professional opinion "as close to a hundred percent sure" as he could be in any case. (Vol.3 at 120:14-20.)

**James Gracey, Ed.D.,** a rehabilitation counselor, believed that Plaintiff was unable to engage in any gainful employment due to the constellation of problems from which he suffered. (Vol.3 at 159:20-161:14.) His opinion was based on interviews of Pasionek concerning his medical condition, symptoms, subjective presentation, complaints, work history, educational history, and a comprehensive review of his medical records.

**2. UPRR Selected Doctors Uniformly Agreed that Plaintiff Displayed Symptoms Consistent with a TBI.**

At the request of UPRR, Pasionek saw several physicians, and all agreed that the medical history and post-explosion symptoms described by Pasionek were consistent with a traumatic brain injury: (1) **Hugh McCauley, M.D.**, who saw Pasionek in February 2005 (Vol.6 at 72:5-8; 96:2-14); (2) **Ralph Round, M.D.**, a neurologist to whom Pasionek was referred by Dr. McCauley (Vol.6 at 100:15-17; Round Depo. at 14:7-15:10); (3) **Victor Chang, M.D.**, a neurologic rehabilitation specialist (Vol.7 at 123:4-12; 182:8-16); (4) **Donald Taylor, M.D.**, UPRR's neuropsychologist (Vol.7 at 57:4-8); and (5) **Edward Jacobson, Ph.D.**,

a clinical diagnostic audiologist, whom Pasionek was referred to by UPRR's Claims Department. (Vol.7 at 68:23-25, 116:1-23, 117:4-128:2.)

**D. UPRR's Attempted "Reconstruction" of the Explosion.**

Howard McGregor, UPRR's accident reconstructionist, attempted to replicate the circumstances of the explosion. He testified that it was critical to be clear about the facts of the incident to avoid bad data from testing. (Vol.6 at 28:24-29:9.) However, there were serious flaws in the methodology that McGregor used in conducting the experiment. (Vol.6 at 34:17-35:15, 36:4-12.) He testified that he could not say for sure that the torpedoes used in his experiment were the same as those involved in the explosion. (Vol.6 at 31:13-18.) At the direction of UPRR's attorneys, he placed his sound measuring device on the nose end of the locomotive when, in fact, Pasionek was standing on the other end of the unit in close proximity to where the explosion occurred. (Vol.6 at 34:17-35:15, 36:4-12, 36:19-25.) (Vol.6 at 30:15-31:7.) McGregor's measurements were thus recorded a full locomotive length away from and behind the spot where the explosion actually occurred.

**Joe Romig, Ph.D.**, a physicist specializing in accident reconstruction (Vol.4 at 5:21-25), tested torpedoes provided by UPRR to determine how they performed (Vol.4 at 21:17-22:9), visited the 36th Street site, and concluded that

"without a lot of sound-field measurements, many measuring devices, and many experiments," it would not be possible "to even approach the conditions that would have occurred on that specific incident." (Vol.4 at 21:17-23:11.) **Mr. Dennis Driscoll**, an acoustical engineer (Vol.4 at 79:13-24), testified that there was no way to know whether the UPRR torpedoes were representative of the ones that exploded under Pasionek. (Vol.4 at 79:22-25.) He further explained that McGregor used a microphone that was designed only to measure sound pressure and could not account for reflectivity (Vol.4 at 84:3-21), causing understatement of the true pressure released from the torpedoes. (Vol.4 at 84:6-21.)

## IV. SUMMARY OF ARGUMENT

Conspicuously absent from UPRR's Opening Brief is any discussion of the theory of the case actually tried by Plaintiff – that UPRR's negligence in its efforts to collect, secure, and dispose of torpedoes played a part in causing Plaintiff's injuries. Evidence in support of this theory was more than sufficient to sustain the jury's verdict. UPRR's own exhibits and testimony established its actual knowledge of the danger to employees posed by the presence of unsecured obsolete explosive torpedoes found everywhere on its premises. Indeed, this knowledge was a principal reason for the 2002 torpedo collection and disposal program in the first instance. After the one-time collection and disposal effort,

torpedoes continued to surface, demonstrating that the torpedo program had been less than fully successful. Despite this knowledge, UPRR undertook no follow up efforts to locate and dispose of torpedoes missed in the 2002 effort. That reasonable jurors could conclude from these facts that UPRR knew that injury to employees was foreseeable is not subject to serious dispute on this record.

UPRR ignores this evidence and focuses on evidence that it believes failed to support a theory never argued by Plaintiff – liability under respondeat superior for the conduct of the unknown tortfeasor. By this straw man argument, UPRR seeks to avoid liability on the ground that the wrongdoer's act could not have been within the scope of employment. This ploy should be rejected. That the conduct of UPRR employees in carrying out the torpedo disposal program was in furtherance of UPRR's interests is not in dispute. When direct negligence by the railroad leads to a condition acted upon by a third party resulting in injury to an employee is proven, a FELA claimant need not prove that the perpetrator acted in furtherance of the railroad's interest or even that the active wrongdoer was an employee. Nor is it relevant whether the injury-causing conduct was intentional, criminal, or even that it was the act of an employee.

UPRR moved in limine to preclude Doctors Gregory Hipskind and Jonathan Woodcock from offering their opinions that the torpedo explosion

caused Plaintiff's brain injury. Relying solely on chemical exposure cases, UPRR argues that Plaintiff was required to prove "specific" causation and because Drs. Hipskind and Woodcock did not know the actual levels of the blast forces unleashed by the explosion, they could not testify that Pasionek's brain injury was "specifically" caused by the explosion. This argument is without merit. The law has universally recognized that in traumatic injury cases, causation can be reasonably inferred based upon medical history. The trial court properly rejected this argument after conducting *Shreck* hearings. UPRR makes no showing that the trial court abused in discretion in admitting this testimony.

Moreover, any error in admitting this testimony (which there was none) was harmless. The testimony was merely cumulative of other physician causation testimony admitted at trial without objection. Further, in FELA cases, jurors may decide causation based on their common sense and experience without causation testimony from medical experts. Here, the jury could have decided that the explosion caused brain damage without medical testimony based on the facts that Plaintiff was in good health before the explosion and suffered immediate onset of symptoms consistent with brain injury when the explosion occurred requiring extensive subsequent medical treatment.

## V. ARGUMENT

### A. Governing Law.

Determination of substantive issues in FELA cases filed in state court is governed by federal common law. *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490, 492-93 (1980); *Marlow v. Atchison, Topeka & Santa Fe Ry. Co.*, 671 P.2d 439, 442 (Colo. App. 1983).

The federal common law tort principles applicable to FELA cases are greatly relaxed in comparison to state common law. *See Maret v. CSX Transp., Inc.*, 721 N.E.2d 452, 454 (Ohio Ct. App. 1998) ("To create a jury question [in a FELA case], a plaintiff must present 'more than a scintilla of evidence . . . but not much more.'"). FELA is a remedial act under which employees are liable in damages if negligence of the railroad played "any part," however slight, in producing injuries to an employee. *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506 (1957). A "relaxed standard of causation applies under FELA." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994). Courts must "take into account the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence." *Rogers*, 352 U.S. at 509-10. This critical point goes unmentioned in UPRR's Brief.

The question of negligence, including forseeability and causation, is for the jury to determine. *Id.* at 509. "Only [where] there is a complete absence of probative facts to support the [jury's] conclusion" can a FELA verdict for plaintiff be set aside. *Lavender v. Kurn,* 327 U.S. 645 (1946). The Supreme Court has jealously guarded the right of FELA plaintiffs to trial by jury. *See Arnold v. Panhandle & Santa Fe Ry. Co.,* 353 U.S. 360, 361 (1957). ("[I]t is our duty under the Act to make certain that [FELA claimants] are fully protected, as the Congress intended them to be.") (citations omitted).

Courts may not invade the province of the jury by substituting their view of the facts for that of the jury in FELA cases. The Supreme Court has repeatedly granted certiorari review when lower courts have entered judgment for the employer before, during, or after trial "because of the importance of preserving for litigants in FELA cases their right to a jury trial . . . ." *Wilkerson v. McCarthy*, 336 U.S. 53, 55 (1949) (collecting cases). *See Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29 (1944) (The Court restored a verdict set aside for lack of evidence on causation, stating that the jury's "conclusion, whether it relates to negligence, causation *or any other factual matter*, cannot be ignored."). *Id.* at 35 (internal citations omitted; emphasis added).

The sole question before the Court is whether the record contains evidence that negligence on the part of UPRR contributed in any way, no matter how slight, to the injuries sustained by Plaintiff. *Rogers,* 352 U.S. at 506-07. To make that determination, the appellate court "need look only to the evidence and reasonable inferences which tend to support" the verdict. *Id.; Wilkerson*, 336 U.S. at 58. *See also Pierce v. Southern Pac. Transp. Co*., 823 F.2d 1366, 1370 (9th Cir. 1987) ("A reviewing court must uphold a verdict even if it finds only 'slight' or 'minimal' facts to support a jury's finding of negligence."); *Mendoza v. Southern Pac. Transp. Co.,* 733 F.2d 631, 633 (9th Cir. 1984) (in FELA cases, it is "only necessary that the jury's conclusion be one which is not outside the possibility of reason on the facts and circumstances shown."). Courts must "take into account the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence." *Rogers*, 352 U.S. at 509-10.

When a jury renders its verdict on a general verdict form, it cannot be determined precisely what acts or omissions the jury relied on in its finding of negligence, but where the evidence permits a finding of negligence on any ground, lack of evidence on another theory is irrelevant. *See Security Ins. Co. v. Johnson*, 276 F.2d 182, 187-88 (10th Cir. 1960)

## B. The Negligence Verdict.

**1. Standard of Review & Preservation:** Pasionek agrees with UPRR's statements concerning preservation and the standard of review for a refusal to direct a verdict, but states that the correct standard for review of denial of a motion for a new trial is abuse of discretion. *Blue Cross v. Bukulmez*, 736 P.2d 834, 841 (Colo. 1987).

**2. Forseeability.**

Under FELA, UPRR has a non-delegable and continuing duty as an employer to provide its employees a reasonably safe place to work. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 558 (1987).

UPRR's Exhibits H and I describing the program and witness testimony established that the railroad fully appreciated the dangerous potential for injury posed by unsecured torpedoes. Evidence showing UPRR's actual knowledge of the danger of foreseeable injury inherent in the presence of unsecured torpedoes on its premises includes: (a) that torpedoes were a dangerous explosive device that could cause personal injury if misused or mishandled (Ex.H at 1; Vol.4 at 43:21-25); (b) that thousands of torpedoes were present in places under UPRR's control—in locomotives, box cars, trucks, sheds, and elsewhere on UPRR premises (Ex.H at 1-2; Vol.4 at 42:12-43:5); (c) that improvements in locomotive

cabs and communications had rendered torpedoes obsolete and no longer useful to railroad operations for at least 20 years (Vol.4 at 58:19-59:13); (d) that UPRR never made any effort to secure torpedoes from access by unauthorized persons and misuse (Ex.H at 1; Vol.4 at 42:12-43:5; Vol.2 at 134:8-135:5); (e) that the one-time collection program executed in 2002 did not succeed in its goal of retrieving and disposing of all torpedoes, a fact known to UPRR because torpedoes continued to be found on railroad premises in the years after 2002 (Vol.4 at 44:16-45:6, 45:7-24, 65:12-22, 168:8-169:8); and (f) despite this knowledge, UPRR never took meaningful steps to follow up on the one-time and obviously deficient collection effort. (Vol.4 at 66:9-16.)

Moreover, when the capacity of something to cause injury is apparent, knowledge is imputable to the railroad. *Turner v. Norfolk & W. Ry. Co.,* 785 S.W.2d 569, 572 (Mo. Ct. App. 1990). "The specification of 'safe conditions for work' is broad enough to cover any cause of injury that was present in the workplace." *Id.* at 572. The very nature of torpedoes (compact explosive devices) made their potential for injury obvious. This fact alone presented a sufficient basis to infer that UPRR knew or should have known that unauthorized use of these devices could cause harm to employees. Based on common sense and everyday experience, the jury would be well within its province in finding

that UPRR knew or should have known that, if not properly disposed of or secured, a torpedo could get into the wrong hands and be misused, causing injury to employees.

UPRR's argument that the event giving rise to this case was unforeseeable simply because it had not happened before at the 36th Street facility is unavailing. The lack of a similar incident in the past does not absolve a railroad from foreseeing injury to employees. *Gallick v. Baltimore & O.R. Co.*, 372 U.S. 108, 121 (1963) (finding jury instruction emphasizing consideration of no prior occurrence was "a far too narrow a concept of foreseeable harm to negative negligence under" FELA). Nor does a failure to foresee the precise manner in which the harm ultimately occurred prevent a finding of liability. *Id.* at n.8.

**3. The Perpetrator's Scope of Employment Is a Non-issue.**

UPRR seeks reversal on the ground that the wrongful act could not have been in the scope of employment and therefore judgment should have been directed in its favor. This is a straw man argument based on a mischaracterization of Plaintiff's claim undeserving of serious consideration.

What Plaintiff sought to prove and did prove was that active negligence by UPRR in connection with the torpedo disposal program increased the potential for employee injury that played some part in the resultant injuries to Plaintiff. (Vol.1

at 200:18-213:11; Vol.5 at 111:7-25; Vol.8 at 5:20-18:17, 43:12-51:1.) Negligence in connection with operation of the program indisputably arose from conduct of UPRR employees acting within the scope of their employment. (Ex.H; Ex.I; Vol.4 at 49:4-14, 50:17-51:12, 53:8-25, 56:19-57:15.)

Whether the injury-causing activity of the unknown perpetrator was in the scope of employment is beside the point. When "direct negligence" based the railroad's failure "to prevent reasonably foreseeable danger to an employee from intentional or criminal conduct" is proven, the plaintiff "need not prove that the co-employee's misconduct was done in furtherance of the employer's business." *Naidoo v. Union Pac. R.R. Co.,* 402 N.W.2d 653, 657 (Neb. 1987) (citing *Harrison v. Missouri Pac. R. Co.*, 372 U.S. 248 (1963) and *Lancaster v. Norfolk & W. Ry. Co.*, 773 F.2d 807 (7th Cir. 1985)). If railroad negligence plays any part, however slight, in injury to an employee, whether the actor whose conduct directly causes the injury was acting in furtherance of the company's interests is irrelevant. *Francisco v. Burlington N. R.R. Co.*, 204 F.3d 787, 789 (8th Cir. 2000).

UPRR is also wrong in its statement that if the act were "done by nonemployee of the Railroad, Union Pacific is not responsible for that person's actions." (Brief at 32.) First, it is irrelevant whether the foreseeable danger takes

the form of intentional torts, *Lancaster*, 773 F.2d at 813, or even criminal behavior. *Lillie v. Thompson,* 332 U.S. 459, 462 (1947) (employee permanently and seriously injured from a beating inflicted by a stranger). Second, "an employee who suffers an 'injury' 'caused in whole or in part' by a railroad's negligence may recover his or her full damages from the railroad, regardless of whether the injury was also caused 'in part' by the actions of a third party." *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 165-66 (2003). Wrongdoing by a stranger to the railroad is no bar to full recovery by the plaintiff if railroad negligence played any part in the injury giving rise to suit. While the railroad may have a right of indemnity against a perpetrator not in the railroad's control, it cannot escape liability for all damages, suffered by the employee.

Finally, in a factual context almost identical to the present case, the Texas Court of Appeals rejected the same argument UPRR relies on so heavily here. In *Missouri Pac. Rd. Co. v. Alcorn*, 598 S.W.2d 352, 353 (Tex.App. 1980), a switchyard conductor brought suit for injuries resulting from "the loud explosion of one or more torpedoes . . . placed on the track as a practical joke" by a co-employee fireman. The jury found negligence based on the railroad's failure to provide a safe place to work. The *Alcorn* Court rejected the railroad's argument

of no liability because the prank was not an act within the scope of employment. In reaching this decision, the court quoted the following Supreme Court holding:

> " . . . it was the conception of this [FELA] legislation that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor. Hence a railroad worker may recover from his employer for an injury caused in whole or in part by a fellow worker, not because the employer is himself to blame, but because justice demands that one who gives his labor to the furtherance of the enterprise should be assured that all combining their exertions with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be endangered. If this standard is not met and injury results, the worker is compensated in damages."

*Id.* at 354, quoting *Sinkler v. Missouri Pacific Rd. Co.*, 356 U.S. 326, 330 (1958). Based on the standard enunciated in *Sinkler*, the *Alcorn* Court concluded that proof of injury by a co-worker under the railroad's control was enough to sustain liability. *Alcorn,* 598 S.W.2d at 354. Other torpedo injury cases have reached the same result. *See also Mullett v. Wheeling & Lake Erie Ry. Co.*, 2003 WL 21469150 (Ohio. App. 2003) (affirming verdict where plaintiff was an unintended victim of explosion from torpedoes put on turntable track as a prank with no discussion of respondeat superior); *Henderson v. CSX Transp., Inc.*, 617 So.2d 770, 773 (Fla. App. 1993) (revising summary judgment for railroad where

circumstantial evidence would support inference by jury that torpedo was placed on track by an employee and "therefore, employer negligence played some part in producing Henderson's injury" with no discussion of respondeat superior); *Garrett v. Union Pacific Rd.*, 828 P.2d 994, 996 (Ok. App. 1992) (affirming verdict for plaintiff on liability in case factually very similar to instant case with no discussion of scope of employment).

## C. The Trial Court Acted Well Within its Discretion in Allowing Drs. Hipskind and Woodcock to Testify on the Issue of Causation.

**1. Standard of Review & Preservation:** Pasionek agrees with UPRR's standard of review and preservation for appeal.

### 2. Traumatic Injury Claimants Are Not Required to Prove General and Specific Causation.

There is absolutely no merit to UPRR's assertion that a plaintiff "is required to establish both general and specific causation through expert testimony." (Brief at 37.) Nor is there any merit to UPRR's contention that the causation testimony of Pasionek's medical experts, Drs. Woodcock and Hipskind, was unreliable because they did not know the precise amount of overpressure to which Pasionek was exposed and because his eardrums were not perforated. (Brief at 37-40.)

The burden of proving causation in a FELA action is "much less stringent that it would be in an ordinary negligence action." *Hahn v. Union Pac. R.R. Co.,* 816 N.E.2d 834, 841 (Ill. Ct. App. 2004). To satisfy the test for adequate proof of causation under FELA, a plaintiff need only prove that employer negligence played "any part, even the slightest, in producing the injury" for which damages are sought. *Rogers*, 352 U.S. at 506.

The cases on which UPRR relies to support its assertion that Plaintiff was required to prove "specific cause" through medical experts are all actions where the plaintiff seeks damages from exposure to toxic substances. *See Amorgianos v. National R.R. Passenger Corp.,* 137 F.Supp.2d 147 (E.D.N.Y. 2001) (paint fumes/nerve damage); *Savage v. Union Pacific R.R. Co.,* 67 F.Supp.2d 1021 (E.D. Ark. 1999) (herbicides/respiratory disorders); *Schmaltz v. Norfolk & Western Ry. Co.,* 878 F.Supp. 119 (N.D. Ill. 1995) (creosote/skin cancer); *Claar v. Burlington No. R.R. Co*., 29 F.3d 499 (9th Cir. 1994) (chemicals/various ailments). (Brief at 35 & 38.) None of these cases involved injury due to a traumatic event.

The concepts of "general" and "specific" causation are unique to toxic torts. 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 28 cmt. c(1) (Toxic Substances and Disease) at 402-10 (2010). Toxic tort

causation principles actions simply do not apply to traumatic-injury cases. *Id*. at § 28 cmt. c(1) at 402 ("The special problem [in toxic tort cases] is proving the connection between a substance and the development of a specific disease. In most traumatic-injury cases, the plaintiff can prove the causal role of the defendant's tortious conduct by observation, based upon reasonable inferences drawn from everyday experience and a close temporal and spatial connection between that conduct and the harm.")

The same argument UPRR makes in this case – that Drs. Hipskind and Woodcock should not have been allowed to render opinions as to "specific" causation – Brief at 37 – was previously advanced by UPRR and rejected in *Hahn v. Union Pac. R.R. Co.,* 816 N.E.2d 834. There, UPRR argued that the medical causation testimony was insufficient because "no medical expert could give an opinion regarding the *specific* cause of [plaintiff's injury.]" (emphasis in original). *Id.* at 841. The court rejected this argument, stating that:

> [t]o be probative on the issue of causation, a medical expert is not required to give an opinion regarding a *specific* cause. Rather, a medical expert is permitted to testify to what might or could have caused an injury, despite any objection that the testimony is inconclusive. Testimony from a physician regarding what might or could have caused an injury is merely a medical opinion given on facts assumed to be true.

*Id.* (internal citations omitted).

Further, it is universally recognized in traumatic-injury cases that a medical doctor's opinion on causation based on examinations and the patient's self-reported history is an accepted reliable method of diagnosis. *Id.* at 842. *See also Cooper v. Nelson*, 211 F.3d 1008, 1020 (7th Cir. 2000) (examination accompanied by history related by patient found to be an accepted diagnostic tool); *Dinnet, v. Lakeside Hosp.,* 811 So. 2d 116, 119 (La. Ct. App. 2002) (finding the practice of basing causation opinion on patient-provided history was routine and well-established); *Lilley v. Home Depot U.S.A., Inc*., 567 F.Supp.2d 953, 957 (S.D. Tex. 2008) (holding that doctor's causation testimony should not be excluded because based solely on patient's self-reported history as this merely affects weight of testimony); *Walker v. Consolidated Rail Corp.,* 111 F.Supp.2d 1016, 1018 (N.D. Ind. 2000) (finding reasonable for physician experts to rely on self-reported medical). Likewise, expert reports and medical records are reasonably relied on by medical experts in support of their causation testimony. Jack B. Weinstein, Margaret A. Berger, *Weinstein's Federal Evidence* § 703.04[3] (2d Ed. Vol. 4 2010) (discussing cases stating medical records and opinions of other experts reasonable source of reliance). *Cf. Carroll v. Morgan,* 17 F.3d 787, 790 (5th Cir. 1995) (qualifying doctor under *Daubert* based on experience and review of medical records). The advisory committee notes for

Rule 703 of the Federal Rules of Evidence, after which the Colorado rules were modeled, contemplates reliance on "statements by patients and relatives, reports and opinions from nurses, technicians and other doctors." FRE 703; *Weinstein, supra,* at 703 App.-1. Obviously, the jury accepted Pasionek's evidence on causation and rejected UPRR's evidence. *See Gordon v. Benson*, 925 P.2d 775, 778 (Colo. 1996) (jury free to discard or disbelieve facts).

If the trial court committed any error, it was in allowing UPRR's *Shreck* motion to be heard at all. *See Dinett*, 811 So.2d at 119) (excluding testimony based on medical history because another expert testified that it was scientifically impossible to determine with certainty that a blood transfusion was the source of plaintiff's infection was not a proper *Daubert* challenge of methodology but only sought exclusion of the expert's opinion and was therefore error.)

### 3. The Evidentiary Rulings Concerning Admissibility of Drs. Woodcock and Hipskind's Testimony on Causation Were the Product of Informed Discretionary Decisions.

A trial court has a superior opportunity to determine the competence of the expert, as well as to assess whether the expert's opinion will be helpful to the jury. *People v. Martinez,* 74 P.3d 316, 322 (Colo. 2003). Trial courts have broad discretion to determine admissibility of expert testimony, and their rulings will not be overturned unless manifestly erroneous. *Id.*

Expert testimony is admissible under CRE 702, if it is both reliable and relevant. *People v. Ramirez,* 155 P.3d 371, 378 (Colo. 2007); *People v. Shreck,* 22 P.3d 68, 77 (Colo. 2001). Expert testimony is reliable if the scientific principles used by the witness are reasonably reliable and the witness is qualified to opine on such matters. *Shreck,* 22 P.3d at 77. This liberal standard of admissibility is balanced against "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Id*. at 78 (quoting *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579 (1993)).

Here, permitting the causation testimony of Drs. Woodcock and Hispkind, both neurologists specializing in traumatic brain injuries, was not an abuse of discretion. Both testified that knowledge of the exact forces of the concussive blast to which Pasionek was exposed was not necessary to formulate a medical opinion on causation. (Vol.2 at 163:18-23, 164:7-165:17, 216:22-217:17; Vol.3 at 15:10-15.) Conclusions as to causation are made on a daily basis by physicians who are unaware of the exact forces acting upon a victim of trauma, for example, in automobile accidents or in roadside explosions in the Middle East. (Vol.2 at 167:13-169:1, 169:8-21, 217:18-218:7; Vol.3 at 15:10-24, 17:19-18:14.) Drs. Hipskind and Woodcock grounded their diagnoses and opinions on causation on their extensive professional experience and training, clinical examination,

medical history given by Pasionek, test results, other expert reports, the observation of others, the sudden onset of symptoms consistent with brain injury immediately after the explosion, and the absence of any other traumatic event that could explain those symptoms. This method is an accepted, established, reliable method by which physicians have diagnosed causation for thousands of years. (Vol.2 at 165:18-167:12, 167:13-169:1, 169:8-21, 217:18-218:13; Vol.3 at 15:16-24, 15:25-17:18, 17:19-18:14.)

The trial court carefully considered UPRR's objections and conducted two *Shreck* hearings. (Vol.2 at 151:6-174:12; Vol.3 at 19:11-33:11.) The trial court scrutinized Drs. Hipskind and Woodcock's opinions as required under *Shreck* and made findings and conclusions that comported the requirements of CRE 702. (Vol.2 at 172:22-174:12; Vol.3 at 31:22-33:11.) The court found that the methodology of relying on a patient's history and the "constellation of symptoms recited by the patient . . . confirmed by their testing" is a reliable technique in this case (Vol.3 at 31:12-33:11) and concluded that the opinions of both physicians were sufficiently reliable to permit their testimony on causation. (Vol.2 at 172:22-174:12.) *See Ramirez*, 155 P.3d at 378-79 ("The proponent "need not prove that the expert is indisputably correct or that the expert's theory is generally accepted in the scientific community. Instead, the [party] must show that the

method employed by the expert in reaching the conclusion is scientifically sound and that the opinion is based on facts which sufficiently satisfy Rule 702's reliability requirements."). Accordingly, causation became an issue for the jury to decide. *See Kaiser Found. Health Plan v. Sharp*, 741 P.2d 714, 719 (Colo. 1987) (finding existence of causative link between plaintiff's injuries and defendant's negligence a question of fact and within province of jury).

### 4. The Hipskind and Woodcock Testimony was Helpful But Not Necessary to the Jury's Finding of Causation.

Finally, absent the Hipskind and Woodcock testimony, there is ample evidence of record to support the jury's determination of causation. UPRR witnesses, including UPRR's own neuropsychologist expert (Dr. Donald Taylor), testified that Pasionek's symptoms post-explosion were consistent with a brain injury caused by a concussive force. (§ III.C.2., *supra*, at 21; Vol.7 at 57:4-8.) Dr. Nitka testified without objection to causation without knowledge as to the degree of overpressure caused by the explosion. (Nitka Depo. at 28:22-25.) This testimony was cumulative to that of Drs. Woodcock and Hipskind. Thus any error in admitting Dr. Hipskind and Woodcock's causation opinions was harmless.

In addition, the Plaintiff testified that he had no pre-existing conditions or symptoms consistent with brain injury before February 4, 2005, and when he was

subjected to the torpedo explosion on that date, he exhibited symptoms consistent with a traumatic brain injury immediately and only after the explosion. His supervisors recognized that he had a head injury right after the incident and took Plaintiff to an emergency room for treatment right after the incident. Even without any medical testimony on causation, evidence was sufficient to prove causation. *See Ulfik v. Metro-North Commuter R.R.*, 77 F.3d 54, 60 (2d Cir. 1996) (finding circumstantial evidence may provide basis for causation) (citing *W. Page Keeton et al.*, *Prosser & Keeton on the Law of Torts § 41*, at 270 (5th ed. 1984) ("Circumstantial evidence, expert testimony, or common knowledge may provide a basis from which the causal sequence may be inferred.")); *Claar,* 29 F.3d at 504 (discussing *Gallick v. Baltimore & O.R. Co.,* 372 U.S. 108 (1963) and *Lavender v. Kurn,* 327 U.S. 645 (1946), cases involving situations where no special expertise was necessary to draw a casual inference).

### 5. The Results of UPRR's Flawed Accident Reconstruction and Testimony that Ear Drum Perforation is a Necessary Condition of Brain Damage Are Neither Scientific Nor Undisputed.

UPRR applies an overly broad and flawed interpretation of *post hoc ergo propter hoc* – the logical fallacy that simply because one event follows another, the latter event was not necessarily caused by the earlier event. By this argument, UPRR asks this Court to apply a logical fallacy – that the temporal sequence of

events has can have no relevance to causation in this case. Causation here is not, as UPRR intimates, simply based on the temporal sequence of events. Pasionek exhibited no symptoms of brain injury before the explosion. He was exposed to blast force waves of energy unleashed by the detonation of two torpedoes one foot below and a few feet behind him, approximately 102 inches from his head (Vol.4 at 24:14-25:13, 127:10-18), amplified by reflection in the confined space between the yard office wall and the steel surfaces of the locomotive seven feet from the wall. (Vol.4 at 126:15-127:18.) Immediately, he experienced dizziness, severe headaches, confusion, and nausea – all symptoms consistent with a traumatic brain injury. (Vol.4 at 129:18-130:4.) In combination with other symptoms that became evident over time, Pasionek was never able to return to work and permanently lost the ability to hold a job. Surely, these facts demonstrate that something more than temporal sequence was in play here. To argue otherwise under these facts is an insult to common sense and experience.

UPRR's assertion that McGregor's measurements taken in his purported reconstruction of the explosion and Dr. Chang's testimony that brain injury cannot occur without eardrum perforation (which Pasionek did not have) constitute "undisputed scientific evidence" (Brief at 40) strains credulity to the breaking point.

While McGregor's measurements may be "undisputed" they are thoroughly unreliable. The impossibility of replicating the event, as testified to by Joe Romig, the flawed methodology McGregor used (he could not say for sure that the torpedoes were the same, he took measurements with equipment that would understate readings, and most important, he recorded his measurement from the wrong end of the train, yards from and opposite the direction of the actual explosion) (Vol.6 at 31:13-18, 34:17-35:15, 36:4-12, 36:19-25; Ex.M), rendered the results of his "experiment" plainly unreliable. "[T]he jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion." *Gordon*, 925 P.2d at 778. Even where "there is evidence tending to show that it was physically and mathematically impossible" for the injury to occur as claimed, such evidence is "irrelevant upon appeal" where the evidence provides a basis for concluding that the injury did occur as plaintiff maintained. *Lavender,* 327 U.S. at 652-653. The jury was also free to – and apparently did – disregard the "no-perforated-eardrum-no-brain-injury" testimony of Dr. Chang.

Finally, McGregor's overpressure and decibel level findings and Dr. Chang's eardrum testimony are irrelevant at this juncture of the case because the record is replete with evidence supporting a finding that Plaintiff did sustain brain damage from the explosion. Conflicting evidence, even if credible (which

UPRR's was not), must be disregarded on appeal in favor of the evidence that negligence of UPRR played a part, however slight, in the injuries suffered by Plaintiff.

## VI. CONCLUSION

WHEREFORE for the reasons above stated, Plaintiff-Appellee respectfully requests the Court to issue its opinion and mandate affirming the judgment below and to grant such further relief as the Court deems appropriate under the circumstances.

Respectfully submitted on this 13th day of August 2010.

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## CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of this **ANSWER BRIEF OF PLAINTIFF-APPELLEE** was timely served via LexisNexis File and Serve on this 13th day of August 2010, to the following:

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