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11/11/2026 01:06 AM CST

the sentences. We reverse, and remand to the Court of Appeals with directions to reverse and remand the cause to the trial court with directions to conduct an evidentiary hearing so that the jury may make a finding regarding whether Alfredson's sexual assault conviction was an aggravated offense and, thus, whether he is subject to lifetime community supervision. In all other respects, the decision of the Court of Appeals is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

LAVERN LOUIS GOLDEN, APPELLANT AND CROSS-APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, A DELAWARE CORPORATION, APPELLEE AND CROSS-APPELLANT.

804 N.W.2d 31

Filed October 7, 2011. No. S-10-596.

1. **Summary Judgment.** A court should grant summary judgment when the pleadings and evidence admitted show that no genuine issue exists regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Federal Acts: Railroads: Evidence.** A Federal Employers' Liability Act plaintiff bears the burden of presenting evidence from which a jury could conclude the existence of a probable or likely causal relationship, as opposed to a merely possible one.
4. **Courts: Expert Witnesses.** When a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must assess whether the scientific evidence presented provides a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded for further proceedings.

Richard J. Dinsmore and Jayson D. Nelson, of Law Offices of Richard J. Dinsmore, P.C., for appellant.

William M. Lamson, Jr., Anastasia Wagner, and Gage R. Cobb, of Lamson, Dugan & Murray, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

LaVern Louis Golden appeals from the decision of the Lincoln County District Court, which granted to Union Pacific Railroad Company (UP) its motion for summary judgment. Primarily at issue in this case is the interpretation of our decision in *McNeel v. Union Pacific RR. Co.*[1] Golden claims that he presented sufficient evidence of a toxic exposure to overcome UP's motion for summary judgment. UP cross-appealed, alleging the district court erred by not addressing the foundational issues raised in its motion in limine when it sought to exclude the expert testimony of Golden's family physician. We reverse the decision of the district court and remand the cause for further proceedings consistent with this opinion.

BACKGROUND

Golden claims there was a smoke incident on March 12, 2001, in the cab of the locomotive in which he was working as an engineer. This incident is the same as the incident at issue in *McNeel*.[2] On that day, Golden and Lynn R. McNeel, the conductor, left North Platte, Nebraska, at 6:15 a.m., en route to Cheyenne, Wyoming. Near Sutherland, Nebraska, near mile post 304, McNeel asked Golden whether he smelled an odor. Golden initially stated that he did not smell anything, but did notice an odor near mile post 312. Golden stated that the odor was difficult to describe and that he had not smelled anything like it before.

Around mile post 322, McNeel asked Golden to come over to McNeel's side of the cab. Golden stated that the odor was much stronger on McNeel's side of the locomotive. Golden called the dispatcher, who instructed the men to open the windows and

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[1] *McNeel v. Union Pacific RR. Co.*, 276 Neb. 143, 753 N.W.2d 321 (2008).

[2] *Id.*

doors. The men were also instructed to continue on to Ogallala, Nebraska, where they stopped the locomotive. Golden stated that he could "taste" the odor, that his eyes began to water, and that he became dizzy and nauseated. McNeel and Golden were taken by ambulance to the emergency room. Golden was given oxygen and then released. Golden spoke to his primary care physician, Dr. Janet Bernard, by telephone 4 days later, but did not go to her office until April 2.

After the first incident, Golden stated that he experienced "head pain, dizziness, blackouts, movement in my eyes. I had had headaches for three or four days in a row." Golden stated that he also experienced memory loss. In June 2001, Bernard referred Golden to a psychologist for his memory loss. Golden stated the psychologist told him that it could take up to 3 years for the memory loss to resolve itself, if it were going to do so at all. Golden had both an MRI and a PET scan, and Bernard told Golden that the scans showed some brain damage. The record does not include any testimony from the psychologist.

A second incident occurred on January 19, 2002. Golden stated that the computer screen "just popped, blew up in the cab. Filled the cab full of smoke." Golden brought the train to a stop immediately. Golden stated that the smoke smelled like paint thinner and that he could taste the odor, his eyes burned, he felt nauseated, and he had a headache. Golden was taken to the hospital, given Tylenol, and released. Golden stated that the headaches continued for about 6 months after that incident.

Golden claims he still suffers intermittent headaches, for which his doctor is treating him. In his deposition, Golden stated that his headaches are brought on by "any type of smoke smell." Golden stated that he used to have visual disturbances with the headaches, but not any longer. Golden also stated that he has memory loss and trouble remembering what he is doing when running errands and that sometimes he has trouble remembering the names of family members.

The affidavit of Golden's expert, Leon Smith, indicated that the locomotive Golden had been riding in was repaired on March 15, 2001, 3 days after the first incident. Smith stated

that the repairs were consistent with an electrical failure and that in his experience and training, electrical failures can result in toxic fume exposures. Smith also stated that "these types of electrical failures result in strong, toxic fumes to which the locomotive crew is frequently exposed." Smith also stated that the repair records indicated the blower had been replaced and that he had "reviewed and personally investigated many reports and incidents where the blowers and cooling systems vented fumes or vapors into the cabs of diesel electric locomotives."

Regarding the second incident, Smith testified in his affidavit that in addition to the computer monitor failure, there was also a failure of the "'DC-to-DC' converter." Smith stated that "[w]hile such incidents are not as numerous as fume and vapor exposure from electrical failures, investigative reports have identified that a component failure of a monitor can result in toxic fume exposure."

In addition, Bernard, a licensed family medicine practitioner, testified in a deposition as to her treatment and diagnosis of Golden. Approximately 1 month after the first incident, Bernard saw Golden for complaints of dizziness, headaches, and short-term memory problems. Bernard stated that the blood gas results after the first incident showed that Golden had been having trouble breathing. Bernard further stated that the blood gases were in normal ranges for a venous sample after the second incident. But later in her deposition, Bernard stated that the results from the second incident were abnormal. Bernard also stated that Golden's lungs showed a mild hyperinflation after the second incident.

Bernard ordered neuropsychological testing and received the results, but when asked to interpret those results, Bernard stated she was not "any kind of expert." Bernard also stated that she could not evaluate Golden's neuropsychological results because she did not have the training to do so. Nevertheless, in her affidavit, Bernard testified to a reasonable degree of medical certainty that Golden was suffering from "post-traumatic encephalopathy" as a result of the two incidents.

UP filed both a motion in limine that sought to prevent Bernard from testifying as to ultimate causation and a motion

for summary judgment. UP argued that Bernard's testimony lacked scientific validity and did not meet the criteria for establishing causation set forth in *McNeel*. The district court found that under *McNeel*, Golden had not presented sufficient evidence of causation because he had not identified a specific toxin to which he was exposed. The district court granted UP's motion for summary judgment and motion in limine on that basis.

After summary judgment was granted, Golden filed a motion to alter or amend the court's order of March 3, 2010, or, in the alternative, a motion for new trial. Golden sought to introduce an affidavit from Dr. Michael Corbett, an expert in the fields of toxicology and chemistry. Corbett's affidavit stated that the train parts which had to be replaced after the March 12, 2001, incident were known to be insulated with "a Modified Polyester Electrical Insulating Varnish." Corbett stated that when the varnish melts, it emits isocyanates, which "are powerful irritants to the skin, mucous membranes, eyes and respiratory tract." Corbett stated that toxic encephalopathy can result from a potent exposure to isocyanates. Corbett also stated that the varnish emitted acrylamide when heated and that it is a neurotoxin. Corbett then stated that it was his expert opinion that Golden had inhaled an injurious level of toxic fumes.

The district court denied Golden's motion to alter or amend, finding that any evidence pertaining to the motion for summary judgment should have been introduced at the hearing on the motion for summary judgment. Golden appealed.

ASSIGNMENTS OF ERROR

Golden assigns that the district court erred in (1) finding that *McNeel* controls, (2) finding that *McNeel* sets an absolute standard requiring evidence of specific toxins before a treating medical expert's opinion on causation is admissible, and (3) denying his motion to alter or amend and not allowing him to introduce expert testimony as to the toxin to which he was exposed.

UP cross-appeals, assigning that the district court erred in failing to grant UP's motion in limine and motion for summary

judgment on the additional bases that Bernard's testimony lacks foundation, scientific reliability, and helpfulness.

STANDARD OF REVIEW

[1] A court should grant summary judgment when the pleadings and evidence admitted show that no genuine issue exists regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[3]

[2] In reviewing a summary judgment, we view the evidence in a light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence.[4]

ANALYSIS

McNeel *Applies to Golden's Claims.*

Golden first argues that our decision in *McNeel* is inapplicable to this case.[5] The district court applied our holding in *McNeel* to Golden's case, interpreting *McNeel* to require that Golden present evidence of a specific toxin to which he was exposed. Golden argues that since McNeel did not have objective evidence of a physical injury, in contrast to Golden, *McNeel* is inapplicable to this case.

First, we note that the incident in *McNeel* is the same as the first incident of which Golden complains here. Golden distinguishes his case by arguing that he had evidence of his injuries in the form of abnormal blood gases and an abnormal PET scan. Golden claims that in the case where McNeel was the plaintiff, McNeel failed to provide any evidence to establish the source of the unnamed toxic exposure.

McNeel was also transported to the hospital after the first incident, however, and he introduced expert testimony regarding a single photon emission computed tomographic scan, pupillography testing of the autonomic nervous system, and

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[3] *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 762 N.W.2d 24 (2009).

[4] *Id.*

[5] See *McNeel, supra* note 1.

thermography. McNeel's expert stated that the test results showed that McNeel was suffering from toxic encephalopathy "caused by his inhalation of an unspecified toxin while employed by [UP]."[6] McNeel presented evidence from another expert indicating that he was suffering from a cognitive disorder resulting from a toxic injury.[7]

[3,4] We stated in *McNeel* that "a [Federal Employers' Liability Act] plaintiff bears the burden of presenting evidence from which a jury could conclude the existence of a probable or likely causal relationship, as opposed to a merely possible one."[8] We went on to find that McNeel's experts did not meet the *Daubert*/*Schafersman*[9] analytical framework because they did not "'"fit"'"; in effect, the scientific evidence presented must provide "'a valid scientific connection to the pertinent inquiry as a precondition to admissibility.'"[10] We also stated that because McNeel's experts could not identify any toxic substance which caused the symptoms they diagnosed as toxic encephalopathy, their reasoning on causation was reduced to nothing more than post hoc, ergo propter hoc, which is not helpful to the trier of fact.[11]

Our decision in *McNeel* addressed the requirements for utilizing expert testimony to establish a causal connection between an event and a diagnosis of toxic encephalopathy. This case presents the same issue. We find that *McNeel* is applicable to Golden's case, and Golden's first assignment of error is without merit.

District Court's Interpretation of McNeel.

Golden next argues that the district court's interpretation of *McNeel* was incorrect. Golden claims that while *McNeel*

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[6] *Id.* at 146, 753 N.W.2d at 326.

[7] *McNeel, supra* note 1.

[8] *Id.* at 150, 753 N.W.2d at 329.

[9] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

[10] *McNeel, supra* note 1, 276 Neb. at 153, 753 N.W.2d at 330.

[11] *McNeel, supra* note 1.

presented no other evidence of exposure to toxic fumes than a temporal relationship between the event and his symptoms, Golden presented far more evidence of exposure to a toxic substance. Golden claims that he offered sufficient evidence of an exposure to a toxic substance to present a genuine issue of material fact and overcome UP's motion for summary judgment. We agree.

Keeping in mind that we must view the evidence in a light most favorable to Golden and draw all reasonable inferences deducible from the evidence, we review the testimony presented prior to the motion for summary judgment.[12] Golden presented testimony from his primary care physician, Bernard, as to her diagnosis and treatment. In Bernard's deposition, she stated that she had ordered neuropsychological testing after Golden complained of headaches and memory loss after the first incident. Bernard stated that after the first incident, Golden had abnormal blood gas results that were consistent with toxic inhalation. Bernard also stated that Golden had an immediate onset of physical and neuropsychological symptoms after the first incident. And according to Bernard, after the second incident, Golden had a mild hyperinflation of the lungs, which indicated smoke inhalation. In her affidavit, Bernard stated that it was her opinion, to a reasonable degree of medical certainty, that Golden suffers from posttraumatic toxic encephalopathy as a result of the two incidents.

Golden also presented expert testimony from Smith regarding the equipment failure on the locomotive involved in the first incident. Smith stated in his affidavit that he had reviewed the various depositions as well as the repair records for the two locomotives involved. Smith stated that if there is an equipment failure, wiring and cabling can overload and heat and that "these types of electrical failures result in strong, toxic fumes to which the locomotive crew is frequently exposed." Smith stated that it was his opinion that Golden "was more likely than not exposed to fumes which resulted from the overheating and failure of electrical components on [the locomotive]." Smith also stated that the repair records indicated the blower

[12] See *King, supra* note 3.

had been replaced and that he had investigated many reports where the blowers and cooling systems vented fumes or vapors into the cabs.

Although no specific toxin was identified, Bernard's and Smith's testimony, viewed as a whole in the context of summary judgment, presents a genuine issue of material fact as to whether Golden was exposed to a toxic substance emitted from within the locomotive that caused his alleged injuries. We therefore reverse the decision of the district court and remand the cause for further proceedings. For that reason, we need not reach Golden's third assignment of error.

UP's Cross-Appeal.

We next turn to UP's cross-appeal. UP argues that the district court erred when it failed to address the foundational issues it raised in its motion in limine. In that motion, UP argued that Bernard's testimony lacked sufficient foundation to testify as to ultimate causation. However, we note that the district court granted UP's motion in limine *because* it had granted UP's motion for summary judgment. As such, it was unnecessary, in the district court's view, to address the foundational issues. Because we hold that the district court erred when it granted summary judgment and, accordingly, reverse, and remand for further proceedings, the district court now has the opportunity to address the foundational issues that UP raised in its motion in limine.

CONCLUSION

Although *McNeel* is applicable to Golden's case, Golden presented sufficient evidence of a toxic exposure to present a genuine issue of material fact. The district court erred in granting summary judgment, and we reverse, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.