

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 2007

No. 770

CSX TRANSPORTATION, INC.,

Appellant,

v.

RICHARD BICKERSTAFF, ET AL.,

Appellees.

Appeal from the Circuit Court for Baltimore City
(The Honorable Alfred Nance, Associate Judge)

REPLY BRIEF OF APPELLANT

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Plaintiffs ask this Court to view this appeal through tinted glasses, asserting that FELA requires abandonment of evenhandedness in favor of a pro-plaintiff tilt. *See* PB 7-8.¹ Although, as this Court has observed, earlier cases expressed some sympathy for that view (*see Norfolk S. Ry. Co. v. Tiller*, 2008 WL 835716, at *3-*4 (Md. Ct. Spec. App. Mar. 31, 2008) (not yet released for publication)), the U.S. Supreme Court recently rejected it (*Norfolk S. Ry. Co. v. Sorrell*, 127 S. Ct. 799 (2007)). In *Sorrell*, the Court acknowledged that “FELA was indeed enacted to benefit railroad employees, as the express abrogation of such common-law defenses as assumption of risk, the contributory negligence bar, and the fellow servant rule make clear.” *Id.* at 808. “It does not follow, however, that this remedial purpose requires [a court] to interpret every uncertainty in the Act in favor of employees.” *Id.* (citing *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) (“[I]t frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.”)). As *Sorrell* makes clear, FELA is not an all-purpose exemption from the rules of evidence, tort liability, and damages. In treating it as such, the trial court converted a close case on liability for injuries of unexceptional severity into a runaway verdict. Reversal is required for multiple reasons.

I. The Dramatic, Misleading Demonstration Of Walking On Ballast.

Plaintiffs do not deny that their counsel’s stunt of placing a handful of mainline ballast rocks on the floor and first standing and then walking on them had its intended effect of causing high drama at the trial: Jurors stood up to watch, and the trial judge had to look away because it appeared that counsel would fall and injure himself. Plaintiffs also do not deny that, as shown in our Statement of Facts (CB 5-9), there was a debate between each side’s experts over the effect that walking on mainline ballast has on the human body (one that was decidedly

¹ “PB ___” refers to the Brief of Appellees, while “CB ___” refers to the Brief of Appellant.

lopsided in CSXT’s favor).² Nor do Plaintiffs dispute that their counsel’s performance—because it was so visceral in the face of the experts’ abstract discussion of “rear foot motion” and “g-forces”—easily could have tipped this case in their favor.

Instead, Plaintiffs contend that CSXT “does not even allege a theory on how the trial court abused its discretion” by allowing this demonstration. PB 9. On the contrary, we explained in our opening brief that, before demonstrative evidence can be admitted, “[a] foundation simply must be laid through the witness’s testimony that the evidence fairly and accurately depicts what it purports to depict (a subject as to which the witness has the required knowledge)” and contended that “the trial court failed utterly to carry out its role as a gatekeeper of demonstrative evidence” by requiring no foundation whatever. CB 16 (quoting *Andrews v. State*, 372 Md. 1, 20, 811 A.2d 282, 293 (2002)). Contrary to Plaintiffs’ suggestion (PB 9), *Andrews* makes clear that the trial court’s discretion to admit demonstrative evidence is far from unfettered. Instead, under *Andrews* it is a manifest abuse of discretion to permit a demonstration of the sort that took place here unless and until a competent witness has laid a foundation showing that the demonstration is substantially similar to the reality it is purporting to represent.

Plaintiffs did not supply such a foundation at trial and make no attempt to

² Plaintiffs characterize our Statement of Facts as “an argument against the jury’s decision on negligence, causation, and damages.” PB 4. As we explained in our opening brief, however, we discussed the evidence solely to demonstrate that the case was a close one that easily could have been influenced by Plaintiffs’ highly inflammatory demonstration. Plaintiffs do not take issue with our actual description of the evidence. In particular, they do not deny that their own expert’s study showed that walking on mainline ballast in work boots like the ones that Plaintiffs always wore is no more stressful than walking on pavement in athletic shoes (*see* CB 6-8).

Plaintiffs also contend that walking on ballast was not their “primary theory” at trial (PB 4), but they do not deny that there was no evidence at all that CSXT acted negligently with respect to any of the other work activities that they claim contributed to their knee conditions (*see* CB 9-12).

do so now. Nor could they. As we explained in our opening brief, Plaintiffs' demonstration "greatly exaggerated the impact that walking on ballast has on the human body" because "[r]ocks that are embedded in dirt or are settled into and supported by layers of other rocks obviously are much more stable than an individual rock placed on a smooth, hard surface" such as a courtroom floor. CB 18; *see also* CB 17. Because counsel's performance was not "substantially similar to the events [at issue], the demonstration was irrelevant as a matter of law" (*Andrews*, 372 Md. at 26-27, 811 A.2d at 297), and it was a clear abuse of discretion to allow it.

The cases cited by Plaintiffs do not help their cause. As an initial matter, they all predate *Andrews*. Thus, insofar as they purport to afford trial courts broader discretion to admit demonstrative evidence than does *Andrews*, they have been superseded. Regardless, each of them is readily distinguished.

In one, individuals with relevant expertise performed a demonstration that was meticulously set up to recreate the exact circumstances at issue in the case. *O'Doherty v. Catonsville Plumbing & Heating Co.*, 269 Md. 371, 373-74, 306 A.2d 248, 249-250 (1973). Furthermore, the trial court "not only exercised strict control over the conduct of the demonstration but * * * before he permitted it to proceed he allowed unlimited cross-examination and full argument in respect of the fairness of the demonstration and the essential similarity of conditions." *Id.* at 375, 306 A.2d at 250.

Similarly, the demonstration in another of Plaintiffs' cases involved a model that had been disclosed to the other side and prepared by a qualified expert, who testified that it replicated the scene of the motor vehicle accident at issue. *Bd. of County Comm'rs v. Dorcus*, 247 Md. 251, 260-61, 230 A.2d 656, 662 (1967). In a third case, a witness who "was familiar with the operation of a BB gun * * * already [had] testified in full detail" to the method of operating the gun, and the prosecutor simply "repeated [that testimony] in the course of the closing argument." *Sullivan v. State*, 132 Md. App. 682, 694, 753 A.2d 601, 607 (2000).

And, in Plaintiffs' final case, this Court affirmed a ruling *refusing to permit* a proposed demonstration. *Brooks v. State*, 24 Md. App. 334, 345-46, 330 A.2d 670, 676-77 (1975).

Equally unavailing is Plaintiff's invocation of the "opening the door" doctrine." PB 10-11. That doctrine "is really a rule of expanded relevancy and authorizes admitting evidence which otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue, or (2) inadmissible evidence admitted by the court over objection." *Clark v. State*, 332 Md. 77, 84-85, 629 A.2d 1239, 1242-43 (1993). "The 'open door' doctrine is implicated when a party seeks to respond to the other party's evidence with either (1) evidence which is competent, or (2) evidence which is similar to the adversary's evidence which was ruled competent over objection." *Id.* at 87, 629 A.2d at 1244 (emphasis omitted).

Plaintiffs suggest that CSXT "opened the door" for their demonstration by introducing samples of ballast into evidence, comparing them to everyday objects in order to give the jury a sense of the size of various types of ballast, and demonstrating how ballast passes through screens during the quarrying process. PB 10. But standing and walking on samples of ballast scattered on a courtroom floor does not "respond to" any of that. The purpose of CSXT's demonstrations was to give the jury a frame of reference so that it could differentiate between various types of ballast. *See, e.g.*, Rep. App. 6 (displaying photograph of a rail yard and noting that "we have not only the baseball, but we have the ballast screens that we showed so you can see with some of the rocks piled on top of there that that indeed is small ballast. * * * That is not mainline ballast."). The spectacle presented by Plaintiffs' counsel did not rebut CSXT's demonstrations of the relative *size* of ballast or the quarrying process for making ballast. Instead, it was intended to prejudice the jury's resolution of the separate issue of whether walking on ballast is harmful to the human body. Accordingly, the "opening the door" doctrine is no more applicable here than it would have been in *Andrews* if

the prosecution had sought to justify its misleading demonstration of the forces involved in shaking a baby on the ground that the defendant had used the same doll to illustrate the baby's size. *See, e.g., Richardson v. State*, 324 Md. 611, 623 598 A.2d 180, 185-86 (1991) (allegedly improper testimony about the *time* of a conversation does not open the door to improper evidence about the *content* of the conversation, because such evidence “d[oes] not in any way explain or put into perspective th[at] issue”).

Because Plaintiffs' demonstration did not “explain or put into perspective” CSXT's demonstrations, Plaintiffs' argument really boils down to the proposition that “two wrongs make a right”: that anything they wanted to do with the ballast was okay because the trial court (allegedly) erred in letting CSXT use samples of ballast, baseballs, and screens, to demonstrate the size of ballast. Setting aside the fact that Plaintiffs have made no attempt to show that CSXT's demonstrations were improper (instead, simply noting that they objected), “the ‘opening the door’ or ‘invited error’ doctrine” does not “adopt[] the proposition that two wrongs make a right.” *United States v. Napue*, 834 F.2d 1311, 1324 (7th Cir. 1987). Even if Plaintiffs had shown that it was error to allow CSXT's demonstrations—which were, in truth, accurate representations that helped the jury to visually differentiate various types of ballast—that would be no justification for permitting Plaintiffs' grossly misleading and inflammatory demonstration.

Similarly misguided is Plaintiffs' assertion that CSXT has somehow forfeited this argument because it could have conducted cross-examination about counsel's improper demonstration or obtained a curative instruction but chose not to do so. PB 11. As noted in our opening brief (at 17-18), *Andrews* squarely held that “[t]he ability to cross-examine is not a substitute for the offering party's burden of showing that a proffered demonstration or experiment offers a fair comparison to the contested events” (372 Md. at 26, 811 A.2d at 296 (internal quotation marks omitted)) and that a cautionary instruction is insufficient because “demonstrative exhibits tend to leave a particularly potent image in the jurors'

minds” (*id.* at 27, 811 A.2d at 297 (internal quotation marks omitted)).³

Finally, Plaintiffs suggest that CSXT suffered no prejudice from this error because one of its experts played a videotape showing his graduate student briefly tripping on a rock in a rail yard which, Plaintiffs claim, “was far more damaging than anything counsel for the Plaintiffs did in the Courtroom.” PB 11-12. Plaintiffs contend that CSXT’s expert “acknowledged” that the videotape revealed that “foot rolling and nearly falling could occur 600 times per day” (PB 12). They fail to mention, however, the expert’s explanation that his graduate student, who had no prior experience in a rail yard, tripped only *once* during an entire day of conducting experiments at the yard, and then only because he was listening to the expert’s instructions rather than watching where he was going. *See* Rep. App. 1-4. The expert did *not* “acknowledge[.]” that this could occur 600 times per day; he simply said that *if*, contrary to fact (*see id.*), someone tripped every 21 steps, then he or she would trip approximately 600 times per day as a matter of simple math (*see* E1277-79). In short, the videotape was not harmful to CSXT at all, let alone as harmful as Plaintiffs’ dramatic, in-court demonstration. It certainly is no basis for excusing the trial court’s grievous error in allowing Plaintiffs to conduct a demonstration that not even they contend is representative of reality.

II. The Misleading Assumption-Of-Risk Instruction.

Plaintiffs do not deny that it generally is reversible error to give an assumption-of-risk instruction in a FELA case (*see, e.g., Norfolk & W. Ry. Co. v. Sonney*, 374 S.E.2d 71, 76 (Va. 1988)) and that “most of the cases in which the question has arisen have found such an instruction confusing” (*Vida v. Patapsco & Back Rivers R.R. Co.*, 1987 WL 35917, at *1 (4th Cir. Mar. 17, 1987) (unpublished)). Nor do they deny that the trial court gave such an instruction here

³ In any event, it is not clear *who* CSXT could have cross-examined because no witness testified to the similarity between counsel’s demonstration and Plaintiffs’ work conditions. And, contrary to Plaintiffs’ contention (PB 11), the trial court did *not* offer to give a curative instruction (*see* E0741-52).

over CSXT's objection. They argue only that this case falls within an exception to the general prohibition because CSXT allegedly adduced evidence and made arguments that raised the possibility that the jury would reduce Plaintiffs' recoveries based on assumption of risk.

As an initial matter, Plaintiffs misstate the test for determining whether an assumption-of-risk instruction is appropriate in a FELA case. They rely on several opinions of Illinois state courts that authorize an assumption-of-risk instruction whenever there is "any evidence whatsoever" that could lead the jury to conclude that a plaintiff had assumed the risks of his employment. PB 15-17. But, as a leading federal appellate decision cited by Plaintiffs makes clear, the Illinois cases are idiosyncratic. The prevailing federal rule is that an instruction is warranted only if, after closely assessing the actual evidence adduced and the purposes to which the defendant put that evidence, the court concludes that there is a real "danger that the jury confused assumption of the risk with contributory negligence." *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1280 (3d Cir. 1995).

In *Fashauer*, the plaintiff asserted that "defense counsel made a number of impermissible references in her opening and closing statements, the net result of which enabled the jury to reduce his recovery based on an impermissible version of assumption of the risk." *Id.* The Third Circuit analyzed each argument or piece of evidence identified by the plaintiff but found that they did not present a sufficient risk of jury confusion to warrant giving an assumption-of-risk instruction. *Id.* at 1280-81. For example, the court explained that the defendant used evidence that the plaintiff did not report the wet condition of the vestibule in which he was injured to show that the plaintiff considered the vestibule to be safe, not that the plaintiff had assumed the risk of an allegedly dangerous condition. *Id.*

In another of Plaintiffs' cases, the Ninth Circuit emphasized that there was conflicting evidence on whether the employee's superior had given a general order (in which event the employee's choice of the manner of accomplishing the task

could amount to contributory negligence) or a direct order (in which event the employee's obedience would amount to, at most, an assumption of risk). *Jenkins v. Union Pac. R.R. Co.*, 22 F.3d 206, 211-12 (9th Cir. 1994). Because "the jury could reasonably have found" either of these alternatives, "the district court was required to ensure that the jury was instructed on the import of either finding." *Id.* at 211.

Here, none of the evidence or argument on which Plaintiffs focus created a risk that the jury would reduce Plaintiffs' recovery on an assumption-of-risk theory. For example, Plaintiffs point out that CSXT elicited testimony that several of them chose the specific rail yards in which they worked. But, as in *Fashauer*, this evidence showed that Plaintiffs believed their work conditions to be *safe* (*see, e.g.*, Rep. App. 7); CSXT did not, either directly or by implication, suggest that this evidence showed that Plaintiffs knew that their jobs were dangerous but chose to do them nonetheless. Notably, Plaintiffs have not identified a single piece of testimony or argument making such a connection. Accordingly, there was no risk that this evidence could have caused the jury to reduce Plaintiffs' recovery on the theory that they had accepted a risk of their employment.

Similarly, when CSXT produced evidence that Plaintiffs were empowered to report unsafe conditions and yet did not complain of alleged mainline ballast in the rail yards (or any of the other conditions about which they complain in this case), it was to show that Plaintiffs considered their work conditions to be safe. *See* Rep. App. 13-16. Again, *Fashauer*, establishes that this kind of use does not warrant giving an assumption-of-risk instruction. *See* 57 F.3d at 1281.

The same is true with respect to evidence that Plaintiffs dismantled moving equipment both before and after CSXT banned the practice: The pre-ban evidence showed that the practice was considered to be safe during the time it still was permitted (*see* Rep. App. 8-12), not that Plaintiffs assumed the risk of a practice they knew to be dangerous, while the post-ban evidence "was a permissible argument advancing the defense of contributory negligence." *Fashauer*, 57 F.3d

at 1281; *see also id.* at 1279 (“evidence that the plaintiff violated company safety rules” is relevant to contributory negligence). Indeed, evidence that Plaintiffs continued to dismount moving equipment after the practice had been banned was perhaps the primary rationale for the jury’s contributory negligence findings.

Finally, the fact that Plaintiffs could choose to retire at age 60 had nothing to do with the risks of employment, assumed or otherwise, but related to the question of when Plaintiffs would have retired but for their alleged injuries.

In short, the evidence that Plaintiffs have identified did not create an undue risk that the jury would reduce their recoveries on the impermissible theory that they had assumed the risks of their employment. Accordingly, it was reversible error to give an assumption-of-risk instruction.

III. The Directed Verdict On The Statute Of Limitations.

The timeliness of a claim under FELA is a question of federal law. Plaintiffs do not dispute that, under federal law, a claim accrues “when the claimant * * * has reason to be aware that he has been injured and * * * has reason to be aware of the cause of his injury.” *CSX Transp., Inc. v. Miller*, 159 Md. App. 123, 153, 858 A.2d 1025, 1042 (2004). This standard contemplates that the employee must exercise reasonable diligence and has an affirmative duty to investigate his symptoms. *See* CB 21-22. Plaintiffs make much of language from *Miller* suggesting that the standard in a FELA case is more lenient and requires “a very substantial common-sense likelihood that a reasonably careful person would discover the existence of the injury and its cause.” *See* PB 20-21. But there is no statutory or precedential basis for employing a different standard in a FELA case than in any other case governed by the federal discovery rule announced in *Kubrick v. United States*, 444 U.S. 111 (1979).⁴ And the language requiring “a

⁴ In *Miller*, this Court quoted dictum in a Jones Act case for the proposition that the standard in FELA cases is “more lenient.” *See Miller*, 159 Md. App. at 150, 858 A.2d at 1041 (quoting *Crisman v. Odeco, Inc.*, 932 F.2d 413, 416 n.2 (5th Cir. 1991)). The *Crisman* dictum is contrary to prior Fifth Circuit cases that

very substantial common-sense likelihood” comes from an opinion of the intermediate appellate court in Missouri that has not been adopted by any other court, including other divisions of the same court. *See Johnson v. Norfolk & W. Ry. Co.*, 836 S.W.2d 83, 86-87 (Mo. Ct. App. 1992) (distinguishing the case cited by *Miller* and holding that “[t]he test for determining when the FELA statute of limitations begins to run is an objective test—when a reasonably diligent man should have investigated his symptoms and their cause”).

Regardless of the phrasing of the standard, the evidence here was more than sufficient to warrant submitting this issue to the jury with respect to Bickerstaff, Brown, Davidson, Hobgood, Short, and Young. Plaintiffs assert that “[t]here was not a shred of evidence that [these six] knew or should have known more than three years prior to filing suit that they suffered from work related knee injuries” (PB 25)—but, in an argument that spans ten pages (PB 19-29), they never explain, why, if that is so, they did not seek a directed verdict on this issue. The obvious answer is that they recognized that their own testimony and the testimony of their experts placed the claims of these six plaintiffs within the “80% bulge of the bell-shaped curve” where “the limitations issue [is] quintessentially a matter of fact” for the jury (*Miller*, 159 Md. App. at 150, 858 A.2d at 1040-41).

In an effort to avoid that conclusion, Plaintiffs suggest that CSXT would

actually addressed the issue (*see, e.g., Dubose v. Kansas City S. Ry. Co.*, 729 F.2d 1026, 1030 (5th Cir. 1984) (approving of proposition from prior case that the “federal standard for accrual of claims does not vary among FTCA, FELA and § 1983”)); has not been repeated in subsequent Fifth Circuit cases; and, to our knowledge, has not been adopted by any other court. As the U.S. Supreme Court recently stated, courts cannot simply invent unique standards for FELA cases without a foundation in the statutory language for so doing. *See Sorrell*, 127 S. Ct. at 808. In any event, *Crisman* ultimately employed the normal federal standard: “A cause of action * * * accrues when a plaintiff has had a reasonable opportunity to discover his injury, its cause, and the link between the two.” 932 F.2d at 415; *see also id.* (“[W]hen an event occurs that should put a plaintiff on notice to check for injury, this is sufficient to start the prescriptive period running * * * even if the event results in only minor physical effects.”).

impose on claimants “the onerous duty” to “seek out immediate medical treatment” for “any ache or pain experienced in the course of employment.” PB 21. Of course, it is not CSXT, but federal law that imposes the relevant duty to investigate. *See* CB 22; *see also Johnson*, 836 S.W.2d at 86-87 (evidence that the plaintiff “was experiencing symptoms of hearing loss and complaining about excessive work noise” were sufficient “to impose a duty of inquiry upon a reasonable man and to commence the running of the statute of limitations”); *Crisman v. Odeco, Inc.*, 932 F.2d 413, 415 (5th Cir. 1991) (“when an event occurs that should put a plaintiff on notice to check for injury, this is sufficient to start the prescriptive period running * * * even if the event results in only minor physical effects”).

Plaintiffs are correct that the law does not require a claimant to investigate *de minimis* aches and pains. PB 21-25.⁵ But the question whether the symptoms that Plaintiffs reported experiencing (*see* CB 25-26) were sufficient to “impose a duty of inquiry upon a reasonable man” was, at the very least, for the jury.⁶

⁵ Plaintiffs’ reliance on *Young v. Clinchfield R.R. Co.*, 288 F.2d 499 (4th Cir. 1961), however, is misplaced. As the Fifth Circuit subsequently observed in distinguishing *Young*, the plaintiff in *Young* “had a number of ailments, some of which were not work related” and “was advised by a physician on at least one occasion that the lung condition for which he brought suit was not work related.” *Emmons v. S. Pac. Transp. Co.*, 701 F.2d 1112, 1122 (5th Cir. 1983). In other words, the plaintiff in *Young* actually sought medical treatment—fulfilling his duty to investigate—but was told that his condition was *not* work related. Moreover, contrary to Plaintiffs’ claim (PB 26), neither *Young*, nor any other case, holds that the limitations period can begin to run only upon a medical diagnosis.

⁶ *Cf. Campbell v. Grand Trunk W. R.R. Co.*, 238 F.3d 772, 776-77 (6th Cir. 2001) (affirming summary judgment *for defendant* based on plaintiff’s testimony that he “experienced the symptoms of his disorder on a daily basis for several years” before filing his claim even though he filed his claim within six months of being diagnosed with carpal tunnel syndrome); *Johnson v. Norfolk & W. Ry. Co.*, 1993 WL 17061, at *1-*2 & n.2 (4th Cir. 1993) (unpublished) (affirming summary judgment *for defendant* based on medical record indicating that plaintiff had reported experiencing some hearing loss four years before filing claim and “could not think of anything other than the noise at [work] that might have caused

Plaintiffs assert that CSXT's contention on the merits that Plaintiffs' knee conditions are not severe and were not caused by their work is inconsistent with its contention on the statute-of-limitations issue that Plaintiffs should have discovered their injuries and the alleged cause more than three years before filing suit. As a result of this supposed inconsistency, they contend, CSXT is "estopped" from contending that there was a question of fact for the jury on the statute-of-limitations issue. PB 25-29.

But as this Court has held, estoppel prevents "a party who *successfully* pursued a position in a prior legal proceeding from asserting a contrary position in a later proceeding." *Gordon v. Posner*, 142 Md. App. 399, 424, 790 A.2d 675, 689 (2002) (emphasis added); *see also id.* at 431-32, 790 A.2d at 694 (noting that plaintiffs "do not point us to any Maryland case in which a party was estopped on the basis of a statement that was not accepted by the judicial entity to which it was made" and concluding that "review of the Maryland case law * * * suggests that assertions that do not serve as the basis for any judicial relief generally are not sufficiently prejudicial to either the judicial system or to the party seeking the estoppel to establish a factual basis for estoppel"). Here, the positions that CSXT

his hearing loss") (internal quotation marks omitted); *Fries v. Chicago & Nw. Transp. Co.*, 909 F.2d 1092, 1094, 1096-97 (7th Cir. 1990) (affirming summary judgment *for defendant* based on evidence that, five years before filing his claim, the plaintiff began experiencing hearing loss that "would increase toward the end of the work day" and subside after work; "[t]hat [the plaintiff's] injury had not reached its maximum severity * * * but continued to progress does not affect this result"); *Johnson*, 836 S.W.2d at 84, 86-87 (affirming summary judgment *for defendant* based on evidence that the plaintiff "was experiencing symptoms of hearing loss and complaining about excessive work noise" more than three years before filing claim even though the plaintiff contended that he learned of his work-related injury only when "he discovered several of his former co-workers had filed FELA lawsuits"); *Wells v. Union Pac. R.R. Co.*, 2008 WL 910196, at *4-*5 (E.D. Tex. Apr. 2, 2008) (granting summary judgment *for defendant* based on evidence that plaintiff "had 'this back problem,'" which he attributed to work, more than three years before filing claim even though "his back started really giving him a lot of problems" less than three years before filing).

took in defense of the liability claims were not accepted by the trial court or the jury. Accordingly, they cannot be the basis for estoppel.

In any event, the positions that Plaintiffs ascribe to CSXT are perfectly consistent: Plaintiffs' knee conditions are not serious and were not caused by their work conditions, but if—as Plaintiffs claim—they were serious and were caused by their work conditions, they would be untimely.⁷ This type of argument in the alternative is essentially unavoidable in a case in which timeliness turns on the discovery rule, and there is nothing improper about it. *See, e.g., MacBride v. Pishvaian*, 402 Md. 572, 578, 937 A.2d 233, 236-37 (2007) (after jury verdict against defendant that had contested liability, trial court properly entered judgment for defendant on statute of limitations because plaintiff should have known of the claim outside limitations period); *Emmons v. S. Pac. Transp. Co.*, 701 F.2d 1112, 1116-17 (5th Cir. 1983) (same); *see also Beaver Creek Local Sch. v. Basic, Inc.*, 595 N.E.2d 360, 374-75 (Ohio Ct. App. 1991) (rejecting plaintiff's argument that defendant "waived its statute of limitations defense at trial by pleading the defense and then presenting an inconsistent theory at trial" because of the absence of case law supporting such an argument).

When Plaintiffs' attempts to water down the standard and to erect estoppel arguments are cast aside, there is very little left of their argument. Most tellingly, Plaintiffs make no effort to explain why the testimony we cited in our opening brief (at pages 25-26 and 28-29) does not give rise to a factual issue with respect to knowledge of both their alleged injuries and the alleged cause; their *ipse dixit* that all of the evidence involved de minimis injuries (PB 25) is far from adequate

⁷ Plaintiffs also forget that it is *their* burden to prove the timeliness of their claims and, indeed, that CSXT was not even required to allege untimeliness. *See, e.g., Emmons*, 701 F.2d at 1118. They relatedly overlook that, because the trial court directed a verdict against CSXT on this aspect of their claims, the court was required to (but did not) interpret the evidence in the light most favorable to CSXT—even if that meant giving credence to Plaintiffs' evidence with respect to liability—and to draw all reasonable inferences in CSXT's favor on this issue—even if those inferences were contrary to CSXT's position on liability. *See* CB 21.

to turn this into the exceptional case in which a directed verdict is permissible. Accordingly, CSXT is entitled to a new trial on the statute of limitations with respect to Bickerstaff, Brown, Davidson, Hobgood, Short, and Young.

IV. The Trial Court’s Refusal To Allow CSXT To Introduce Evidence Of The Normal Retirement Age For Railroad Employees.

At trial, CSXT attempted to cross examine Plaintiffs’ economist with “*statistics* from the railroad retirement board” showing that “the *overwhelming majority* of people that retire in the railroad industry [are], in fact, 60 years old.” E1109 (emphases added). We explained in our opening brief that the trial court had no basis for excluding “*statistics* showing that *most employees* in the railroad industry retire close to age 60, not 65.” CB 31 (emphases added). Nevertheless, Plaintiffs suggest that, “[p]resumably, the Defendant was attempting to establish through this statement to the witness, some evidence that the Plaintiffs could retire under the Railroad Retirement Act at the age of 60.” PB 29.

Plaintiffs’ mischaracterization of the evidence at issue is not surprising because it so clearly was reversible error to prevent this line of questioning and exclude statistical evidence of normal retirement age for railroad workers. Indeed, this Court recently observed that “[o]n the issue of the loss of future wages, the age at which the injured employee would have been expected to stop working, had the accident never occurred, is obviously very material.” *Tiller*, 2008 WL 835716, at *4. The plaintiff in *Tiller*, like Plaintiffs here, claimed that he would have retired at age 65 if not for his injury. *Id.* at *1. The defendant attempted to “inform the jury that [the plaintiff] was eligible to receive retirement benefits at age 60 in order to persuade the jury that, notwithstanding his testimony to the contrary, he in all likelihood would have stopped working at age 60.” *Id.* at *2. This Court held that such evidence was “*indisputably both relevant and material*” but nevertheless was properly excluded under the collateral source rule. *Id.* at *4 (emphasis added).

Here, CSXT sought to question Plaintiffs’ economist about statistical

evidence that the majority of railroad employees retire at age 60 “in order to persuade the jury that, notwithstanding [Plaintiffs’] testimony to the contrary, [they] in all likelihood would have stopped working at age 60” (*id.* at *2). According to this Court, such evidence is “indisputably both relevant and material” (*id.* at *4), but the trial court reached exactly the opposite conclusion, excluding the evidence because it “doesn’t mean a hill of beans” and is “irrelevant to these plaintiffs” (E1109-10). That was clear error. This Court held in *Tiller* that “[a] number of factors may enter into the making of what amounts to * * * an educated guess” about when the employee would have retired but for the injury. 2008 WL 835716, at *1; *see also Vida*, 1987 WL 35917, at *4 (upholding new trial order, in part because the plaintiff’s economist had simply assumed that the deceased employee would have retired at age 70 even though “the statistics of the American Association of Railroads” showed that “the normal age for retirement of working crews was 62 [in 1987]”). The defendant is not limited to cross-examining the employee.

Unlike in *Tiller*, the evidence at issue here would not have informed the jury that Plaintiffs have a collateral source of income upon retirement, but rather was limited to the statistical fact that the overwhelming majority of railroad workers retire at age 60. In *Tiller*, this Court “sympathize[d] with [the defendant’s] evidentiary frustration” (2008 WL 835716, at *4), but felt that its hands were tied by the collateral-source rule. Because that rule is inapplicable, the Court’s sympathy can be appropriately expressed here by holding that the trial court committed reversible error.

Plaintiffs’ suggestion that the trial court ruled in favor of CSXT and “allowed the line of questioning” (PB 29) is mistaken. The trial court very clearly—and very erroneously—held that statistical evidence of normal retirement age “doesn’t mean a hill of beans when it comes to individuals that are specifically plaintiffs before us,” “is irrelevant to these plaintiffs,” and “is not important because we’re dealing with them [indicating the plaintiffs].” E1109-10. Indeed,

Plaintiffs now agree that the statement of Judge Nance on which they rely so heavily in their brief (*see* PB 29 (quoting E1110)) was mistranscribed. The videotaped record reveals that Judge Nance actually said: “You can *ask a different question of him*, of it. * * * But based on the overall numbers as to the industry, it is not important because we’re dealing with them [indicating the plaintiffs].”⁸

Moreover, it is indisputable that Judge Nance *sustained* Plaintiffs’ objection. E1110. Notably, he did so even though, as CSXT pointed out (E1109), it had just begun this line of questioning by asking Plaintiffs’ economist “if he is aware of [the statistics].” There is thus no merit to Plaintiffs’ suggestion (PB 29) that, after this ruling, CSXT should have pressed the trial court to admit the actual statistics at issue. As the Court of Appeals has explained, “where the tenor of the questions and the replies they were designed to elicit is clear, a proffer in the record is not a necessary prerequisite for a review of the ruling.” *Peregoy v. W. Md. Ry. Co.*, 202 Md. 203, 209, 95 A.2d 867, 870 (1953); *see generally* Md. R. 5-103(a)(2). And once Judge Nance made very clear that, in his opinion, statistical evidence of retirement age is irrelevant and inadmissible (and “doesn’t mean a hill of beans”), any further effort to introduce such evidence would have been pointless and likely only to antagonize the court.

Finally, because Plaintiffs do not dispute that this evidence, if admitted, could have materially reduced their damages, the only remedy for this obvious error is a new trial on damages.

V. The Trial Court’s Refusal To Allow Apportionment Of Damages.

A. The case-law requires apportionment.

Plaintiffs’ response reads as if the question whether to allow apportionment of damages to causes other than the parties’ negligence is one of first impression in the FELA context. They spend four pages identifying “sources for authority in

⁸ CSXT has filed a consent motion to correct this mistranscription.

assessing damages under the FELA” (PB 31-34), but apparently do not believe that these sources include FELA cases holding that apportionment is required whenever there is evidence that the plaintiff’s injuries were caused in part by factors other than the parties’ negligence or, as some cases put it, that the plaintiff would have suffered some degree of injury even without the defendant’s negligence (*see* CB 33).

In fact, there is much existing precedent on this issue, and that precedent requires rejection of Plaintiffs’ post hoc justifications for the trial court’s ruling. Plaintiffs tie their argument to the Restatement (Second) of Torts § 433A,) asserting that, “[a]s concluded to [sic] by the writers of the Restatement, in order for there to be apportionment, there must be ‘a prior reduction in value of what has been destroyed.’” PB 32. But that is not what the Restatement says. On the contrary, it specifies that apportionment among causes is required whenever “(a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm.” Restatement (Second) of Torts § 433A. The “reasonable basis for apportionment” standard was employed by the FELA cases cited in our opening brief and obviously requires apportionment here.

For example, Pennsylvania’s intermediate appellate court has held that it was reversible error to refuse an apportionment instruction in the face of testimony from the defendant’s experts that the plaintiff’s “pre-existing degenerative disc condition could have caused [the plaintiff’s] herniated disc.” *Meyer v. Union R.R. Co.*, 865 A.2d 857, 867-68 (Pa. Super. Ct. 2004). The court emphasized that, in order to warrant an apportionment instruction, the defendant need only provide evidence “sufficient to permit a ***rough practical apportionment***,” not “evidence to substantiate a mathematical proportion” (*id.* at 868) (emphasis added).

Meyer also relied on a Tenth Circuit FELA opinion holding that an apportionment instruction was warranted based on “expert medical opinions from three witnesses, which unanimously acknowledged that the victim’s pre-existing, degenerative bone condition would have worsened notwithstanding the employer’s

negligence.” 865 A.2d at 868 (citing *Sauer v. Burlington N. R.R. Co.*, 106 F.3d 1490, 1495 (10th Cir. 1996)). “Although the experts [in *Sauer*] could not ascertain the exact manner that the condition would progress or the probability that the condition would become symptomatic, they all concluded that the condition would have worsened independently over time * * *.” *Id.* The Tenth Circuit observed that, “[a]lthough apportionment may be difficult, like comparative negligence[,] it is a question for which juries are well suited. Apportionment can be proved without expert testimony stating the percentage of injury attributable to the different causes.” *Sauer*, 106 F.3d at 1494 (citations omitted); *see also Kapsis v. Port Auth. of N.Y. & N.J.*, 712 A.2d 1250, 1257 (N.J. Super. Ct. App. Div. 1998) (holding in FELA case that it was appropriate to apportion fault based on expert testimony “about the relative significance of exposure to asbestos and of cigarette smoking as causes of [the plaintiff’s] laryngeal cancer”).

Here, Plaintiffs concede that CSXT adduced expert testimony that the damage to the cartilage in their knees was caused by normal wear and tear for men their age, by their obesity, by their smoking habits, and by their pre-existing medical conditions. *See* PB 45-46. In other words, CSXT introduced evidence not only that Plaintiffs’ injuries *could have* occurred without CSXT’s negligence but that, in fact, they *were* caused entirely by other factors. Moreover, Plaintiffs’ own experts admitted that many of these factors played a causal role in Plaintiffs’ knee conditions and even attempted to rank the relative influence of various causes. *See* CB 36. Finally, Plaintiffs’ own expert assigned a specific percentage (50%) by which Young’s pre-existing bowleggedness contributed to his knee condition. *See* CB 37. In other words, the evidence in this case is much stronger than that which was found sufficient to support an apportionment instruction in both *Sauer* and *Meyer* and clearly satisfies the “reasonable basis for apportionment” standard those cases established.

Plaintiffs appear to assume that there can be no reasonable basis for apportioning their injuries because a comment to the Restatement notes that

“[c]ertain kinds of harm, by their very nature, are normally incapable of any logical, reasonable, or practical division.” Restatement (Second) of Torts § 433A, cmt. i. That comment gives, as examples, “death,” “a broken leg, or any single wound” and observes that “[b]y far the greater number of personal injuries” are thus incapable of reasonable apportionment. *Id.* Of course, the injuries that Plaintiffs allege here are not like a broken leg or a single wound. Plaintiffs claim that their knee conditions are the cumulative result of damage caused by thousands or millions of “micro-trauma” incidents. In any event, as noted above, the evidence in this case far exceeds that required to provide a reasonable basis for apportioning damages among the various conceded causes of Plaintiffs’ injuries.

B. The eggshell-skull doctrine requires apportionment here.

Plaintiffs’ invocation of the “eggshell-skull” doctrine (PB 35-37) also is unavailing. The final sentence of Plaintiffs’ argument undoes the preceding three pages by describing the settled corollary to the “eggshell-skull” doctrine that, even when a plaintiff’s pre-existing vulnerability has exacerbated the subsequent injury caused by the defendant’s negligence, the defendant still is entitled to “have the plaintiff’s damages discounted to reflect the proportion of damages that would have been suffered even in the absence of the subsequent injury.” PB 37 (quoting *Maurer v. United States*, 668 F.2d 98, 100 (2d Cir. 1981) (per curium)). That corollary clearly applies here because the evidence at trial showed that Plaintiffs would have experienced cartilage damage simply on account of their age, their obesity, and their pre-existing medical conditions—even if they had never stepped foot on ballast (small or large). As noted in our opening brief (at 36), it was undisputed at trial that 30 to 50 percent of men Plaintiffs’ age have some degree of osteoarthritis of the knees. And Plaintiffs’ own doctors testified that significant portions of the cumulative damage to Plaintiffs’ knees had been caused by these other factors (most memorably, that 50 percent of the damage to Young’s knees had been caused by his bowleggedness). *See* CB 36-37. CSXT’s experts, for their part, testified that *all* of the deterioration to Plaintiffs’ knees had been caused by

normal wear and tear over the course of 50 to 60 years, combined with their pre-existing medical conditions, smoking, and obesity. *See e.g.*, PB 25-26, 45-46. Accordingly, this corollary to the “eggshell-skull” doctrine required apportionment here.

Other courts considering whether to require apportionment in FELA cases have rejected precisely the argument that Plaintiffs raise here. For example, writing for the Seventh Circuit, Judge Posner found that the “eggshell-skull” doctrine creates no obstacle to apportionment. *Lancaster v. Norfolk & W. Ry. Co.*, 773 F.2d 807, 822 (7th Cir. 1985). He acknowledged the plaintiff’s contention “that since the tortfeasor takes his victim as he finds him, if the victim is highly vulnerable that is the tortfeasor’s bad luck; there is no discount to average damages.” *Id.* But he held that the plaintiff in *Lancaster*, like Plaintiffs here, failed to recognize that “a corollary to this principle is that the damages of the ‘eggshell skull’ victim *must be reduced* to reflect the likelihood that he would have been injured anyway, from a nonliable cause, even if the defendant had not injured him.” *Id.* (emphasis added). *Accord Meyer*, 865 A.2d at 863 (holding that it was reversible error to refuse an apportionment instruction and explaining that “the ‘eggshell-skull’ principle [does] not bar [an apportionment] instruction” because, “while a tortfeasor is subject to liability for the full extent of the injury he caused, the damages should be reduced to reflect the likelihood that the pre-existing vulnerability or condition would eventually have injured the victim notwithstanding the tortfeasor’s conduct”).

Because the testimony of Plaintiffs’ own witnesses—not to mention the testimony of CSXT’s witnesses—created a question of fact regarding the extent to which Plaintiffs’ injuries would have been caused (or were caused) by factors other than either party’s alleged negligence, there was more than enough evidence “to permit a rough practical apportionment” between CSXT’s negligence, Plaintiffs’ negligence, and other causes. Accordingly, the “eggshell-skull” doctrine, along with its settled corollary, affirmatively required apportionment

here.

C. This error was highly prejudicial.

In a final effort to avoid reversal, Plaintiffs assert that CSXT was not prejudiced by the trial court’s refusal to permit apportionment to “other causes.” That contention is based on a mischaracterization of what happened at trial. In any event, the argument only highlights the extreme prejudice that CSXT suffered.

Plaintiffs contend that the trial court rejected CSXT’s request for an apportionment instruction and a verdict sheet allowing apportionment because the court “felt it was improper for Defendant to make the same factual argument on two levels”—arguing that obesity and smoking could constitute either “other causes” or contributory negligence—“which would result in a double reduction of damages for the Plaintiffs.” PB 43.⁹ But that is not the trial court’s rationale for refusing to allow apportionment. Judge Nance told the parties that “[t]he Court’s position is that the jury is only to award damages if there is a cause directly related to the negligence in question” and “the directly related result *from the negligence* causes the jury to come to an amount and then the apportionment is based on the *actual injury as a result of negligence.*” E1350 (emphases added). He then explained that, in his opinion, allowing apportionment to causes other than negligence (*i.e.*, “the apportionment that you ask for”) would amount to “a second reduction of that based on *something that shouldn’t be in the calculation at all.*” *Id.* (emphasis added). In other words, Judge Nance did not take issue with CSXT’s suggestion that obesity and smoking could fall under either contributory

⁹ When responding to Plaintiffs’ motion for a directed verdict on contributory negligence, CSXT stated that, although “[t]he first” basis for finding contributory negligence “obviously is this mounting and dismounting [moving equipment] argument” (E1311), the jury also could find that Plaintiffs were contributorily negligent because they “failed to control [their] weight”—which increases the risk of osteoarthritis—or smoked—which reduces the ability of cartilage to recover from trauma (E1316-19). When excepting to the trial court’s refusal to allow apportionment, CSXT pointed out that weight and smoking, among other factors, also could constitute “other causes.” E1349-50.

negligence or “other causes”; instead, his view was that the jury could award damages only for harms caused by CSXT’s negligence and not for harms caused by other factors, making an apportionment of the jury’s damage awards to “other causes” a “second reduction * * * based on something that shouldn’t be in the calculation at all.” *See* CB 34-35.

As shown in our opening brief (at 35-36), that rationale misses the point of apportionment entirely, particularly here, where the jury was told that CSXT is liable for an injury if its negligence “played any part, no matter how small, in bringing about or actually causing the injury.” E1332. Contrary to the trial court’s rationale, the jury was told to impose liability for injuries with multiple causes (indeed, injuries for which the dominant cause had nothing to do with CSXT). As the *Meyer* court observed, apportionment is required precisely because “the statutory language ‘in whole or in part’ relates to liability, and not, implicitly, to damages” so that “while liability attaches in a FELA claim upon a mere showing that an employer’s negligence partially caused an injury, financial responsibility [is] limited to the degree that the employer’s conduct contributed to the injury.” 865 A.2d at 864 (internal quotation marks omitted). Notably, Plaintiffs make no effort to defend the trial court’s actual rationale, but instead use selective quotation to imply that the trial court was concerned that the jury might reduce the damages twice for the same causes—once under the rubric of comparative fault and once under the proposed apportionment instruction.¹⁰

¹⁰ Contrary to Plaintiffs’ contention, there is nothing improper about arguing that obesity and smoking could qualify as either contributory negligence or “other causes.” As Plaintiffs themselves pointed out, “[c]ontributory negligence implies some failure to act reasonably,” which “implies some actual or constructive knowledge” of the risk posed by the behavior in question. E1301-02. But as Plaintiffs also recognized, the jury could find that these factors played a causal role in Plaintiffs’ injuries even if Plaintiffs did not have actual or constructive knowledge of the risks. E1301 (“smoking, diabetes, obesity, to the extent it is [sic] present in this case * * * are clearly issues of causation [rather than contributory negligence]”). If the trial court’s concern really had been double

Even if Plaintiffs' characterization of the trial court's reasoning were accurate, however, any concern about double counting would apply only to obesity and smoking. CSXT obviously did not suggest that Plaintiffs were contributorily negligent for being in their 50s and 60s or having various genetic conditions. Depriving CSXT of apportionment based on Plaintiffs' age and pre-existing medical conditions was enormously prejudicial because, as shown in our opening brief (at 36-38), these factors indisputably accounted for a significant portion of the damage to Plaintiffs' knees. Plaintiffs do not deny that fact.

Instead, Plaintiffs suggest that any prejudice was avoided because CSXT "strongly and successfully argue[d] those factors in closing." PB 44. This assertion simply highlights the extreme prejudice that CSXT suffered. As Plaintiffs observe (PB 45-46), CSXT contested liability, in part, by arguing that Plaintiffs' knee conditions were caused entirely by normal wear and tear for men their ages and/or by pre-existing medical conditions such as Young's bowleggedness. But once the jury rejected that defense and concluded that CSXT's alleged negligence played at least some part, "no matter how small," in causing Plaintiff's injuries, it had no way to apportion responsibility for the resulting damages to factors such as Plaintiffs' age or pre-existing medical conditions (which obviously did not qualify as comparative negligence) even though it was *undisputed* that those factors played a significant role in causing the harm to Plaintiffs' knees. As shown in our opening brief and not disputed by Plaintiffs, just with respect to Young this error almost certainly increased CSXT's financial liability by at least \$2.4 million.

Moreover, the showing required to establish contributory negligence is much more stringent than the showing required to establish that a factor had some causal role in the injury. The former is fault based; the latter is not. Hence, even with respect to smoking and obesity, it was highly prejudicial to deny an

counting, that concern could have been easily addressed by instructing the jury that it should not reduce the damages twice for the same causal factor.

apportionment instruction for “other causes” and instead relegate CSXT to arguing that these factors constituted contributory negligence.

Finally, Plaintiffs’ contention that “[a] careful review of the evidence leads to the conclusion that the jury accepted Defendant’s position, apportioning from 10% to 40% to the factors argued by Defendant” (PB 46), is flatly contradicted by the record. Most obviously, as explained in our opening brief (CB 36-38), it was undisputed that Young’s genetic bowleggedness caused at least 50 percent of his knee condition, and yet the jury found only 20 percent contributory negligence (the third lowest percentage among the nine plaintiffs). Plaintiffs make no effort to explain this incongruity, which completely undermines their theory.

Indeed, Plaintiff’s speculative theory of the jury’s contributory negligence findings violates the fundamental maxim that a jury is assumed to have understood and followed the court’s instructions (*see, e.g., Bittinger v. CSX Transp. Inc.*, 176 Md. App. 262, 274-75, 932 A.2d 1243, 1250-51 (2007)): It obviously would have been a gross departure from the instructions on contributory negligence if the jury had found that turning 50 or 60 is “the doing of something that a person of ordinary prudence would not do under the same or similar circumstances” (Rep. App. 5). That also is true of Plaintiffs’ pre-existing medical conditions and genetic pre-dispositions. In other words, the jury could not have transformed CSXT’s causation arguments into contributory negligence findings, as Plaintiffs speculate, without flouting the trial court’s instructions. And there is no basis in the record for assuming that it did so. The much more reasonable inference is that the findings of contributory fault reflect Plaintiffs’ work-related negligence, most notably dismounting moving equipment after that practice had been banned.

In sum, under on-point FELA precedent, CSXT was entitled to a jury finding on whether Plaintiffs’ damages should be apportioned to causes other than the parties’ negligence. The trial court’s refusal to allow apportionment was highly prejudicial, increasing CSXT’s liability by millions of dollars.

VI. The Trial Court's Exclusion Of Two Plaintiffs' Railroad Retirement Board Disability Benefits.

Plaintiffs now abandon the position they espoused in their pre-trial motions (*see* CB 40) and concede that there is an exception to the prohibition on evidence of Railroad Retirement Board benefits (“RRB benefits”) when a plaintiff has testified that his injury caused financial distress that he has insufficient financial resources to meet. *See* PB 47; *see also* CB 38.¹¹ Here, both Davidson and Young so testified. Plaintiffs argue that Davidson’s testimony about financial strain was not extensive enough and that CSXT did not preserve this issue with respect to Young. Both contentions are mistaken.

According to Plaintiffs, Davidson’s testimony that he was worried about having enough money to pay his bills because he could not work (E0524, E0528) “is a far cry from the facts of both *Moore* and *Gladden*” (PB 49), the cases cited by the Court of Appeals as examples of this exception in *Haischer v. CSX Transportation, Inc.*, 381 Md. 119, 137, 848 A.2d 620, 630-31 (2004). In *Gladden*, however, the plaintiff’s testimony was remarkably similar to Davidson’s: He said that being off of work caused problems with paying his bills, which motivated his return to work. *Gladden v. P. Henderson & Co.*, 385 F.2d 480, 482 (3d Cir. 1967). Even as characterized in Plaintiffs’ brief, Davidson’s testimony “that his bills were a worry in the context of many other ways in which his injury has affected him” (PB 49) is sufficient under *Gladden* to open the door to evidence of RRB benefits.

¹¹ Plaintiffs speculate that CSXT sought to introduce such evidence “presumably to show that the plaintiff had an alternative motive for not returning to work, i.e., he is a malingerer.” PB 47. In fact, CSXT’s reason for introducing the evidence was to prevent the same type of harm as the collateral-source rule itself. Just as evidence of RRB benefits might cause the jury to impermissibly reduce a plaintiff’s recovery, so too a plaintiff’s testimony claiming financial distress when, in fact, he has access to RRB benefits might cause the jury to impermissibly increase his recovery out of misplaced sympathy. *See Haischer v. CSX Transp., Inc.*, 381 Md. 119, 135, 848 A.2d 620, 629 (2004); *see also* E0559.

Plaintiffs' emphasis on the brevity of Davidson's testimony on this point (*see* PB 48, 49) is misguided. As *Gladden* held, "[t]he barriers which have been created against the admission of otherwise relevant evidence because of its prejudicial effect do not extend to the affirmative volunteering by a plaintiff of testimony which breaks into this restricted area." 385 F.2d at 483-84. Once Davidson put his financial condition at issue by testifying that he was worried that he would not have enough money to pay his bills, the door was opened, regardless of the terseness of the testimony.

Equally unavailing is Plaintiffs' suggestion that the Court should not consider Davidson's testimony on cross-examination. *See* PB 48 n.14. "There is no functional distinction between the plaintiff injecting his dire financial condition on direct examination or on cross-examination." *Moore v. Mo. Pac. R.R. Co.*, 825 S.W.2d 839, 842 (Mo. 1992) (en banc). "In either case, the plaintiff makes the jury aware of his financial condition * * * in an attempt to obtain sympathy," and it is "the raising of plaintiff's financial condition with the jury that permits the opposing party to attack his claims of financial distress by showing that other financial assistance was available." *Id.* at 842-43. Because Davidson testified on direct that he was concerned about not being able to pay his bills, it was appropriate for CSXT first to clarify that he was in fact putting his financial condition at issue and then, having so clarified, to complete the picture of his financial condition by inquiring about his access to RRB benefits.

Plaintiffs do not dispute our showing (CB 41-42) that Young's testimony was more than sufficient to open the door to evidence of RRB benefits under *Haischer*. Instead, they contend that CSXT did not preserve the issue with respect to Young. Plaintiffs acknowledge that an issue is preserved without further proffer or objection once the trial judge has, over objection, made a "ruling to exclude evidence that is clearly intended to be the final word on the matter, and that will not be affected by the manner in which the evidence unfolds at trial." *Prout v. State*, 311 Md. 348, 357, 535 A.2d 445, 449 (1988). But Plaintiffs

contend that, prior to the trial court's ruling "[h]ere, there was no discussion about th[is] issue whatsoever." PB 51. Nothing could be further from the truth.

As shown in our opening brief (at 41 n.14), the question whether a plaintiff can open the door to evidence of RRB benefits by claiming financial distress has been repeatedly hashed out in front of Judge Nance, in both this and previous clusters of FELA cases. Plaintiffs consistently have argued that there is no exception to the collateral-source rule in FELA cases, and Judge Nance consistently has agreed with them. *See* E0429-30 (order in cluster I). Indeed, in this very case, Plaintiffs filed a motion in limine to exclude such evidence, contending that "limited admissibility theories advanced by a railroad defendant were explicitly rejected by the U.S. Supreme Court" (*see* E0338)—which, incidentally, disproves Plaintiffs' assertion that *Prout* is irrelevant here because there were no motions in limine on this issue (*see also* E0347-49 (CSXT's response to Plaintiffs' motion in limine)).

Although Judge Nance consistently had refused to recognize that there are exceptions to the collateral-source rule (*see* E0429-30), he failed to enter an order on Plaintiff's motion in this case. Accordingly, CSXT raised the issue, once again, after Davidson's testimony, but Judge Nance stated, once again, that he was "not persuaded to change [his] original ruling." E0563.¹² Given that this issue had been extensively argued on several occasions and that Judge Nance had made clear that his rejection of exceptions to the collateral-source rule was "the final word on the matter" and would "not be affected by the manner in which the evidence unfolds at trial," CSXT was not obliged to continue beating this dead horse. And because Plaintiffs don't dispute that Young opened the door under *Haischer*, a new trial on Young's damages is required.

¹² During this bench conference, Plaintiffs' counsel acknowledged for the first time that there could be an exception to the collateral-source rule, but claimed that it was "only in the extreme cases" and that courts had gone "to great pains * * * to protect this very sacred collateral source rule." E0560.

VII. Excessiveness Of The Damages Awards.

Plaintiffs—whose alleged medical condition is experienced to varying degrees by 30 to 50 percent of men their age (*see* CB 4)—do not dispute that they were awarded non-economic damages that range from **9.6** to **76.3** times their annual incomes and that turn most of them into instant millionaires, providing compensation amounting to **\$30,114.41** to **\$203,747.29** every year for the rest of their expected life spans. CB 48-57. As we showed in our opening brief, such awards are out of all proportion to awards in other cases involving similar injuries and, under the applicable federal standard, should shock this Court’s conscience.

Although Plaintiffs elsewhere acknowledge that the measure of damages in a FELA action is a question of *federal* law (*see* PB 30; *see also* CB 45-46 (citing cases)), when responding to our showing that these awards are excessive, Plaintiffs base their entire argument on the contention that, under *Maryland* law, the standard for reviewing awards is essentially insurmountable (*see* PB 52-53). Whatever the standard under Maryland law might be, it does not apply here. Accordingly, Plaintiffs’ response is almost entirely irrelevant.

In particular, Plaintiffs are badly mistaken in contending that an appellate court’s review is effectively limited to ensuring that the trial court followed the correct procedure when reviewing the award post-trial (PB 53). On the contrary, under the applicable federal standard, “the appellate court must make its own ‘detailed appraisal of the evidence bearing on damages’” and then independently decide whether the award shocks its conscience. *Nairn v. Nat’l R.R. Passenger Corp.*, 837 F.2d 565, 567 (2d Cir. 1988) (quoting *Grunenthal v. Long Island R.R. Co.*, 393 U.S. 156, 159 (1968)).

Equally mistaken is Plaintiffs’ claim that we did not cite, and they have not been able to locate, a single case in which an appellate court reduced a non-economic award after a trial court refused to do so. PB 53 n.16. *Nairn*—the very case that we cited for the federal standard in a FELA case (*see* CB 46)—did exactly that. In *Nairn*, the Second Circuit observed that “appellate courts have

become increasingly willing to review damage awards” and that “this trend is a response to the increasingly outrageous amounts demanded by plaintiffs and awarded by juries.” 837 F.2d at 568. In language that is particularly salient here, the court held that “[a] jury has very broad discretion in measuring damages; nevertheless, a jury may not abandon analysis for sympathy for a suffering plaintiff and treat an injury as though it were a winning lottery ticket.” *Id.* (internal quotation marks omitted). After comparing the award in that case to others, the Second Circuit concluded:

Our review of these and other cases, as well as our independent examination of the facts in this case, leads us to agree with the Railroad that the jury’s verdict was excessive. We do not mean to belittle Nairn’s pain and disappointment at no longer being the active, athletic man he once was, or to minimize the very real impact of the injury on Nairn’s life and lifestyle. We conclude, however, that an award for pain and suffering of at least \$400,000 for a 15% functional impairment is one that “shocks the judicial conscience.”

*Id.*¹³

As this same passage from *Nairn* reveals, Plaintiffs again are mistaken when they contend that it is “not appropriate” to compare an award in one case to the damages allowed in other cases involving similar injuries (PB 55-56). Under the applicable federal standard, “[i]n order to determine whether a particular award is excessive, courts have found it useful to review awards in other cases involving similar injuries, while bearing in mind that any given judgment depends on a unique set of facts and circumstances.” *Nairn*, 837 F.2d at 568.

Here, “other cases involving similar [or more severe] injuries” prove that Plaintiffs’ non-economic awards are excessive. *See* CB 46-48. Plaintiffs do not deny that we fairly presented the evidence relating to their individual awards. *See*

¹³ The plaintiff in *Nairn* suffered a “lumbosacral strain” and “a certain degree of disc degeneration.” 837 F.2d at 567. He “experienced a great deal of pain,” “could not sit for prolonged periods,” “continued to have his good days and bad days,” was unable to play sports or play with his children, could not perform household chores, and had become distant and depressed. *Id.*

CB 48-57. Nor do they deny that these awards vastly outstrip those allowed in the cases that we identified involving similar or more severe injuries. *See id.* And they also make no challenge to the specific conclusions that we urged upon the Court after comparing those other cases to the facts of this case. *See* CB 46-48. Because Plaintiffs base their entire response on the legally mistaken proposition that such comparisons are “not appropriate,” our analysis of the awards here is effectively undisputed.

Plaintiffs have failed utterly to engage the federal standard that applies to this point of error and have instead misstated the law at every turn. Under the correct standard, these awards unquestionably are excessive and should be reduced to the amounts suggested in our opening brief.

VIII. FRSA Preclusion.

As indicated in our opening brief, this point of error was raised only “to preserve this issue for possible review by the Court of Appeals of Maryland or the United States Supreme Court.” CB 58. Accordingly, we will not here engage the substance of Plaintiffs’ response.¹⁴

¹⁴ We note, however, that Plaintiffs have incorrectly cited and attached legislative history that is irrelevant here because it relates to a bill, H.R. 1401, that was not incorporated into the final amendment to the FRSA. *See* Conference Rpt. On H.R. 1, 153 Cong. Rec. H8496-01, H8589-H8590; *see also* *Van Buren v. Burlington N. Sante Fe Ry. Co.*, 2008 WL 1027200, at *7-*8 (D. Neb. Apr. 8, 2008) (the FRSA “was not amended to eliminate preemption” of tort claims).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of *April 2008*, two copies of the foregoing Reply Brief of Appellant were served on each of the counsel listed below, via overnight courier, postage prepaid:

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