

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM FRANK WARD,

Plaintiff-Appellee,

v

CONSOLIDATED RAIL CORPORATION, d/b/a
Conrail, a Pennsylvania Corporation,

Defendant-Appellant.

UNPUBLISHED

August 7, 2003

No. 234619

Wayne Circuit Court

LC No. 99-903048-NO

Before: Sawyer, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant appeals by right from a judgment for plaintiff entered after a jury trial. The jury concluded that defendant violated 49 USC § 20302(a)(1)(B), a provision of the Federal Safety Appliance Act (FSAA), 49 USC § 20301 *et seq.*, by having an “inefficient” handbrake on one of its locomotives. The jury concluded that plaintiff incurred injuries as a result of operating the inefficient handbrake¹ and therefore awarded him \$800,000 in damages. We affirm in part but remand this case for a reduction of the case evaluation sanctions by the amount attributable to paralegal billings.

On appeal, defendant first argues that the trial court erred in (1) ruling that plaintiff was entitled to a presumption at trial that the handbrake in question was defective and (2) instructing the jury that it could infer that the handbrake was defective. Because the issue of a possible presumption or inference was argued and ruled on in conjunction with plaintiff’s pretrial motion for summary disposition, and because it also involves an allegation of instructional error, our review is *de novo*. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

Before trial, the court ruled that plaintiff was entitled to the presumption in question because the handbrake had been destroyed by an employee of defendant and could not be

¹ Plaintiff theorized at trial that an improperly-sized “clevis” on the chain of the handbrake in question caused the handbrake to stop suddenly and that this sudden stop caused damage to his back. Witnesses at trial testified that a clevis is a device that is sometimes used to repair links in a chain, although the term “clevis” is not synonymous with the phrase “repair link.”

examined for defects. Defendant contends that the employee did not in fact “destroy” the handbrake but merely discarded it in the ordinary course of business because he was not aware of a pending claim involving the handbrake and was not aware of any problems workers had had in applying the brake. Defendant claims that the presumption about the brake enjoyed by plaintiff greatly prejudiced defendant because under the federal statutes central to plaintiff’s claims, any defect found on a locomotive “imposes upon a railroad strict liability for any resulting injury.” Defendant claims that the court’s grant of the presumption to plaintiff “essentially granted plaintiff summary disposition on the issue of liability.”

We do not agree that this issue warrants reversal. As noted in *Johnson v Secretary of State*, 406 Mich 420, 440; 280 NW2d 9 (1979):

The rule is well established that where there is a deliberate destruction of or failure to produce evidence in one’s control a presumption arises that if the evidence were produced it would operate against the party who deliberately destroyed or failed to produce it.

See also *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 193; 600 NW2d 129 (1999). Here, the handbrake had been in defendant’s control. Moreover, evidence existed that the handbrake was discarded by defendant after plaintiff had made an injury report with respect to it, and thus defendant should have been aware of the need to retain the handbrake. See, generally, *Brenner v Kolk*, 226 Mich App 149, 162; 659 NW2d 684 (1997). Under the above case law, the trial court correctly found, as a preliminary matter, that a presumption in favor of plaintiff existed.²

Moreover, the court properly instructed the jury. Defendant cites *Widmayer v Leonard*, 422 Mich 280; 373 NW2d 538 (1985), and *State Farm Mut Automobile Ins Co v Allen*, 191 Mich App 18; 477 NW2d 445 (1991), in support of its argument that the pertinent instruction given by the court with regard to the presumption was incorrect. In *Widmayer*, *supra* at 288, the Court clarified that a party entitled to a presumption is not entitled to have the jury automatically accept the presumption in the face of sufficient rebuttal evidence. The court held:

[I]f the jury finds a basic fact, they must also find the presumed fact unless persuaded by the evidence that its nonexistence is more probable than its existence.

² However, in *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 520; 592 NW2d 786 (1999), the Court indicated that a presumption is appropriate only if there is evidence of “intentional fraudulent conduct and intentional destruction of evidence.” The Court stated that if a party merely fails to produce evidence and there is no evidence of willful destruction, only a rebuttable *inference* arises. *Id.* at 521. Here, even assuming the applicability of the *Lagalo* principle to the instant case, the trial court properly instructed the jury with regard to an *inference* and not with regard to an unrebuttable *presumption*. Moreover, as discussed *infra*, the court’s use of the term “presumption” as opposed to the term “inference” in its pretrial ruling did not deprive defendant of a fair trial.

We so hold because we are persuaded that the function of a presumption is solely to place the burden of producing evidence on the opposing party. It is a procedural device which allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to produce evidence rebutting the presumption.

Almost all presumptions are made up of permissible inferences. Thus, while the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced. But always it is the inference and not the presumption that must be weighed against the rebutting evidence. [*Id.*]

In *State Farm, supra* at 23, this Court discussed *Widmayer* and indicated that if a plaintiff is initially entitled to a presumption and “the defendant has presented evidence sufficient to rebut” the presumed fact, the presumption no longer exists but becomes a “permissible inference.”

The court’s instruction in this case conformed to *Widmayer* and *State Farm*. The court instructed the jury as follows:

Certain evidence relevant to this case, namely the handbrake, the clevis and chain, were not available at trial because they were destroyed while in the possession or in the control of the defendant. The rules of evidence provide that you, the jury, may infer that this evidence was unfavorable to the defendant.

The instruction referred merely to an “inference” and therefore conformed to the above case law. No error requiring reversal is apparent.

Defendant also appears to argue that the court, in ruling on the pretrial motion regarding the presumption, should have taken into account the rebuttal evidence defendant produced during discovery and ruled *initially* that plaintiff was entitled only to an inference and not to a presumption under *Widmayer* and *State Farm*. We again see no basis for reversal. First, *Widmayer* and *State Farm* specifically refer to jury instructions and not to pretrial determinations. *Id.*; *Widmayer, supra* at 288-289. Second, any error by the court in this regard did not deprive defendant of a fair trial. While plaintiff’s attorney used the term “presumption” in its arguments, the court specifically instructed the jury that the attorney’s arguments, statements, and remarks were not evidence. Moreover, and significantly, the court ultimately gave a proper instruction about the inference. Reversal is therefore unwarranted.

Defendant also suggests that the court erred by failing to read the jurors the second half of the second sentence of SJI2d 6.01(c), which states that an inference for failure to produce evidence exists “if you believe that no reasonable excuse for [defendant’s] failure to produce the evidence has been shown.” Defendant contends that it had a reasonable excuse for failing to produce the handbrake and that the jurors should have been given the instruction in question.

However, aside from citing the jury instruction itself,³ defendant cites no legal authority in support of his argument that the instruction should have been given. An issue that has been given cursory treatment with little or no citation to relevant supporting authority is not properly presented for review. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001); see also *Palo Group Foster Care, Inc v Dep't of Social Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998). Moreover, although defendant represents that it asked the court to read this line from SJI2d 6.01(c), and although defendant made a similar representation when arguing for a judgment notwithstanding the verdict (JNOV), our review of the record fails to demonstrate that defendant did in fact request that the court read the line in question. While the court made a reference to rejecting certain of defendant's proposed jury instructions, it did not specify the last phrase of SJI2d 6.01(c) as one of the requested instructions. Moreover, the instruction in question is not located in the original proposed jury instructions submitted by defendant and filed in the trial court. As an appellate court, we are limited to the record before us. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). On the present record, no clear request for the instruction in question by defendant⁴ is apparent, and therefore the issue is not preserved for appellate review.

Next, defendant argues that the jury's findings were irreconcilably inconsistent and that the trial court therefore should have granted either (1) defendant's motion for a JNOV or (2) defendant's motion for a new trial based on the great weight of the evidence. When reviewing a trial court's denial of a motion for a JNOV, this Court examines the evidence and all legitimate inferences arising from the evidence in the light most favorable to the non-moving party. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999). A motion for a JNOV should be granted only if there was insufficient evidence presented to create a jury-triable issue. *Id.* This Court reviews a trial court's decision with regard to a motion for a new trial for an abuse of discretion. *Morinelli v Provident Life and Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000). The trial court's function when reviewing a motion for a new trial based on the great weight of the evidence is "to determine whether the overwhelming weight of the evidence favors the losing party." *Id.* This Court gives substantial deference to the trial court's conclusion that the verdict was not against the great weight of the evidence. *Id.*

Defendant specifically focuses on the jury's findings as reported on the verdict form. Defendant argues that because the jury found (1) that the handbrake was "in proper condition and safe to operate" under the Federal Locomotive Inspection Act (FLIA), 49 USC § 20701 *et seq.*, and (2) that defendant was not negligent on the day in question, the jury acted inconsistently and illogically in simultaneously finding that the handbrake was not "efficient" under 49 USC § 20302(a)(1)(B), a provision of the FSAA, and that this inefficiency caused plaintiff to incur damages.

The FLIA states, in relevant part, that

³ The Standard Jury Instructions do not carry the force of law. *Shinholster v Annapolis Hosp*, 255 Mich App 339, 350 n 8; 660 NW2d 361 (2003).

⁴ Although they are not entirely clear, the transcripts suggest to us that *plaintiff* requested that some portion of SJI2d 6.01 be read to the jury.

[a] railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts or appurtenances . . . [a]re in proper condition and safe to operate without unnecessary danger of personal injury. [49 USC § 20701(1).]

The trial court instructed the jury as follows with regard to the FLIA:

Plaintiff alleges that at the time and place in question the defective condition of the handbrake was a cause in whole or in part of the plaintiff's injuries and consequential damages. Under the [FLIA] a railroad may use a locomotive on its line only when the locomotive and its parts are in proper condition and safe to operate without unnecessary danger or personal injury.

The FSAA states, in relevant part, that “a railroad carrier may use or allow to be used on any of its railroad lines . . . a vehicle only if it is equipped with . . . [s]ecure sill steps and efficient handbrakes” 49 USC § 20302(a)(1)(B). The trial court instructed the jury as follows with respect to the FSAA:

Further, the plaintiff alleges that the defective condition of the handbrake on February 19th was a violation of the [FSAA].

Under the [FSAA], a railroad may use on its line a vehicle only if it is equipped with efficient handbrakes. A vehicle includes a locomotive. Efficient means adequate in performance producing a properly desired effect. Inefficient means not producing or not capable of producing the desired effect incapable [sic], incompetent and inadequate.^[5]

We initially note that under the FSAA, the statute deemed violated by the jury, a railroad may be held liable even if it has not been negligent. *O'Donnell v Elgin, Joliet & Erie Railway Co*, 338 US 384, 390; 70 S Ct 200; 94 L Ed 2d 187 (1949). Accordingly, the jury's finding that defendant was not negligent on the day in question was not inconsistent with its award of damages under the FSAA. Moreover, the jury's findings under the FLIA and the FSAA are not necessarily inconsistent. Indeed, the jury might have concluded that the handbrake did not pose an “unnecessary danger of personal injury” and was not unsafe under the FLIA but that it nonetheless did not “produce the desired effect” as required by the FSAA and accompanying case law. Various witnesses testified that the intermittent jamming of the handbrake constituted an inefficiency. As noted in *Bean v Directions Unlimited, Inc*, 462 Mich 24, 31; 609 NW2d 567 (2000), a jury's verdict should be upheld, despite an apparent inconsistency, if a logical explanation for the jury's findings can be determined. The court must try to reconcile the seemingly inconsistent findings by examining how the relevant legal principles were argued and applied to the facts of the case. *Id.* at 31-32. Here, given the differing language employed by the FLIA and the FSAA, a logical explanation for the jury's findings is apparent, and the trial court therefore did not err in upholding the verdict. *Id.*

⁵ The court's definitions of “efficient” and “inefficient” were consistent with Supreme Court precedent. See *Myers v Reading Co*, 331 US 477, 483; 67 S Ct 1334; 91 L Ed 2d 1615 (1947).

Next, defendant argues that the trial court erred in prohibiting defendant from demonstrating for the jury the operation of a model handbrake produced by defendant at trial. We review for an abuse of discretion a trial court's ruling with regard to the admission of evidence at trial. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998).

Defendant proposed at trial to demonstrate for the jury the operation of a handbrake similar to that involved in plaintiff's accident. He claimed that the demonstration would be useful because it would show that a sudden stop caused by a clevis would not result in a "tremendous jolt." The trial court ruled, in part:

[A witness] has testified that the apparatus doesn't necessarily work here the same way [as when it is attached to a locomotive], because there is no tension from a spring. . . .

He can testify, under the rules of evidence, that the housing unit there is substantially similar to the unit on [the locomotive in question], but for the lower level. And the reason that was removed [is] so that there is a benefit to this jury, to see the chain links that are there. We have no repair link and/or clevis in there, nor do we have a spring. So, I'm going to allow you to utilize this, pursuant to the rules of evidence, for a very limited purpose, to show them. You're not going to pull the lever, unless you get a spring in there and attach the end the way it's supposed to be attached.

The Court is satisfied that we [have] some problems that it's not, it looks substantially similar, but it doesn't work in substantially similar ways. So, the Court's going to limit the use of this[.]

On appeal, defendant claims that the court should have allowed the jurors to see a witness using the model handbrake in order to show them the slow, controlled motion normally used by handbrake operators.⁶ Defendant claims that "[i]n order to show how the lever looked while in operation, it was unnecessary to have actual tension on the handbrake lever."

Initially, we note that defendant cites no authority in support of his argument and therefore has abandoned the issue. *Silver Creek Twp, supra* at 99; *Palo Group Foster Care, supra* at 152. Nevertheless, we find no abuse of discretion with respect to the court's ruling. As noted in *Lopez v General Motors Corp*, 224 Mich App 618, 627-628; 569 NW2d 861 (1997), quoting *Smith v Grange Mut Fire Ins Co of Michigan*, 234 Mich 119, 126; 208 NW 145 (1926), "demonstrative evidence is admissible if it bears 'substantial similarity' to an issue of fact involved in a trial." The trial court could have reasonably concluded that the model handbrake did not bear a substantial similarity to the pertinent factual circumstances because the model brake had no tension on it, and plaintiff testified that the sudden stop occurred when resistance on the brake was increasing. While plaintiff testified at his deposition that there had *not* been

⁶ Defendant evidently wanted to demonstrate that a sudden stop of the handbrake during this slow, controlled motion would not result in a "jolt" sufficient to cause a back injury to the operator.

much resistance on the brake at the time of the sudden stop, the court may have nonetheless deemed a demonstration of the model handbrake inappropriate in light of plaintiff's trial testimony. Moreover, the model handbrake was not mounted on a locomotive, and thus its operation would not take into account the operator's positioning and various other factors, such as the location of the locomotive, that can affect the operation of a handbrake such as that used by plaintiff. The trial court's decision was reasonable,⁷ and reversal is unwarranted.

Next, defendant argues that the trial court should have granted its motion for a directed verdict,⁸ its motion for a JNOV, or its motion for a new trial based on the great weight of the evidence because the evidence introduced at trial showed that "immediately before and after plaintiff's complaint accident [sic], no defect or improper condition was discovered with respect to the subject handbrake." Defendant argues that the jury's finding of liability was improper because (1) Thomas Barr and Raymond Chandler operated the handbrake on the day after plaintiff's accident and found no malfunctioning, (2) Raymond Chandler testified that the clevis or repair link in the chain was located so far from the brake housing that it could not have gotten jammed in the housing, (3) Jeffrey Chandler testified that an improper clevis or repair link would have been remedied by the machinist when the locomotive was serviced several days before plaintiff's accident, (4) plaintiff testified that the handbrake worked properly earlier in the day on the date of his accident, and (5) the jury found no negligence on the part of defendant.

We disagree that a reversal of the jury's finding of liability is required. Indeed, trial testimony adequately supported the finding. Timothy Parker testified that two or three times before plaintiff's accident, he experienced difficulty in applying the brake in question because it stopped suddenly. Thomas Barr testified that two employees complained about the handbrake failing to release before plaintiff's accident, that he himself had the brake fail to release at one time after plaintiff's accident, and that he had seen a clevis mending the chain on the brake. Plaintiff, in addition to testifying about the sudden stop that occurred on the day of the accident, testified that the handbrake in question would not release about a month before the accident and that at the time, he saw a clevis jammed at the bottom of the brake housing. He also testified that Barr and Raymond Chandler looked at the handbrake the day after the accident and saw a clevis on the chain. Both Jeffrey Chandler and Alfred Rienig testified that an oversized clevis mending a handbrake chain could indeed get caught in the brake housing and cause the brake to stop. Rienig testified that if a clevis was catching on the brake housing, the problem could be intermittent, and it could occur during both the application and the release of the brake. Under these circumstances, sufficient evidence supported the jury's finding of a FSAA violation.

⁷ Moreover, given the testimony by defense witnesses that a sudden stop of a handbrake does not cause a jolt to the operator, we conclude that a demonstration of the model handbrake in the manner sought by defendant would have essentially been cumulative evidence and would not have affected the outcome of the case.

⁸ We review a trial court's decision to deny a motion for a directed verdict in the same manner as we review a trial court's decision to deny a motion for a JNOV, but only the evidence presented up to the time of the motion is considered. See, e.g., *Hatfield v St Mary's Medical Center*, 211 Mich App 321, 325; 535 NW2d 272 (1995).

Moreover, the overwhelming weight of the evidence did not favor defendant. See *Morinelli, supra* at 261. Accordingly, reversal is unwarranted.

Next, defendant argues that the court should have granted its motion for a directed verdict, its motion for a JNOV, or its motion for a new trial based on the great weight of the evidence because the evidence “demonstrated that a handbrake lever which came to a stop could not cause a ‘jolt’ sufficient to result in plaintiff’s claimed injuries.” This argument is without merit. First, Parker testified that he received jolts when the handbrake stopped suddenly during operation. Second, Reinig testified that a clevis hitting the brake housing caused a jolt to plaintiff on the day in question. Third, plaintiff testified that when the handbrake stopped suddenly on the day of the accident, he felt a snapping in his lower back and went home with pain in his lower back, left leg, and testicle area. Fourth, Dr. Lawrence Rapp testified that plaintiff’s back injuries were causally related to the sudden stop of the handbrake. Fifth, one of defendant’s own witnesses admitted that plaintiff sustained an injury of some sort during the handbrake incident. While other witnesses testified to the contrary, it was up to the jurors to resolve the conflicting evidence. See, generally, *Ellsworth, supra* at 194. Once again, the overwhelming weight of the evidence did not favor defendant, and therefore reversal is unwarranted. See *Morinelli, supra* at 261.

In a related argument, defendant claims that the court should have granted its motion for a directed verdict, its motion for a JNOV, or its motion for a new trial based on the great weight of the evidence because the evidence demonstrated that plaintiff’s back problems resulted from an unrelated back condition and not from the handbrake incident. Defendant emphasizes that (1) Dr. Rapp was the only physician who testified that plaintiff’s back problems and eventual herniated disc resulted from the handbrake incident and (2) Dr. Rapp admitted that when he discovered the herniated disc in March 2000, he had not seen plaintiff for eighteen months. Defendant therefore argues that the herniated disc could have resulted from an unrelated incident during those eighteen months and that Dr. Rapp improperly used the “temporal relationship” between the incident and the onset of symptoms to establish a causal relationship between the handbrake incident and plaintiff’s back problems. Defendant further argues that Dr. Rapp improperly relied on the “mechanism of injury” in establishing a causal relationship because Dr. Rapp admitted that he had no knowledge of factors such as the force used by plaintiff at the time of the handbrake’s sudden stop. Once again, we cannot agree with defendant’s argument. Dr. Rapp testified that he based his opinion regarding causation “on multiple things” and that “[n]o one thing is looked at in isolation.” He stated that he considered the temporal relationship between the incident and the onset of symptoms but that he also considered the history as provided by the patient and “[e]very test that was available” to him. Contrary to defendant’s suggestion on appeal, Dr. Rapp did not base his causation opinion solely on the temporal relationship between the incident and the onset of symptoms. Moreover, we disagree that Dr. Rapp was required to know every factor, such as the amount of force used by plaintiff in applying the handbrake, in analyzing the “mechanism of injury.” There was simply “nothing novel, suspect, or unreliable” about Dr. Rapp’s testimony concerning plaintiff’s injury. See *People v Stiller*, 242 Mich App 38, 55; 617 NW2d 697 (2000). The jurors heard conflicting views and acted within their prerogatives by choosing to accept Dr. Rapp’s testimony. Reversal is unwarranted.

Next, defendant claims that the court should have granted its motion for a directed verdict, its motion for a JNOV, or its motion for a new trial based on the great weight of the evidence because the evidence “demonstrated [that] plaintiff was not disabled from his employment with defendant as a locomotive engineer.” Defendant claims that the only testimony about the disability came from defendant and Dr. Rapp and that neither person had a sufficient basis on which to base his conclusion. Initially, we note that defendant has essentially waived this issue by failing to cite any pertinent authority in support of his argument regarding evidentiary foundational requirements. *Silver Creek Twp, supra* at 99; *Palo Group Foster Care, supra* at 152. At any rate, no error is apparent. Indeed, Dr. Rapp testified that plaintiff should not return to work as a locomotive engineer because the strenuous nature of the job would aggravate his back problems. Dr. Rapp based his opinion on job descriptions that had been provided to him and thus had an adequate basis for his conclusions. Moreover, one of defendant’s own witnesses, Dr. Scott Monson, concurred that “restrictions are needed” for plaintiff and that plaintiff should be restricted to a sedentary job. A job description for locomotive engineers discussed at trial indicated that the job of a locomotive engineer was not sedentary, and plaintiff concurred with the description. Finally, plaintiff testified that he tried to return to work as a locomotive engineer but was unable to do so. Accordingly, the jury’s verdict was amply supported. It was up to the jury to resolve any conflicts with the aforementioned evidence. See, generally, *Ellsworth, supra* at 194.

Next, defendant argues that the trial court erred in allowing plaintiff to seek damages for a six-month period between June 1999 and November 1999⁹ because plaintiff had, in June 1999, received a letter from his doctor allowing him to return to work with no restrictions. Defendant argues that it was not responsible for plaintiff’s failure to return to work during this period because it was no longer plaintiff’s employer at the time. We will review for an abuse of discretion the trial court’s decision to allow evidence of lost wages for this period. See, generally, *Chmielewski, supra* at 614. However, to the extent this issue involves a question of law, review is de novo. See *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 487; 608 NW2d 531 (2000). We disagree that an error requiring reversal occurred.

Plaintiff testified at trial that around June 1999, defendant was acquired by two other railroads, Norfolk Southern Corporation (NS) and CSX Transportation, Inc. (CSX). Defendant’s employees were then given the choice of working for NS or CSX. Plaintiff testified that he chose NS and wrote it of his intentions. He stated that NS made him take various tests, reviewed his medical records, and delayed his return to work until November 1999. Defendant contends that any wage loss plaintiff experienced between June 1999 and November 1999 resulted from a dispute between plaintiff and NS and that defendant is not involved. Defendant further contends that the dispute between plaintiff and NS was “minor” and therefore subject to internal grievance procedures as opposed to circuit court litigation. We cannot agree that defendant has met its burden for appellate relief. Contrary to MCR 7.212(C)(7), defendant cites no contracts indicating the pertinent details of the employment relationship between plaintiff and defendant and between plaintiff and NS during the period in question. From the evidence presented by

⁹ Defendant filed a motion to prevent plaintiff from seeking damages for this period. The trial court perfunctorily denied the motion as untimely.

defendant, it is unclear whether an employer-employee relationship between plaintiff and NS had even begun during the period in question, and it is unclear what duties NS owed to plaintiff at the time. Moreover, plaintiff testified that when NS delayed his return to work, he was informed that NS was still reviewing his medical records. A reasonable inference by the jury would be that the delay in plaintiff's return to work was ultimately related to the injuries relating to the handbrake incident. Finally, there is no indication that the trial court precluded defendant from cross-examining witnesses on the issue and arguing to the jury that defendant should not be responsible for damages during the six-month period in question. Considering all the circumstances, reversal is not warranted.

Next, defendant argues that plaintiff's attorney committed misconduct requiring reversal by stating in opening arguments¹⁰ that plaintiff was not entitled to state worker's compensation benefits. Defendant contends that although the statement was accurate, case law indicates that such references in cases brought under the Federal Employers' Liability Act (FELA), 45 USC § 51, *et seq.* (on which the instant case was based), are improper. We review allegations of attorney misconduct to determine "whether or not the claimed error was in fact error and, if so, whether it was harmless." *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982). Here, we discern no attorney misconduct because the court indicated before opening statements that plaintiff's attorney *could* make such a comment during opening statements. Indeed, even if the trial court's ruling was incorrect, the fact remains that plaintiff's attorney committed no misconduct in following the court's ruling. Moreover, we cannot conclude that the brief statement by plaintiff's counsel denied defendant a fair trial or affected the outcome of the case.¹¹ *Id.*

Next, defendant argues that the trial court erred in refusing "to require . . . plaintiff's economic expert . . . to deduct from his future wage loss calculations an amount representing the contributions plaintiff would have made during the course of his future employment to the United States Railroad Retirement Board for purposes of his pension." During pretrial arguments, the trial court perfunctorily ruled, without elaboration, that plaintiff's economist, Michael Thompson, did not have to deduct the amounts in question from his calculations but that defendant could cross-examine Thompson on the subject. Again, although we generally review evidentiary rulings using the abuse of discretion standard, *Chmielewski, supra* at 614, to the extent this issue involves a question of law, review is *de novo*. *City of Jackson, supra* at 487.

Defendant relies on *Norfolk & Western Railway Co v Liepelt*, 444 US 490, 493-495; 100 S Ct 755; 62 L Ed 2d 689 (1980), in which the Supreme Court ruled that in cases brought under the FELA, the jury can be instructed regarding the effect of income taxes on the plaintiff's

¹⁰ Plaintiff's attorney also attempted to mention the issue of worker's compensation benefits during *voir dire* but was effectively cut off by defense counsel.

¹¹ In the context of another issue involving damages, defendant contends that plaintiff's attorney engaged in additional misconduct that requires reversal. Defendant has waived this allegation, however, due to inadequate briefing and by failing to raise it in the statement of questions presented on appeal. *Palo Group Foster Care, supra* at 152; *In re BKD*, 246 Mich App 212, 218; 631 NW2d 353 (2001).

estimated future earnings. Evidently, defendant analogizes the taxes at issue in *Norfolk* with the pension contributions in the instant case. Defendant also cites *Rachel v Consolidated Rail Corp*, 891 F Supp 428, 431 (ND Ohio, 1995), in which the court ruled that an economist must deduct pension contributions from his calculations of a plaintiff's projected future earnings. However, in *Maylie v Nat Railroad Passenger Corp*, 791 F Supp 477, 488 (ED Pa, 1992), the court found that "[b]ecause defendant did not consent to inclusion of the value of the [plaintiff's] pension as an item of damages, it was not error to refuse to reduce plaintiff's lost wages by the amounts he would have had to pay in railroad retirement taxes." The court stated that "[i]t would be inappropriate to deduct from plaintiff's lost salary taxes that, in effect, represented plaintiff's contribution toward a pension without including, as an item of damages, the value of that pension." *Id.* Here, there is no evidence that defendant consented to the inclusion of lost pension benefits as an item of damages. Therefore, under *Maylie*, no error occurred in the instant case. Moreover, the *Maylie* court noted that the *Liepert* case was inapplicable to the issue of railroad pension contributions. *Id.* at 487. See also *Norfolk & Western Railway Co v Chittum*, 251 Va 408, 416; 468 SE2d 877 (1996). Defendant has failed to establish a basis for reversal.¹²

Next, defendant argues that the trial court improperly instructed the jury on "assumption of risk." As noted earlier, we review allegations of instructional error de novo. *Case, supra* at 6. The court instructed the jury as follows:

Section four of the Federal Employer's Liability Act provides in part that, in any action brought against any common carrier to recover damages for injuries to any of its employees such employees shall not be held to have assumed the risk of his employment in any case where such injury resulted in whole or in part from the negligence of any of the officers, agents or employees of the carriers.

Apparently, the court disregarded its pretrial ruling in which it stated that the doctrine of "assumption of risk" was irrelevant to the case because neither plaintiff nor defendant was going to make an argument concerning it. Defendant argues that in giving the challenged instruction, the court failed to follow federal case law holding that an "assumption of risk" instruction should not be given if the doctrine is not raised by the parties. However, even assuming, arguendo, that the court erred in giving the instruction, we cannot agree that the error requires reversal, particularly because the jurors made an explicit finding that defendant had not been negligent in the present case. The giving of the instruction was not "inconsistent with substantial justice." See MCR 2.613(A). See also *Heater v Chesapeake & Ohio Railway*, 497 F 2d 1243, 1249 (CA 7, 1973) (holding harmless the erroneous giving of an "assumption of risk" instruction similar to that at issue in the instant case).

¹² Defendant also contends that the trial court improperly limited defense counsel's cross-examination of Thompson. Defendant has waived this issue by failing to cite any authority in support of his argument. *Silver Creek Twp, supra* at 99; *Palo Group Foster Care, supra* at 152. At any rate, we discern no abuse of discretion with regard to the trial court's ruling, as it was based on a reasoned consideration of the evidence introduced in the case. Additionally, we cannot conclude that additional cross-examination of Thompson would have affected the ultimate verdict.

Next, defendant argues that the trial court erred by instructing the jurors as follows after the jurors had begun their deliberations but had returned to the courtroom in order to receive a revised verdict form:

So, I'm going to send you back there for another half-hour. If you think you're going to need lunch and you're going to need a lot more time to deliberate, I might think about cutting you loose so you can start your turkeys tonight and we'll finish Monday. So another half-hour before we eat.

The court made the statement and released the jury for further deliberations around 12:45 p.m. on the day before Thanksgiving, and the jury returned with a verdict around 1:30 p.m. Defendant contends that

. . . the court's instruction to the jury that they would be permitted to consider all the evidence and deliberate for only ½ hour before being sent home to begin a four-day Thanksgiving weekend compelled the jury to unduly "rush to judgment" to arrive at a verdict in a complex case which had lasted eight days.

Defendant fails to support its argument with any authority and has therefore waived it for purposes of appeal. *Silver Creek Twp, supra* at 99; *Palo Group Foster Care, supra* at 152. Moreover, defendant failed to preserve the issue with a timely objection at trial, and the statement made by the trial court was in no way "inconsistent with substantial justice." See MCR 2.613(A). The jurors had deliberated for over two hours before the court's statement, and there is no evidence that they "rushed to judgment" as a result of the statement. Reversal is unwarranted.

Next, defendant argues that the trial court should not have awarded attorney fees to plaintiff as part of defendant's case-evaluation sanctions¹³ because (1) the court was obligated to apply federal substantive law to this case, as it involved FELA claims; and (2) federal law does not allow for the recovery of attorney fees in a FELA case. See *Liepelt, supra* at 495. Because this issue involves a question of law, review is de novo. *City of Jackson, supra* at 487.

Defendant relies on *Monessen Southwestern Railway Co v Morgan*, 486 US 330, 335; 108 S Ct 1837; 100 L Ed 2d 349 (1988), in which the Court noted that the measure of damages in FELA actions must be determined according to federal law. The *Monessen* Court ruled that a Pennsylvania court rule allowing for prejudgment interest as "delay damages" could not be reconciled with federal law because the FELA did not allow for prejudgment interest. *Id.* at 336-338. The Court therefore disallowed prejudgment interest in a FELA case adjudicated in a Pennsylvania court. *Id.* at 342. The Court, in making its ruling, emphasized that the Pennsylvania court rule could not be characterized as "procedural" because it concerned "part of the actual damages sought to be recovered" and because the prejudgment interest "may constitute a significant portion of a FELA plaintiff's total recovery." *Id.* at 335-336.

¹³ The court indicated that it was unsure of the proper legal outcome regarding the issue but was awarding the fees because to do otherwise would "make[] our mediation sanctions without merit.

We cannot agree with defendant that *Monessen* requires us to reverse the award of attorney fees in the instant case.¹⁴ Indeed, the *Monessen* Court emphasized that the Pennsylvania rule involved in that case was substantive because it involved an amount necessary to make the plaintiff whole, i.e., it involved part of the actual damages sought to be recovered. *Id.* at 335. By contrast, attorney fees are not considered necessary to make a plaintiff whole. See *Liepelt, supra* at 495. The Michigan case evaluation rules simply do not conflict with the FELA, because they involve a procedural device to facilitate the settlement of claims. Moreover, the FELA does not include such settlement provisions and the state rule therefore supplements the federal statute. See *X v Peterson*, 240 Mich App 287, 289-290; 611 NW2d 566 (2000) (discussing, in general, conflicts between state and federal laws). Moreover, and significantly, defendant failed to object to the use of a case evaluation panel under MCR 2.403(C)(1). If defendant was unwilling to subject itself to attorney fees because of the federal nature of plaintiff's claim, then it should have stated as such *before* the case proceeded to the case evaluation procedure, of which sanctions are an integral part.

Finally, defendant claims that the court improperly awarded, as part of plaintiff's costs, the costs associated with the work of plaintiff's attorney's paralegal. This issue again involves an issue of law, and review therefore is de novo. *City of Jackson, supra* at 487.

Plaintiff admits that "[i]ncluded in [the costs awarded by the trial court] were those generated as a result of the work of [the] paralegal for [plaintiff's] counsel." In *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 181-183; 568 NW2d 365 (1997), this Court clearly held that expenses generated by paralegals are not recoverable as a separate component of mediation sanctions. Accordingly, we must remand this case so that the court may reduce the case evaluation sanctions "by the amount attributable to the independent paralegal billings." *Id.* at 182.

Affirmed in part but remanded for a reduction of the case evaluation sanctions by the amount attributable to paralegal billings. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Bill Schuette

¹⁴ Nor, contrary to defendant's brief suggestion, did the trial court's award of case evaluation sanctions violate defendant's right to a jury trial. See *Great Lakes Gas Transmission Ltd P'ship v Markel*, 226 Mich App 127, 131-133; 573 NW2d 61 (2000).