

No. 10-3745

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

KEVIN ROBERTS,
Plaintiff-Appellee,

– v. –

CSX TRANSPORTATION, INC.,
Defendant-Appellant.

On Appeal from a Final Judgment of
the United States District Court for the Southern District of Indiana

Honorable Larry J. McKinney, District Judge
Case No. 1:09-cv-162

**REPLY BRIEF
OF CSX TRANSPORTATION, INC.**

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INTRODUCTION

At the heart of this appeal is a long-settled proposition of law, that “[w]hat constitutes negligence” under FELA is strictly “a federal question” that does “not vary[] in accordance with the differing conceptions of negligence * * * under state and local laws.” *Robinson v. Burlington N. R.R.*, 131 F.3d 648, 652 (7th Cir. 1997) (quoting *Urie v. Thompson*, 337 U.S. 163, 174 (1949)). Having been apprised of the nearly century-long list of cases holding that state laws “ha[ve] no bearing on the civil liability [under FELA] of a railway to its employees” (*Chesapeake & Ohio Ry. v. Stapleton*, 279 U.S. 587, 597 (1929)), Roberts nevertheless persists in his argument that Indiana traffic laws should determine whether CSXT is liable in this case. As we demonstrated in our opening brief, that contention is plainly incorrect.

Perhaps recognizing the weakness of his argument, Roberts now effectively abandons his state-law negligence per se theory (the *only* theory he presented to the jury in the proceedings below) in favor of a newly minted *res ipsa loquitur* theory. But this new approach offers Roberts no more hope than the old one. It is well settled that *res ipsa loquitur* is inapplicable in FELA cases when factors other than the negligence of the defendant might have caused the accident. Here, Perry’s truck lost traction and slid into oncoming traffic in admittedly dark, icy, and snowy conditions. As Roberts himself repeatedly has conceded,

the accident thus could have been caused by adverse weather conditions, and not by Perry's negligence. Though we made this point in our opening brief, Roberts offers no response.

As for the arguments to which he does respond, Roberts has nothing persuasive to say. Concerning the sufficiency of the evidence, for example, he attempts to reframe this case as one about credibility, asserting that the jury evidently disbelieved Perry's account of the accident, including his testimony that he was traveling at just 20 miles per hour when he encountered the patch of ice. But what Roberts ignores is that there was no *other* account for the jury to credit over Perry's. Even granting that the jury disbelieved Perry, therefore, it was left only to speculate how fast he was going and whether that speed was unreasonable under the conditions. As this Court has made clear, speculation is no basis for upholding a verdict.

At bottom, Roberts's theory of the case was predicated exclusively on Perry's supposed violations of certain Indiana traffic laws, and it was on that basis alone that the jury could have found in his favor. But the instruction charging the jury to find CSXT liable if Perry violated any Indiana traffic laws was plain error, and there was no evidence to support a finding of liability based on the traditional elements of negligence. The verdict accordingly cannot stand.

ARGUMENT

I. THE EVIDENCE WAS NOT SUFFICIENT TO SUPPORT THE VERDICT.

Roberts does not disagree that, in addressing our sufficiency-of-the-evidence argument, this Court may consider only the “properly formulated legal standard” without regard for any “inconsistent * * * jury instructions given by [the] district court.” *Geldermann, Inc. v. Fin. Mgmt. Consultants, Inc.*, 27 F.3d 307, 313 (7th Cir. 1994) (citing *Boyle v. United Techs. Corp.*, 487 U.S. 500, 513-514 (1988)). He also does not dispute that, under the proper legal standard, he bore the burden of proving that Perry failed to exercise reasonable care under all the circumstances and thereby caused or contributed to Roberts’s injury. Opening Br. 14. Roberts asserts nevertheless that there was sufficient evidence to support the verdict because, in his view, the jury evidently disbelieved Perry and could have found for Roberts under the doctrine of *res ipsa loquitur*. He is wrong.

A. Without Perry’s testimony, the jury could only have speculated that Perry was driving negligently.

As we demonstrated in our opening brief (at 22-24), Roberts adduced no evidence to establish the precautions that a reasonably careful person would have taken on the morning of the accident, that Perry failed to take such precautions, and that such failure caused Roberts’s injuries. Roberts offered no proof, for example, establishing what a rea-

sonable speed would have been under the circumstances, or rebutting Perry's testimony that Perry was traveling just 20 miles per hour. Moreover, even assuming that Perry was not driving reasonably, Roberts made no effort to prove that the accident would have been avoided if he had been.

Nothing Roberts says in his brief can or does overcome these glaring omissions. He insists, first, that the jury could have inferred negligence by finding that "Perry was not credible when he claimed that: (a) the accident was caused by invisible ice that could not have reasonably been anticipated by an ordinarily prudent driver; (b) he had turned onto Rockville within 100 feet of the collision point; and (c) he was only going 20 mph when he lost control of his truck and it skidded into oncoming traffic." Roberts Br. 14; *see generally id.* at 12-15. Trumpeting the jury's fact-finding role, he argues that credibility determinations are "impossible to upset on appeal." *Id.* at 14.

Perhaps. But Robert's credibility argument is a red herring. Perry's testimony concerning his speed and the visibility of the ice was not inconsistent with any other evidence at trial; despite Roberts's suggestion otherwise, the jury was not faced with a choice between differing stories supported by "conflicting" evidence with respect to these issues. Roberts Br. 13. None of the eye witnesses to the accident testified

concerning Perry's speed; nor did anyone who viewed the scene after the accident testify concerning the appearance of the ice on the road. There was no photographic or other hard evidence concerning Perry's speed or the nature of the ice, and Roberts did not call an accident reconstruction expert to opine on either issue. Perry's testimony thus was the sole and exclusive evidence bearing on both issues.

Even imagining, then, that the jurors disbelieved Perry's testimony, they would have had no basis on which to determine that Perry was traveling at any speed *other* than 20 miles per hour, much less that such speed was imprudent; or that the ice at the scene was anything *other* than "black ice," much less that Perry's failure to detect it was unreasonable.¹

¹ To be sure, other elements of Perry's testimony were inconsistent with Challis's accident report. *See* Opening Br. 5, nn. 1, 2. If the jury disbelieved Perry, therefore, it could have found both that snow was falling at the time of the accident (and not simply blowing across the road) and that Perry had turned right from a Meijer gas station (and not from Raceway Road). But so what? The jury still would have had no basis for inferring how fast Perry was going or at what speed a reasonably prudent driver would have been going under the circumstances. Neither of these potential findings lessens in any way the naked speculation the jury would have needed to engage in to find CSXT liable under the traditional negligence standard.

It also bears mention that the evidence regarding the gas station does not support Roberts's theory that Perry had traveled more than 100 feet on Rockville Road before encountering the ice. *See* Roberts Br. 6. Challis testified that the gas station was *east*, not west, of the intersection between Raceway and Rockville (SA61), meaning that Perry

continued . . .

Without Perry’s account of events, the jurors were left to speculate about Perry’s speed and the appearance of the ice, along with any other factors that might have supported a finding of negligence in this case. But as we explained in our opening brief (at 26), a verdict cannot stand on “speculation”; it must instead find support in “a defensible view of the *evidence*.” *Grossman v. S. Shore Pub. Sch. Dist.*, 507 F.3d 1097, 1100 (7th Cir. 2007) (emphasis added). And because “speculation cannot be the basis of a jury verdict,” it is “proper” to set aside a jury’s finding of liability when it “is supported only by sheer speculation and conjecture.” *Garrett v. Barnes*, 961 F.2d 629, 632, 634 (7th Cir. 1992). Given the notable lack of evidence bearing on the precautions a reasonably prudent person would have taken; whether Perry failed to take any such precautions; and whether any such failure caused Roberts’s injuries, speculation and conjecture are all the jury had to go on in this case.

B. *Res ipsa loquitur* does not apply here.

Unable to overcome the gaping holes in the record, Roberts spends the bulk of his argument attempting to show that the jury could

would have traveled a *shorter*, not longer, distance before encountering the ice. *See also* SA112. As it turns out, Challis was wrong: the gas station is west of the intersection. But there was no evidence to that effect before the jury and hence no basis for the jury to disbelieve Perry’s testimony that he turned right only 100 feet before hitting the ice.

have inferred negligence under the doctrine of *res ipsa loquitur*. Roberts Br. 16-23. But his efforts are unavailing.

Res ipsa loquitur is not a free pass for plaintiffs to avoid proving the elements of negligence. As the Supreme Court has said, the “basis” for liability under FELA is “negligence, [and] not the fact that injuries occur.” *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543-544 (1994). Plaintiffs thus always bear the burden of adducing evidence to “show that the injury resulted from the defendant’s failure to exercise due care.” *Anderson v. Griffin*, 397 F.3d 515, 519 (7th Cir. 2005). The *res ipsa loquitur* doctrine merely “allows a plaintiff to prevail in a negligence case by showing that even if there is no direct evidence of negligence,” the circumstances surrounding the accident indicate that it “probably would not have occurred had the defendant not been negligent.” *Clifford v. Crop Prod. Servs., Inc.*, 627 F.3d 268, 273 (7th Cir. 2010)); see also *Restatement (Third) of Torts: Liability for Physical & Emotional Harm* § 17(a) (2005) (hereinafter “*Restatement*”) (describing *res ipsa loquitur* as a “form of circumstantial evidence”).

The conditions under which *res ipsa loquitur* applies in a FELA case are very narrow: it may be invoked only when “the occurrence * * * was extraordinary in nature” and would have been an “unexplained event[]” in the absence of the defendant’s negligence. *Robinson*, 131

F.3d at 654; *see also Jesionowski v. Boston & Maine R.R.*, 329 U.S. 452, 454 (1947) (the doctrine applies to “unusual happenings”). Thus, the Supreme Court approved application of the doctrine in *Jesionowski*, a derailment case, because “[d]erailments are extraordinary, not usual, happenings” that are “ordinarily the result of negligence which may be attributed only to the lack of care of the railroad.” 329 U.S. at 458.

In contrast, it is well settled that *res ipsa loquitur* does not apply in FELA cases when “other causes than the negligence of the defendant, its agents or servants, might have produced the accident.” *Jesionowski*, 329 U.S. at 454. As this Court has put it, “[*r*]es ipsa does not apply [in a FELA case] when the accident could have occurred in the absence of the defendant’s negligence.” *Robinson*, 131 F.3d. at 655.

Here, there is no question that – in light of the adverse weather conditions on the morning of the accident – the collision could have occurred in the absence of Perry’s negligence. On this point, the relevant facts are undisputed: Perry was traveling eastbound on an ice-covered road in the snowy darkness when he encountered a patch of ice and lost control of his truck. Roberts readily admits this much: as he describes it, Perry “lost control of his vehicle” while driving “on an icy four-lane highway before dawn in December * * * while it was snowing.” Roberts Br. 11; *see also id.* at 16, 19 (making similar assertions).

Roberts just as readily admits that one of “several possible causes” of car accidents apart from “motorist negligence” is “very adverse weather conditions.” Roberts Br. 18 (quoting *Restatement* § 17(a)). Such conditions were admittedly present here. In fact, on the day of the accident Roberts prepared a written statement in which he conceded that Perry’s truck “lost control *due to inclement weather.*” SA114 (emphasis added). In his briefing before this Court, he again concedes that “Perry lost control of his CSX pickup truck * * * *because of ice on the highway.*” Roberts Br. 3 (emphasis added). Indeed, the district court denied Roberts’s motion for summary judgment precisely because a “reasonable juror could conclude that Perry simply drove over a patch of black ice,” and thus “that the collision was not the result of negligence, but rather that it was simply an accident.” Order on Pl.’s Mot. for Summ. J. at 3, dkt. 69 (May 28, 2010).²

² In an apparent effort to make the accident sound more remarkable than it was, Roberts repeatedly suggests that Perry’s truck crossed a “concrete median” (Roberts Br. 1, 10, 12) or a “concrete barrier’ in the median” (*id.* at 3, 5, 11) before colliding with the van in which Roberts was riding. From his description, one might think that Perry’s truck went careening over an imposing concrete wall, like the bulky medians typically found on interstate highways. In fact, the testimony was that there was a “small” *curb*, only a “couple of inches high,” separating the opposing lanes of traffic near the intersection. SA15. Perry’s truck, in other words, merely hopped a curb before hitting the van. The notable absence of damage to the truck (SA115) confirms that there was no imposing median.

There is thus no dispute that the accident here could have been caused simply by adverse weather conditions and not by Perry’s failure to exercise due care. Roberts himself has admitted as much (SA114), and the district court concluded the same (dkt. 69, at 3). *Res ipsa loquitur* accordingly provides no basis for upholding the verdict.³

II. INSTRUCTING THE JURY ON VIOLATIONS OF INDIANA TRAFFIC LAWS WAS PLAIN ERROR.

A. The instructional error was clear and obvious.

With respect to the jury-instruction error, Roberts argues that the negligence-per-se instruction was not “improper.” Roberts Br. 26. As he sees it, “the role of the Indiana Motor Vehicle Code” in this case

³ Tellingly, Roberts makes no effort to address *Robinson* or any of the other FELA-based *res ipsa loquitur* cases that we cited in our opening brief. See Opening Br. 27, n.8. Instead, he dedicates substantial portions of his *res ipsa loquitur* argument to discussing the law of New York, Missouri, Oregon, Kentucky, Pennsylvania, and Wisconsin. See Roberts Br. 20-23. According to Roberts, each of these states has adopted a prima-facie-negligence (*i.e.*, burden-shifting) rule for cases involving vehicles that “skid[] over the center line into oncoming traffic.” *Id.* at 21. But as we explained at length in our opening brief (at 17-21), FELA’s negligence standard takes no account of state substantive law. See also *infra*, at 11-14. These state-law rules of decision accordingly have no application here.

Of course, none of the prima-facie-negligence rules that Roberts cites would apply in this case anyway. Unlike in those other states, “[i]n Indiana, the skidding and sliding of an automobile is not negligence in and of itself,” and thus “[i]t is incumbent upon the party asserting negligence to prove that such skidding and sliding was attended by prior negligence on the part of the defendants.” *Sullivan v. Fairmont Homes, Inc.*, 543 N.E.2d 1130, 1141 (Ind. Ct. App. 1989).

“is a question of federal common law,” and “as a matter of federal common law,” a “state’s Rules of the Road establish the applicable standard of care” for FELA cases involving motor-vehicle accidents. *Id.* at 28-29. Without citing a single case to support this remarkable proposition, he concludes that the jury thus “was properly instructed that the Indiana Rules of the Road established the appropriate standard of care [in this case], and that an unexcused, unjustified violation of the local Rules of the Road supported a finding of negligence” against CSXT. *Id.* at 30.

Just like the district court’s decision to give the negligence-per-se instruction, Roberts’s argument defending it is clearly and obviously wrong. Whatever the federal common law may mean for actions like this one, there is no question that the inquiry begins first with federal statutory law. See *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 165-166 (2007). Congress has provided expressly that all laws “related to railroad safety,” including FELA, “shall be nationally uniform to the extent practicable.” 49 U.S.C. § 20106(a)(1). Consistent with this plain language and the clear purpose of FELA itself, this Court and the Supreme Court both have explained that FELA’s negligence standard accordingly must have a “uniform application throughout the country” in order “to effectuate [the Act’s] purposes.” *Schadel v. Iowa Interstate R.R.*, 381 F.3d 671, 676 (7th Cir. 2004) (quoting *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361 (1952)).

The laws of the states, however, are decidedly *not* uniform. Indeed, it has long been recognized that the variability among state laws is “one of the great strengths of our federal system”; local legislatures act as “laboratories,” testing new ideas and “novel techniques” for regulation. *Roth v. United States*, 354 U.S. 476, 505 (1957). As the Supreme Court has observed in other contexts, “[t]he result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570 (1996).

For precisely this reason, the Supreme Court has held that the diverse laws of the states “are not controlling in determining” when “damages [are] negligently inflicted” under FELA (*Dice*, 342 U.S. at 361) and “ha[ve] no bearing” on the “[t]he kind or amount of evidence required to establish” “civil liability of a railway to its employees” under the Act (*Stapleton*, 279 U.S. at 590, 597). Were it otherwise, FELA’s negligence standard would vary from state to state, and the uniformity that Congress sought to achieve in enacting the statute would be lost. Roberts’s theory – that FELA’s federal negligence standard nevertheless subsumes variable local traffic regulations and the occasional burden-shifting schemes that attend them (Roberts Br. 28-32) – is squarely inconsistent with this long-settled law.

Indeed, Roberts’s conclusion that the Indiana Rules of the Road should, of themselves, determine CSXT’s liability in this case is precisely what FELA’s uniform standard was designed to prevent – “irrational disparities in the enforcement” of the statute, whereby “FELA would mean one thing in Illinois and another thing in Indiana even with regard to identical accidents.” *Fletcher v. Chicago Rail Link, L.L.C.*, 568 F.3d 638, 640 (7th Cir. 2009). And as we explained in our opening brief (at 21 n.5), the prospect of such disparity in motor-vehicle-accident cases is real, and not merely an academic exercise.⁴

Roberts offers no response to this dispositive point. Instead, he argues that *Stapleton* is distinguishable. Roberts Br. 30-32. He notes that the district court there instructed the jury to impose “absolute liability” if it found that the railroad had violated state law, whereas in this case the negligence-per-se instruction allowed the jury to take the purported statutory violations simply as “prima facie evidence of negligence,” which CSXT could have “rebutted.” *Id.*

⁴ We do not mean to suggest that juries in FELA actions involving car accidents may never consider state or local traffic laws. Local traffic standards (including, for example, posted speed limits) ordinarily will be relevant *evidence* bearing on the question of due care. Our point is simply that proof that a defendant violated a state traffic law cannot, of itself, establish liability under FELA or alter a plaintiff’s burden to prove each element of negligence under the federal standard.

But that is a distinction without a difference: FELA forbids *any* instruction according to which state law dictates “[t]he kind or amount of evidence required to establish” negligence under the Act. *Stapleton*, 279 U.S. at 590. Thus, as other courts have held, “no presumption of negligence arises in a case tried under [FELA] from the violation of a state statute.” *Moore v. So. Ry. Co.*, 161 S.E. 525, 526 (S.C. 1931), *reversed on unrelated grounds*, 284 U.S. 581 (1931); *see also Smith v. Thompson*, 182 S.W.2d 63, 66 (Mo. 1944) (“[T]he test and measure of [a railroad’s] liability [under FELA] is not whether [it has] complied with a state statute but is whether [it was] guilty of negligence under the act.”). At bottom, “the substantive law of the states” is categorically “inapplicable in litigation based upon the F.E.L.A.” *Davee v. S. Pac. Co.*, 375 P.2d 293, 295 (Cal. 1962) (en banc). We cited each of these cases in our opening brief, and once again, Roberts offers no response.

B. The instructional error affected the outcome of the trial.

Invoking what he calls the “two-issue rule” (Roberts Br. 11), Roberts next insists that, even if the district court erred in giving the negligence-per-se instruction, the error was not prejudicial because “it must be assumed that the verdict was supported by the general F.E.L.A. negligence instructions” and not the negligence-per-se instruction. *Id.* at 25-26. That is incorrect.

In fact, Roberts appears to confuse two different arguments: the “two-issue rule” that he cites is applicable to challenges to the sufficiency of the evidence, and not to arguments concerning jury instructions. The rule stands for the self-evident proposition that, when a prevailing plaintiff offers “two alternative independent theories of relief, and the jury return[s] a general verdict as opposed to a special verdict,” a court should uphold the jury’s decision so long as there was sufficient evidence to support either of the theories. *Culli v. Marathon Petroleum Co.*, 862 F.2d 119, 123 (7th Cir. 1988).

The rule is predicated on an assumption, however, that *both* of the plaintiff’s theories are legally correct and thus that either legitimately could support the verdict; as we explained in our opening brief (at 18), when reviewing sufficiency-of-the-evidence challenges, courts may consider only properly formulated legal standards. *Geldermann*, 27 F.3d at 312-313. But it is precisely our point that Roberts’s negligence-per-se theory is not legally correct and thus cannot support the verdict. And perhaps more importantly (as we have just shown, *supra* at 3-10), the evidence was not sufficient to support a verdict under the traditional negligence standard in any event. The “two-issue rule” accordingly offers Roberts no help.

Apart from that, Roberts argues that the negligence-per-se instruction was harmless because it was “[a]t most * * * redundant” with other instructions charging the jury with respect to the traditional elements of negligence. Roberts Br. 32-33. That also is incorrect.

Far from superfluously restating the reasonable-and-prudent-person standard, the negligence-per-se instruction provided in plain terms that, if Perry’s truck was at any time not “driven upon the right half of the roadway” or if Perry failed to make his “right turn as close as practical to the right-hand curb,” then CSXT was guilty of “violat[ions]” of state traffic laws and “such conduct would constitute fault to be assessed against” CSXT. SA88-89. The instruction plainly did not require the jury to find specifically that “Perry negligently failed to reduce speed” (Roberts Br. 33), much less that Perry failed to exercise due care in any other way, in order to render a verdict for Roberts on the basis of negligence per se.⁵

⁵ True enough, the elements of the per-se instruction concerning whether Perry was driving at “a speed greater than is reasonable and prudent under the conditions” or “at an appropriate reduced speed * * * [w]hen special hazard exists by reason of weather” (SA88) arguably were redundant of the instructions concerning general negligence. But as we explained in Section I, there was insufficient evidence for the jury to find that Perry was driving unreasonably fast; the jury therefore could not rationally have based its verdict on those elements of the instruction.

In proposing the per-se instruction to the district court in the first place, Roberts certainly did not take the position that it was redundant of any of the other instructions. As we described at length in our opening brief (at 7-11, 29-30), negligence per se was his entire theory of the case. With respect to liability, he focused exclusively on whether (i) Perry had failed to reduce his speed to account for the weather, (ii) Perry's truck had crossed the center line, and (iii) Perry had failed to turn right into the right-hand lane. Roberts argued repeatedly that any affirmative determination on any one of these issues, standing alone, was a statutory violation, and "[t]here's no defense * * * to a statutory violation, and we all know that." SA72. That theory plainly was not encompassed by the general negligence instructions.

Nor did the district court, for its part, consider the per-se instruction superfluous or redundant. In rejecting CSXT's objection to the instruction for lack of evidentiary foundation, it noted that "[w]e don't have the world's greatest investigation of the accident" or the sort of evidence "that you have in most traffic reconstruction cases." SA85. The court thus concluded that the negligence-per-se instruction not only was not redundant, but was in fact "the *only* guidance" the jury had on the issue of liability. SA85-86 (emphasis added).

There is thus little question that the instruction changed the outcome of the trial: it was the only theory that Roberts presented to the jury, and the evidence was demonstrably insufficient to support a verdict on any other basis. As this Court previously has recognized, reversal is warranted in circumstances like these, “where the instructions are central and the error potentially dispositive.” *Bronk v. Ineichen*, 54 F.3d 425, 430 (7th Cir. 1995). That rule holds true even with respect to unpreserved objections. As this Court has suggested, a jury-instruction error that has “probably changed the outcome of the trial” necessarily also has “affected * * * substantial rights” and “the fairness, integrity or public reputation of [the] judicial proceedings.” *United States v. Courtright*, 632 F.3d 363, 371 (7th Cir. 2011) (alteration omitted). That surely is the case here, and the verdict accordingly cannot stand.

C. The instructional error was not invited.

Finally, Roberts is mistaken that the instructional error was invited. *See* Roberts Br. 25. The “invited error” doctrine is essentially a waiver rule: when an instruction challenged on appeal is one that the appellant himself “requested” at trial, then “any objection to giving it [necessarily has] been waived.” *United States v. Hamilton*, 499 F.3d 734, 736 (7th Cir. 2007). Such a rule plainly has no application here: CSXT not only did not request the per-se negligence instruction, but

expressly objected to it, albeit on different grounds from those raised before this Court. Opening Br. 11 (citing SA83-85).

The statement that Roberts adverts to as evidence of CSXT's supposed invitation of the error (Roberts Br. 25) had nothing to do with the per-se-negligence instruction. During the argument on CSXT's motion for a directed verdict, Roberts argued that FELA actions are governed by a relaxed negligence standard. He asserted specifically that "it's a very specialized standard under the FELA," and a plaintiff needs to establish only that there is something more than "absolutely zero evidence" to support his case in order to avoid a directed verdict. SA80.

Responding to this dubious reading of the case law, CSXT argued that "the standard of proof of negligence is no different in an FELA case than it is in a common law negligence case," and thus the "plaintiff's burden is exactly the same as if we were here with a motor vehicle collision between two private citizens." SA81. In other words, "[a] FELA plaintiff must prove the traditional common law elements of negligence" (Opening Br. 22 (quoting *Stevens v. Bangor & Aroostook R.R.*, 97 F.3d 594, 598 (1st Cir. 1996)), just like any other plaintiff in any other case. This argument, which had nothing whatever to do with the jury instructions, obviously did not invite the district court to give an erroneous negligence-per-se charge.

CONCLUSION

The judgment should be reversed and the case remanded with instructions to enter judgment for CSXT or, at minimum, to hold a new trial before a properly instructed jury.

Respectfully submitted,

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Dated: April 12, 2011

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the rules concerning format and length contained in Circuit Rule 32(b) and Federal Rule of Appellate Procedure 32(a)(7). This brief was produced with a proportionally spaced font, 12 points or larger; and the length of this brief, including footnotes, is 4,027 words.

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CERTIFICATE OF SERVICE

I hereby certify that that on April 12, 2011, two copies of the Reply Brief of CSX Transportation, Inc. were served by overnight courier upon counsel of record for Plaintiff-Appellee, Kevin Roberts. Digital versions of the same were served electronically via the Court's CM/ECF system.

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