

SUPREME COURT OF KENTUCKY
No. 2008-SC-000643-D

MARY JANE CALHOUN and
JESSE DAYMOND CALHOUN,

APPELLANTS,

v.

CSX TRANSPORTATION, INC.,

APPELLEE.

APPEAL FROM COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
No. 2007-CA-001650

BRIEF FOR APPELLEE
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The undersigned hereby certifies that, on this 21st day of April, 2010, copies of this Brief for Appellee were served by U.S. Express Mail, postage prepaid, on: Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Rodney Burress, Judge, Bullitt Circuit Court, Bullitt County Judicial Center, 250 Frank E. Simon Avenue, Shepherdsville, Kentucky 40165; and Kevin B. Sciantarelli, Bubalo, Hiestand & Rotman, 9300 Shelbyville Road, Suite 215, Louisville, Kentucky 40222, counsel for appellants.

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I. INTRODUCTION

On the morning of December 12, 2001, Mary Calhoun sustained serious injuries when she drove her vehicle onto a private railroad crossing and was struck by an oncoming train. She sued appellee CSX Transportation, Inc. (“CSX”), alleging that the railroad had, *inter alia*, negligently failed to provide adequate warning of the train’s approach and negligently failed to maintain the crossing to keep it safe for public use. The circuit court granted summary judgment in favor of CSX, concluding—consistent with the longstanding law of this Commonwealth—that the railroad had no such duties at a private crossing. The Court of Appeals affirmed. In this appeal, plaintiffs ask this Court to overturn a century of precedent that sharply limits the duties owed by railroads at private railroad crossings. As we discuss herein, there is no warrant for this Court to undertake that drastic change in course.

II. STATEMENT CONCERNING ORAL ARGUMENT

As we demonstrate below, there is no valid reason for this Court to eradicate a century of precedent in this case. But, insofar as this Court is not prepared to dismiss plaintiffs' radical request out of hand, we submit that oral argument is warranted so that CSX can respond to whatever concerns about the public/private distinction the Court may have.

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IV. COUNTERSTATEMENT OF THE CASE

A. Factual Background

The accident at issue in this case took place at a rural railroad crossing near Shepherdsville, Kentucky. The crossing, designated by the United States Department of Transportation as private at-grade crossing No. 343536D,¹ is the third in a series of three railroad crossings located within a half-mile section of railroad track. Supp. App. 6 at 57. The first two crossings occur at public highways; therefore, they are equipped with certain signs and/or warning devices pursuant to state and federal law. *Id.* Crossing 343536D, by contrast, occurs at an unnamed, single-lane gravel driveway that provides vehicular access to two tracts of private farmland located west of the tracks. App. 33 at 70. Crossbucks, but no gates or other active warning devices, alert drivers to the presence of the crossing. Supp. App. 6 at 57.

The unnamed gravel drive that intersects the tracks at crossing 343536D was not constructed by any public entity; nor has it been incorporated into the state or county road system or dedicated to public use. App. 1 at 3; Supp. App. 4 at 39.² Rather, the rural road is maintained exclusively by the two private landowners, Kerrin Hester and Charles Burris, for whose convenience the crossing exists. App. 33 at 11, 16, 70-71, 103-05. At the time of the accident, Hester permitted a small, private garbage-collection business, Bullitt County Sanitation, Inc. (“BCS”), to operate on his property³; however, no other residences or commercial buildings in the vicinity were located west of the tracks. *Id.* at

¹ See Department of Transportation Crossing Inventory, *available at* <http://safetydata.fra.dot.gov/OfficeofSafety/PublicSite/Crossing/Crossing.aspx>.

² Plaintiffs assert in passing that CSX “built” and “maintained” the crossing (Pl. Br. 27), but there is no evidence in the record to support that assertion.

³ The BCS facility is no longer in business.

17-24. Other than the individual property owners, then, only BCS garbage trucks, BCS employees, and an occasional BCS customer had reason to travel over the crossing. *Id.*

Plaintiff Mary Jane Calhoun was one of the few individuals who traversed this crossing on a regular basis. Two of her sons were employed at the BCS facility, and she frequently drove them to and from work. Accordingly, Mrs. Calhoun testified, she was “very familiar” with the crossing. App. 1 at 2-3; App. 25 at 34; Supp. App. 1 at 1-2. She was aware that trains passed regularly over the crossing at high speeds. App. 25 at 34-36. She was aware that, as she approached the crossing from the west, a broken line of trees shielding the Hester and Burris properties from the railroad tracks temporarily limited her view of oncoming trains. App. 1 at 18; Supp. App. 1 at 4. She also was aware that it was possible to pull her vehicle up safely beyond this tree-line and obtain an unobstructed view prior to crossing. App. 1 at 18; Supp. App. 1 at 9-11; *see also* App. 1 at 19-21 (noting that “[t]he tracks are unwaveringly straight at this point, and the view is virtually to the horizon”). In leaving the BCS facility, therefore, it was Mrs. Calhoun’s practice always to drive past the tree-line, stop a safe distance from the tracks, and look both ways for oncoming trains before crossing. App. 25 at 38-41.

Early in the morning on December 12, 2001, as usual, Mrs. Calhoun dropped off her sons at the BCS facility. Unfortunately, however, she deviated from her usual routine as she left the facility and travelled back east towards the railroad tracks. Although Mrs. Calhoun has no recollection of the incident, one of her sons testified that he witnessed the accident and that Mrs. Calhoun did not appear to stop when she reached the crossing. App. 1 at 4; Supp. App. 2 at 20. As Mrs. Calhoun drove onto the tracks without stopping

to look for oncoming trains, a CSX locomotive en route from Nashville to Louisville was simultaneously bearing down upon the crossing. App. 1 at 4.

The train was travelling north on the tracks at approximately 50 miles per hour, well below the federally established 60 mph speed limit.⁴ App. 1 at 3. As it was still somewhat dark, both the train's headlights and its ditch lights were illuminated. App. 9 at 35. The parties agree that the engineer, defendant Paul McClintock, sounded the locomotive's whistle at the two preceding public crossings; however, there is a factual dispute as to whether he sounded the whistle in the seconds immediately before reaching the crossing in question. App. 1 at 4.

McClintock testified that he had observed Mrs. Calhoun's vehicle as it was leaving the BCS facility, several hundred feet from the tracks, but that he lost sight of the car briefly as it approached the crossing. App. 9 at 44-46. McClintock noted, however, that Mrs. Calhoun's vehicle had been travelling slowly on the gravel drive (less than 10 mph), and that he had assumed the driver would yield to the train. *Id.*; *see also* Supp. App. 5 at 45. Tragically, once McClintock realized that the vehicle was not going to stop, it was too late. The train, travelling at 52-53 miles per hour on fixed tracks, was unable to avoid a collision. *Id.* at 54-55. Mrs. Calhoun was ejected from her vehicle and sustained serious injuries. App. 1 at 4.

B. Procedural History

1. The Circuit Court

Mrs. Calhoun and her husband filed this lawsuit in Bullitt Circuit Court, alleging that CSX and McClintock had, *inter alia*, negligently failed to maintain the vegetation

⁴ *See* 49 C.F.R. § 213.9 (speed limit of 60 mph for freight trains on a Class IV track).

around the crossing, negligently failed to install and maintain adequate warning devices and guards at the crossing, negligently operated the train at an excessive speed, and negligently failed to provide adequate warning of the train's approach. The Calhouns also brought negligence claims against Hester, Burris, and the sanitation company, alleging that they had negligently failed to install adequate warning devices on their property and negligently failed to keep and maintain the area around the crossing. App. 2 at 10.⁵ On March 21, 2007, following extensive discovery, CSX and McClintock moved for summary judgment.

The circuit court first found that, as a matter of law, the crossing at issue was a private crossing. App. 2 at 8. Under the well-settled law of Kentucky, therefore, the duties owed by the railroad and its employees at this crossing were quite limited. *Id.* at 5-6, 10. Noting that “Kentucky law does not impose on the railroad an obligation to clear its right of way,” “slow the speed of a train,” or “give a signal” at a private crossing (*id.* at 6-8), and that none of the limited exceptions to this “no duty” rule applied, the trial court concluded that the railroad’s only duty at this crossing was to exercise due care to avoid injury after discovering Mrs. Calhoun in a position of peril. *Id.* at 6. As there was “nothing in the record to indicate that [the engineer] observed the Plaintiff in a position of peril and failed to take action,” the circuit court granted summary judgment in favor of CSX and McClintock. *Id.* at 6, 10. Plaintiffs appealed.

2. The Court Of Appeals

The Court of Appeals affirmed the circuit court’s grant of summary judgment. App. 1 at 34. It agreed with the circuit court’s findings that the crossing at issue was private as a matter of law (*id.* at 10), and that the duties owed by the railroad were

⁵ Plaintiffs voluntarily dismissed their claims against these defendants. App. 3.

therefore quite limited (*id.* at 13). It also agreed that plaintiffs had failed to submit evidence sufficient to bring the crossing within any of the three narrow exceptions to the general private-crossing rule: namely, the assumed-duty exception, the ultrahazardous-crossing exception, and the pervasive-use exception. *Id.* at 13-23.

First, although CSX conceded for purposes of summary judgment that it had adopted a practice of sounding a whistle at the crossing, Mrs. Calhoun herself testified that she had traversed the crossing on numerous occasions and never once heard a train whistle there. App. 1 at 14-15. Accordingly, the court noted, even if the railroad had in fact customarily sounded a warning as it approached the crossing, Mrs. Calhoun could not possibly have relied upon this practice—a “crucial element” of the assumed-duty exception. *Id.* at 14. Second, quoting Mrs. Calhoun’s testimony that “it is possible to pull up to the tracks close enough that you can see up the tracks without anything blocking your view,” the court found no evidence to support a finding that the crossing was “ultrahazardous” within the meaning of Kentucky law. *Id.* at 17-21. Finally, noting the limited number of individuals who used the crossing on a daily basis, the court held that “[t]here is no evidence of record which would indicate that the number of crossings at the subject site is *anywhere near*” the number required for the pervasive use exception to apply. *Id.* at 22 (emphasis added).

Concluding that the railroad owed no other duty under Kentucky law, and finding no evidence to indicate that the railroad defendants had acted wantonly or willfully or failed to exercise reasonable care to avoid injury once Mrs. Calhoun’s position of peril was discovered, the appellate court affirmed the trial court’s grant of summary judgment.

V. ARGUMENT

The scope of a railroad's duty at private crossings in Kentucky is well settled. Unlike at public crossings, where a railroad is subject to numerous statutory and common-law requirements, Kentucky law does not require a railroad to install warning devices, slacken its speed, sound a whistle, clear vegetation, or take other prophylactic measures to avoid harm to individuals at private crossings. Rather, at private crossings, the primary responsibility rests with private property owners, motorists, and pedestrians themselves—the parties most often in the best position to avoid an accident. Absent certain well-defined exceptions, therefore, a railroad's only duty at a private crossing is to exercise reasonable care to avoid injury to an individual on the crossing *after* discovering him or her in a position of peril.

Plaintiffs concede that, under the well-established law of this Commonwealth, the crossing at issue in this case was “[t]echnically” a private one. The crossing was not extrahazardous or pervasively used within the meaning of Kentucky law, and Mrs. Calhoun did not rely on any voluntary signals customarily given at the crossing; therefore, none of the recognized exceptions to the general “no duty” rule apply here. Finally, no evidence suggests that the train's engineer acted wantonly, willfully, or failed to take reasonable care to avoid an accident once he discovered Mrs. Calhoun's position of peril. The circuit court thus correctly granted the railroad defendants summary judgment.

Plaintiffs recognize that it is impossible for them to prevail under existing law; therefore, they submit that this Court should rewrite it. Other than a desire that they be able to recover damages in this case, however, plaintiffs offer no justification for overruling more than a century of precedent. They provide no compelling reason to

believe that the “no duty” rule is incompatible with existing tort law principles; nor do they suggest that the rule has been detrimental to public safety. The rationales underlying this Court’s longstanding treatment of private crossings hold equally true today. Accordingly, the Court should decline plaintiffs’ invitation to upset years of established law and should affirm the summary judgment.

A. The Court Of Appeals Correctly Held That CSX’s Only Duty At The Private Crossing Was To Exercise Reasonable Care To Avoid A Collision Once It Discovered Mrs. Calhoun In A Position of Peril.

1. The Court of Appeals correctly concluded that the crossing in question is private as a matter of law.

Under the well-settled law of this Commonwealth, “the duties required of persons who operate railroad trains, when approaching and passing over public crossings, are very different from those which are required of them at private crossings.” *Stull’s Adm’x v. Kentucky Traction & Terminal Co.*, 172 Ky. 650, 189 S.W. 721, 723 (1916). Accordingly, the threshold issue in this case is whether the crossing where Mrs. Calhoun was injured is classified as “public” or “private” under Kentucky law.

Plaintiffs submit that, despite its classification in the federal crossing inventory as a private crossing, crossing No. 343536D is in fact a public crossing based on its “public character” and “public use.” Pl. Br. 14-16. As a federal court recently concluded in a case involving this very crossing, however, their arguments are unavailing. *See Gaw v. CSX Transp., Inc.*, 2008 WL 793655, at *3 (W.D. Ky. 2008) (applying Kentucky law), *aff’d*, 326 F. App’x 382 (6th Cir. 2009).

The Kentucky legislature has defined a “public grade crossing” as “the at-grade intersection of a railroad track or tracks and a road or highway that has been dedicated to public use *and* incorporated into either the state primary road system or the highway or

road system of a county or municipality.” Ky. Rev. Stat. 177.010(5) (emphasis added). Although this definition by its terms applies only “[a]s used in KRS 177.010 to 177.890,” Kentucky courts have long applied the same definition in common-law negligence cases. *See, e.g., Deitz’ Adm’x v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.*, 296 Ky. 279, 281, 176 S.W.2d 699, 701 (1943) (“For a crossing to be a public one the road or street on which it is situated must be a public road or street established either in the manner prescribed by statute or by dedication, and if in the latter manner there must be an acceptance.”).

Plaintiffs concede that the unnamed gravel drive that intersects the tracks at crossing No. 343536D was not constructed by the state or county, and it has never been incorporated into the state or county road system. Pl. Br. 14, 30; *see also* App. 4 at 39. The Kentucky Transportation Cabinet does not include the drive on its list of public roads; nor does the City of Shepherdsville or Bullitt County. App. 1 at 9. Furthermore, the access road undisputedly is maintained solely by the two private landowners served by the crossing—not by the county or local road departments. *See* App. 33 at 11, 16, 70-71, 103-05. The Court of Appeals thus correctly held that, as a matter of law, crossing No. 343536D is properly classified as a private crossing. App 1 at 7-10.

Plaintiffs’ efforts to evade this black-letter law by pointing to the “public character” of the crossing are unavailing. Isolated language in a 1986 national crossing handbook notwithstanding (*see* Pl. Br. 17-18), neither a road’s “public use” nor its “public character” is sufficient to transform a private crossing into a public one under Kentucky law. Rather, a public highway “may be established only in the manner provided by statute, or by its dedication to the public use *and* its acceptance by the proper

authorities as a public highway.” *Hunt’s Adm’r v. Chesapeake & Ohio Ry.*, 254 S.W.2d 705, 707 (Ky. 1953) (emphasis added); *see also Deitz’ Adm’x*, 176 S.W.2d at 701. Although acceptance by the local authorities “need not be formal,” this Court has made clear that “some control on the part of the county authorities must be exercised” over the road in order to transform a private crossing into a public one. *Hunt’s Adm’r*, 254 S.W.2d at 707; *Louisville & Nashville R.R. v. Whittle’s Adm’rs*, 216 Ky. 314, 287 S.W. 894, 895 (1926). Absent this exercise of control, even “continual use of the road by the public” at large will not suffice to make it a public highway. *Louisville & Nashville R.R. v. Engle*, 278 Ky. 576, 129 S.W.2d 133, 134 (1939).

Moreover, even assuming that a mere resemblance to public crossings could render a private crossing public, crossing No. 343536D is far from public in character. The gravel drive that leads to the crossing does not serve as a public thoroughfare; rather, it branches off another unnamed road and dead-ends at the Hester and Burris properties. App. 33 at 7-10. It is unnamed, unmarked, and unpaved. *Id.* at 11, 70. The road is not regularly used by the general public; rather, at the time of the accident, it was used only by the private landowners, BCS employees, and an occasional BCS customer. App. 33 at 17-24.⁶ Indeed, contrary to plaintiffs’ assertions, crossing No. 343536D has all the hallmarks of a private crossing.

⁶ To negate these clear indications that the private road is in fact private, plaintiffs make much of the absence of other (hypothetical) indicators. First, they note that no posted sign expressly informs motorists turning off the county garage access road and onto the gravel drive that “the road is no longer maintained by Bullitt County.” Pl. Br. 15. Of course, they can point to no case law suggesting that a motorist would reasonably expect to see such a sign. Moreover, the manifest difference between the well-paved road that provides access to the county garage and the rough gravel road that leads to the Hester and Burris properties surely has the same effect. *See* Supp. App. 4 at 41-42. Second, plaintiffs make much of the absence of a “Private Road Crossing Agreement”

Plaintiffs contend that the presence of crossbucks and whistle posts constitutes evidence that the crossing is public, pointing to *Louisville & Nashville Railroad v. Blanton*, 304 Ky. 127, 200 S.W. 133 (1947). *See* Pl. Br. 30. That case, however, is inapposite. In *Blanton*, the road in question had been constructed and maintained by the county—and thus unquestionably was a public road—until a portion was destroyed in the construction of the railway. 200 S.W. at 135. The railroad later rebuilt that segment of the road pursuant to statute. *Id.* The question in that case, then, was whether the railroad’s act of re-construction was sufficient to transform a *public* road into a *private* one.

The Court in *Blanton* ultimately concluded that the crossing in question was public as a matter of law, based on the fact that the county had originally constructed and later assumed supervision of the road. 200 S.W.2d at 135; *see also Hunt’s Adm’r*, 254 S.W.2d at 708 (distinguishing *Blanton*). The fact that the railroad maintained crossbucks and whistle posts pursuant to statute was merely additional evidence that the railroad itself considered the road still to be public. *See Blanton*, 200 S.W.2d at 135. In this case, by contrast, plaintiffs introduced no evidence that the drive was constructed or ever had been maintained by Bullitt County: To the contrary, it is undisputed that the private landowners maintained exclusive responsibility for the gravel road on both sides of the

that covers this crossing. Pl. Br. at 17. Although CSX obviously prefers to have written confirmation of the property owners’ duties at private crossings, and accordingly maintains a form private crossing agreement on its website, the vast majority of private crossings do not have such an agreement in place. *See Private Highway-Rail Grade Crossing Safety Research and Inquiry*, at 67 (May 2008), *available at* http://www.fra.dot.gov/downloads/safety/privatexingsafetyresearchinquiry_061008.pdf. Plaintiffs again point to no legal authority to suggest that the absence of a private crossing agreement renders a crossing public. As the Court of Appeals noted, “these factors do not supersede the rather straight-forward statutory and case law definitional requirements for classification as a public crossing.” App. 1 at 10.

crossing. App. 33 at 103-04. As such, the mere presence of crossbucks and whistle posts—required by statute at public crossings but optional at private ones—is insufficient to change the legal character of the crossing.

The Circuit Court and Court of Appeals thus correctly concluded that the crossing was private as a matter of law. App. 1 at 7-10; App. 2 at 2-4. The only question, then, was whether the railroad had any duty to maintain the vegetation, install signal devices, keep a lookout, or provide a warning prior to discovering Mrs. Calhoun in a position of peril.

2. Under well-established law, a railroad generally has no duty of lookout, warning, or maintenance at private crossings

a. At crossings involving public roadways, “it is the duty of those operating railroad trains to anticipate the presence thereon of persons traveling the highway.” *Chesapeake & Ohio Ry. v. Young’s Adm’r*, 146 Ky. 317, 142 S.W. 709, 712-13 (1912). At public crossings, therefore, a railroad’s failure to take reasonable precautions to protect those persons from injury may result in a finding of negligence. *Id.* Consistent with this common-law rule, the Kentucky legislature has imposed several specific statutory duties upon railroads at public crossings: KRS § 277.160 requires a railroad to erect signal boards at each public crossing; KRS § 277.190 requires a train to sound its whistle at certain distances from each public crossing; and KRS § 277.200 sets limits on the amount of time a train may stop and obstruct a public crossing.

At crossings involving private roadways, however, no comparable common-law or statutory duties exist. *Young’s Adm’r*, 142 S.W. at 713. Indeed, absent certain well-defined circumstances, courts in this Commonwealth for 127 years have refused to impose upon railroads any duty of lookout, warning, or maintenance at private crossings.

See, e.g., Louisville & Nashville R.R. v. Wallace, 302 S.W.2d 561, 563-64 (Ky. 1956); *Hunt's Adm'r v. Chesapeake & O. Ry.*, 254 S.W.2d 705, 706-07 (Ky. 1952); *Deitz' Adm'x v. Cincinnati, N.O. & T.P. Ry.*, 296 Ky. 279, 281, 176 S.W.2d 699, 701 (1943); *Spalding v. Louisville & Nashville R.R.*, 281 Ky. 357, 136 S.W.2d 1, 2-3 (1940); *Louisville & Nashville R.R. v. Engle*, 278 Ky. 576, 129 S.W.2d 133, 135 (1939); *Stull's Adm'x v. Kentucky Traction & Terminal Co.*, 172 Ky. 650, 189 S.W. 721, 723 (1916); *Chesapeake & Ohio Ry. v. Hunter's Adm'r*, 170 Ky. 4, 185 S.W. 140, 141 (1916); *Adkins' Adm'r v. Big Sandy & Cumberland R.R.*, 147 Ky. 30, 143 S.W. 764, 765 (1912); *Gividen's Adm'r v. Louisville & Nashville R.R.*, 17 Ky. 789, 32 S.W. 612, 613 (1895); *Johnson's Adm'r v. Louisville & Nashville R.R.*, 91 Ky. 651, 25 S.W. 754, 755 (1883); *Maggard v. Louisville & Nashville R.R.*, 568 S.W.2d 508, 509 (Ky. Ct. App. 1977); *see also Gaw v. CSX Transp., Inc.*, 2008 WL 793655, at *3 (W.D. Ky. 2008) (applying Kentucky law), *aff'd*, 326 Fed. App'x 382 (6th Cir. 2009). Unlike at public crossings, where railroads owe a duty of care to prevent harm to individuals who may be crossing the tracks, this Court's predecessor long ago made clear that a railroad's only duty at private crossings is to exercise "ordinary care to save [a person] from injury *after* her peril [is] discovered." *Chesapeake & Ohio Ry. v. Hunter's Adm'r*, 170 Ky. 4, 185 S.W. 140, 141 (1916) (emphasis added).

b. The rationale for this "no duty" rule at private crossings is simple. As this Court's predecessor explained nearly a century ago:

The reasons for these differences [in duties] arise from the purpose of the law to permit the operation of the railroad trains with such expedition as will meet the just requirements of commerce and travel, and at the same time to reduce the danger of injuries to the people to a minimum. To require a lookout duty of railroads at every private

crossing, which may be established by any person for his own use, and where, in the large number of instances, there is no person at all on or about the crossing when the train approaches, and to require the trains to give warning of their approach and to moderate their speed at such places[,] would greatly hinder both commerce and public travel, without any beneficial result.

Stull's, 189 S.W. at 723; *see also Wallace*, 302 S.W.2d at 563 (reiterating this rationale); *Johnson's Adm'r*, 25 S.W. at 755 (noting that the contrary rule “would unnecessarily and seriously interfere with and impede the running of trains”).

The “no duty” rule at private crossings also comports with traditional tort-law principles that place the duty of care on the “cheapest cost avoider,” incentivizing that party to take the necessary steps to avoid an accident. *See generally* Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 Yale L.J. 1055, 1057-65 (1972); GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); Guido Calabresi, *Views and Overviews*, 1967 U. Ill. L.F. 600, 600-611 (1967). As one federal court has explained, “trains run on fixed tracks and their course cannot be altered,” yet “no such steel-bound limitation controls the movement of motor vehicles.” *Weaver v. Nat'l R.R. Passenger Corp.*, 863 F. Supp. 291, 295 (W.D. Va. 1994) (quoting *Wright v. Norfolk & W. Ry.*, 427 S.E.2d 724, 730 (Va. 1993)). Moreover, trains typically weigh several tons and travel at high rates of speed, making them extremely difficult to stop at a moment's notice—unlike automobiles, which easily can stop at a crossing, look both ways, and proceed only when the tracks are clear. *See, e.g.*, Kentucky Driver Manual at 24 (2006), *available at* www.kentuckystatepolice.org/pdf/2006_ky_drivers_manual.pdf (warning motorists that “[t]rains cannot stop quickly; cars can”). “[I]n recognition of the fact that the driver is in the best position to avoid an accident in the first place,” a clear rule barring a railroad's liability at private crossings encourages

drivers to adapt their behavior accordingly. *Weaver*, 863 F. Supp. at 295 (noting that the legislature had sensibly chosen to alter this rule only at public crossings, “which generally are more heavily used, where the speeds of cars are greater, and where the danger of accidents increases to the point where the railway company must bear some of the burden of accident prevention”).

Balancing the desire to minimize the risk of accidents, on the one hand, and the need to promote efficient travel and commerce, on the other, Kentucky courts developed a bright-line rule: Railroads must maintain the area, keep a lookout, and provide reasonable warnings at public crossings, where motorists and pedestrians are frequent and anticipated, but they owe no such duties at private crossings, where the presence of individuals on the track is far less likely. *See Stull’s*, 189 S.W. at 723-24. Instead, the duty to avoid injury at private crossings rests solely with the property owner and other individuals crossing the tracks, who are expected to “exercise ordinary care and prudence for [their] own safety.” *Id.* at 724; *see also Spalding*, 136 S.W.2d at 2-3. This well-settled Kentucky law helps to ensure that railroads are free to traverse their tracks in a reasonably efficient manner, while at the same time incentivizing the proper parties to take precautions to reduce the risk of accidents.

3. The Court of Appeals correctly concluded that none of the three established exceptions to the “no duty” rule apply here.

In certain limited circumstances, the rationales underlying the “no duty” rule at private crossings hold less true, and it makes less sense to impose the sole duty of care upon motorists or pedestrians. Therefore, where the risk of accidents is particularly high or the motorist is not in fact the cheapest cost avoider, this Court has recognized exceptions to the bright-line rule. At private crossings, a railroad may take on certain

duties of care where: (1) the crossing is “extrahazardous” (*Louisville & Nashville R.R. v. Quisenberry*, 338 S.W.2d 409 (1960)); (2) there is “habitual use of the crossing by the public” (*Hunt’s Adm’r v. Chesapeake & O. Ry.*, 254 S.W.2d 705, 707 (Ky. 1953)); or (3) the railroad voluntarily assumes a duty through custom or practice (*Ill. Central R. Co. v. Maxwell*, 167 S.W.2d 841, 843 (Ky. 1943)). In keeping with the purposes of the rule, however, these three exceptions are both narrow and well defined—and none apply in this case.

a. Extrahazardous crossings

All railroad crossings are dangerous—a fact that the Kentucky courts certainly recognized when they developed the “no duty” rule at private crossings. *See Cincinnati, New Orleans & Tex. Pac. Ry. v. Hare’s Adm’x*, 297 Ky. 5, 178 S.W.2d 835, 837 (Ky. 1944). But Kentucky courts also presumably recognized the significant costs associated with requiring a railroad to install and maintain warning devices, “regulate or slacken speed,” station a lookout, “sound the train’s horn,” and “trim or remove” the vegetation at every one of the 2,394 recognized (and innumerable unrecognized) private railroad crossings in Kentucky. *See* Pl. Br. 1. Accordingly, where the danger of a railroad crossing is open and obvious, and motorists can prevent an accident simply by stopping at a crossing and looking out for oncoming trains, Kentucky law requires them to do so. *See* Part A.2, *supra*.

In certain “peculiar or extraordinary circumstances,” however, the natural or artificial features of a crossing render it so dangerous that, *even if a motorist takes all possible precautions*, it is nevertheless “impossible” for him or her “to see the train in time to avert [a] tragedy.” *Louisville & Nashville R.R. v. Quisenberry*, 338 S.W. 2d 409, 412-14 (Ky. 1960). In such circumstances, not only is the risk of accidents higher, but it

is also likely that the motorist is no longer the “cheapest cost avoider.” Accordingly, when a railroad is aware that even a duly cautious motorist does not have “enough time to do anything to prevent the accident” after coming within view of a train, this Court will require the railroad to take reasonable precautions to prevent an accident. *Id.* at 410-11. The Court has made clear, however, that in order to fall under this exception “the crossing must be so exceptionally dangerous” that even a motorist “exercising ordinary care and prudence” is unable to see an oncoming train “until he is practically in immediate danger and unable by the exercise of ordinary care to avoid being struck by the train.” *Hare’s Adm’x*, 178 S.W.2d at 837; *see also Ill. Cent. R.R. v. House*, 352 S.W.2d 819, 821 (Ky. 1962) (citing *Hare’s Adm’x* with approval); *Justice’s Adm’r v. Chesapeake & Ohio Ry.*, 244 Ky. 168, 50 S.W.2d 531, 534 (1932) (a crossing is extrahazardous only when “from either natural or artificial obstructions, curvatures in approaches to the track, or other appearing facts, a situation existed where the traveler on the highway had but little, if any, opportunity to discover the approach of the train ... until he was practically in immediate danger”).

That is certainly not the case here. The topographical features of the crossing are far from extrahazardous: The incline at the crossing, if any, is very slight (Burris depo. at 54, App. 33 at 60-61); and the tracks at that point are “unwaveringly straight” (App. 1 at 20). There are no artificial obstructions at the crossing. And although a row of trees lining the railroad’s right-of-way does limit a motorist’s line of sight approximately 30 feet from the tracks, the two adjacent property owners each testified that, once a motorist clears this line of trees, he or she would have a wide and unobstructed view. Burris, for example, explained that the distance between the tree-line and the tracks affords “ample

room” to “stop back a good bit from the track” and “see a long distance both ways”—“you don’t have to pull up next to the track to see if it’s clear.” App. 3 at 29, 36. Hester similarly testified that there was “plenty of room” for a motorist to pull up at a safe distance and see clearly approximately half a mile down the tracks. App. 33 at 51, 79-80, 102-03, 109. Moreover, photographic evidence in the record clearly illustrates that, once past the tree-line, “the view is virtually to the horizon.” App. 1 at 20-21; *see also* Supp. App. 1 at 17-18. Indeed, Mrs. Calhoun herself testified that it was possible to drive pass the tree line, stop at the crossing, and look both ways before going across the tracks. App. 25 at 38-41.⁷

No evidence in the record suggests that, had Mrs. Calhoun taken this basic precaution on the morning of December 12, she would have been unable to see the train as it approached the crossing. To the contrary, the uncontradicted evidence in the record indicates that, “if a driver does what [she is] supposed to do, which is pull up and look both ways ... you can see in both directions for thousands of feet.” App. 33 at 38, 103;

⁷ The topography of crossing No. 343536D is thus materially different from that of crossings deemed extrahazardous under Kentucky law. *See, e.g., Louisville & Nashville R.R. v. Quisenberry*, 338 S.W. 2d 409, 412-14 (Ky. 1960) (“the road sharply angles” and “is on a sharp downgrade,” and “about 300 feet north of the crossing is a sharp curve in the track and on the west ... is a bluff or cut which obscures the vision of an operator” such that “neither the engineer nor the [motorist] had enough time to do anything to prevent the accident after they came within view of each other”); *Louisville & Nashville R.R. v. Howser’s Adm’r*, 201 Ky. 548, 257 S.W. 1010, 1012 (1923) (motorists must approach the crossing on “a steep incline” to “a cut through which the highway is built,” which “intersects and crosses a cut of equal depth through which runs the tracks of the railroad company,” and is surrounded on either side by high embankments topped with significant vegetation “so as to obstruct the view of a traveler on the highway, and prevent him seeing the approach of trains to the crossing until such traveler almost arrived at the tracks”); *Louisville & Nashville R.R. v. Bodine*, 109 Ky. 509, 59 S.W. 740, 740 (1900) (heavily travelled crossing where “to the south there was a deep cut, and the road on the east side came up a hill, so that, by reason of the bank, the view to the south was obstructed until the traveler was within a few feet of the track”).

see also Supp. App. 3 at 29 (“[I]f people would pull up, stop, and look, it’s a safe crossing.”). Because a motorist exercising ordinary care could easily pull past the tree-line, see an oncoming train, and react with enough time to avoid an accident, this crossing cannot be classified as “extrahazardous” under Kentucky law.

Plaintiffs submit that the rule as articulated in *Hare’s Administratrix* has been replaced in recent years by a rule deeming “extrahazardous” any crossing that presents a “real and substantial obstruction to sight or hearing.” Pl. Br. 39 (quoting *Hargadon v. Louisville & Nashville R.R.*, 375 S.W.2d 834, 838 (Ky. 1963)). But the language they cite has been plucked entirely out of context. *Hargadon* involved a public crossing used by more than 1,000 vehicles per day. 375 S.W.2d at 838. The plaintiff argued that his vision had been temporarily obstructed by a double row of telephone poles, a railroad cross-arm, and a light post near the edge of the tracks, which together created a “momentary ‘blind spot’” at the crossing. *Id.* at 836. Although the obstructions were not in themselves particularly substantial, the plaintiff argued that the “frequent and constant use” of the crossing, together with the temporary blind spot, combined to make the crossing “extra hazardous.” *Id.* at 838. The Court disagreed, reiterating the “rationale” of the extrahazardous crossing exception. *Id.* at 837-38. “[R]egardless of the amount of traffic” at the crossing, it concluded, the extrahazardous crossing rule “does not apply unless there is a real and substantial obstruction to sight or hearing.” *Id.* at 838. In other words, the Court in *Hargadon* held that a “real and substantial obstruction” is a *necessary* condition for a crossing to be considered extrahazardous—not, as plaintiffs argue, a *sufficient* one.

Even if plaintiffs' proposed rule were the law in this Commonwealth, moreover, they failed to submit any evidence to establish that the crossing in question satisfies even their own definition. We acknowledge that, like the "momentary blind spot" held to be inadequate in *Hargadon*, the line of trees approximately 30 feet from the tracks temporarily limits a motorist's view.⁸ Both photographic evidence and witness testimony make clear, however, that once past this tree-line, the view down the tracks is ample and unobstructed. Indeed, plaintiffs' own expert witness (Pl. Br. 43) testified that, at a point behind the crossbucks and two car-lengths back from the tracks, motorists have at least "800 feet of clear view to the south"—a view that allows them to see any train within 10 seconds of the crossing, and affords them ample opportunity to avoid an accident. *See* App. 25 at 70-77. Accordingly, there is no evidence in the record of any "real and substantial obstruction to sight or hearing" at the point where a reasonably prudent motorist would decide whether to proceed over the tracks at this crossing.⁹

⁸ Plaintiffs assert that testimony from an asserted "mapping" expert, Dr. Cusick, demonstrates that a motorist's view would be somewhat limited up to 21 feet from the crossing. As the Court of Appeals noted, however, the accuracy of his model is wholly belied by the witness testimony and photographic evidence in the record. As such, it is not sufficient to create a question of fact. *See* App. 1 at 19-20 (citing *Scott v. Harris*, 550 U.S. 372 (2007)). Moreover, even if Dr. Cusick's model were correct, there is no dispute that a motorist at a point past the tree-line could obtain a clear view of the tracks with plenty of time to stop. Accordingly, his testimony fails to establish that the crossing was extrahazardous.

⁹ Plaintiffs submit that the natural "stopping point" close to the tracks is not the relevant point for determining whether a crossing is extrahazardous. They cite two cases, *Jewell v. CSX Transportation, Inc.*, 135 F.3d 361 (6th Cir. 1998), and *Illinois Central Railroad v. House*, 352 S.W.2d 819 (Ky. 1961), both of which involved crossings where the motorist had an unobstructed view from significantly greater distances. Neither of these cases, however, suggests that these distances, as opposed to the place where a reasonably prudent motorist would make a decision regarding whether to stop or cross the tracks, are determinative. So long as a motorist is able, with the exercise of ordinary care, to see an oncoming train in time to avoid an accident, the crossing is not extrahazardous and Kentucky's "no duty" rule applies.

The plaintiffs contend that their expert witnesses' opinions that the crossing was extrahazardous created a question for the jury. *See* Pl. Br. 43. But an expert's belief that the crossing is maintained below industry standard or is "extrahazardous" in a general sense does not create a question of fact regarding whether the crossing is "extrahazardous" in a legal sense. *Hargadon*, 375 S.W.2d at 839; *see also Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604, 623-24 (Ky. Ct. App. 2003) ("testimony regarding a legal conclusion is improper, for witnesses, whether of a lay or expert variety, 'are not qualified to express opinions as to matters of law.'") (quoting ROBERT G. LAWSON, KENTUCKY EVIDENCE HANDBOOK, § 6.15 at 291 (3d ed., 2002 supp.)). The photographic evidence and witness testimony in the record emphatically illustrate that, at a certain point past the tree-line, a motorist has an unobstructed view of the tracks. There is no dispute that, if acting reasonably prudently, a motorist can see an approaching train with plenty of time to avoid an accident. Under either proffered definition, therefore, the Court of Appeals correctly concluded that this crossing is not extrahazardous as a matter of law.

b. Pervasive use

Kentucky law is clear that the public's use of a crossing is never sufficient to convert a private crossing into a public one. *See* Part V.A.1, *supra*. In a narrowly defined set of cases, this Court has held that the public may use a crossing so extensively that it makes sense to impose upon the railroad a duty to anticipate the presence of persons at the crossing. *Hunt's Adm'r*, 254 S.W.2d at 707. As plaintiffs concede, however, this pervasive use exception is quite narrow (Pl. Br. 32), and "the effect of the

use in the particular case is a matter of law for the court to determine” (*Hunt’s Adm’r*, 254 S.W.2d at 707).

In numerous cases, this Court has held as a matter of law that a “duty of trainmen to anticipate the presence of persons upon the track, and to exercise ordinary care to discover and avoid injuring them, does not arise where the greatest number of persons using the track ... was 150 persons each 24 hours.” *Hunt’s Adm’r*, 254 S.W.2d at 707 (internal quotation marks omitted); *see also Louisville & Nashville R.R. v. Mahan*, 311 Ky. 264, 268, 223 S.W.2d 1000, 1002 (1949) (holding, as a matter of law, that where “[t]he largest number of people shown to have been using appellant’s track at or near the place where appellant was found is 75,” “appellee failed to show that appellant’s railroad tracks were used to such an extent as to convert trespassers into licensees and thereby impose upon appellant’s employees the duty to anticipate their presence and use precautions for their safety”); *Louisville & Nashville R.R. v. Wilson*, 285 Ky. 772, 149 S.W.2d 545, 547 (1941) (where “the largest estimate of any witness as to the number of persons using the tracks each twenty-four hours was 150,” there was no duty to anticipate the presence of persons on the tracks); *Chesapeake & Ohio Ry. v. Cole*, 281 Ky. 381, 136 S.W.2d 5, 9 (1940) (“evidence that a great many people used the tracks night and day, one witness estimating the number using the tracks daily to be from 100 to 150,” was insufficient to impose upon the railroad “the duty of anticipating the presence of persons on the tracks”) (internal quotation marks omitted) (collecting cases).

This narrow exception is sensible. When the use of a private crossing changes so significantly that it is travelled as often as a typical public crossing, “the crossing is one where the presence of persons on the track is to be expected, and therefore to be

anticipated.” *Stull’s*, 189 S.W. at 723. In such cases, the benefits of warning devices, lookouts, signals, and vegetation maintenance are far more likely to outweigh their costs, and this Court is willing to impose a duty of care upon the railroad. *See id.* Nevertheless, for the same reasons that the “no duty” rule at private crossings generally furthers commerce and encourages motorists to take proper precautions, this Court has consistently refused to impose such a duty where the number of people who habitually use a private crossing is less than 150.¹⁰ If a private landowner’s decision to permit a small garbage-collection business to operate on his property were sufficient to impose upon the railroad a duty to install warning devices or maintain the vegetation surrounding a crossing, any benefit of the “no duty” rule would be almost entirely lost.

A stable bright-line of at least 150 persons per day is necessary for another reason: to enable railroads (and adjacent property owners¹¹) to determine, *ex ante*, the scope of their duties at a private crossing. Currently, railroads know where they are required to place warning devices, where they must (or must not) sound their horns, where they are obligated to slacken their speed, and where they have a duty to maintain

¹⁰ Plaintiffs analogize this rule to relieving a motorist of the duty to stop at a stop sign based on the number of cars that enter the intersection. Pl. Br. 33. Yet the reason a court will not relieve a motorist of a duty to stop at a stop sign is the very reason that the Court should not impose such a duty here: Where the government places a stop sign, the legislature has made the judgment that motorists must stop; however, where a railroad intersects a private road, the legislature has made the opposite judgment. *See* Ky. Rev. Stat. § 277.190 (requiring a signal only at public crossings).

¹¹ In this case, for example, evidence indicated that after the accident, Hester and Burris undertook several activities to reduce the risk of accidents at the crossing. They placed signs on the private road leading away from their property in order to encourage their guests to stop at the crossing, and on days that Burris held a car auction on his property, he would hire someone to act as a lookout and direct traffic over the crossing. App. 33 at 16-17, 44, 51-52, 73-74; Supp. App. 3 at 52. Hester also testified that, without CSX’s knowledge, he would occasionally enter the right-of-way to trim some of the trees to ensure visibility near the crossing. *Id.* at 99-100.

the vegetation surrounding a railroad crossing. They also know where they are *not* required to do so. If a plaintiff could create a jury question regarding the “pervasive use” exception simply by submitting evidence that a few members of the public used a private crossing, railroads would be unable to determine where their duties lie, and they would be subject to costly (and ultimately meritless) litigation based upon every incident at a private crossing. This Court’s predecessor wisely determined that such a situation was intolerable, and it established a high bar for the “pervasive use” standard. This Court should decline plaintiffs’ exhortation to lower that bar.

c. Assumed duty rule

When a railroad voluntarily adopts a regular custom or practice at a particular private crossing, this Court may consider the railroad to have assumed a duty towards individuals who rely on that practice. *See, e.g., Maxwell*, 167 S.W.2d at 843. A railroad’s failure to comply with its usual custom at a crossing may therefore result in a finding of negligence, so long as the plaintiff was aware of and relied on that custom. *Id.*; *Kentucky Traction & Terminal Co. v. Brawner*, 208 Ky. 310, 270 S.W. 825, 826 (1925); *Young’s Adm’r*, 142 S.W. at 713.

As with the extrahazardous-crossing and pervasive-use exceptions, the “assumed duty” exception furthers the twin purposes of the general “no duty” rule—to promote efficient travel and commerce while minimizing the risk of accidents. Applied consistently and narrowly, the “assumed duty” exception is unlikely to significantly impact the railroad’s ability to provide efficient travel or commerce—otherwise the railroad likely would not have adopted the custom voluntarily. More importantly, however, if a railroad has adopted a custom or practice at a particular crossing, an individual who has come to rely on that practice is less likely to be the “cheapest cost

avoider” should that custom fail. In such circumstances, placing the sole duty of care upon the motorist could actually *increase* the risk of accidents.

Consider this example. When a railroad—voluntarily or not—habitually sounds a warning signal upon its approach to a particular crossing, persons who regularly travel that crossing may interpret the absence of a signal as an indication that it is safe to cross the tracks. A motorist who has become accustomed to relying on that signal thus may be less likely to take other precautionary measures, such as stopping at the crossing and looking carefully both ways. Consequently, when a railroad fails to give its customary signal at a crossing, it actually *increases* the risk that those persons will fail to recognize that a train is approaching. *See Maxwell*, 167 S.W.2d at 843 (noting that the absence of a signal in such cases “is an assurance of safety”). In other words, a railroad’s decision to assume a duty may induce individuals who rely on that duty to take *less* care. (This is, of course, one of the rationales behind the general “no duty” rule.)

When a motorist reasonably relies on a railroad’s custom, therefore, it makes sense to hold the railroad responsible if its failure to follow that custom causes an accident. In this case, however, plaintiffs concede that Mrs. Calhoun *did not* rely on CSX’s alleged custom of signaling at the crossing.¹² Pl. Br. 36; *see also* Calhoun depo. at 86-87 (testifying that she had never once heard a train whistle at the crossing). The railroad’s alleged failure to sound the whistle on this occasion therefore could not have

¹² The plaintiffs suggest in passing that CSX also assumed a duty to clear the vegetation at crossing No. 343536D by adopting certain general vegetation-clearing policies. Pl. Br. 23. Of course, the plaintiffs themselves submit that CSX did not comply with its vegetation-clearing policy at this crossing, Pl. Br. 34-35, so it could not have assumed a duty through custom or practice there. Even if it had, moreover, the evidence is clear that Mrs. Calhoun did not rely on this policy: She testified that she was aware of the tree-line, and she always pulled beyond it in order to get a view of the tracks. App. 25 at 38-41.

increased the risk of the accident. *Cf. Morgan v. Scott*, 291 S.W.3d 622, 632-33 (Ky. 2009). Accordingly, the Court of Appeals correctly refused to apply the “assumed duty” exception here. App. 1 at 13-15.

Unable to prevail under the law as it exists, plaintiffs urge this Court to “end the reliance requirement” in railroad “assumed duty” cases. Pl. Br. at 36. As explained above, however, absent evidence that a plaintiff actually relied upon an allegedly assumed duty, the primary rationale for this exception is wholly inapplicable. *See also Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 538 (Ky. 2003) (“[T]raditionally, the purpose of imposing liability upon a party who has assumed a duty to act is premised upon reliance.”) (internal quotation marks omitted). Moreover, a decision to abandon the reliance requirement in the railroad context would require revisiting longstanding and generally applicable Kentucky assumed-duty rules. *See, e.g., Morgan*, 291 S.W.3d at 632-33; *Ostendorf*, 122 S.W.3d at 538; RESTATEMENT (SECOND) OF TORTS § 324A (1965) (all noting a well-established reliance requirement in the assumed duty context). This Court should therefore decline plaintiffs’ unsupported and misguided invitation to upend decades of settled law.

B. The Court Of Appeals Correctly Held That CSX Satisfied Its Duty At The Crossing In Question.

Absent evidence that the crossing meets the definition of a public crossing or falls within one of the three exceptions, a railroad has no duty to slacken its speed, install warning devices, station a lookout, sound a warning signal, or clear and maintain the vegetation at a private crossing. Rather, under well-settled Kentucky law, negligence may be attributable to a railroad only if, “after having seen the peril of [the plaintiff] in time to have prevented injury,” the train operators nonetheless “failed to exercise

ordinary care to use all the means of which they had command” to avoid an accident. *Stull’s*, 189 S.W. at 724. Plaintiffs offer no evidence—indeed, they do not even contend—that CSX breached this duty. *See* Pl. Br. 31. Accordingly, the Court of Appeals properly affirmed the circuit court’s grant of summary judgment. *See* App. 1 at 24-26.

C. This Court Should Decline Plaintiffs’ Invitation To Reverse A Century Of Settled Law.

Plaintiffs effectively concede that settled Kentucky law bars their recovery in this case. Undaunted, they submit that the Court simply should overrule whatever established law stands in the way of their claim. Specifically, they ask the Court broadly to “overrule *Spalding* and the entire *Stull’s* line of private crossing ‘no duty’ cases.” Pl. Br. 31. Barring that, they ask the Court to eliminate the “pervasive use” requirement of the pervasive use exception (Pl. Br. 31-33), the “reliance requirement” of the assumed duty exception (Pl. Br. 36), and the requirement that a crossing actually be “extrahazardous” to fit within the “extrahazardous crossing” exception (Pl. Br. 37). If the Court is disinclined to overrule wide swaths of settled law, plaintiffs also proffer some new exceptions to the “no duty” rule for the Court to consider. They contend that the Court should, “as a matter of first impression,” rule that an engineer has an independent obligation to act in a reasonably prudent manner at private crossings. Pl. Br. 46. And barring that, they suggest that the Court create from whole cloth a new “established crossing exception” that would encompass their claim. Pl. Br. 48.

The scope of a railroad’s duty at private crossings has long been settled in this jurisdiction—and railroads, property owners, motorists and pedestrians have adapted their behavior accordingly. When parties have long relied upon the law as it exists,

courts should be loath to disturb it. Indeed, as this Court oft has noted, the doctrine of *stare decisis* requires that established precedent be overturned only if there is some “compelling and urgent” reason for doing so. *Matheney v. Commonwealth*, 191 S.W.3d 599, 614-25 (Ky. 2006) (explaining the numerous rationales behind the rule of *stare decisis*, including judicial economy, stability, and legitimacy). No such reason has been offered here. Accordingly, the Court should decline plaintiffs’ invitation to rewrite a century of railroad crossing law.

1. The well-established “no duty” rule at private crossings is consistent with modern tort law.

Plaintiffs submit that several developments in Kentucky law that postdate the *Stull*’s line of cases compel abrogation of the established rule at private crossings. In their view, this Court’s decision to adopt a system of comparative fault, rather than contributory negligence, warrants revisiting the “no duty” rule. They also contend that relatively recent Kentucky cases recognizing a “universal duty of care” and the “undertaker’s doctrine” are inconsistent with the railroad’s limited duty at private crossings. None of these developments, however, call into question the underpinnings of the existing private crossing law. To the contrary, many of them reaffirm the validity of the “no duty” rule as applied at private crossings.

a. The “no duty” rule is consistent with Kentucky’s recent shift to a comparative fault system.

Plaintiffs correctly point out that, at the time of the Court of Appeals’ decision in *Stull*’s, Kentucky adhered to the doctrine of contributory negligence, under which a plaintiff’s own negligence—no matter how modest in relation to the defendant’s—was a complete bar to recovery. *See* Pl. Br. 20-21. Since the development of the “no duty” rule

at private crossings, plaintiffs note, this contributory negligence regime has been replaced by a system of comparative fault. *Id.* (citing *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984)).

But plaintiffs fail to explain why this change is a reason to abandon the well-settled rule at private crossings. The “no duty” rule announced in *Stull’s* was just that—a “no *duty*” rule, not an affirmative defense. The Court’s conclusion that the railroad was not liable for failing to signal or take other precautionary measures at a private crossing rested on the scope of the railroad’s obligation to the plaintiff, not the fact of the plaintiff’s contributory negligence. *See Stull’s*, 189 S.W. at 723 (“Negligence is the failure to perform a duty which one owes to another, and where one does not owe to another the duty of performing an act, then there is no negligence as to such person in failing to perform such act.”); *see also Wallace*, 302 S.W.2d at 563-65 (determining scope of a railroad’s duty before addressing questions of contributory negligence); *Deitz’ Adm’x*, 281 176 S.W.2d at 701 (finding it “unnecessary to consider” the district court’s contributory negligence ruling because the evidence failed to establish any duty of care on the part of the railroad); *Louisville & Nashville R.R. v. Elmore’s Adm’r*, 180 Ky. 733, 203 S.W. 876, 878 (1918) (same). Indeed, if contributory negligence were truly the driving force behind the *Stull’s* “no duty” rule, it would be difficult to explain the longstanding difference between a railroad’s duty at public and private crossings: It is equally contributorily negligent for a motorist to drive into the path of an oncoming train at a public crossing as it is at a private one; yet, Kentucky law has long held that a railroad has a general duty of care only at public crossings.

This Court has previously rejected arguments that longstanding “no duty” rules should be revisited in light of *Hilen’s* shift to a comparative negligence regime. *See, e.g.,*

Kirschner v. Louisville Gas & Elec. Co., 743 S.W.2d 840, 844 (Ky. 1988). In *Kirschner*, the plaintiff argued that the established distinction between trespassers, licensees, and invitees should be abolished because they are “archaic, outmoded, and promote ‘all or nothing’ results expressly disapproved in *Hilen*.” *Id.* Much like plaintiffs suggest here, the plaintiff in *Kirschner* urged the Court to replace the established premises-liability categories with a rule that “all cases be submitted to the jury on the basis of ‘reasonable care under the circumstances.’” *Id.* This Court refused the plaintiff’s request, noting that “[t]here is nothing illogical or unfair in requiring violation of a duty before liability can be imposed,” and that “*Hilen* presupposes a submissible issue of negligence and does not even suggest abandoning the concept of duties.” *Id.* The same reasoning dictates rejection of plaintiffs’ contention here that the shift to a comparative negligence regime warrants abandonment of the well-established “no duty” rule at private crossings.

b. The so-called “universal duty of care” does not compel reversal

Plaintiffs next contend that the longstanding rule at private crossings is inconsistent with the so-called “universal duty of care” announced by this Court in *Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell*, 736 S.W.2d 328 (Ky. 1987). Despite *Claywell*’s use of the broad catch phrase “universal duty of care,” however, this Court has made clear that “the duty referred to is not without limits.” *Morgan*, 291 S.W.3d at 631 (internal quotation marks omitted); *see also Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 848-49 (Ky. 2005) (“[T]his proposition, frequently cited as the ‘universal duty of care,’ is not boundless.”).

As this Court has noted, “*Claywell* is often invoked by parties advocating a theory of liability or cause of action where none previously existed and legal authority is

otherwise lacking.” *Morgan*, 291 S.W.3d at 631 (internal quotation marks omitted). Kentucky courts are thus particularly hesitant to apply the vague and standardless “universal duty of care” in cases such as this one, “where a traditional rule of non-liability based upon a recognized legal relationship is applicable.” *Johnson v. S.O.S. Transp., Inc.*, 926 F.2d 516, 520 (6th Cir. 1991) (questioning “the continued viability of the universal duty concept under Kentucky law”). Indeed, even in *Claywell* itself, the Court was careful to note that “the decision in this case is not intended to cover a social host and his guests,” thereby leaving unaltered Kentucky’s long-recognized distinction between the duty of care owed to a business invitee and the duty owed to a social licensee. *Claywell*, 736 S.W.2d at 335. By the same token, the “universal duty of care” concept is not a carte blanche to undo longstanding Kentucky law holding that a railroad owes no duty of care at a railroad until *after* discovering a person in a position of peril.

Indeed, many of the early cases discussing the “no duty” rule at private crossings invoked the longstanding premises-liability rules explicitly preserved in *Claywell*. Adjacent property owners (and their guests) are typically the sole beneficiaries of a private crossing; railroads derive no benefit. In fact, railroads often have been the leading proponents of closing private crossings altogether in order to reduce the risks to motorists, pedestrians, nearby landowners, and the railroads themselves.¹³ Accordingly, Kentucky courts have held that those who choose to enter upon a railroad’s tracks at

¹³ See, e.g., *Railroads of New York, Inc.*, Comments before the United States Dep’t of Transp. Fed. R.R. Admin., Safety of Private Highway-Rail Crossings, Notice of Safety Inquiry, Docket No. FRA-2005-23281, at 2-9 (July 26, 2007); *Rio Grande Pacific Corp. & New Orleans & Gulf Coast Ry. Co.*, Comments before the United States Dep’t of Transp. Fed. R.R. Admin., Safety of Private Highway-Rail Crossings, Notice of Safety Inquiry, Docket No. FRA-2005-23281, at 2-3, 8 (Nov. 29, 2006) (both available at <http://www.regulations.gov/search/Regs/home.html#docketDetail?R=FRA-2005-23281>).

private crossings are “mere licensee[s], if as much as that,”¹⁴ and a railroad owes such persons a duty only to refrain from wanton and willful activity and to exercise reasonable care once they are discovered in a position of peril. *Stull*’s, 189 S.W. at 722; *see also Adkins’ Adm’r*, 143 S.W. at 765 (“[W]hen a person having no business with the railroad company goes upon its tracks or private property, he is a trespasser, and takes things just as he finds them.”). As an outgrowth of the longstanding premises liability rules that *Claywell* specifically reaffirmed, the “no duty” rule at private crossings should also be unaffected by *Claywell*’s “universal duty of care.”

Despite this clear precedent, plaintiffs argue that a duty ought to apply here because “[o]nly CSX can make this crossing safe, no one else.” Pl. Br. 23. But this premise is false: Several parties other than the railroad could have—and arguably should have¹⁵—taken measures to prevent an accident at this crossing. The local government could have installed warning devices or additional signage on the road leading to the crossing. The private property owners could have cleared and maintained any vegetation that impinges upon the safety of their private crossing. *See Spalding*, 136 S.W.2d at 2-3.¹⁶ The sanitation company where Mrs. Calhoun’s sons were employed could have

¹⁴ Plaintiffs assert that Mrs. Calhoun was “a business invitee,” and therefore entitled to greater protection. Pl. Br. 27. If that is correct at all, she was an invitee of BCS, not CSX. As such, it is BCS that took on additional duties towards her, not CSX.

¹⁵ Indeed, Mrs. Calhoun filed a negligence-based lawsuit against several of these parties.

¹⁶ Plaintiffs assert that CSX prevented the property owners from clearing the vegetation in this case. But they point to no evidence in support of that accusation. The only evidence in the record that even hints at such a proposition is Hester’s hearsay testimony that “I think there’s been people to ask to go over there and trim them, and they said they didn’t want people on there, afraid they’d get hurt.” App. 33 at 34-36. This is a far cry from evidence that CSX in fact barred property owners from making necessary safety improvements to their private crossings. Kentucky law makes clear that, to the extent that a property owner must enter onto the railroad’s right-of-way “to make

taken steps to warn its invitees of the crossing's dangers. And Mrs. Calhoun herself could have pulled to a point where she had a clear view down the tracks before deciding to proceed over the crossing. In such circumstances, the "universal duty of care" does not warrant reversing the well-settled rule at private crossings.

c. The "no duty" rule is consistent with the "undertaker's doctrine."

Finally, plaintiffs contend that this Court's recent decision to adopt Section 324A of the Restatement of Torts—also known as the "undertaker's doctrine"—requires abandoning the "no duty" rule at private crossings. Pl. Br. 23 (citing *Louisville Gas & Elec. Co. v. Roberson*, 212 S.W.3d 107, 111 (Ky. 2006)). Plaintiffs' argument falls far short because, as explained above, Kentucky courts already recognize a well-established "assumed duty" exception to the "no duty" rule at private crossings that anticipated and is fully consistent with Section 324A. *See supra* at Part A.3.C.

Plaintiffs failed to show that this "assumed duty" exception applies in this case. Pl. Br. 23; *see also Gaw*, 2008 WL 793655, at *3 n.4 (distinguishing *Roberson*). They contend that CSX "undertook" a duty at the crossing by instructing its maintenance personnel to clear obstructing vegetation, and adopting other operating rules that promoted public safety. Pl. Br. 23. But this Court has long held that internal operating rules, without more, do not establish an "undertaking" sufficient to impose an independent duty of care on either the company or its employees. *Morgan*, 291 S.W.3d at 632 ("[W]e reject any argument that a person or business entity's adoption of an internal guideline or policy and subsequent failure to follow that internal guideline

whatever repairs were necessary for the safe use of his estate," he has the right—and the obligation—to do so. *Spalding*, 136 S.W.2d at 3.

automatically leads to liability under § 324A.”). Rather, when a company has voluntarily undertaken a duty to render services, liability may be imposed only if “one of three further preconditions” exists: “(1) the failure to exercise reasonable care in performing the undertaking must *increase* the risk of harm; (2) the duty undertaken must already be owed to the third person by another; or (3) the third person must rely on the undertaking.” *Carneyhan*, 169 S.W.3d at 848 n.2 (emphasis added); *accord Roberson*, 212 S.W.3d at 111.

Plaintiffs do not allege that CSX undertook a duty already owed to Mrs. Calhoun by another party. They have introduced no evidence that Mrs. Calhoun relied upon—or even knew of—CSX’s internal policies affecting the crossing in question, so its alleged failure to follow these policies could not have increased the risk of harm. And the plaintiffs concede that Mrs. Calhoun did not rely upon any railroad horn typically sounded at the crossing. Accordingly, plaintiffs cannot make out a claim under either Section 324A or the “assumed duty” exception to the “no duty” rule.

2. Kentucky’s “no duty” rule at private crossings is consistent with the law of other jurisdictions.

a. In addition to being consistent with well-established tort principles in Kentucky, the “no duty” rule applied at private crossings is consistent with the law in other jurisdictions. Indeed, although the Federal Railroad Administration (“FRA”) and the Federal Highway Administration (“FHWA”) have promulgated numerous federal regulations governing track speed, signage, signals, warning devices, and other aspects of railroad crossing safety, most of these regulations apply only at *public* crossings. *See* Federal Railroad Administration, *Private Highway-Rail Grade Crossing Safety Research and Inquiry*, at 2 (May 2008), *available at* <http://www.fra.dot.gov/downloads/safety/>

privatexingsafetyresearchinquiry_061008.pdf (hereinafter “FRA Report”); *see also* 49 C.F.R. §§ 222, 234; FHWA Manual on Uniform Traffic Control Devices for Streets and Highways §§ 1A.13, 8A.01 (2009 ed.).¹⁷ Although the FRA has investigated the feasibility of regulating private crossings,¹⁸ it has thus far declined to do so, citing the wide variety of features, traffic patterns, and complex private property arrangements that make the nationwide regulation of private crossings so difficult. *See* FRA Report at 5. Under federal law, therefore, railroads have significantly greater duties at public crossings than at private ones.

b. Cognizant of this gap in federal law, states have varied widely in their approach to regulating private railroad crossings. The Florida legislature, for example, has elected to require signage and/or warning devices at private crossings to comply with the federal standards for public crossings. *See* Fla. Stat. § 351.03. The Virginia legislature, by contrast, has established certain safety requirements applicable to all public crossings in the state, but applicable at private crossings only upon notice and a hearing before a regulatory commission. *See* Va. Code Ann. § 56-414. Other states have chosen to prevent accidents by forbidding the creation of new private crossings and encouraging the closing of existing ones. *See* R.I. Gen. Laws § 39-8-1.1. And many

¹⁷ Federal law defines “public crossing” consistent with Kentucky law. *See* 23 U.S.C. § 130(l)(4) (defining “public crossing” to mean a location where “a public highway, road, or street ... crosses one or more railroad tracks either at grade or grade-separated”); 23 CFR § 460.2(a) (further defining public road to mean “any road under the jurisdiction of and maintained by a public authority and open to public travel”); 49 C.F.R. § 222.9 (defining “public highway-rail grade crossing” to mean “a location where a public highway, road, or street, including associated sidewalks or pathways, crosses one or more railroad tracks at grade,” and noting that “[i]f a public authority maintains the roadway on both sides of the crossing, the crossing is considered a public crossing”).

¹⁸ *See* Safety of Private Highway-Rail Grade Crossings; Notice of Safety Inquiry, 72 Fed. Reg. 18,730, 18,730 (Apr. 13, 2007).

states, like Kentucky, have imposed specific statutory requirements upon railroads that are applicable only at public crossings, while electing to leave the railroads' duties at private crossings governed solely by common law.

Among the states in this latter group, the duties imposed at private crossings vary widely by jurisdiction. Plaintiffs point to four states where the common law requires railroads to exercise reasonable care for the protection of motorists at all crossings, whether public or private. Pl. Br. 29-30 (citing cases from Indiana, Connecticut, Illinois, and Mississippi¹⁹). At least that many states, however, have chosen precisely the opposite rule. In its decision to apply differing duties at private and public railroad crossings, therefore, Kentucky is hardly an outlier.

The common-law rule in Virginia is much the same as it is in Kentucky: At private crossings, “[a] railroad company does not owe to a licensee the duty of running its train in a particular manner, or at a particular rate of speed, and is under no obligation to keep a lookout on its car, or ring its bell, or to blow its whistle, and the mere failure to do any or all of these things does not give him a right of action.” *Ingle v. Clinchfield R.R.*, 192 S.E. 782, 785 (Va. 1937) (internal quotation marks omitted) (collecting cases); *see also Weaver*, 863 F. Supp. at 295 (noting that “Virginia places the primary responsibility of avoiding accidents at train crossings on the driver of the car, in recognition of the fact that the driver is in the best position to avoid an accident in the first place”); *Chesapeake & Ohio Ry. v. Faison*, 52 S.E.2d 865, 868 (Va. 1949) (holding that a railroad owes “no

¹⁹ *But see Ill. Cent. R.R. v. White*, 610 So. 2d 308, 316 (Miss. 1992) (Mississippi courts have “adhered to the rule that a person using a private crossing which is not known to be regularly and frequently used by the public, is a licensee” to whom the railroad owes only “a duty not to willfully or wantonly injure and to exercise reasonable care for his safety after his presence is discovered”).

duty to keep the crossing in a reasonably safe condition, free of obstruction, or to give him warning of the presence of the gate”). At private crossings, a motorist is “at best a bare licensee on the property of the Railway Company and [takes] the crossing as he found it” (*Faison*, 52 S.E.2d at 868), and the railroad is therefore liable only for “willful and wanton injury which may be inflicted by the gross negligence of its agents and employees” (*Ingle*, 192 S.E. at 782). Like in Kentucky, Virginia courts have held that the habitual use of a private crossing by the public may cast upon a railway the duty of exercising ordinary care for the safety of others, but only where “the use of the crossing by the public was habitual, general and of long standing, and was known to the employees of the railway company.” *Faison*, 52 S.E.2d at 867.

Oregon law also provides that a railroad has dramatically different duties at public and private crossings. In *Powers v. Spokane, Portland and Seattle Railway*, 187 P.2d 960, 966 (Or. 1947) (en banc), the Oregon Supreme Court held that, at a private crossing, a railroad has a duty only to avoid “reckless or wanton conduct.” And although it has an exception for private crossings used pervasively by the public, like Kentucky, it interprets this rule narrowly. In *Powers*, for example, despite record evidence that several logging trucks and up to ten other vehicles had been known to use a private crossing on any given day, the court refused to charge the railroad with a duty to anticipate the presence of the public on the tracks. It emphasized that “mere use of a railroad crossing by the public does not convert the users thereof from trespassers to licensees unless the use is at a place habitually used by the public in such large numbers that the presence of persons on the track at that place should be anticipated.” *Id.* at 965.

In Massachusetts, members of the public who use a private crossing with the “[m]ere passive acquiescence” of the railroad similarly are considered “mere licensees.” *McCarthy v. Boston & Me. R.R.*, 66 N.E.2d 561, 562-63 (Mass. 1946). Accordingly, absent certain exceptions, the railroad owes them no duty other than to avoid “reckless or wanton conduct.” *Id.* at 563; *see also Couto v. Palmer*, 42 N.E.2d 802, 804-05 (Mass. 1942) (at a private crossing, a railroad owes no duty other than to “refrain from willful or wanton conduct,” absent evidence that it has affirmatively induced, as opposed to simply permitted, the public to use the crossing); *Murphy v. Avery Chem. Co.*, 133 N.E. 92, 93-94 (Mass. 1921) (same). Likewise, a railroad in Rhode Island owes a “bare licensee” at a private crossing “no duty except not to willfully or wantonly injure her after actually discovering her peril.” *Zoubra v. N.Y., New Haven & Hartford R.R.*, 150 A.2d 643, 644-45 (R.I. 1959).

In *Zoubra*, the Rhode Island Supreme Court was asked to reconsider its “no duty” rule, based in part on the fact that several other states had imposed a duty to exercise ordinary care at both public and private crossings. It declined, explaining that “[w]hatever the rule may be in other jurisdictions, this court has long since adopted the view that in railroad cases the fact that a certain place, where there is no public right of passage, has been used by persons as a crossing does not constitute such place a public crossing. Nor does it confer upon persons using it any other relation to the railroad than that of trespassers.” 150 A.2d at 645. Despite the plaintiff’s—and the dissent’s—arguments to the contrary, the court saw no reason to alter its longstanding rule. *Id.*; *see also Cain v. Johnson*, 755 A.2d 156, 161 (R.I. 2000) (citing *Zoubra* with approval). In Rhode Island, as in Kentucky, the primary responsibility for avoiding accidents at private

crossings thus remains with motorists and pedestrians, who know that “the prudent traveler does not attempt to cross without first looking to ascertain whether he may safely do so.” *Francis v. Atlantic Terminals, Inc.*, 244 A.2d 415, 417 (R.I. 1968).

3. Kentucky’s “no duty” rule is consistent with public policy.

a. In addition to its consistency with the settled law of this and other jurisdictions, the “no duty” rule at private crossings is consistent with Kentucky’s public policy. As the former Court of Appeals explained in *Stull’s*, the “no duty” rule applicable to private crossings furthers the longstanding policy of promoting efficient travel and commerce wherever consistent with public safety. 189 S.W. at 723. Plaintiffs do not suggest that the “no duty” rule fails to further this goal; nor do they offer any reason to believe that promoting efficient travel and commerce is no longer consistent with public policy objectives. Instead, they argue simply that the *Stull’s* rationale is outmoded because the railroad at that time was an “interurban,” and interurbans no longer exist. *See* Pl. Br. 25-26.

Yet, the demise of interurban railroads as the “primary public transportation system of the time” (Pl. Br. 26) hardly warrants relegating the *Stull’s* line of cases to the dustbin of history. Busses may have replaced the interurban, just as automobiles replaced the horse and buggy; but the railroad’s importance to travel and commerce in the region is greater than ever before. CSX transports 7.4 million carloads of fuel, agricultural products, consumer goods, and raw materials through Kentucky and the surrounding region each year.²⁰ Its trains can transport a ton of freight 436 miles on a single gallon of fuel, and they keep a million tons of freight per day off the nation’s highways—reducing

²⁰ *See CSX, Network & Operations*, www.csx.com/?fuseaction=about.network.

traffic and congestion, as well as the environmental impact of transportation.²¹ The efficient travel of freight trains is thus highly significant to commerce in the region. When it is possible to promote efficient railway travel without a significant impact upon public safety, therefore, this Court should continue to do so.

Moreover, although plaintiffs correctly note that railroads in Kentucky today operate “massive freight trains” rather than “street cars” (Pl. Br. 25), the rules of physics underlying the *Stull*’s opinion have remained constant. Just as yesterday’s interurban travelled at higher speeds than a horse and buggy, today’s freight train travels at higher speeds than an automobile—at least one at a gravel crossing. Just as yesterday’s interurban weighed significantly more and carried far greater momentum than a horse and buggy, today’s freight train weighs significantly more and carries far greater momentum than an automobile. Today’s freight train, like yesterday’s interurban, is confined to its tracks and cannot deviate from its course. Accordingly, just as a horse and buggy driver was in a far better position to stop, yield, or take evasive maneuvers to avoid a crossing accident in the early 1900s, an automobile driver is in a far better position to avoid a collision with a freight train today. A legal rule that encourages the driver to take such precautions is therefore as applicable now as it was when the former Court of Appeals decided *Stull*’s. *Cf. Hunt’s Adm’r*, 254 S.W.2d at 707 (applying *Stull*’s in a case involving a modern freight train).

b. This Court should not abandon a century of established law based on a distinction without a difference. Nor should it do so based on plaintiffs’ unsupported appeals to public safety.

²¹ See CSX, *Infrastructure*, www.csx.com/?fuseaction=about.tomorrow_inf.

As explained above, the *Stull*'s line of cases implicitly relied on the fact that an individual, not a train, was in the best position to cheaply and efficiently avoid an accident at a railroad crossing—particularly at a private crossing, where the universe of users is limited and largely composed of repeat players. The former Court of Appeals chose to place the primary duty of care upon the cheapest cost avoider, in order to encourage him or her to take the necessary precautions. Its decision was sensible. And even if, as plaintiffs assert, the validity of its rationale was debatable at the time (*see* Pl. Br. 27), the rule is now settled, and parties have adapted their behavior accordingly. *Cf.* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960) (explaining that even when an initial allocation is wholly arbitrary, parties will adapt towards an efficient result so long as the default rule is clear and predictable).

The wisdom of the approach of the former Court of Appeals is confirmed by the facts on the ground: Plaintiffs are unable to point to *any* evidence that Kentucky's "no duty" rule has had a significant impact upon public safety at private crossings. Indeed, the safety statistics relied upon by plaintiffs²² indicate that private crossings in Kentucky are no less safe than private crossings in other states, where railroads often have greater duties.

As reported by the FRA, Kentucky has 2,394 private railroad crossings, or 2.8% of the private crossings in the United States, and 2,382 public crossings, or 1.7% of the public crossings in the United States.²³ From 2006-2009, there were a total of 44

²² *See* Pl. Br. 1 nn. 1-2 (submitting that this Court may take judicial notice of the crossing and accident statistics collected on the FRA website).

²³ Federal Railway Administration, *Summary of Inventory Data Crossing Counts*, at 6, www.fra.dot.gov/downloads/safety/SummaryInventoryDataCounts41209.pdf; *Supp. App.* 9.

accidents at Kentucky private crossings, amounting to 3.0% of the private crossing incidents nationwide. Supp. App. 8 at 60. During that same time period, there were 204 accidents at Kentucky public crossings, representing 2.4% of the public crossing incidents nationwide. Supp. App. 7 at 59. If Kentucky's "no duty" rule in fact translated into greater accident risks at private crossings, one would expect crossing incident data to reveal that (1) Kentucky's share of private crossing accidents is significantly greater than its share of private crossings, and (2) Kentucky's share of public crossing accidents is much the same as its share of public crossings. But the FRA data cited by plaintiffs in fact indicate the opposite. At private crossings, where the duty imposed upon railroads is supposedly more limited than in other states, Kentucky's share of accidents is almost the same as its share of crossings (3.0% compared to 2.8%). But at public crossings, where the duty imposed upon railroads is the same as in most other states, Kentucky's share of accidents is significantly *higher* than its share of crossings (2.4% compared to 1.7%). This trend was even more striking when looking at last year alone. Kentucky saw 5 accidents at private crossings during all of 2009, amounting to 1.9% of the nationwide total and significantly less than its expected 2.8% share. Supp. App. 8 at 60. By contrast, there were 50 accidents at Kentucky public crossings, amounting to 3.1% of the nationwide total and significantly *more* than Kentucky's expected 1.7% share. Supp. App. 7 at 59. When compared to the national average, then, Kentucky's track record at private crossings appears to be better than its track record at public crossings.

When the tools of statistical analysis are brought to bear, the data are perhaps even more revealing. From 2006 to 2009, the accident rate at Kentucky's private crossings was 1.84 incidents for every 100 private crossings. Supp. App. 8 at 60.

Nationwide, the accident rate at private crossings was 1.71 incidents per 100 crossings, and the average single-state incident rate was 1.69 incidents per 100 crossings—but with a standard deviation of 1.03 and a margin of error of +/- .15. Supp. App. 10 at 62. This puts the accident rate at Kentucky private crossings right at the average, statistically speaking.²⁴ A linear regression analysis, which accounts for the variation in the data, similarly indicates that Kentucky is not an outlier in private crossing safety. The regression confirms that there is a positive correlation between the number of crossings and the number of accidents, and that the expected number of accidents is 2.02 +/- .18— or between 1.84 and 2.20 accidents for every 100 crossings. *Id.* Under this analysis, Kentucky is at the low end of the expected range.

Before this Court considers abandoning the well-established “no duty” rule at private crossings based on concerns about public safety, it should have compelling evidence that the current law in Kentucky is in fact detrimental. Plaintiffs have adduced no such evidence. Indeed, because the data affirmatively show that private crossings in Kentucky are no less safe than private crossings nationwide, this Court should be doubly hesitant to overturn a century of settled law.

4. This Court should not create new exceptions that would eviscerate the “no duty” rule.

As a last-ditch effort to obtain recovery from the railroad, plaintiffs ask this Court to adopt two new exceptions to the “no duty” rule: one for “engineers” (Pl. Br. 46), and another for “established crossings” (Pl. Br. 48-49). Neither of these exceptions, however,

²⁴ Indeed, two of the four states that plaintiffs identify as having abrogated the distinction between public and private crossings (Pl. Br. 29-30) actually have materially higher accident rates at private crossings than does Kentucky: Indiana has an accident rate of 2.24 incidents per 100 private crossings, and Illinois has an accident rate of 2.33 accidents per 100 private crossings. Supp. App. 10 at 62.

has any support in existing Kentucky law. Furthermore, if applied as plaintiffs suggest, these exceptions would swallow the “no duty” rule at private crossings.

a. The proposed “reasonably prudent engineer” exception

Plaintiffs first contend that, even if a *railroad* has no duty of care at private crossings, this Court should impose a new duty on railroad *engineers* to “act in a reasonably prudent manner.” Pl. Br. 44-48. Specifically, they submit that an engineer should be required to comply with “the industry standard” at railroad crossings and otherwise “exercise ordinary care under the circumstances.” Pl. Br. 45-47. In their view, this includes sounding the horn whenever an engineer “has a subjective knowledge of an approaching vehicle driving towards a crossing,” as well as following all “industry standard[s]” and “railroad operating rules” (including those related to the consumption of prescription medication). Pl. Br. 46-48. Of course, as train engineers typically are employees of railroads, imposing such a duty on engineers would effectively impose that duty on railroads as well. Plaintiffs also fail to explain why this Court should abandon Kentucky’s long-held “no duty” rule as it relates solely to engineers.

Moreover, contrary to plaintiffs’ assertion (Pl. Br. 45, 46), this is far from “a matter of first impression” under Kentucky law. At every crossing—whether public or private—an engineer must refrain from wanton and willful conduct; he must also exercise ordinary care to avoid an accident whenever he discovers a motorist or pedestrian in a position of peril. This Court’s predecessor made it quite clear, however, that this duty encompasses the full extent of an engineer’s obligation at private crossings. *Hunt’s Adm’r*, 254 S.W.2d at 706-07 (“Operators of a train at or near a private crossing are not liable for injuries to a traveler at that crossing unless after discovery of his peril, they fail to use all means to avoid the accident.”).

Consistent with this approach, Kentucky courts have long held that an engineer is entitled to assume that a motorist approaching the tracks will exercise reasonable care for her own safety and yield to an oncoming train—and thus is *not* required to slow the train or sound the horn every time he sees someone somewhere in the vicinity of the railroad tracks. *See Hunter’s Adm’r*, 185 S.W. at 142 (collecting cases); *see also Johnson’s Adm’r*, 25 S.W. at 755 (train operators have “the right to presume that [the plaintiff] would not heedlessly go upon the track in full view of the train”). This rule is sensible: Not only are constant and unnecessary locomotive horns considered by many to be a nuisance, but they also lose their effectiveness in getting a motorist’s attention if constantly used. *See, e.g.*, App. at 83. The rule also is consistent with Kentucky’s well-established presumption that the motorist or pedestrian—not the railroad—is in the best position to avoid an accident at a private crossing.

Plaintiffs’ insistence that an engineer should be bound by the railroad’s operating procedures—and personally liable to third parties for a failure to comply—is equally unavailing under Kentucky law. As explained above (*supra* at Part C.1.c), this Court has long held that internal operating rules, without more, do not establish an independent duty of care as to either the company or its employees. An alleged failure to comply with industry standards is similarly irrelevant here. Practically speaking, industry standards are important, as railroads may be just as likely to bow to peer pressure as they are to legal rules. Legally speaking, however, industry standards merely assist the court in giving meaning to the standard of “ordinary care”—a standard wholly inapplicable where there is no *duty* to exercise such care in the first place. This Court accordingly should

decline plaintiffs' invitation to circumvent the well-established "no duty" rule through their proposed "reasonably prudent engineer" exception.

b. The proposed "established crossing" exception

Plaintiffs next suggest that this Court adopt a new exception to the "no duty" rule for so-called "established crossings." Pl. Br. 48. In support of their proposed exception, the plaintiffs point solely to the "early views" of this Court, as expressed in *Cahill v. Cincinnati, New Orleans & Texas Pacific Railway*, 92 Ky. 345, 18 S.W. 2 (1891). *Cahill*, however, is entirely inapposite.

In that case, the Court was asked to decide whether an individual injured at a private crossing could establish a negligence claim based on a railroad's failure to sound a whistle at a nearby *public* crossing. The railroad argued that the plaintiff could not recover because the statutorily required signals—though easily heard at the nearby private crossings—were for the sole benefit of those at the public crossing. The Court disagreed. Noting that the private crossing had been established by express contract with the railroad company, and that the railroad had thereby "allure[d] a person to go on the railroad track at his private crossing," the Court held that the plaintiff was within the zone of individuals entitled to rely upon signals sounded at the nearby public crossing. *Cahill*, 18 S.W. at 4; *see also Elmore's Adm'r*, 203 S.W. at 877 (making clear that *Cahill* "was strictly confined in its application" to plaintiffs at an established and recognized private crossing, not other private crossings).

Importantly, however, the Court in *Cahill* did *not* hold that a railroad could be negligent in failing to signal at a *private* crossing. To the contrary, it reaffirmed the general "no duty" rule. *Cahill*, 18 S.W. at 4 (noting that "to require their speed slackened and signals given at every private crossing" would be "an unreasonable hindrance of

regular and prompt movement of trains running on schedule time”). The Court held simply that motorists at a recognized private crossing who “rightfully and prudently” relied upon “the customary sound of the steam-whistle for a public crossing” could bring a reliance-based claim against the railroad. *Id.* In such circumstances, it emphasized, “nothing more is thereby exacted” than “simple performance by the railroad company of a legal duty already prescribed for safety of those using the public crossing that incidentally and naturally operates for their own.” *Id.*

That is not the case here. First, the crossing at issue is not “established and recognized” in the sense that the *Cahill* Court found meaningful: There is no express contract between the railroad and the property owners that “recognizes” the crossing. Moreover, plaintiffs here do not contend that CSX failed to comply with the statutory signal requirements at the two public crossings immediately south of crossing No. 343536D. Rather, they contend that CSX should have been required to signal at the *private* crossing as well. *Cahill* offers no support for such a proposition. Accordingly, for the same reasons that this Court should not eliminate the “no duty” rule at private crossings, it should not impose upon railroads a new duty to signal (or slacken speed, install warning devices, or clear and maintain nearby vegetation) at all “established” private crossings.

D. Rewriting Long-Established Kentucky Crossings Law Is A Job For The Legislature, Not The Courts.

As explained above, the Commonwealth’s established law at private crossings represents sound public policy. If this Court disagrees, however, it should voice its concerns to the Legislature—not take it upon itself to rewrite established law. As this Court has often noted, “[t]he public policy of the Commonwealth is determined by the

General Assembly,” and any decision to overhaul well-settled law on policy grounds must be made by the Legislature, not the courts. *Wilson v. Kentucky Transp. Cabinet*, 884 S.W.2d 641, 646 (Ky. 1994); *see also Commonwealth ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610, 614 (Ky. 1992).

Deference to the Legislature on questions of public policy is proper even when the doctrine in question has its genesis in judge-made law. In *Kemper v. Gordon*, 272 S.W.3d 146 (Ky. 2008), for example, this Court refused to upset longstanding tort law principles even in the face of compelling public policy concerns. Although the Court acknowledged that the policy-based arguments in favor of the proposed change in doctrine were “appealing,” it nevertheless “decline[d] to expand tort liability by judicial legislation.” *Id.* at 152. In its view, any decision to expand existing tort law “involves significant and far-reaching policy concerns more properly left to the Legislature, where hearings may be held, data collected, and competing interests heard before a wise decision is reached.” *Id.* (internal quotation marks omitted). Accordingly, it concluded, any “significant departure” from the well-settled common law must be made by the legislature, not the courts. *Id.*

It is of course true that, “[i]n the absence of a legislative decree, courts may adopt and apply public policy principles.” *Giuliani v. Guiler*, 951 S.W.2d 318 (Ky. 1997). Here, however, the Legislature has spoken on the subject. *See* Ky. Rev. Stat. § 277.190 (requiring a railroad to signal only at public crossings). It must “be presumed that the Legislature is aware of the status of the law at the time of the enactment of a statute” (*Dept. of Banking & Sec. v. Brown*, 605 S.W.2d 497, 498 (Ky. 1980)), and the Legislature’s decision to codify the railroads’ duty at public crossings while leaving in

place the “no duty” rule at private crossings evidences a deliberate policy choice. This legislative policy must be respected by the Court. *Cf. JP Morgan Chase Bank, N.A. v. Longmeyer*, 275 S.W.3d 697, 702 (Ky. 2009) (if the law is “out of touch with modern policy or with the expectations of today’s community,” then “it is the legislature’s task to amend the statutes, not this Court’s role to re-write them”).

E. If A Judicial Change In The Law Is Warranted, Any Such Change Should Apply Only Prospectively.

Finally, even if this Court determines that a radical change in the longstanding private crossings law is both warranted and an appropriate exercise of judicial authority, it should nevertheless affirm the grant of summary judgment in this case.

It is within this Court’s “inherent power” to decide whether its decision should have prospective or retrospective application. *Lasher v. Commonwealth*, 418 S.W.2d 416, 419 (Ky. 1967). Where retrospective application would cause “confusion and expense arising from the unsettling of matters deemed to have been settled under the old law” (*id.*), upset property rights, or otherwise be unfair, this Court has refused to make a law-changing decision applicable to the case at hand. *See, e.g., Fannin v. Cassell*, 487 S.W.2d 919, 921 (Ky. 1972) (overruling prior precedent, but noting that, for reasons of fairness, “this holding should be made prospective only, and should not apply to the instant case”); *Lasher*, 418 S.W.2d at 419 (providing that “this opinion will have prospective application only”).

Such is the case here. The scope of a railroad’s duties at private crossings has been settled for decades. CSX has acted in reliance on this law. If this Court determines that railroads are to have all of the same obligations at private crossings that they do at

public ones, it should afford CSX and other railroads an opportunity to take remedial action and apply the new rule prospectively only.

VI. CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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