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)

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STATEMENT OF THE CASE

On December 20, 2004, Richard Bickerstaff filed a complaint against CSX Transportation, Inc. ("CSXT") under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq*. On February 14, 2005, eight other plaintiffs—Eddie Brown, Anthony Davidson, Michael Fedorchak, John Hartman, Robert Hobgood, Stephen Short, Nathaniel Young, and Larry Zientek—filed similar claims.

On May 5, 2005, the circuit court consolidated these and over 50 other FELA cases involving allegations of personal injury caused primarily by walking on the rocks, or ballast, that make up the surfaces in CSXT rail yards. The court assigned the consolidated cases to Judge Alfred Nance. Judge Nance then divided the cases into clusters for purposes of trial. Cluster IV included the nine plaintiffs identified above, each of whom alleged injuries to one or both of his knees. One plaintiff also alleged injuries to his back.

A jury trial of Cluster IV was conducted over the course of 17 days from March 6 to 28, 2007. On March 28, 2007, the jury returned a unanimous verdict against CSXT with respect to each of the nine plaintiffs and imposed total damages of $19,300,000, with awards for individual plaintiffs ranging from $750,000 to $6,000,000. Judgment was entered on March 29, 2007. On May 4, 2007, the circuit court denied CSXT's post-trial motions. CSXT filed a timely notice of appeal on June 4, 2007.

QUESTIONS PRESENTED

1. Whether a new trial is required because the trial court allowed plaintiffs' counsel to conduct a misleading "demonstration" of plaintiffs' work conditions in CSXT's rail yards by placing a few rocks on the courtroom floor and then standing and walking on those loose rocks.

2. Whether a new trial is required because the trial court instructed the jury that plaintiffs did not assume the risks of their employment.

3. Whether a new trial is required on the timeliness of six of the plaintiffs' claims because the trial court ruled, *sua sponte*, that their claims were timely as a matter of law even though there was evidence that they knew or had reason to know of their injuries and the alleged causes of those injuries more than three years before filing their claims (the limitations period for a FELA claim).

4. Whether a new trial on damages is required because the trial court barred CSXT from introducing evidence of the normal retirement age for railroad employees to show that the plaintiffs were reasonably likely to have retired before age 65 even if they had not been injured, thereby demonstrating that plaintiffs' economist had overestimated plaintiffs' future economic losses from their anticipated inability to work.

5. Whether a new trial on damages is required because the trial court refused to allow apportionment of liability among the causes of plaintiffs' injuries other than the parties' negligence, such as obesity, pre-existing conditions, and age.

6. Whether a new trial on damages is required for two of the plaintiffs because the trial court refused to allow CSXT to introduce evidence of their Railroad Retirement Board benefits to rebut their specific and direct claims of financial distress.

7. Whether the damages awarded to plaintiffs are excessive and therefore should be substantially reduced.

8. Whether plaintiffs' claims that they were injured by walking on allegedly improper ballast were precluded by federal law.

STATEMENT OF FACTS

As part of its extensive East Coast rail network, CSXT operates a number of rail yards within the greater Baltimore area and Maryland generally. *See* E0448-55. These yards consist of a series of interconnected tracks and associated buildings where CSXT disassembles incoming trains and assembles outgoing trains to effectively transport goods across its rail network. Trains enter and exit

the yard on a "mainline" track (*i.e.*, a track that is used to move goods between locations), but rail cars generally are parked on one of the parallel side tracks while in the yard. *See* E0469-70. The nine plaintiffs in this trial alleged that their knee conditions, and, in one case, a back condition, were caused by their work in CSXT's rail yards.

A. Plaintiffs' occupations

Each of the nine plaintiffs has been a CSXT employee—or an employee of CSXT's predecessors such as the Baltimore & Ohio Railroad (*see* E0474)—for approximately 30 to 35 years. Although some of the plaintiffs have held other positions at the railroad, seven of them have worked primarily as trainmen and two as car inspectors.

A trainman—who also can be called a conductor, brakeman, or switchman—is responsible for breaking down the trains that enter the yard and reconfiguring them into appropriate trains for onward transportation. The job duties of a trainman include throwing switches that change the destination of cars on the various interconnected tracks, engaging and disengaging the manual brakes on the individual rail cars, and connecting the hoses that control the airbrakes between cars. *See* E0468-73. At trial, plaintiffs alleged that, each shift, a trainman walks approximately 5 to 10 miles (*see* E0485-86), throws dozens of switches (*see* E0487), and couples dozens of air hoses (*see* E0494-95).

A car inspector, or carman, inspects rail cars to ensure that they are in safe operating order. A car inspector works his way down a line of cars parked on a side track, inspecting each car at several points to ensure that maintenance is not needed. *See* E0923-39. Plaintiffs testified that this requires them to briefly squat at several points so that they can see a specific component such as the brake shoe. *See id.* At trial, plaintiffs alleged that a car inspector will inspect approximately 150 to 200 cars in each shift (*see* E0939), walking a total of approximately 5 to 8 miles (*see* E0926-27). If a car inspector finds a defect, he will either repair it on

the track if possible—such as when a brake shoe must be replaced—or send the car to the shop if more extensive work is needed. *See* E0939-42.

B. Plaintiffs' medical conditions

Although there was evidence that most of the plaintiffs had been experiencing symptoms of their alleged knee conditions for years, all but two of them had never sought medical attention for those symptoms before they received a solicitation from plaintiffs' counsel. *See* pages 48-57, *infra*. Accordingly, the primary diagnoses, treatments, surgeries, and prognoses for plaintiffs' medical conditions were provided by the physicians that plaintiffs' counsel had selected for purposes of prosecuting these cases: Dr. Constantine Misoul and Dr. John O'Hearn.

Each of the nine plaintiffs presented evidence that he suffers from osteoarthritis of one or both knees. Osteoarthritis is a degeneration of the cartilage that coats the ends of bones in a joint (in this case the femur and tibia) and allows the bones to move smoothly against each other when the joint moves. *See* E0792-94. The stages of osteoarthritis range from superficial cracks in the surface of the cartilage through complete degeneration of the cartilage, resulting in bone-on-bone contact. *See id.*; E1048-52. Osteoarthritis of the knees is a common condition among men of plaintiffs' age: It was undisputed at trial that approximately 30 to 50 percent of males over 50 years of age have some arthritic changes in their knees. *See* E0571-72, E0623-30, E0997. Moreover, some people are genetically predisposed to osteoarthritis (*see* E0570, E0575-76, E0795-96), and osteoarthritis of the knees is directly associated with certain other health conditions, particularly obesity (*see* E0572-75, E0797-98).

In addition to osteoarthritis, some of the plaintiffs also claimed damage to one or more of the menisci in their knees. The menisci are horseshoe-shaped cartilage pads that sit between the femur and tibia (one on both the inside and outside of the knee). A healthy meniscus absorbs a significant amount of the force from any impact to the knee and protects the cartilage on the femur and tibia. A

damaged meniscus can tear, break into pieces, or simply degenerate.[1] *See* E1044-46.

Most of the plaintiffs had undergone arthroscopic surgery on one or both knees. This is an outpatient procedure in which a thin tube is inserted into the knee in order to repair the cartilage, a meniscus, or both. *See* E0596-97, E1064-65. The recovery period for this procedure normally is a few days to a week. *See* E813-17, E0982-83. Many of the plaintiffs also received injections into their knees of either cortisone, an anti-inflammatory (*see, e.g.*, E0588-90), or Synvisc, a synthetic lubricant (*see, e.g.*, E0620-21). Finally, plaintiffs' medical experts opined that most of the plaintiffs might need knee replacement surgery at some point in the future, although only one plaintiff (Larry Zientek), actually had been scheduled for such surgery. *See* E0994-96.

C. Plaintiffs' theories of liability

Plaintiffs alleged that their knee conditions were caused, in part, by various tasks that they performed during their work in CSXT's rail yards. The underlying theory behind each of these allegations is that repetition of an activity that places stress on the knee will cause the cartilage to degenerate over time. Plaintiffs called this the "cumulative trauma" or "microtrauma" theory of causation. *See* E0577, E0795-801. Their ergonomic and medical experts testified that each of several activities that are part of plaintiffs' job descriptions causes microtrauma that, when repeated many times, will contribute to the onset and progression of osteoarthritis in the knees. CSXT's experts, on the other hand, testified that the activities plaintiffs identified do not contribute to osteoarthritis and, indeed, are consistent with the type of regular exercise that is recommended to maintain healthy cartilage.

Walking on large ballast. The primary contention in these cases is that plaintiffs' knee conditions were caused by years of walking in CSXT's rail yards.

[1] One of the plaintiffs, Eddie Brown, also suffered from a back injury that he claimed was work related.

The surface in a rail yard consists primarily of crushed rock, slag (a byproduct of steel production), and cinders. Depending on the location of these materials within the yard, they function to support the tracks (and the trains on those tracks), allow drainage, and provide a walking surface for workers. *See* E0643-45, E1140-42. Crushed rock, which also is known as "ballast," is the most common surface material. *See* E1142-43. Ballast comes in two varieties that are of relevance to this case. The first—which is called "large," "mainline," or "track" ballast—consists of rocks that range from 1 to 2.5 inches in diameter with a median, or "nominal," size of 1.5 inches. *See* E0720-27. The second—which is called "small," "yard," "walkway," or "walking" ballast—consists of rocks that range from 0.375 to 1 inch in diameter, with a median, or "nominal," size of 0.75 inches.[2] *See id.* Plaintiffs alleged that CSXT negligently used significant amounts of large ballast in its rail yards even though it knew or should have known that walking on that ballast, rather than small ballast, could cause cumulative trauma injuries such as knee osteoarthritis.

1. CSXT's internal regulations require the use of small ballast in rail yards where there is "considerable foot traffic." *See* E0858-59. CSXT's witnesses testified that the Maryland yards at issue in this case actually contain primarily small ballast walking surfaces for workers. *See, e.g.*, E1145-50, E1047-50, E1253. Plaintiffs' expert testified that he found some large ballast in the Baltimore yards (E0659-62), and plaintiffs testified that, in their non-expert opinion, they had worked on large ballast and that the Baltimore yards contained significant amounts of large ballast (*see, e.g.*, E0921-22, E0927).

2. It was undisputed at trial that large ballast is a superior surface from a purely engineering standpoint (because it provides better stability and drainage for

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[2] The size of ballast is determined by the screen through which the rock is sifted—for example, one-inch ballast must pass through a screen with one-inch by one-inch gaps, whereas 2.5 inch ballast must pass through a screen with 2.5-inch by 2.5-inch gaps. *See* E0716-19.

the track) and that it would not be safe to use small ballast to support a mainline track. *See* E0644-45, E0728-30 (plaintiffs' expert). It also was undisputed that small ballast is generally thought to provide a more comfortable walking surface. *See* E1151-52 (CSXT's expert). It was hotly debated, however, whether walking on large ballast is dangerous (rather than simply less comfortable) and can cause osteoarthritis through the cumulative effects of "microtrauma."

Plaintiffs' experts testified that walking on large ballast causes significant instability in the ankle, which translates into significant stress, or torque, on the knee. *See, e.g.*, E0585-86. And several of the plaintiffs testified that walking on large ballast was less stable than walking on small ballast and would place strain on their ankles and knees. *See, e.g.*, E0471.

One of plaintiffs' experts, Dr. Andres, conducted a study of the "motion of the back of [the] leg and the back of [the] foot" while walking on small and large ballast. *See* E0852-55. He found a "58 percent increase in rear-foot motion walking on big rocks versus walking on small rocks," whereas walking on small ballast was statistically the same as walking on a slab of concrete. E0855. Dr. Andres testified that this increased rear-foot motion when walking on large ballast translates into increased stress on the knee joint. E0856-57. However, he was forced to admit that the increased range of rear-foot motion of the subjects in his experiment who were walking on large ballast in work boots (like those regularly worn by plaintiffs) was ***less*** than the standard range of rear-foot motion for someone walking on a flat, hard surface in athletic shoes (E0868-70). This was the only medical or scientific study that supposedly showed a connection between walking on large ballast and cumulative-trauma injuries such as osteoarthritis.[3]

CSXT's experts testified that, even though people generally think that large ballast is not as comfortable to walk on as small ballast, it still is safe. They

[3] Dr. Andres's study was conducted in 2000 in his garage using several college students and was funded by five law firms that were bringing ballast-related FELA claims. E0860-63.

opined that the stresses placed on the joints when walking on large ballast are similar to those when walking on small ballast and are within the range of normal activities that are recommended in order to preserve strong, stable cartilage. E1191-93, E1272-73.

One of CSXT's experts, Dr. Steven Wilker, had conducted an independent study in his laboratory at the University of West Virginia that compared the forces on the ankle, knee, and hip when performing a variety of tasks on a solid surface, on small ballast, and on large ballast. *See* E1229-46. His study showed that there is no "material change in the forces on the knees when walking on [large] ballast." E1245. At the request of CSXT, Dr. Wilker also conducted similar testing in CSXT's rail yards, measuring the forces on the ankle, knee, and hip while performing the normal job duties of a CSXT employee. *See* E1246-60. Dr. Wilker opined that "when we measure the angles, the angular velocities and angular acceleration and we looked at the heel strikes, they were not materially different for mainline ballast versus yard ballast versus walking on the asphalt," so that "the risk associated with walking on mainline ballast or yard ballast is, from a kinematics and a foot force input standpoint the same." E1260-61; *see also* E1263-73.

Dr. Wilker also opined that the variation in rear-foot motion measured in Dr. Andres's study was not significant as an "ergonomic risk factor * * * in the context of knee injury" and, in fact, was "within the normal range of motion of the rear foot." E1281-82. In other words, he testified that Dr. Andres's study actually supported the proposition that walking on large ballast poses no more risk than normal daily activities (which is consistent with Dr. Andres's admission that the rear-foot motion for walking on large ballast in work boots is less than the rear-foot motion for walking on a flat surface in athletic shoes).

3. It was generally recognized that there is no statistical evidence showing a higher incidence of knee osteoarthritis among railroad workers (*see* E0632-34) and, with the exception of Dr. Andres's recent lawyer-funded study, no literature

on the risk of cumulative-trauma knee injuries from walking on large ballast (*see* E0864-67, E1274-76). CSXT's witnesses testified that, although small ballast is generally thought to be more comfortable to walk on, they do not consider walking on large ballast to pose a risk of damage to the knee through microtrauma. *See, e.g.*, E1151-52. Furthermore, plaintiffs' railroad engineering expert—who had worked at railroads (but not CSXT) for most of his career—testified that he did not learn of the allegation that walking on large ballast could cause cumulative-trauma injuries until a few years ago in the course of litigation and that this alleged risk had not been foreseeable to him when he was working as a railroad engineer. E0730-35. However, plaintiffs argued that, because CSXT's internal regulations require the use of small ballast for walking surfaces in rail yards where there is considerable foot traffic, it can be inferred that CSXT knew that large ballast was an unsafe walking surface. E0643-45, E0648-49. Plaintiffs also introduced a number of letters from union officials to CSXT complaining about the walking surface provided by large ballast in CSXT yards (though not the yards at issue in this trial). E0834-39.

In sum, there were disputes with respect to (1) the amount of large ballast in CSXT's rail yards, (2) whether working on large ballast could have caused plaintiffs' medical conditions, and (3) whether CSXT knew or had reason to know that working on large ballast could cause such conditions.

In addition to this large-ballast theory—which was the primary theory of liability at trial—plaintiffs raised a number of other allegations about their work conditions. Although, in each case, there was a dispute about whether the job duty that plaintiffs identified could cause their medical conditions, there was no evidence that CSXT acted negligently with respect to any of these alternative theories of liability.

Engaging brakes. One of the job duties of a trainman is to climb onto rail cars to engage or disengage the manual brake multiple times each shift. *See* E0494-95. When climbing back down from the car, there is a long step from the

car ladder. *See* E0496-98. Plaintiffs' experts testified that this activity—taking a long step from the ladder—causes microtrauma that can contribute to the degeneration of cartilage in the knee. *See, e.g.*, E0851-52. CSXT's experts, on the other hand, testified that this activity is not materially different from the type of regular vigorous exercise that is recommended to ensure healthy cartilage. *See, e.g.*, E1262-63.

Several of the plaintiffs testified that, at some point in the mid-1990s, they had used a "brake stick" that allowed them to engage or disengage the brake from the ground, without climbing onto the car. They testified that the brake sticks would disappear from the yards and not be replaced. *See, e.g.*, E0501-02. There was no evidence, however, that these brake sticks were designed to remedy a dangerous situation—rather than simply provide a more efficient and convenient method of performing a trainman's job. Moreover, there was no evidence that CSXT knew or should have known that mounting and dismounting rail cars multiple times a day causes osteoarthritis (or any other cumulative injury). In other words, even if this activity contributed to plaintiffs' medical conditions, there was no evidence that CSXT was acting negligently by failing to ensure the availability of brake sticks or by requiring trainmen to mount and dismount rail cars to engage and disengage brakes—a task that is necessary to the operation of a rail yard—multiple times a day.

Throwing ball-handled switches. Another regular duty of a trainman is throwing track switches dozens of times a day. *See* E0487. Historically, most of the switches in CSXT's rail yards were "ball-handled switches" that require the trainman to squat and then lift a 30-pound metal handle to throw the switch. *See* E0488-92. Plaintiffs' experts testified that this activity—lifting the switch from a squatting position—causes microtrauma that can contribute to the degeneration of cartilage in the knee. *See, e.g.*, E0849-50. CSXT's experts, on the other hand, testified that this activity is not materially different from the type of regular

athletic activity that is recommended to ensure healthy cartilage. *See, e.g.*, E1194-97, E1261.

In approximately 1994, the "bow-handled switch" was invented, which allows a trainman to throw the track switch while upright. *See* E0736-39. CSXT's witnesses testified that CSXT systematically changed out the switches in its yards over several years once the bow-handled switch was available and, in fact, was ahead of the industry in this regard. *See* E1135-40, E1220-21. Some of the plaintiffs testified that CSXT did not replace all of the ball-handled switches immediately, but instead waited until an old switch was broken to replace it and that there still were some ball-handled switches in CSXT's yards at least as late as 2005. *See, e.g.*, E0493-94. Although the bow-handled switch was designed to be easier to operate, there was no evidence that ball-handled switches were associated with cumulative injuries, let alone that CSXT knew or should have known that operating a ball-handled switch causes osteoarthritis. Indeed, plaintiffs' railroad engineering expert admitted that a properly maintained ball-handled switch is safe to operate. E0739-40. In other words, even if this activity contributed to plaintiffs' medical conditions, there was no evidence that CSXT was acting negligently by allowing trainmen to throw a ball-handled switch multiple times a day.

Squatting. At trial, plaintiffs alleged that both trainmen and car inspectors must regularly squat to perform various job duties. The trainmen testified that they are required to squat multiple times a day in order to attach the air-brake hoses between cars. *See* E0495-96. The car inspectors testified that they are required to briefly squat several times for each of the cars that they inspect every shift. *See* E0923-39. Plaintiffs' experts testified that this activity—regular squatting throughout the day—causes microtrauma that can contribute to osteoarthritis. *See* E1054-55. CSXT's experts, on the other hand, testified that this activity is not materially different from the type of regular exercise that is recommended to ensure healthy cartilage. *See, e.g.*, E1261-62.

There was no evidence that the squatting that is required of railroad employees has been associated with injuries, let alone that CSXT knew or should have known that squatting causes osteoarthritis. Moreover, there was no evidence that there are other methods of attaching air-brake hoses or inspecting rail cars—both critical safety measures—that do not involve squatting. In other words, even if this activity contributed to plaintiffs' medical conditions, there was no evidence that CSXT was acting negligently by allowing its employees to squat as part of their work duties.

D. The individual plaintiffs

Richard Bickerstaff. Bickerstaff is a 56-year old car inspector with a left-knee condition who still was working at the time of trial. He claimed economic losses of $189,300 (E1095-96) and was awarded total damages of $900,000 with 70 percent fault assigned to CSXT.

Eddie Brown. Brown is a 57-year old trainman with a right-knee condition and a herniated disk. He stopped working in August 2006. E0594-95. He claimed economic losses of $382,700 (E1100) and was awarded total damages of $2,500,000 with 70 percent fault assigned to CSXT.

Anthony Davidson. Davidson is a 52-year old trainman with a right-knee condition. He stopped working in October 2006. E0514-20. He claimed $612,700 in economic damages (E1101) and was awarded total damages of $2,300,000 with 80 percent fault assigned to CSXT.

Michael Fedorchak. Fedorchak is a 53-year old trainman with left- and right-knee conditions who still was working at the time of trial. He claimed economic losses of $196,600 (E1103) and was awarded total damages of $1,000,000 with 75 percent fault assigned to CSXT.

John Hartman. Hartman is a 52-year old trainman with left- and right-knee conditions who still was working at the time of trial. He had not had surgical intervention, was not projected to be taken off of work in the future, and plaintiffs'

economist did not calculate a future economic loss figure for Hartman. He was awarded total damages of $850,000 with 90 percent fault assigned to CSXT.

Robert Hobgood. Hobgood is a 62-year old conductor and flagman, who worked in an office for approximately 5 years of his employment (E0782-86), with left- and right-knee conditions. He still was working at the time of trial. He claimed economic losses of $44,400 (E1104) and was awarded total damages of $750,000 with 60 percent fault assigned to CSXT.

Stephen Short. Short is a 55-year old conductor with a right-knee condition. He stopped working in May 2005. E0622. He claimed economic damages of $800,000 (E1105) and was awarded total damages of $3,000,000 with 90 percent fault assigned to CSXT.

Nathaniel Young. Young is a 51-year old trainman with left- and right-knee conditions who still was working at the time of trial. He claimed economic damages of $356,200 (E1106) and was awarded total damages of $6,000,000 with 80 percent fault assigned to CSXT.

Larry Zientek. Zientek is a 51-year old car inspector with left- and right-knee conditions. He stopped working in February 2007. E0956-67. He claimed economic losses of $532,500 (E1107-08) and was awarded total damages of $2,000,000 with 70 percent fault assigned to CSXT.

ARGUMENT

CSXT strongly disagrees with the jury's finding of liability because, as the discussion of the evidence above shows, (i) the surfaces in the rail yards at issue are comprised primarily of small ballast, (ii) walking on large ballast does not cause the types of medical conditions from which plaintiffs claim to suffer, and (iii) CSXT had no reason to believe that walking on large ballast could cause such medical conditions. However, given the high standard for reversing a judgment based on the insufficiency of the evidence, and the fact that every inference must be drawn in plaintiffs' favor when considering such an appeal, CSXT does not, in

this appeal, challenge the sufficiency of the evidence to support the liability verdicts.

Nevertheless, the judgment must be overturned because the jury's deliberations were irrevocably tainted by an improper and highly misleading "demonstration" that the trial court allowed plaintiffs' counsel to perform in the courtroom. Further skewing the jury's deliberations, the trial court gave an assumption-of-risk instruction that has been recognized to constitute reversible error in a FELA case. That error, like the improper demonstration, requires a new trial on all issues and as to all plaintiffs.

Moreover, because the trial court ruled, *sua sponte*, that six of the plaintiffs' claims were timely as a matter of law despite the fact that there was substantial evidence of untimeliness, the judgment with respect to those six plaintiffs must be vacated and their cases remanded for a new trial on the statute of limitations.

But even if the liability findings could stand, a series of errors infected the damages calculations and undoubtedly contributed to the shockingly high awards described above. First, the trial court prevented CSXT from introducing evidence from which the jury could have found that the plaintiffs would likely have retired at a younger age than what they claimed at trial. That error essentially allowed each plaintiff to choose the amount of his future economic losses without fear of rebuttal. Second, in an extremely prejudicial ruling, the trial court refused to allow the jury to apportion damages to any cause of plaintiffs' medical conditions other than CSXT's or plaintiffs' negligence. That completely erased the conceded causative role of factors such as plaintiffs' age, pre-existing medical conditions, and obesity—shifting the burden for that portion of the damages to CSXT. Both of these errors require a new trial on damages as to all plaintiffs.

Third, with respect to two of the plaintiffs, a new trial on damages is required for the additional reason that the trial court prevented CSXT from introducing evidence of their Railroad Retirement Board disability benefits in

contravention of clear case law allowing such evidence to be used in rebuttal when—as here—the plaintiff makes a specific and direct claim of financial distress.

Finally, even if the Court does not believe that a new trial is warranted, it should order a substantial remittitur of each plaintiff's damages because those damages are shockingly disproportionate to the injuries claimed.

I. The Court Erroneously Allowed Plaintiffs' Counsel To Conduct A Misleading Demonstration By Walking On Individual Ballast Rocks In The Courtroom, Skewing The Jury's Impression Of Plaintiffs' Work Conditions.

The impact on a person's joints from walking on large ballast, as opposed to small ballast, was a major subject of dispute at trial. Plaintiffs presented expert testimony that walking on large ballast causes "microtrauma" to the knee joints that, over time, can wear down the cartilage. CSXT, on the other hand, presented expert testimony that walking on large ballast is no more stressful to the knee than other common activities and does not damage the cartilage. *See* pages 6-8, *supra*. This scientific debate between experts was overshadowed, however, by a visually arresting but highly misleading "demonstration" of walking on large ballast conducted not by one of the experts, but by plaintiffs' counsel.

During the redirect of plaintiffs' railroad engineering expert, Raymond Duffany, plaintiffs' counsel placed 10 to 12 samples of mainline ballast rocks on the courtroom floor and began to step on them in an alleged demonstration of what it is like to walk on large ballast in a rail yard. E0741-43. CSXT objected to this misleading and improper demonstration, but the trial court overruled the objection and plaintiffs' counsel resumed standing and walking on the rocks. E0741-42. Unsurprisingly, this created quite a spectacle for the jury. When moving for a mistrial after Mr. Duffany left the stand (E0745-52), CSXT's counsel observed that the alternate jurors stood up from the back row of the jury box so that they could watch this "demonstration" (E0746). And Judge Nance noted that he was so struck by the awkwardness of counsel during the performance that he had to look

away because he was convinced that counsel was going to fall over. E0746. ("[Plaintiffs' counsel] did put his foot on it. I thought he was about to fall to be honest, so I looked the other way at that point."). Nevertheless, Judge Nance ruled that plaintiffs' counsel "came to the edge" but "didn't cross[] the edge" (E0750-51) and that the demonstration was proper because CSXT had used "the same rocks * * * to be demonstrative of that which would be in the area [where the plaintiffs worked]" (E0746).

"[T]he decision to admit demonstrative evidence rests within the sound discretion of the trial court." *Andrews v. State*, 372 Md. 1, 20, 811 A.2d 282, 293 (2002) (quoting *Ware v. State*, 348 Md. 19, 65, 702 A.2d 699, 721-22 (1997)). However, "before demonstrative evidence is admitted, there ***must*** be 'ample evidence' that the item offered is substantially similar to the item that actually played a part in the events at issue. The test is the same when, rather than an item, the subject of dispute is an event." *Id.* at 25, 811 A.2d at 296 (citations and internal quotation marks omitted; emphasis added); *see also id.* at 20, 811 A.2d at 293 (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 that it will be helpful to the witness in explaining his or her testimony") (emphasis added). If—and only if—such a foundation has been laid, the demonstration can be admitted "if the court determines that the evidence will be helpful to the trier of fact. * * * The court must weigh the demonstrative evidence's probative value against the possibility of unfair prejudice or confusion." *Id.* at 20-21, 811 A.2d at 293 (quoting 2 MCCORMICK ON EVIDENCE § 212, at 9 (J. Strong 4th ed.1992)).

Here, the trial court failed utterly to carry out its role as a gatekeeper of demonstrative evidence. Plaintiffs made no attempt to lay a foundation, let alone by "ample evidence," that counsel's "demonstration"—walking on individual ballast rocks placed on the smooth, hard courtroom floor—was substantially

similar to walking on layered ballast in a rail yard. Indeed, plaintiffs' counsel did not have "the required knowledge" of the subject to make a showing of similarity (*see id.* at 20, 811 A.2d at 293). Contrary to the trial court's rationale for its ruling (E0746), the fact that counsel was stepping on genuine large-ballast samples is irrelevant. By placing individual rocks on the smooth, hard courtroom floor, plaintiffs' counsel destroyed any similarity between his demonstration and plaintiffs' work conditions. In the rail yard, large ballast is stabilized from below and on the sides by the dirt in which it is embedded or by the lower layers of ballast into which it has settled, or "interlock[ed]" (E1143-44). On the courtroom floor, there was nothing to prevent the individual rocks from slipping or rolling under counsel's feet, greatly exaggerating the effect that walking on large ballast has on the human ankle and knee.

Maryland courts have not hesitated to vacate a judgment when the trial was tainted with an improper demonstration. For example, in *Andrews* the Court of Appeals reversed a conviction because the trial court allowed the prosecution's expert to demonstrate shaken-baby syndrome using a doll even though the expert admitted that the demonstration was not substantially similar to the alleged crime and, in fact, misrepresented the forces involved in shaking a baby. The Court of Appeals held that "[w]ithout laying a proper foundation that the in-court demonstration would be substantially similar to the events [at issue], the demonstration was irrelevant as a matter of law." 372 Md. at 26-27, 811 A.2d at 297. The prosecution argued that any prejudice from the improper demonstration was cured by the defendant's ability to cross-examine the expert and the trial court's cautionary instruction regarding the limitations of the demonstration. The Court of Appeals disagreed. It specified 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." *Id.* at 26, 811 A.2d at 296. It also explained that a cautionary instruction "acknowledging that the demonstration was not an 'accurate re-enactment' and

only an opinion" was ineffective because "demonstrative exhibits tend to leave a particularly potent image in the jurors' minds." *Id.* at 27, 811 A.2d at 297.

Andrews is on point here. Because plaintiffs did not even try to show that their "demonstration" was substantially similar to the events at issue, "the demonstration was irrelevant as a matter of law." Nor could plaintiffs have laid such a foundation if they had tried. Stepping on individual rocks placed on the floor of a courtroom obviously is not "substantially similar" to walking on layers of mainline ballast in a rail yard. Rocks 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. As the trial court itself observed, when plaintiffs' counsel walked on the sample ballast, it looked as if he were about to fall. E0746.

Moreover, because plaintiff's "demonstration" greatly exaggerated the impact that walking on ballast has on the human body, it was highly prejudicial. And, as noted, the effect of the "demonstration" was not lost on the court or the jurors. The court had to look away because counsel was so unstable walking on the ballast (E0746), while the jurors showed their captivation by standing up from the back row of the jury box in order to more closely observe the spectacle (*id.*). Given the parties' competing characterizations of walking on large ballast—and particularly the weight of CSXT's scientific (but, from the jury's perspective, abstract) showing that walking on large ballast is no more stressful than everyday activities such as walking in athletic shoes (*see* page 8, *supra*)—it is entirely possible that counsel's visceral demonstration was the factor that tipped the jury in plaintiffs' favor on this issue. As the Court of Appeals noted in *Andrews*, "demonstrat[ions] tend to leave a particularly potent image in the jurors' minds." *Id.* at 27, 811 A.2d at 297. Here, the image left by plaintiffs' improper demonstration infected the entire debate over the effect that walking on large ballast has on the human body by providing the most memorable—even if most

misleading—piece of "evidence" on that topic. The only remedy for this error is a new trial.

II. The Trial Court Erred By Giving A Misleading Assumption-of-Risk Instruction.

In 1939, Congress abrogated the assumption-of-risk defense in cases under FELA by amending the Act to specify that a railroad employee "shall not be held to have assumed the risks of his employment." 45 U.S.C. § 54. "[T]he result is an Act which requires cases tried under [it] ***to be handled as though no doctrine of assumption of risk ever existed***." *Tiller v. Atl. Coast Line R.R.*, 318 U.S. 54, 64 (1943) (emphasis added).

Accordingly, courts consistently have recognized that it is error to give an instruction advising the jury that the plaintiff does not assume the risks of his or her employment. Courts have found that this type of instruction is "a confusing, negative statement" (*Heater v. Chesapeake & Ohio Ry. Co.*, 497 F.2d 1243, 1249 (7th Cir. 1974)) that "serves only to obscure the issues in the case" (*Casko v. Elgin, Joliet & E. Ry. Co.*, 361 F.2d 748, 751 (7th Cir. 1966)). A precautionary assumption-of-risk instruction is "likely to confuse rather than instruct the jury * * * [b]ecause the doctrine of assumption of risk play[s] no part in the case." *Phillips v. Chesapeake & Ohio Ry. Co.*, 475 F.2d 22, 26 (4th Cir. 1973).

Contrary to this clear authority, and over CSXT's objection (E1342), the trial court gave just such an instruction in this case:

> [I]n any action brought against CSXT Transportation for injury to recover damages for injuries to the said plaintiff or employee, that employee 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 officer or supervisor of the same railroad or carrier. And no employee shall be held to have assumed the risk of his employment in any case where the violation by such railroad of any statute enacted for the safety of employees contributed to the injury or death of an employee.

E1333-34.

This instruction is strikingly similar to one that the Virginia Supreme Court found to constitute reversible error 20 years ago. *See Norfolk & W. Ry. Co. v. Sonney*, 374 S.E.2d 71 (Va. 1988). The instruction in *Sonney* stated:

> In any action brought against any common carrier . . . to recover damages for injuries to . . . any of its employees, such employee shall not be held to have assumed the risks 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 such carrier.

Id. at 76 n.4 (omissions in original). The Virginia Supreme Court could find no indication "that the railroad was invoking [an assumption-of-risk] defense" and held that "it is reversible error to grant an instruction on assumption of risk in any FELA case, absent an allegation or proof on the question." *Id.* at 76; *accord Siciliano v. Denver & Rio Grande W. R.R. Co.*, 364 P.2d 413, 415 (Utah 1961) ("[I]n the usual case it is prejudicial error to instruct that under [FELA] the employee does not assume the risks of his employment occasioned by the employer's negligence * * * unless * * * raised by the pleadings or evidence.").

Here, CSXT did not plead or argue that it could avoid liability because the plaintiffs had assumed the risks of their employment. On the contrary, CSXT argued that it provided a reasonably safe workplace—and thus was not negligent in the first place—and that plaintiffs' alleged medical conditions were not caused by their employment. Accordingly, it was clear and reversible error to give a misleading assumption-of-risk instruction. That instruction "could have [had] no other effect except to have confused and misled the jury by inducing the erroneous inference that defendant was an insurer against all risks of plaintiff's employment, regardless of their character or genesis." *Ellis v. Union Pac. R. Co.*, 27 N.W.2d 921, 926 (Neb. 1947). For this reason, the judgment of the district court should be vacated and a new trial should be ordered as to all plaintiffs.

III. The Trial Court Erred By Ruling, *Sua Sponte*, That Plaintiffs' Claims Were Timely As A Matter Of Law.

An action cannot be maintained under FELA "unless commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56. Federal law governs application of this three-year limitation period. *Scarborough v. Atl. Coast Line R.R. Co.*, 190 F.2d 935, 938 (4th Cir. 1951). And under federal law, "this statute of limitations is not an affirmative defense; instead, compliance with 45 U.S.C. § 56 is a condition precedent to recovery under the Act." *Johnson v. Norfolk & W. Ry. Co.*, 985 F.2d 553, 1993 WL 17061, at *1 (4th Cir.) (unpublished table opinion). "Failure to timely bring suit not only bars the claimant's remedy, but it also destroys the employer's liability." *Emmons v. S. Pac. Transp. Co.*, 701 F.2d 1112, 1117 (5th Cir. 1983); *accord Kichline v. Consolidated Rail Corp.*, 800 F.2d 356, 360-61 (3d Cir. 1986). "The burden is therefore on the claimant to allege and to prove that his cause of action was commenced within the three-year period." *Johnson*, 1993 WL 17061, at *1; *accord Harvey v. CSX Transp., Inc.*, 23 F.3d 401, 1994 WL 168354, at *2 (4th Cir.) ("[t]he burden is on the claimant to allege and prove" timeliness).

In "cases of progressive trauma"—such as this one—"the accrual date for purposes of timeliness is determined by applying what has come to be called 'the discovery rule.'" *CSX Transp., Inc. v. Miller*, 159 Md. App. 123, 151, 858 A.2d 1025, 1041 (2004). "The discovery rule is an ***objective*** test of the plaintiff's awareness" (*Johnson v. Norfolk & W. Ry. Co.*, 836 S.W.2d 83, 85 (Mo. Ct. App. 1992) (emphasis added)) derived from the Supreme Court's decisions in *Urie v. Thompson*, 337 U.S. 163 (1949) and *United States v. Kubrick*, 444 U.S. 111 (1979). Under this rule, a claim accrues "when the claimant becomes aware or has reason to be aware that he has been injured and is aware or has reason to be aware of the cause of his injury." *Miller*, 159 Md. App. at 153, 858 A.2d at 1042 (emphasis omitted); *accord Townley v. Norfolk & W. Ry. Co.*, 887 F.2d 498, 501 (4th Cir. 1989).

Moreover, as the Supreme Court noted in *Kubrick*, "[a] plaintiff . . ., armed with facts about the harm done to him, can protect himself by seeking advice in the medical and legal community." 444 U.S. at 123. Accordingly, "upon experiencing symptoms ***a plaintiff has a duty to investigate*** both the injury and any suspect cause." *Fries v. Chicago & Nw. Transp. Co*., 909 F.2d 1092, 1096 (7th Cir. 1990) (emphasis added); *accord Matson v. Burlington N. Santa Fe R.R.*, 240 F.3d 1233, 1235 (10th Cir. 2001) (the discovery rule "imposes on plaintiffs an affirmative duty to exercise reasonable diligence and investigate the cause of a known injury"); *Vincent*, 552 S.E.2d at 646 ("The *Kubrick* Court emphasized a claimant's affirmative duty to investigate his injury with reasonable diligence."); *Johnson*, 836 S.W.2d at 86 ("Rather than waiting for a physician's diagnosis, a plaintiff has an affirmative duty to investigate his injury and any suspect cause once he experiences symptoms."). "This is a fair rule since the discovery rule should not be abused by plaintiffs who are aware that an injury exists yet choose to ignore it and fail to investigate the cause." *Williams v. S. Pac. Transp. Co.*, 813 F. Supp. 1227, 1232 (S.D. Miss. 1992); *accord Fries*, 909 F.2d at 1095-96.

In *Miller*, this Court explained that the question of timeliness in most FELA cases will fall "within that 80% bulge of the bell-shaped curve where there [is] some plausible evidence pointing in each direction." 159 Md. App. at 150, 858 A.2d at 1040-41. In such cases, "the limitations issue [is] quintessentially a matter of fact" that must be decided by the jury. *Id.* at 150, 858 A.2d at 1041. Only in the "overwhelming case" (*id.* at 160, 858 A.2d at 1046), where the evidence with respect to timeliness is "clear, decisive, and unequivocal," may a trial judge conclude, as a matter of law, that the action is or is not timely (*id.* at 150, 858 A.2d at 1040).

Ignoring these precedents—and despite the fact that plaintiffs had not even moved for judgment on this issue—the court below held, as a matter of law, that all nine of the plaintiffs had brought their claims in a timely manner and thus took

this issue from the jury. That ruling was error, necessitating a new trial to determine whether the claims of six of the plaintiffs were timely.

A. The trial court ruled, *sua sponte*, that the claims of all of the plaintiffs were timely as a matter of law.

At the close of plaintiffs' case, CSXT moved for judgment based on FELA's three-year statute of limitations with respect to six plaintiffs: Bickerstaff (E1129), Brown (E1128), Davidson (E1112), Hobgood (E1131-32), Short (E1123-26), and Young (E1130). The court denied CSXT's motions, indicating that the issue of timeliness was for the jury to decide:

> The Court feels that the issue[] of statute of limitations more appropriately [is] a jury question in light of the evidence that's been submitted and the arguments made is that the issue as to statute of limitations as to all of those four plaintiffs will be submitted to the jury for the jury's consideration.

E1133-34.[4]

At the close of the evidence, CSXT renewed its motion as to the same six plaintiffs. E1285-92. After hearing argument from both sides, the court made the following vague ruling:

> [T]he Court notes that while the plaintiff is not allowed to ignore medical conditions and is required to seek out appropriate medical treatment, the Court is reminded that case law is very clear that the mere fact that one has pain in the workday does not mean that it necessitates going to the doctor.
>
> The Court turns it and reviews the facts and circumstances before it. There is sufficient evidence before the Court that the Court will deny the motion as to the statute of limitations as to each of said plaintiffs, and all other matters will go to the jury.

E1293-94.

CSXT subsequently proposed several instructions on the statute of limitations. *See* E364-66. The trial court refused to give the instructions and

[4] The trial court obviously intended its ruling to apply to all six plaintiffs mentioned in CSXT's motion as it did not enter judgment in CSXT's favor as to any plaintiff.

instead informed the parties that, at the close of evidence, it not only denied CSXT's motion for judgment, it also ruled *sua sponte* that plaintiffs' claims were timely as a matter of law. *See* E1343-46.[5]

B. There was ample evidence from which a jury could find that the claims of six of the plaintiffs were untimely.

Each plaintiff had the burden to prove that his claim accrued ***on or after February 14, 2002*** (or, in Bickerstaff's case, ***December 20, 2001***).[6] *See Johnson*, 1993 WL 17061, at *1; *Harvey*, 1994 WL 168354, at *2. Each plaintiff's claim accrued when he "bec[ame] aware or ha[d] reason to be aware that he ha[d] been injured and [was] aware or ha[d] reason to be aware of the cause of his injury." *Miller,* 159 Md. App. at 153, 858 A.2d at 1042. Whether a plaintiff "ha[d] reason to be aware" of his medical condition and its cause depends in part on his affirmative duty to investigate symptoms by seeking medical or legal assistance. *See, e.g.*, *Tolston v. Nat'l R.R. Passenger Corp.*, 102 F.3d 863, 866 (7th Cir. 1996); *Fries*, 909 F.2d at 1096; *Matson*, 240 F.3d at 1236; *Williams*, 813 F. Supp. at 1232; *Vincent*, 552 S.E.2d at 646; *Johnson*, 836 S.W.2d at 86. And when ruling for plaintiffs as a matter of law, the trial court obviously was required to "assume[] the truth of all credible evidence on the issue and any inferences therefrom in the light most favorable to [CSXT]." *Lowery v. Smithsburg Emergency Med. Serv.*, 173 Md. App. 662, 683, 920 A.2d 546, 558 (2007).

Accordingly, plaintiffs were entitled to judgment only if the evidence that their claims were timely was "clear, decisive, and unequivocal." *Miller*, 159 Md. App. at 150, 858 A.2d at 1040. If, on the other hand, there was "some plausible evidence" (*id.* at 150, 858 A.2d at 1041) that a plaintiff knew or had reason to know about his medical condition and its alleged cause before February 14, 2002

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[5] Although the court did not expressly mention Bickerstaff, it obviously intended its ruling to encompass his claim because it refused to give any instruction on the statute-of-limitations issue.

[6] All plaintiffs except Bickerstaff filed their claims on February 14, 2005. Bickerstaff filed his claim on December 20, 2004.

(or, in Bickerstaff's case, December 20, 2001), CSXT was entitled, at the very least, to submit the question of timeliness to the jury. Although the evidence showed that Fedorchak's, Hartman's, and Zientek's claims were timely—and judgment for them on the statue of limitations thus was warranted—the evidence with respect to the other six plaintiffs was, at least, conflicting, placing them within the "80% bulge of the bell-shaped curve" where a jury finding on the question of timeliness is required.

1. There was evidence that six of the plaintiffs knew or had reason to know of their alleged medical conditions more than three years before filing their claims.

For plaintiffs Bickerstaff, Brown, Davidson, Hobgood, Short, and Young, there was at least "some plausible evidence" suggesting that each plaintiff knew or had reason to know of his alleged medical condition ***before*** February 14, 2002, or, in Bickerstaff's case, December 20, 2001.

- Bickerstaff's treating physician, Dr. Misoul, testified that, in 2004, Bickerstaff reported that he had been having "problems with both of his knees ***for ten years***." E0587, E0635 (emphasis added).
- Brown testified that he first started experiencing back pain "***around 2000***." E0880 (emphasis added). Dr. Misoul indicated that, in 2004, Brown told him that he had been experiencing back and knee pain "***on and off for many years***," which the doctor understood to mean ***more than five years***. E0636 (emphasis added).
- Davidson testified that he first experienced knee pain "probably about ***six or seven years ago***" (E0505) (emphasis added), ***in 1999*** (E0546) (emphasis added). Dr. Misoul testified that, in 2004, Davidson reported that he had been having "right knee difficulties ***for five years***." E0637 (emphasis added).
- Hobgood testified at trial that he ***started experiencing knee pain in 2001***. E0760-61 (emphasis added). At his deposition, however,

Hobgood admitted that his knee pain began ***in 1995*** (E0771) (emphasis added) and that he had completed a medical form listing ***1995 as the date of onset*** for his knee pain (E0773-74 (emphasis added)). Dr. Lander testified that, in 2005, Hobgood reported having had knee pain "for years" and completed a medical history form indicating that he had been having pain ***since 1995***. E0827-28 (emphasis added).

- Short testified that he started having problems with his knees "***around 2001***." E1025, E1038-39 (emphasis added).
- Young testified that he began to experience knee pain ***in 1999***. E1005 (emphasis added). Dr. Shepard testified that, in 2004, Young complained of a "***five-year history*** of bilateral or both-sided knee pain." E1283 (emphasis added).

To be sure, each of these plaintiffs also testified that his symptoms began later or that he attributed his symptoms to old age and did not realize that he was "injured" until plaintiffs' counsel contacted him and referred him to a physician who diagnosed his condition in 2003 or 2004. But the evidence described above is more than sufficient to create a jury question as to whether each of these plaintiffs knew ***or had reason to know*** of his alleged medical condition more than three years before filing his claim—especially given the plaintiffs' affirmative duty to investigate any symptoms.

2. There was evidence that these six plaintiffs knew or had reason to know that their alleged medical conditions were allegedly work related more than three years before filing their claims.

"Actual knowledge by the plaintiff of the governing cause of the injury is not necessary to a finding that the cause of action has accrued." *Williams*, 813 F. Supp. at 1232. Nor is it "necessary that the plaintiff be formally advised by a physician or receive a medical diagnosis as to the cause of injury for the action to accrue." *Id.* Rather, "a FELA claim accrues when the plaintiff knows ***or should know*** that his injury is ***merely work-related***." *Matson*, 240 F.3d at 1236 (emphasis

added); *accord Tolston*, 102 F.3d at 865 (a FELA claim accrues "as long as [the claimant] knows ***or has reason to know*** of a potential cause") (emphasis added); *Bealer v. Mo. Pac. R.R. Co.*, 951 F.2d 38, 39 (5th Cir. 1991) (a FELA "claim accrues when a plaintiff knows or should know that his injury is work related"). Here, not only was there evidence that these six plaintiffs knew or had reason to know of their alleged medical conditions, there also was evidence that they knew or had reason to know that their medical conditions allegedly were associated with their work more than three years before filing their claim.

Most obviously, according to plaintiffs' own position at trial, if they had sought medical care when they first experienced their symptoms, it is reasonably likely that they would have received the same diagnosis that they received later when they finally sought medical care on the advice of counsel. Plaintiffs' expert, Dr. Misoul, testified that, in his opinion, the relationship between occupational activities and osteoarthritis is not a "secret in the medical community" and has been known to him since he was in medical school in the early 1980s.[7] E580-84; *see also* E0568. In other words, according to plaintiffs' own expert, if plaintiffs had sought medical care when they experienced their initial symptoms—as they were required to do under the discovery rule—it is reasonable to infer that they would have learned about the alleged connection between their medical conditions and their employment for CSXT. That inference alone, along with the evidence on the timing of plaintiffs' initial symptoms, is enough to create a jury question on whether plaintiffs had reason to know about the alleged cause of their medical conditions more than three years before filing their claims.

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[7] Although CSXT obviously disputes the alleged connection between plaintiffs' work activities and their medical conditions, plaintiffs should be precluded from, on the one hand, contending for purposes of establishing liability that the connection between work activities such as theirs and osteoarthritis was well known in the medical community while, on the other, supporting their timeliness argument by asserting that they would not have discovered this connection if they had sought medical care for their symptoms.

Moreover, much of the evidence that plaintiffs presented in an attempt to show that CSXT should have known that walking on large ballast caused injuries also suggests that plaintiffs should have known well before the limitations deadline that their medical conditions were work related. For example, Dr. Andres testified that railroad-employee union representatives across the country had been complaining about walking on large ballast since the 1970s and drew particular attention to a 1984 letter that "talks about the issues that are directly relevant to what we are talking about here today." E0834. Dr. Andres also read portions of a union letter complaining that nothing had been done about the ballast problem at the Cumberland, Maryland, yard for over 28 years. E0838-39. In fact, several of the plaintiffs testified that they had complained about large ballast in the past, suggesting that concern over ballast-related injuries was widespread among railroad employees. *See, e.g.*, E480-81 (Davidson), E0895 (Brown), E0943-45 (Zientek), E0986-88 (Bickerstaff).

Finally, for five of these six plaintiffs, there was direct evidence that they actually knew either that their knee pain was work related or that walking on large ballast could cause the type of symptoms that they were experiencing.

- Brown testified that, in his opinion, large ballast was unstable and would cause his feet to roll from side to side and his back to tense up. E0878-79.
- Davidson testified that his knee pain was "aggravated back in 1999" when he engaged in a variety of work-related activities, including throwing switches and walking on ballast. E0547. He said that he would slip and slide when walking on large ballast and had complained about this to management. E0480-82. Davidson also testified that he "felt fine" at the end of the day "once [he] got off the railroad." E0548.
- When Hobgood filled out a medical information form, he stated that he had "work related injuries." E0772-76. He completed that form in July 2005, but admitted that no doctor had diagnosed his condition at that

point and that the information on the form was his personal opinion. *Id.* That created a reasonable inference that Hobgood had considered his knee pain to be a "work related injur[y]" since it began in 1995.

- Short testified that when he first experienced knee pain in 2001, he noticed that he would feel better after he got off work. E1026, E1039. He also testified that, in 2001, he knew that a number of his work-related duties—*e.g.*, "climbing up and down cars, getting switches, [and] getting air hoses"—caused knee pain. E1039.
- Young testified that, in his opinion, walking on large ballast was unstable, like walking on ice. E1004.

To be sure, each of these plaintiffs also testified that he did not learn that his medical condition was work related until plaintiffs' counsel contacted him and referred him to a physician who diagnosed his condition in 2003 or 2004. But the evidence described above, interpreted in the light most favorable to CSXT, was more than sufficient to create a jury question as to whether each of these six plaintiffs knew ***or had reason to know*** that he suffered from a work-related medical condition more than three years before filing his claim. The existence of "some plausible evidence" in CSXT's favor (*Miller,* 159 Md. App. at 150, 858 A.2d at 1041) should have precluded judgment for plaintiffs on this issue.

C. The trial court misunderstood the governing law.

The only explanation for the trial court's ruling was its statement that "the Court is reminded that case law is very clear that the mere fact that one has pain in the workday does not mean that it necessitates going to the doctor." E1293. Apparently, the court believed that—as a matter of law—evidence that a plaintiff experienced symptoms such as pain more than three years before filing his claim cannot support a finding that he "had reason to know" of his injury and its cause. But the cases submitted by plaintiffs in opposition to CSXT's motion for judgment as a matter of law stand only for the unremarkable proposition that pain experienced before the limitations period does not ***necessarily*** prove untimeliness.

See Sandoval v. Union Pac. R.R., 396 F. Supp. 2d 1269, 1272-73 (D.N.M. 2005); *Ray v. Ill. Cent. R.R. Co.*, 864 F. Supp. 569, 570 (E.D. La. 1994). Indeed, those cases suggest that the question whether a plaintiff should have discovered his injury and its cause after experiencing symptoms is "quintessentially a matter of fact" (*Miller*, 159 Md. App. at 150, 858 A.2d at 1041) that must be decided by the jury. *See, e.g., Sandoval*, 396 F. Supp. 2d at 1273 (submitting timeliness issue to jury because there was a "factual issue regarding whether, given Plaintiff's pain, he should have sought medical attention sooner in order to determine that he was injured"); *Ray*, 864 F. Supp. at 570 (same). The rule adopted by the trial court is directly contrary to these cases and the well-established principle that plaintiffs have a duty to investigate their symptoms by seeking medical or legal assistance. *See* page 22, *supra*.

The trial court's *sua sponte* ruling violated the fundamental legal principle that "if there is any evidence, no matter how slight, that is legally sufficient to generate a jury question, the case ***must*** be submitted to the jury for its consideration." *Tate v. Bd. of Educ. of Prince George's County*, 155 Md. App. 536, 545, 843 A.2d 890, 895 (2004) (emphasis added). Because of that ruling, CSXT was not "given a fighting chance on the limitations issue in front of the jury." *Miller*, 159 Md. App. at 159, 858 A.2d at 1046. But the evidence summarized above easily could have led reasonable jurors to conclude that plaintiffs Bickerstaff, Brown, Davidson, Hobgood, Short, and Young knew or had reason to know about their medical conditions and the alleged causes of those conditions more than three years before filing their claims. Accordingly, at bare minimum, CSXT is entitled to a new trial on whether the claims of these six plaintiffs were timely.

IV. The Trial Court Erroneously Prevented CSXT From Introducing Evidence Of The Normal Retirement Age For Railroad Employees.

Each plaintiff claimed that he would loose future wages because his alleged medical condition would prevent him from working at his former position. In an

attempt to predict each plaintiff's future lost income, plaintiffs' economist, Dr. Hamilton, calculated each plaintiff's earning potential and projected it into the future, beginning on the date that the plaintiff was expected to stop (or had stopped) working and ending on the date when the plaintiff ***would have*** stopped working but for his alleged medical condition. For each year into the future, Dr. Hamilton reduced the projected lost earnings by the expected risk that the plaintiff would have died by then, using standard mortality tables. E1090-91. But when deciding when the plaintiffs would have stopped working, Dr. Hamilton simply accepted at face value each plaintiff's testimony that he had intended to work until age 64 or 65—making no reduction for the risk of an earlier retirement. E1090; *see also* E1090-108.

CSXT attempted to cross-examine Dr. Hamilton with statistics showing that most employees in the railroad industry retire close to age 60, not 65. E1109-10. This evidence would have demonstrated that Dr. Hamilton's future lost-wage estimates were too high because he failed to reduce each year's projected lost earnings by the expected risk that the plaintiff would have retired by then (*i.e*, he failed to apply a retirement-risk discount analogous to his mortality-risk discount). The excluded statistics also would have provided the best method of calculating the missing discount (just as the mortality tables provided for the risk of death).

Plaintiffs objected to this evidence, and the trial court sustained their objection, expressing the opinion that standard retirement-age statistics were "irrelevant to these plaintiffs" because the plaintiffs already had testified that they had planned to retire at age 64 or 65. E1109-10. That manifestly erroneous ruling was obviously prejudicial and invalidates the damages awarded in this case.

It is well established that "recovery of damages based on future consequences of an injury may be had . . . if such consequences are ***reasonably probable or reasonably certain to occur***." *Johns Hopkins Hosp. v. Pepper*, 346 Md. 679, 695, 697 A.2d 1358, 1366 (1997) (emphasis added; internal quotation marks omitted; omission in original). Consistent with this principle, the jury in the

present case was instructed to award future economic damages only if it found "that the plaintiff is ***reasonably certain*** to lose earnings in the future or to incur medical expenses in the future." E1337 (emphasis added); *accord* E1338 (instructing the jury that it may award future economic losses that, "with ***reasonable probability***, may be expected in the future") (emphasis added). Accordingly, the relevant question regarding future economic damages in this case was what losses were "reasonably certain," not simply what losses were claimed.

A plaintiff's statement that he intended to work until a given age obviously is ***relevant*** to the question whether it is "reasonably certain" that he would have worked until that age (and thus would sustain a loss because he now is unable to work), but it is not ***decisive***. If CSXT had been allowed to cross-examine Dr. Hamilton with evidence of industry retirement statistics, the jury very well could have concluded that it was "reasonably certain" that some or all of the plaintiffs would have retired earlier than they claimed during their testimony. The trial court apparently was of the view that a plaintiff's assertion that he would have been working (rather than retired) at age 64 or 65 is dispositive proof on the subject. That obviously is incorrect. Indeed, the trial court's reasoning also would undermine Dr. Hamilton's mortality-risk discount (*see* E1091-92) because each plaintiff testified that he would have been working (rather than dead) at age 64 or 65. The court's failure to allow CSXT's cross-examination of Dr. Hamilton with industry retirement-age statistics was an abuse of discretion. Because the trial court did not use a verdict sheet that separated out the components of the damages, the only remedy for this error is to vacate the damages in their entirety and to order a new trial on that issue.

V. The Trial Court Erroneously Refused To Allow Apportionment Of The Plaintiffs' Damages.

It is generally recognized that a FELA defendant is entitled to apportion the plaintiff's damages among its own negligence, the plaintiff's contributory

negligence, and other causes.[8] *See, e.g.*, *Nichols v. Burlington N. Santa Fe Ry. Co.*, 148 P.3d 212, 216 (Colo. Ct. App. 2006); *Meyer v. Union R.R. Co.*, 865 A.2d 857, 865-66 (Pa. Super. Ct. 2004); *Rust v. Burlington N. & Santa Fe Ry. Co.*, 308 F. Supp. 2d 1230 (D. Colo. 2003).[9] Courts recognizing this rule have observed that when the Supreme Court held that FELA does not allow apportionment among jointly-liable tortfeasors (*see Norfolk & W. Ry. v. Ayers*, 538 U.S. 135 (2003)), it left undisturbed the long line of cases allowing apportionment among other alternative causes (*see, e.g.*, *Stevens v. Bangor & Aroostook R.R. Co.*, 97 F.3d 594, 601 (1st Cir. 1996); *Sauer v. Burlington N. R.R. Co.*, 106 F.3d 1490, 1495 (10th Cir. 1997); *Lancaster v. Norfolk & W. Ry. Co.*, 773 F.2d 807, 822-23 (7th Cir. 1985); *Schultz v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 775 N.E.2d 964, 974 (Ill. 2002)).

Here, there was substantial evidence that plaintiffs' medical conditions—even if attributable, in part, to negligence by CSXT—had other significant causes such as obesity, smoking, other pre-existing medical conditions, and age.[10] Accordingly, CSXT proposed three instructions regarding apportionment and a verdict sheet that allowed the jury to assign liability to "other factors" in addition to CSXT's and the plaintiff's negligence (*see, e.g.*, E0405).[11]

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[8] As explained below, the sole exception to this rule is that a FELA defendant cannot obtain apportionment for the causal role of a jointly-liable tortfeasor, but must instead seek indemnification from the tortfeasor.

[9] This Court recently considered this issue in an unpublished opinion. *See Fagan v. CSX Transp., Inc.*, No. 800 (Sept. Term 2006), at *19 (Md. Ct. Spec. App. July 18, 2007).

[10] These non-negligence causes are in addition to the role played by plaintiffs' own contributory negligence for conduct such as jumping off moving equipment after that practice had been prohibited (*see, e.g.*, E0533-41, E0802-05).

[11] The first proposed instruction specifically addressed pre-existing injuries:

> Plaintiff claims he aggravated a pre-existing condition. If you find that the Plaintiff's injury was due in part to a pre-existing condition and in part to Defendant's aggravation of that pre-existing condition,

The trial court refused CSXT's instructions and used a verdict form that forced the jury to assign 100 percent of liability to either CSXT's or the plaintiff's negligence (*see, e.g.*, E0408). In response to CSXT's exception (E1347-48), the trial court explained that, in its opinion, an apportionment instruction would have permitted a "second reduction" of plaintiffs' damages because injuries resulting from causes other than the negligence of the parties "shouldn't be in the calculation at all." E1350-51.

> you must determine how much of his injury is a result of Defendant's aggravation of his pre-existing condition. Defendant can only be held responsible for that portion of Plaintiff's present injury that is the result of Defendant's aggravation of his pre-existing condition.

E0394. The second instruction told the jury to discount its award by the likelihood that a plaintiff would have sustained his injuries without CSXT's negligence:

> An award of damages for future wage loss, if any, must be reduced to reflect the likelihood, if you find one exists, that the plaintiff would have sustained future wage losses in any event due to other causes or factors. It is for you to determine what, if any, future wage loss the plaintiff is likely to sustain; what, if any, percentage of that will be a proximate result of the negligence alleged in this action and what, if any, percentage of that will be attributable to other causes or factors and to apportion your award of damages accordingly.

E0398. The third instruction covered non-negligence-based causes other than pre-existing conditions:

> Defendant is also entitled to apportion damages between the various causes of plaintiff's injury, including pre-existing conditions and Plaintiff's own negligence. Based on the evidence in the case, determine, if you can, what percentage of Plaintiff's present condition was caused by the Plaintiff's work, and what percentage was caused by prior injuries, age, weight, pre-existing health problems, personal lifestyle choices, hereditary or genetic factors, other employment, and avocational activities, what percentage was caused by Plaintiff's own negligence and award Plaintiff only the percentage of his damages regarding his alleged injuries which are attributable to the work Plaintiff performed for the railroad.

E0400.

The trial court's rationale appears to have been that plaintiffs already were prevented from recovering for injuries attributable to "non-negligent causes" because the jury was charged that it should award damages only for injuries that were caused by CSXT's negligence (*see* E1326-27, E1332-33). That is obviously mistaken and entirely misses the point of apportionment, which addresses the situation in which an injury or element of damages has ***multiple*** causes, one of which is the defendant's negligence. Neither the trial court's causation instruction nor any other instruction in this case prevented plaintiffs from recovering for such injuries. In fact, it is particularly likely that CSXT was found liable for injuries with multiple causes because, according to the trial court's instructions, the jury could impose liability whenever CSXT's negligence "played ***any part no matter how small*** in actually bringing about or actually causing the injury or damages claimed" (E1326-27 (emphasis added)).[12] An instruction on causation, particularly under this standard, does not obviate the need for apportionment.

Indeed, the circuit court's reasoning is inconsistent with the court's decision to instruct the jury on plaintiffs' contributory negligence. The jurors clearly understood that they were to decide whether CSXT's negligence caused a claimed injury (using the trial court's "any part no matter how small" standard), award total damages for that injury, and then apportion those damages between CSXT's negligence and the plaintiff's comparative negligence. The apportionment instructions and verdict form requested by CSXT simply would have allowed the jury to assign a portion of liability to ***other*** causes of the plaintiffs' alleged medical conditions. Because the trial court prohibited such apportionment, its instructions and verdict form effectively told the jury that CSXT is responsible for ***the totality*** of any injuries or damages that were caused in any part by its negligence (except for that part caused by plaintiffs' contributory negligence). *See, e.g.*, E1332-33 ("[I]f you should find from the evidence that, in

[12] CSXT objected to this language at trial. *See* E1338-41.

this case, any negligence of CSXT Transportation contributed in any way toward any injury or damage suffered by the said plaintiff, you may find that such injury or damage was caused by the defendant."); E1328 ("[T]he railroad is responsible if its negligence, if any, played any part, no matter how small, in causing the said plaintiff's injury."). That is an erroneous statement of the law and is grounds for reversing the judgment. *See, e.g.*, *Meyer*, 865 A.2d at 869 (failure to give apportionment instruction on pre-existing conditions was "reversible error" because the trial court "did not cover apportionment aside from a reference to comparative negligence and did not even discuss the pre-existing condition as a possible cause for the injury").

The prejudice from this error is hard to overstate and is apparent on the face of the verdict sheet. If the trial court had given CSXT's instruction and used its verdict sheet, CSXT's actual liability for each plaintiff's damages could have been substantially reduced through apportionment of a percentage of fault to "other causes." Several plaintiffs were overweight (*see, e.g.*, E0591-93, E0997, E1072-73, E1076-78), several had medical conditions unrelated to their work activities (*see, e.g.*, E0618-17, E1071-72), and all were over 50 years of age. Experts for ***both sides*** agreed that each of these factors contributed to the plaintiffs' claimed knee and back conditions. *See, e.g.*, E0569-77, E0591-93, E0598-99, E0608-09, E0615-16, E0618-19, E0631 (Dr. Misoul); E0997, E1056-60, E1069-73, E1076-78 (Dr. O'Hearn). Indeed, with respect to age, the evidence showed that more than 30 percent of men over 50 years old have osteoarthritis of the knees. E0627-28, E0997. The jury easily could have assigned a significant percentage of the damages to "other causes" if it had concluded that the medical conditions claimed in this case—although partially caused by CSXT's alleged negligence—were, to a significant extent, simply the result of old age. The same is true for such "other causes" as the plaintiffs' obesity and pre-existing conditions.

For example, at the time of trial, plaintiff Young was a 51-year-old trainman who had had arthroscopic surgery on both knees but still was working.

E1008, E1011-12. (Dr. O'Hearn projected that Young would need knee replacement surgery within five to seven years and would not be able to work thereafter. E1073-75.) Although Young claimed only $356,200 in economic damages (*see* E1106)—which placed him in the middle of the pack of plaintiffs—he was awarded $6,000,000 in total damages, twice the next highest award. The only element of his claim that could explain this result is Young's bowleggedness. During closing argument (E1353-55), plaintiffs' counsel made an emotional plea based on the fact that Dr. O'Hearn had proposed a procedure to address Young's bowleggedness that would involve breaking Young's legs and resetting them in a knock-kneed configuration in order to shift his weight to a relatively undamaged part of the knee joint (*see* E1066-68). There was no dispute that Young's bowleggedness was fundamentally a genetic condition from which Young had likely suffered his entire life (E1053, E1070, E1079-80), although Dr. O'Hearn suggested that it may have been exacerbated by his work conditions (E1079-80). Dr. O'Hearn testified, however, that, in his opinion, Young's knee conditions were caused 50 percent by his work and 50 percent by his genetic bowleggedness, "half and half."[13] E1071-72.

The jury apparently accepted Dr. O'Hearn's testimony that Young's work played some role "no matter how small" in exacerbating his bowleggedness and awarded Young damages for that condition—including the threat of the rather grotesque realignment surgery proposed by Dr. O'Hearn. However, the jury had no method of offsetting Young's damages (for both his genetic condition and his knee conditions) by assigning a share of fault to Young's genetic condition Instead, the jury was forced to assign 100 percent of the fault for these damages to either CSXT's negligence (80 percent) or Young's contributory negligence (20 percent)—even though Young's own doctor assigned 50 percent of the fault for his knee conditions to his genetics (and, presumably, assigned Young's genetics a

[13] Dr. O'Hearn also testified that Young's age and obesity were risk factors for his injuries. E1353-54.

much higher percentage of responsibility for his lifelong bowleggedness). It is a fair inference that, if the trial court had allowed apportionment to "other causes," the jury would have assigned at least 50 percent fault to Young's bowleggedness, 20 percent fault to Young's contributory negligence, and only 30 percent fault, or less, to CSXT. That would have erased approximately $3 million dollars of CSXT's liability. A similar, if perhaps less dramatic, result could be expected for each of the plaintiffs. Accordingly, a new trial is required in which the jury can apportion damages among the various causes of plaintiffs' alleged medical conditions.

VI. The Trial Court Erred By Excluding Evidence Of The Railroad Retirement Board Disability Benefits That Two Of The Plaintiffs Receive.

Long-serving railroad employees who are unable to work due to a disability are entitled to apply for Railroad Retirement Board disability benefits ("RRB benefits"). Although evidence of RRB benefits has generally been deemed inadmissible in FELA cases under the collateral source rule, the Court of Appeals of Maryland has held that such evidence ***is*** admissible if the plaintiff claims "that he/she is in financial distress due to the injury arising from the railroad's negligence * * * and has no other sufficient source of income." *Haischer v. CSX Transp., Inc.*, 381 Md. 119, 135, 848 A.2d 620, 629 (2004). Ignoring this exception, the court below erroneously prevented CSXT from introducing evidence of RRB benefits with respect to plaintiffs Davidson and Young even though both of them made specific and direct claims of financial distress. That error requires a new trial on damages with respect to those two plaintiffs.

A. Evidence of RRB benefits is admissible in a FELA case if the plaintiff has made a specific and direct claim of financial distress.

In *Haischer*, a locomotive engineer brought an action against CSXT for injuries that he allegedly sustained at work. *Id.* at 123, 848 A.2d at 622. As here, the trial court prevented CSXT from questioning the plaintiff regarding his receipt

of RRB benefits. *Id.* at 128, 848 A.2d at 625. On appeal, CSXT argued that the plaintiff had opened the door to evidence of RRB benefits by testifying that he (i) was unable to earn a wage comparable to what he earned before his injury; (ii) would have to spend $6,000 to replace his railroad insurance; (iii) no longer could work to age 65 as he had planned to do in order to send his son to college; and (iv) had to hire others to perform home maintenance that he used to do himself. *Id.* at 135, 848 A.2d at 629.

The Court of Appeals agreed with CSXT that "if the plaintiff claims, in argument or through the introduction of evidence, that he/she is in financial distress due to the injury arising from the railroad's negligence * * * and has no other sufficient source of income, evidence that the plaintiff is receiving Railroad Retirement benefits is admissible to rebut that claim." *Id.* (citing *Eichel v. New York Cent. R.R. Co.*, 375 U.S. 253 (1963)). The court concluded, however, that "[n]one of the testimony" identified in *Haischer* actually "suggested that [the plaintiff] was impecunious or had no other source of income" because the plaintiff did "not say, or imply, that he could not afford to replace [his] insurance," "have the [home] maintenance done," or "send his son to college." *Id.* at 136-37, 848 A.2d at 630. In other words, the plaintiff had simply described his financial situation but had not claimed that it placed him in financial distress. Without a direct claim of financial distress, the court held, the proposed evidence of RRB benefits was appropriately excluded. *Id.* at 138, 848 A.2d at 631.

In reaching that conclusion, however, the court contrasted the generalized testimony about the plaintiff's financial situation in *Haischer* with the "far more specific and direct evidence of impoverishment" (*id.* at 137, 848 A.2d at 630-31) in two other cases: *Moore v. Missouri Pac. R.R. Co.*, 825 S.W.2d 839 (Mo. 1992), and *Gladden v. P. Henderson & Co.*, 385 F.2d 480 (3d Cir. 1967). In *Moore*, the Missouri Supreme Court held that the defendant railroad was entitled to introduce evidence of RRB benefits to challenge the plaintiff's testimony that he was unable to attend physical therapy because he "couldn't afford it." 825 S.W.2d at 842.

Similarly, in *Gladden* the Third Circuit held that evidence of RRB benefits was admissible to challenge the plaintiff's testimony that he did not return to his doctor because his "bills got behind" and that "one of the main reasons [he] went back to work[] was to try to catch [his] bills up and support [his] family." 385 F.2d at 482.

Thus, under *Haischer*, evidence of RRB benefits "may be used [to] test[] the credibility of [a] plaintiff's assertion regarding financial distress" (318 Md. at 135, 848 A.2d at 629) if that assertion is "specific and direct," as in *Moore* and *Gladden*. *Id.* at 137, 848 A.2d at 631.

B. The trial court excluded all evidence of RRB benefits, despite Davidson's and Young's claims of financial distress.

Before trial, plaintiffs filed a motion in limine to exclude "[a]ny reference to the plaintiff's [sic] receipt of collateral source benefits [including] railroad retirement board disability pension benefits." E0338. According to plaintiffs, "***any*** evidence of such payments is inadmissible in FELA actions" because the Supreme Court has "explicitly rejected" "limited admissibility theories advanced by a railroad defendant." *Id.* (emphasis added). CSXT opposed plaintiffs' motion, arguing that "at the very least * * * CSXT is entitled to admit evidence of Plaintiffs' [RRB] Benefits where Plaintiffs have opened the door to such evidence" by claiming financial distress. E0349.

Although the trial court had unconditionally granted a substantially similar motion in limine by the plaintiff in Cluster I (E0256), it did not issue a pre-trial order addressing plaintiffs' motion in Cluster IV. Accordingly, CSXT treated the issue as an open one. The issue first became relevant after Davidson gave the following testimony that he was under financial distress because of the injury he allegedly had suffered as a result of CSXT's negligence:

Q: How have you been mentally in terms of understanding that you are not going to be able to go back to work on [the] railroad?

A: ***It is kind of hard, because I am worried about my bills.***

E0524 (emphasis added). During cross-examination, Davidson confirmed that he was alleging financial distress:

> Q: As I understand your testimony this afternoon that you just gave, you've got a couple things on your mind with respect to finances. Is that what you just told Mr. Darby, you're concerned about paying your bills?
>
> A: Yes.

E0528.

Following this testimony, CSXT attempted to question Davidson regarding his receipt of RRB benefits. E0528-30. Plaintiffs objected, and the trial court sustained the objection. E0529-30. At the conclusion of Davidson's cross examination, CSXT asked the trial court to reconsider its ruling (E0552-63), pointing out that *Haischer* authorizes a defendant to use evidence of RRB benefits to challenge a specific and direct claim of financial distress such as that Davidson had just made. E0554-59. Ignoring *Haischer*, as well as Davidson's express testimony that he was "worried about [his] bills" because of his injury (E0524), the trial court simply stated—without explanation—that it was "not persuaded to change its original ruling" (E0563).

Later, plaintiff Young also made explicit claims of financial hardship:

> Q: Did you decide to go forward with the arthroscopic surgery at that time?
>
> A: No, I didn't.
>
> Q: Why not?
>
> A: I am kind of fearful of surgery. ***And plus I really couldn't afford to take the time off at that time.***

E1007 (emphasis added).[14] During cross-examination, Young again claimed financial hardship:

[14] CSXT was not required to repeat its request for admission of RRB benefits following Young's testimony. It is a well-established rule that when "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, and the proponent of the evidence makes a contemporaneous objection, his objection is

Q: After those injections, you wanted to return to work at Jessup, did you not?

A: I wanted to—when I was—***it's got a lot to do with my financial situation***, too, here ***why I am trying to return to work. I really can't afford to be off work so long***[,] so I really did want to get back to work as soon as I thought that I could endure it.

E1022 (emphasis added).

Plaintiffs once again put Young's alleged financial difficulties at issue when Dr. O'Hearn was asked to read a portion of Dr. Misoul's opinion regarding Young:

Q: Could you read Dr. Misoul's opinion for us, please.

A: He stated, "I saw patient Nathaniel Young today in follow-up examination. * * * ***At the present time, * * * the patient cannot afford to have arthroscopic surgery.***["]

E1086 (emphasis added). And, during closing argument, Plaintiffs' counsel underscored Young's testimony of financial distress:

> [Young] is one heck of a man. ***When I heard him sit and say that he couldn't afford to get off work to get an operation, that he had to endure the pain, for his children and this man is a father when 17 years old.***

E1352 (emphasis added).

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ordinarily preserved." *Prout v. State*, 311 Md. 348, 357, 535 A.2d 445, 449 (1988), *superseded by rule on other grounds*, *Beales v. State*, 329 Md. 263, 619 A.2d 105 (1993); *accord Reed v. State*, 353 Md. 628, 638, 728 A.2d 195, 200 (1999). Here, CSXT contemporaneously objected to the trial court's ruling excluding evidence of RRB benefits despite Davidson's claim of financial distress (E0528-30) and even asked the court to reconsider its original ruling, pointing out once again that claims of financial hardship open the door to evidence of RRB benefits under *Haischer* (E0552-63). The trial court rejected that position (E0563)—which, as noted above, was consistent with its ruling on the same issue during cluster I (*see* E0429-30 (concluding that "[i]n Maryland you can't bring up collateral source, period")). Any further efforts to adduce RRB benefits evidence during Young's testimony would have been futile and served only to anger the court.

C. CSXT should have been allowed to rebut Davidson's and Young's specific and direct claims of financial distress with evidence of their RRB benefits.

The testimony here was much closer to the "specific and direct evidence of impoverishment" in *Moore* and *Gladden* (381 Md. at 137, 848 A.2d at 631) than the generalized testimony about the plaintiff's financial status in *Haischer*.

Davidson testified that it was "hard" for him to deal with the fact that he was not "able to go back to work on [the] railroad" because he was "***worried about [his] bills***." E0524 (emphasis added); *see also* E0528. In other words, he was not simply describing his financial obligations like the plaintiff in *Haischer*. Instead, he was expressing concern over his ability to meet those obligations as a result of his alleged injury, like the plaintiff in *Gladden* (*see* 385 F.2d at 482).

Similarly, Young testified that he could not get medical treatment for his injury because he "***couldn't afford to take the time off***" (E1007 (emphasis added)) and could not "***afford to be off work so long***" because of his "***financial situation***" (E1022 (emphasis added)). Dr. O'Hearn also testified that, according to Young's medical records, Young could not "***afford to have arthroscopic surgery***." E1022 (emphasis added). Young's claim that he could not afford medical treatment closely mirrors the testimony in *Moore* (*see* 825 S.W.2d at 842). And his contention that financial distress drove him back to work despite his injury tracks the testimony in *Gladden* (*see* 385 F.2d at 482).

Under *Haischer*, CSXT had a right to challenge Davidson's and Young's specific and direct claims of financial distress with evidence of their RRB benefits. Because the trial court erroneously silenced CSXT on this issue, the plaintiffs were "able to paint a truly misleading picture for the jury of the extent of [their] loss and thus obtain a recovery in excess of what is warranted." *Haischer*, 381 Md. at 136, 848 A.2d at 629-30. The jury's extraordinary multi-million dollar awards for Davidson and Young should be vacated, and the court below should be instructed to conduct a new trial on damages in which CSXT is afforded the

opportunity to introduce evidence of RRB benefits if plaintiffs continue to make claims of financial distress.

VII. Each Plaintiff's Damages Is Excessive.

The nine cases in this consolidated trial each resulted in a shockingly large damages award—ranging from $750,000 to an eye-popping $6,000,000. As we have shown, there were several errors that undoubtedly contributed to this outcome. But even setting aside those errors, each of the individual awards should shock the Court's conscience and be substantially reduced.

Because the trial court used a verdict sheet that did not separate out the elements of damages, each plaintiff was awarded an undifferentiated sum for past and future economic losses and past and future non-economic injuries such as pain and suffering and emotional distress. For present purposes, we presume that the jury awarded each plaintiff the full economic damages that he claimed. Although CSXT challenged the amounts of economic damages claimed at trial, and still maintains that those amounts were overstated, CSXT does not here dispute that it was within the jury's purview to accept the economic damages estimates advanced by plaintiffs' economist.[15] But the remaining portion of each of the awards is grossly excessive as compensation for the non-economic harms that were proved at trial.

The awards for the individual plaintiffs were as follows:

- Bickerstaff requested economic damages of $189,300 (E1095-96) and received a total award of $900,000. Accordingly, his non-economic damages were at least ***$710,700***.

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[15] Of course, as shown above (*see* Part IV), the trial court improperly excluded evidence that would have rendered the economic damages claimed by plaintiffs excessive. We do not intend to waive that argument, but simply to point out that the economic damages claimed by plaintiffs could be supported by the evidence ***as it came in at trial***.

- Brown requested economic damages of $382,700 (E1100) and received a total award of $2,500,000. Accordingly, his non-economic damages were at least ***$2,117,300***.
- Davidson requested economic damages of $612,700 (E1101) and received a total award of $2,3000,000. Accordingly, his non-economic damages were at least ***$1,687,300***.
- Fedorchak requested economic damages of $196,600 (E1103) and received a total award of $1,000,000. Accordingly, his non-economic damages were at least ***$803,400***.
- Hartman did not claim any specific amount for economic injuries but was awarded total damages of ***$850,000***.
- Hobgood requested economic damages of $44,400 (E1104) and received a total award was $750,000. Accordingly, his non-economic damages were at least ***$705,600***.
- Short requested economic damages of $800,000 (E1105) and received a total award was $3,000,000. Accordingly, his non-economic damages were at least ***$2,200,000***.
- Young requested economic damages of $356,200 (E1106) and received a total award of $6,000,000. Accordingly, his non-economic damages were at least ***$5,643,800***.
- Zientek requested economic damages of $532,500 (E1107-08) and received a total award of $2,000,000. Accordingly, his non-economic damages were at least ***$1,467,500***.

A. Previous cases involving similar injuries show that the non-economic damages awarded here are excessive.

The measure of damages in a FELA action is a question of federal law. *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490 (1980); *Chesapeake & Ohio R. Co. v. Kelly*, 241 U.S. 485, 491 (1916) ("the proper measure of damages [under FELA] is inseparably connected with the right of action" and "must be settled according

to general principles of law administered in the Federal courts"). Accordingly, this Court should consider the evidence pertaining to each plaintiff's emotional distress and pain and suffering in the light most favorable to the plaintiff and then ask whether the award shocks the Court's conscience.[16] *See, e.g.*, *Nairn v. Nat'l R.R. Passenger Corp.*, 837 F.2d 565, 568 (2d Cir.1988).

This Court has an independent duty to assess the excessiveness of the damages awarded in these cases. But in performing that analysis, CSXT believes that the Court should be guided by a prior FELA case involving injuries similar to those claimed here: *Mazyck v. Long Island R. Co.*, 896 F. Supp. 1330 (E.D.N.Y. 1995). In *Mazyck*, the plaintiff suffered a "torn medial meniscus, which caused him substantial discomfort over a prolonged period of time" and required surgery, after which he was in "considerable pain and required the use of crutches for several months." *Id.* at 1336. At the time of trial, the plaintiff still was experiencing "discomfort," "stiffness," "sensitiv[ity]," and "hurt" in his knee. *Id.* The court also was "mindful of [the] diagnosis of post-traumatic arthritis that may worsen over time, and [the] expert testimony that the plaintiff may require knee-reconstruction surgery at some unspecified point in the future." *Id.* at 1338-39. Nevertheless, the court concluded that "the jury's award of $436,932.80 for future pain and suffering, albeit over a remaining life expectancy of 36 years, is grossly in excess of that amount which the evidence reasonably can support." *Id.* The court ordered a remittitur of the total past and future non-economic damages from $654,432.80 to $348,000 (approximately $456,500 adjusted for inflation). *Id.* This amounted to $12,680.55 per year (in 2007 dollars) for the rest of the plaintiff's life.

Mazyck also relied on two non-FELA cases that are informative here.

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[16] Maryland courts have described the relevant test for excessiveness as whether the award "shocks the conscience of the court," or is "grossly excessive," "inordinate," "outrageously excessive," or just "excessive." *Banegura v. Taylor*, 312 Md. 609, 624, 541 A.2d 969, 976 (1988).

1. In the first case, a 26-year-old plaintiff sustained a ruptured meniscus and related damage to ligaments, tendons, and soft tissue in his knee. *Burton v. New York City Housing Authority*, 191 A.D.2d 669 (N.Y. App. Div. 1993). The plaintiff had reconstructive surgery that involved removal of the ruptured meniscus, and a subsequent arthroscopic examination that revealed severe cartilage deterioration. The plaintiff's medical expert concluded that the plaintiff's knee had developed a severe arthritic condition, that the injury was permanent, and that the plaintiff likely would need a knee-replacement operation in the future. Nevertheless, the appellate court held that the jury's award of $525,000 for pain and suffering (over a life expectancy of more than 50 years) was excessive, and ordered that it be reduced to $262,500. *Id.* at 670.

2. In the second case, the plaintiff slipped on an icy sidewalk, causing an injury to his knee that required two arthroscopic surgeries and rendered him unable to perform his job as a police officer. *Castellano v. City of New York*, 183 A.D.2d 800 (N.Y. App. Div. 1992). His treating physician opined that he would suffer arthritic changes in the knee, require surgery, and may need to have his kneecap removed. Nevertheless, the appellate court held that the jury's award of $500,000 for pain and suffering was excessive and ordered that it be remitted to $200,000. *Id.* at 801.

There are relatively few Maryland cases discussing the appropriate amount of non-economic damages for injuries of the sort alleged here. However, one recent case, like *Mazyck*, suggests that the damages awarded here are excessive. *See Hebron Volunteer Fire Dep't, Inc. v. Whitelock*, 166 Md. App. 619, 628-44, 890 A.2d 899, 904-13 (2006). In *Whitelock*, the plaintiff fell while exiting a carnival ride and suffered injuries to his face, leg, and wrist. 166 Md. App. 619, 890 A.2d 899. He "underwent two operations on his left wrist" and, "[i]n the second operation, three bones were removed from his wrist." *Id.* at 623-24, 890 A.2d at 901. After the surgeries he "needed assistance in getting dressed," "had trouble sleeping," and "underwent physical therapy for his wrist and hand for five

months." *Id.* at 624. At the time of trial, the plaintiff still had "'very little grip, very little strength' in his left hand, and ha[d] difficulty making a fist. He also stated that he suffer[ed] from pain in his left wrist every day, the level of which he estimate[d] at 'between six and seven' on a scale of one to ten. He testified further that there [were] numerous activities that he [was] unable to do because of the weakness of his left hand, including bathing, tying his shoes, playing golf, and hunting." *Id.* Finally, the plaintiff faced the possibility of a future surgery to fuse his wrist bones. *Id.* at 626, 890 A.2d at 903.

On post-trial motions, the trial court determined that the jury's award of $515,000 was excessive as compensation for the plaintiff's non-economic injuries and ordered a remittitur to $300,000. It was stipulated that the plaintiff's life expectancy was 17.8 years, making the remitted damages $16,853.93 per year for the rest of the plaintiff's life.

B. Each plaintiff's award should shock the Court's conscience and be substantially reduced.

With the foregoing cases—which reduced awards for non-economic injuries that are similar to or more severe than those claimed here—as a measuring stick, we next analyze each plaintiff's damages and the evidence of that plaintiff's non-economic injuries.

1. Bickerstaff

Bickerstaff first experienced left knee pain in 1994, although he did not seek treatment until 2004 when he saw Dr. Misoul on the advice of counsel. E0587, E0635, E0976-77, E0990. Bickerstaff described his initial pain as "[j]ust a tingling sensation, a throbbing." E0977. He had an outpatient arthroscopy of his left knee on March 30, 2006, because his "knee had really swelled up and [he] couldn't walk on it." E0978-83. Bickerstaff testified that, at the time of trial, his left knee was "doing fine, but it still throbs," and he has "a little problem crouching and kneeling" because the knee "gets tight" and "sometimes it hurts." E0984. Dr. Lumsden testified that Bickerstaff's left knee has been "periodically

hav[ing] some mild difficulty, but [Bickerstaff] seemed to be okay" so that treatment had been "deferred on the left knee." E0992-93. Nevertheless, he predicted that Bickerstaff would need surgical intervention within five years and might need a knee replacement at some point in the future. E0994-96.

The jury awarded Bickerstaff $900,000 (finding CSXT 70 percent at fault). Dr. Hamilton estimated that Bickerstaff would suffer $189,300 in economic losses based on an annual earning potential of $69,849 and the assumptions that Bickerstaff, a 56-year-old man, would be able to work for only five more years despite having planned to work until age 65. E1093-96. The trial court instructed the jury that Bickerstaff's life expectancy was 23.6 years. E1335. Accordingly, assuming full compensation for his alleged economic damages, the jury awarded Bickerstaff non-economic damages of $710,700—***10 times*** his annual income and ***$30,114.41*** every year for the rest of his life.

The evidence of Bickerstaff's non-economic injuries is substantially less compelling than that in each of the cases described above. He had a medical condition involving one knee that, at the time of trial, "seemed to be okay" and did not testify to any extraordinary suffering that would warrant an award of this magnitude. The evidence of Bickerstaff's non-economic damages certainly cannot support any award larger than the $300,000 allowed in *Whitelock* (which would amount to approximately $12,000 per year for the rest of Bickerstaff's life).

2. Brown

Brown first experienced back pain in 2000, at which point he received pain medication from his family physician. E0880-81. He first had problems with his right knee "many years" before 2004, but did not seek any medical treatment until November 13, 2004, when he saw Dr. Misoul on the advice of counsel. E0880-81. At that point, his back was "sore[]" and "really bothering [him]," and his right knee was "aching and sore." E0882. Brown had an injection in his back that was painful during the procedure and "very painful" when the anesthetic wore off. E0883. Dr. Misoul did not focus his treatment on Brown's knee until May 2006.

E0883-84. On January 11, 2007, Brown had outpatient arthroscopic surgery on his right knee. E0884-88. Brown testified that, although he still has some soreness in his knee, it is relieved with pain medication. E0890-91. He testified that his knee and back pain prevent him from doing the housework that he used to do and that he has not been able to go bowling in a while. *Id.*

The jury awarded Brown $2,500,000 (finding CSXT 70 percent at fault). Dr. Hamilton estimated that Brown would suffer $382,700 in economic losses based on an annual earning potential of $76,264 and the assumptions that Brown, a 57-year-old man, would be able to work for only three more years despite having planned to work until age 64. E1096-100. The trial court instructed the jury that Brown's life expectancy was 22.8 years. E1336. Accordingly, assuming full compensation for his alleged economic damages, the jury awarded Brown $2,117,300 for non-economic damages—***27.8 times*** his annual income and ***$92,864.04*** every year for the rest of his life.

This is a shocking amount of money by any standard, especially in comparison to the remitted awards in the cases discussed above. The evidence simply cannot support an award that would value Brown's suffering at almost $100,000 a year. Taking into account both of Brown's claimed injuries, the highest award for non-economic injuries that can be sustained on this evidence should not be materially higher than $300,000 (which would amount to approximately $13,000 per year for the rest of Brown's life).

3. Davidson

Davidson started experiencing pain in his right and left knees in approximately 1999. E0546, E0637. He said that these were "pains stooping down, kneeling climbing, walking," that his knees "creaked or popped," and that he "had a lot of pain." E0505-06, E0547. He admitted, however, that he sought medical treatment for his knees only on the advice of counsel, in 2004. E0505-06. On October 5, 2006, Davidson had outpatient arthroscopic surgery on his right

knee because he "just couldn't stand the pain."[17] E0513-15, E0550, E0638. Davidson had decreased mobility after the surgery and still is taking oxycodone for the pain. E0516-17. He also has received several injections into his knee that he described as "very painful." E0511-12. Davidson testified that his knee condition has restricted his lifestyle (E0521-24), but also said that he continues to participate in normal recreational activities such as hunting and riding his ATV and jet ski (E0549). Dr. Misoul testified that Davidson eventually would be a candidate for knee replacement ***if*** he continued working at the railroad, but that he, in fact, cannot return to work. E0608-11.

The jury awarded Davidson $2,300,000 (finding CSXT 80 percent at fault). Dr. Hamilton estimated that Davidson would suffer $612,700 in economic losses based on an annual earning potential of $63,985 and the assumptions that Davidson, a 52-year-old man, would never work at the railroad again despite having planned to work until age 65. E1100-02. The trial court instructed the jury that Davidson's life expectancy was 26.8 years. E1336. Accordingly, assuming full compensation for his alleged economic damages, the jury awarded Davidson $1,687,300 for non-economic damages—***26.4 times*** his annual income and ***$62,958.96*** every year for the rest of his life.

The evidence of Davidson's non-economic injuries is more weighty than that for Bickerstaff and Brown, but still cannot support the jury's enormous award. It should shock the Court's conscience to award Davidson an amount that nearly matches his annual income every year for the rest of his life. Instead, these facts can support no more than the approximately $450,000 award allowed for non-economic damages in *Mazyck* (which would amount to approximately $16,500 a year for the rest of Davidson's life).

[17] On February 3, 2005, Davidson had outpatient surgery to remove a pre-patellar bursa (which was not caused by CSXT's negligence) from his right knee. E0507-10.

4. Fedorchak

Fedorchak did not experience knee pain until 2003, and did not seek treatment until he saw Dr. Misoul in late 2004 on the advice of counsel. E0810-12, E0823. He testified to "a lot of pain in [his] right knee" and "a little pain" in his left. E0809. Fedorchak had outpatient arthroscopic surgery on his right knee on September 1, 2005. E0814, E0824. After the surgery, he did not get out of bed for three days during which he was in pain. E0816. When describing his current pain, Fedorchak said: "[W]hen it really hurts is, when the bone touches the bone, it is a pain that you just can't describe that pain." E0818-19. He testified that his knee pain results in various tasks taking longer and requires various therapies at the end of a work day. E0820-22. Fedorchak has no current restrictions on work or other activities (E0825-26), although Dr. Misoul expects that he will need a knee replacement within five to seven years (E0612-14).

The jury awarded Fedorchak $1,000,000 (finding CSXT 75 percent at fault). Dr. Hamilton estimated that Fedorchak would suffer $196,600 in economic losses based on an annual earning potential of $60,495 and the assumptions that Fedorchak, a 53-year-old man, would be able to work for only six more years despite having planned to work until age 65. E1101-03. The court instructed the jury that Fedorchak's life expectancy was 26.0 years. E1336. Accordingly, assuming full compensation for his alleged economic damages, the jury awarded Fedorchak $803,400 for non-economic damages—***13.3 times*** his annual income and $30,900.00 every year for the rest of his life.

The evidence with respect to Fedorchak's non-economic injuries is similar to that with respect to Davidson. Accordingly, as with Davidson, the highest award for non-economic damages that can be supported here is approximately $450,000 (which would amount to approximately $17,000 per year for the rest of Davidson's life).

5. Hartman

Hartman started experiencing intermittent pain in his knees in 2002 or 2003 (E0900) but did not seek any medical treatment until he was advised to do so by counsel. E0901-03, E0910-15. Dr. O'Hearn testified that Hartman has only mild degeneration in his knees, which is not uncommon for a man of his age (E1081), and that Hartman's knees are "not that bad." E1081. Hartman has had no surgical procedures on his knees, and none are anticipated. However, he does expect to receive "[v]ery painful" injections into his knee (E0904) every six to twelve months for the rest of his life (E1061-63).

The jury awarded Hartman $850,000 (finding CSXT 90 percent at fault). Hartman did not offer any evidence of future economic losses aside from testimony that he was no longer able to work overtime (E0905-06) and did not request a specific amount of future economic losses. The court instructed the jury that Hartman's life expectancy was 26.0 years. E1336. Assuming that the entire award to Hartman is for non-economic damages, he was awarded $32,692.31 every year for the rest of his life. If approximately $50,000 is assigned to Hartman's non-specific "lost overtime" claim, then Hartman was awarded $30,769.23 every year for his non-economic injuries.

The evidence of Hartman's non-economic damages is weaker than that for any of the other plaintiffs. He had no work restrictions, and his knee pain was "not that bad." Nevertheless, Hartman was awarded an amount for non-economic damages that is greater than the amounts awarded to several other plaintiffs. This result should shock the Court's conscience and result in a reduction to substantially less than the amount allowed for plaintiffs such as Bickerstaff and Brown.

6. Hobgood

Hobgood testified that he first had problems with his knees in 2001, although other evidence indicated that his pain began in 1995 (E0771-74). He mentioned the knee pain to his family doctor but did not seek treatment until he

was advised to do so by counsel in November 2004. E0760-61, E0770. Hobgood said that "when I climb steps, when I squat, I was getting pain, aching." E0763. He has had no surgical procedures on his knees, although Drs. Misoul and Launder both opined that he may need surgery in the future (E0762-64), and Hobgood thinks that he will need arthroscopic surgery (E0765). Hobgood testified that he is healthy enough, at the age of 60, to continue working (E0789-91), and that his knees are "tolerable," although he still is having "some soreness" (E0617), and working causes his knees to feel "stiff, numb[], ache[y], [and] swollen," particularly in the morning (E0767-68). Hobgood testified that he continues to participate in recreational activities such as biking, swimming, and horseback riding. E0777-79.

The jury awarded Hobgood $750,000 (finding CSXT 60 percent at fault). Dr. Hamilton estimated that Hobgood would suffer $44,400 in economic losses based on an annual earning potential of $73,412 and the assumptions that Hobgood, a 61-year-old man, would be able to work for only two more years despite having planned to work until age 65. E1103-04. The court instructed the jury that Hobgood's life expectancy was 19.7 years. E1336. Accordingly, assuming full compensation for his alleged economic damages, the jury awarded Hobgood ***$705,600*** for non-economic damages—***9.6 times*** his annual income and $35,817.26 every year for the rest of his life.

Hobgood's evidence of non-economic injury is somewhat less than Bickerstaff's and Brown's, especially because he has not had any surgical intervention. Accordingly, the non-economic component of his damages should be reduced to somewhat less than $300,000 (which would amount to approximately $15,000 per year for the rest of Hobgood's life).

7. Short

Short first experienced intermittent knee pain in 2001 (E1025), but did not seek treatment until he was advised to see Dr. Misoul by counsel in December 2004 (E1026, E1038-39). Short had outpatient arthroscopic surgery on his right

knee on May 5, 2005. E1027-28. He also has had injections in his knee, which he said were painful. E1028-29. At trial, Short was considering a total knee replacement because he was having "really sharp, spear-like pains around [his] kneecap" (E1030), but two doctors had refused to do the surgery because he is too young (E1033-35). Short testified that he is limited in his ability to walk his dogs and does not go dancing anymore (E1031-32), but he still participates in recreational activities such as swimming and working in his yard (E1040-41). Short also said that he feels "a void," is "lonely" and "sort of lost" because he can no longer work on the railroad. E1036.

The jury awarded Short $3,000,000 (finding CSXT 90 percent at fault). Dr. Hamilton estimated that Short would suffer $800,000 in economic losses based on an annual earning potential of $80,400 and the assumptions that Short, a 55-year-old man, would never return to work despite having planned to work until age 65. E1104-05. The court instructed the jury that Short's life expectancy was 24.4 years. E1336. Accordingly, assuming full compensation for his alleged economic damages, the jury awarded Short $2,200,000 for non-economic damages—***27.4 times*** his annual income and ***$90,163.93*** every year for the rest of his life.

This award is shocking by any standard. The evidence of Short's non-economic injuries was not weightier than that in *Mazyck* and *Whitelock* and was similar to that presented by Davidson. Accordingly, the highest award for non-economic damages that can be supported here is approximately $450,000 (which would amount to approximately $18,500 per year for the rest of Short's life).

8. Young

Young complained of knee problems to his family physician in 1999 (E1005-06) and was referred to an orthopedic doctor who recommended arthroscopic surgery, which Young refused (E1006-07). After seeing Dr. O'Hearn on the advice of counsel, Young was scheduled for outpatient arthroscopic surgery on his right knee in March 2006 and on his left knee in April 2006. E1009, E1021. He agreed to the surgery because "it was getting hard to * * * work, hard

to walk," and his knees "stayed sore," "stiffened up," and "stayed swollen." E1009. After surgery, he had pain in his knees, and "one time [he] had to go to the emergency room" because he thought that he "was having a blood clot" in his left knee. E1010. Young also has had injections in his knee, which he described as "[l]ike somebody put a needle in your [tooth] cavity." E1012. Young said that he still has "a lot of soreness and swelling in [his] knees," that he still has "problems sleeping at night" and "problems going up and down the stairs," and that his knees are still painful. E1016. He said that he cannot do "a lot of basic, basic things" such as "throw the football with [his] son" or hunt.[18] E1017. Dr. Misoul predicted that Young might need a knee replacement within five to seven years if he continues to work at the railroad. E1073-75.

The jury awarded Young $6,000,000 (finding CSXT 80 percent at fault). Dr. Hamilton estimated that Young would suffer $356,200 in economic losses based on an annual income of $73,984 and the assumptions that Young, a 51-year-old man, would be able to work for only five more years despite having planned to work until age 65. E1105-06. The court instructed the jury that Young's life expectancy was 27.7 years. E1336. Accordingly, assuming full compensation for his alleged economic damages, the jury awarded Young $5,643,800 for non-economic damages—***76.3 times*** his annual income, and $203,747.29 every year for the rest of his life.

This award is unquestionably outrageous. Although the evidence of Young's non-economic injuries was not as compelling as that of some of the other plaintiffs (because he has had only one arthroscopic surgery), the jury was incited to award Young more than twice the non-economic damages of any other plaintiff. This award should be reduced to no more than the amount allowed for Davidson or Short.

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[18] Young also testified regarding a corrective procedure for his genetic bowleggedness which would entail breaking and then realigning his legs, but said that he has refused that option. E1014-15.

9. Zientek

Zientek first experienced knee pain in the summer of 2004 (E0946) but did not seek medical attention until he saw Dr. Shepard in December 2004 on the advice of counsel and did not actually get treatment for his knees until February 9, 2006, when he saw Dr. O'Hearn (E0947, E0971, E1082). Zientek had outpatient arthroscopic surgery on his left knee on June 2, 2006, and on his right knee in September 2006 because "with the way [his knees felt, he] had to do something to get some relief." E0948-54, E1083-85. Zientek testified that at the end of the work day his knees are "burning, painful, swelling" and that they "keep [him] awake at night." E0955. He was scheduled for a left-knee replacement shortly after the trial (E0956-57) and was expected to need a right-knee replacement within five years (E0966-67).

The jury awarded Zientek $2,000,000 (finding CSXT 70 percent at fault). Dr. Hamilton estimated that Zientek would suffer $532,500 in economic losses based on an annual earning potential of $57,325 and the assumptions that Zientek, a 51-year-old man, would never work again despite having planned to work until age 65. E1107-08. The court instructed the jury that Zientek's life expectancy was 27.7 years. E1336. Accordingly, assuming full compensation for his alleged economic damages, the jury awarded Zientek $1,467,500 for non-economic damages—***25.6 times*** his annual income and $52,978.34 every year for the rest of his life.

Zientek's non-economic injuries were perhaps the most severe of the plaintiffs (because he actually had been scheduled to undergo knee replacement surgery), although they did not far outstrip the harms alleged by Davidson, Short, and Young. Accordingly, the non-economic component of Zientek's award should be reduced to an amount that is not significantly greater than that allowed for Davidson, Short, and Young.

VIII. Plaintiffs' Claims Based On Allegations Of Improper Ballast Were Precluded By Federal Law.

A panel of this Court has held that FELA claims involving allegations that the plaintiff was injured by improper ballast are not precluded by the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20101 *et seq.* and the regulations promulgated thereunder. *Miller*, 159 Md. App. at 166-72, 858 A.2d at 1050-53. In order to preserve this issue for possible review by the Court of Appeals of Maryland or the United States Supreme Court, we submit that the *Miller* court erred in reaching that conclusion. As several federal and state courts have recognized, the FRSA and applicable regulations, particularly 49 C.F.R. § 213.103, establish a nationally uniform standard for railroad ballast. As a result, FELA claims based on allegations of improper ballast, including those brought by plaintiffs in this case, are precluded by federal law and should be dismissed. *See, e.g.*, *Norris v. Cent. of Ga. R.R. Co.*, 635 S.E.2d 179, 182-84 (Ga. Ct. App. 2006); *Nickels v. Grand Trunk R.R., Inc.*, No. 06-CV-11846 (Docket # 34: Granting Defendant's S.J. Mot.) (E.D. Mich. May 5, 2007); *Ferra v. Canadian Nat'l/Ill. Cent. R.R.*, No. 05-CV-72721 (Docket #40: Granting Defendant's S.J. Mot.) (E.D. Mich. May 4, 2007); *Haag v. CSX Transp., Inc.*, No. 03-048817-NO-2 (Docket # 71-2: Granting Defendant's S.J. Mot.) (Mich. Cir. Ct. March 27, 2007).

CONCLUSION

The Court should vacate the judgment as to all plaintiffs and remand for a new trial. Alternatively, the Court should vacate the judgment with respect to Bickerstaff, Brown, Davidson, Hobgood, Short, and Young and remand for a new trial on timeliness. The Court also should vacate the judgment with respect to all plaintiffs—or at least Davidson and Young—and remand for a new trial on damages. At the very least, the damages for each plaintiff should be substantially reduced.

Respectfully submitted,

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This brief was prepared using Times New Roman 13-point font.

STATUTES

45 U.S.C. § 51

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. § 54

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. § 56

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ***21st***day of ***March, 2008***, 2 copies of the foregoing Brief of Appellant and 2 copies of the Record Extract were served on each of the counsel listed below, via overnight courier, postage prepaid:

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APPENDIX

Excerpt of Reporter's Official Transcript of Proceeding Pertaining to Argument Section I, March 8, 2007 at pages 1583-84, 1592-99 .... 5a

Excerpt of Reporter's Official Transcript of Proceeding Pertaining to Argument Section II, March 27, 2007 at pages 6459-60, 6493 .... 15a

Excerpt of Reporter's Official Transcript of Proceeding Pertaining to Argument Section III, March 20, 2007 at pages 4351-52, and March 27, 2007 at pages 6392-93, 6499-6500 .... 18a

Excerpt of Reporter's Official Transcript of Proceeding Pertaining to Argument Section IV, March 19, 2007 at pages 4096-97 .... 24a

Excerpt of Reporter's Official Transcript of Proceeding Pertaining to Argument Section V, March 27, 2007 at pages 6510-15 .... 26a

Excerpt of Reporter's Official Transcript of Proceeding Pertaining to Argument VI, March 6, 2007 at pages 735-36, and March 7, 2007 at pages 888-99 .... 32a