

Exhibit No. 1
Date 2-10-05
JH, SB 375

**Statement of Alexander (Zander) Blewett, III,
Re Proposed Amendment to Venue Statute Re FELA Claims
§ 25-2-122, MCA,**

February 9, 2005

Federal law allows State Legislatures to enact venue laws applicable to FELA actions, and, at the present time, the Legislature has provided that in any tort action, the proper place of trial is the county in which any of the defendants reside or the county in which the tort was committed. If the defendant is a foreign corporation, the Legislature has decided that the tort claim can be brought in the county in which the tort was committed, the county in which the plaintiff resides, or the county in which the corporation's registered agent is located. This is a perfectly acceptable and fair venue provision for every conceivable tort claim, except an FELA claim.

An FELA claim arises out of negligence on the part of a railroad whereby a railroad worker suffers personal injury in the course and scope of his employment. The railroad is entitled to claim that the railroad worker was contributorily negligent and that his claim will be reduced by whatever percentage of negligence is found by a jury. The problem in an FELA case is that there is no workers' compensation benefits for any railroad worker injured on the job and that he must

file a negligence action against the employer railroad in one of the counties in our state.

The biggest problem arises with all of the railroad workers in Havre and in Glendive where the railroad virtually owns and controls these relatively small towns. Usually these railroad workers are going to be injured in Havre and since they live in Havre, the only place they could conceivably bring the case would be Havre or the county chosen by the railroad to have its registered agent. In an FELA action against BNSF in Havre, where the jurors would be faced with finding liability for damages against BNSF where BNSF controls the jurors' destiny and where BNSF is absolutely mandatory for the jurors' business interests and for the existence of their community, it would be entirely unfair to expect the railroad worker to bring such an action in Havre. Over the years, there have been an extremely limited number of FELA cases filed in Havre. The exact same circumstances exist in Glendive.

When these workers are injured in Havre or Glendive and live in Havre or Glendive, they are limited to one county in which they can file an FELA claim and that county is where the railroad has designated its registered agent. As a result, the railroad gets the opportunity to determine where it chooses to be sued in FELA cases and at the present time it has chosen Billings. BNSF could choose any other

county in the state besides Billings, and thereby force railroad workers to sue in any county designated by BNSF.

The proposed bill will rectify this problem and allow injured railroad workers to bring their action against a railroad in any county where the railroad does business in the state of Montana. The FELA stands for the Federal Employers Liability Act and is an act of Congress and allows FELA claims to be brought both in state court and in federal court. When the case is brought in federal court, the Congress, in its wisdom, allowed the injured railroad worker to bring the claim in any district where the defendant "shall be doing business at the time of commencing such action." This law is set forth in Title 45, U.S.C.S., § 56, and I have made a photocopy of this section for each of you committee members. You will note that I have highlighted in yellow the specific language where Congress has determined that the appropriate venue in an FELA case is any district where the railroad does business.

This is really quite a simple issue. When this statute was amended in 1995 to include the present language in 25-2-122, the Legislature inadvertently failed to address the differences between FELA actions and all other tort actions. If this bill is passed into law, it will allow injured railroad workers a reasonable choice of

venue, especially for the Havre workers and the Glendive workers who are presently restricted to filing the case in the county chosen by the railroad.

There has been some concern raised that a venue provision like this, which refers only to Montana residents and not out-of-state residents, would create an equal protection argument under our U.S. Constitution. This concern has been clearly removed by the Montana Supreme Court in *Ford v. BN* and the United States Supreme Court in *Ford v. BN*. Clearly, the state of Montana has a rational basis for making the distinction between Montana residents and out-of-state residents, to avoid the inundation of claims by out-of-state FELA workers under our "open court" system.

In the recent case of *Rule v. BNSF*, the Court, concluding that this Legislature has the right to enact venue laws applicable to FELA actions, stated:

The Legislature did not create an exception from the provisions of §25-2-122(2) for FELA claims. Because § 25-2-122, MCA, does not expressly exclude FELA claims, we conclude the statute applies to FELA claims.

All we are asking by this bill is to set forth an appropriate FELA venue statute.

Thank you.

Alexander (Zander) Blewett, III

45 USCS § 55, n 51

RAILROADS

Purvis v Pennsylvania R. Co. (1950, DC Pa) 96 F Supp 698.

Question of validity of release executed by employee should be permitted to go to jury; withdrawal of this question from jury constitutes reversible error. *Pacific E. R. Co. v Dewey* (1949) 95 Cal App 2d 69, 212 P2d 255.

52. Summary judgment

Defendant was not entitled to summary judgment based on defense of accord and satisfaction where allegations of complaint set forth serious injuries sustained by plaintiff, and stated that

consideration for release executed by plaintiff was \$100 which claim agent said was wages. *Kiloski v Pennsylvania R. Co.* (1951, DC Del) 96 F Supp 321.

Issue as to material fact precluding summary judgment for railroad is raised by evidence that at time that plaintiff entered into settlement with railroad and signed release, which settlement almost exclusively represented plaintiff's wages for time lost from employment, neither plaintiff nor railroad claims agent contemplated that plaintiff had suffered permanent and disabling injury. *Holmes v Missouri K. T. R. Co.* (1978, Okla) 574 P2d 297.

§ 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this act [45 USCS §§ 51 et seq.] unless commenced within three years from the day the cause of action accrued.

Under this act [45 USCS §§ 51 et seq.] an action may be brought in a circuit [district] court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act [45 USCS §§ 51 et seq.] shall be concurrent with that of the courts of the several States.

(Apr. 22, 1908, ch 149, § 6, 35 Stat. 66; Apr. 5, 1910, ch 143, § 1, 36 Stat. 291; Aug. 11, 1939, ch 685, § 2, 53 Stat. 1404; June 25, 1948, ch 646, § 18, 62 Stat. 989.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The bracketed word, "district" is inserted on authority of Act Mar. 3, 1911, ch 231, §§ 289, 291, 36 Stat. 1167, which appears as 28 USCS §§ 430 and 430a which transferred the powers and duties of the circuit courts to the district courts.

Amendments:

1910. Act Apr. 5, 1910 added "Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

1939. Act Aug. 11, 1939, substituted "three years" for "two years".