

To be Argued by: Jack L. Wilson
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New York Supreme Court
Appellate Division – Fourth Department

CSX TRANSPORTATION, INC.,

Defendant-Appellant,

– against –

DAVID CANAZZI,

Plaintiff-Respondent,

Erie County Index No. I 2004-7241
Docket Nos. CA 08-01659 & CA 08-01660

BRIEF ON BEHALF OF
DEFENDANT-APPELLANT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
QUESTIONS PRESENTED.....	4
STATEMENT OF FACTS	5
A. Standard Of Review Of The Evidence.....	5
B. Background.....	5
C. The Accident.....	7
D. Canazzi’s Theories Of Negligence, The Verdict, And Post-Trial Motions.....	12
ARGUMENT.....	17
I. The Trial Court Erred In Setting Aside The Jury’s Verdict In Favor Of CSX And Directing A Verdict In Favor Of Canazzi.....	17
A. The Jury’s Verdict Must Be Upheld Because It Is Supported By A Valid, Rational Line Of Reasoning And The Issues Of Negligence And Causation Are Not Inextricably Interwoven.....	17
B. Canazzi’s Claim Of Inconsistency Between The Jury’s Findings On The Issues Of Negligence And Causation Cannot, Under Any Circumstances, Justify A Directed Verdict On Either Issue.....	27
II. The Trial Court’s Alternative Holding Is Erroneous.....	29
A. The Alleged Discussion Of Workers’ Compensation Benefits Does Not Constitute An Outside Influence Or “Exceptional Circumstance” Sufficient To Warrant Setting Aside The Verdict.....	30
B. A Single, Uncorroborated Affidavit Of A Dissenting Juror Alleging Discussions That Are Not Logically Related To The Issue Of Causation Is An Inadequate Basis For Upsetting The Verdict Or Proving Prejudice.....	32
CONCLUSION.....	37

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Ahr v. Karolewski</i> , 32 A.D.3d 805 (2d Dep’t 2006)	28
<i>Alford v. Sventek</i> , 53 N.Y.2d 743 (1981)	29
<i>Bent v. Anderson</i> , 207 A.D.2d 370 (2d Dep’t 1994)	21
<i>Cona v. Dwyer</i> , 292 A.D.2d 562 (4th Dep’t 2002)	17
<i>Cruz v. Long Island R.R. Co.</i> , 22 A.D.3d 451 (2d Dep’t 2006)	18
<i>Di Cesare v. Glasgow</i> , 295 A.D.2d 1007 (4th Dep’t 2002)	28
<i>Fitzgibbons v. New York State Construction Fund</i> , 177 A.D.2d 1033 (4th Dep’t 1991)	34, 35, 36
<i>Fleiss v. S. Buffalo Ry. Co.</i> , 280 A.D.2d 1004 (4th Dep’t 2001)	18
<i>Geiger v. Sherrodd, Inc.</i> , 866 P.2d 1106 (Mont. 1993)	31
<i>Giantonno v. Taccard</i> , 676 A.2d 1110 (N.J. Super. Ct. App. Div. 1996)	29
<i>Golden Eagle Archery, Inc. v. Jackson</i> , 24 S.W.3d 362 (Tex. 2000)	31
<i>Gottesman v. Goldberg</i> , 149 Misc. 50 (N.Y. Mun. Ct. 1933)	35
<i>Holden v. Porter</i> , 405 F.2d 878 (10th Cir. 1969)	31, 37
<i>Hollamon v. Vinson</i> , 38 A.D.3d 1159 (4th Dep’t 2007)	4, 5, 17, 26

TABLE OF AUTHORITIES

(continued)

	Page(s)
<i>Hyatt v. Metro-N. Commuter R.R.</i> , 16 A.D.3d 218 (1st Dep’t 2005)	18
<i>In re Weinbaum’s Estate</i> , 51 Misc.2d 538 (Sur. Ct. 1966).....	35
<i>James v. Swindell</i> , 2000 WL 1195683 (Tenn. Ct. App. Aug. 23, 2000)	31, 32
<i>Kauffman v. Eli Lilly & Co.</i> , 65 N.Y.2d 449 (1985)	33
<i>Kauffman v. Eli Lilly & Co.</i> , 116 Misc.2d 351, 355 (Sup. Ct. 1982), <i>aff’d</i> , 99 A.D.2d 695 (1st Dep’t 1984), <i>aff’d in relevant part</i> , 65 N.Y.2d 449 (1985).....	33
<i>Kelson v. Cent. of Ga. R.R. Co.</i> , 505 S.E.2d 803 (Ga. Ct. App. 1998).....	20
<i>Kim v. N.Y. City Transp. Auth.</i> , 29 A.D.3d 984 (2d Dep’t 2006)	17
<i>King v. United States</i> , 576 F.2d 432 (2d Cir. 1978).....	33
<i>Lavender v. Kurn</i> , 327 U.S. 645 (1946).....	18
<i>Lebron v. Said</i> , 51 A.D.3d 1384 (4th Dep’t 2008).....	17, 18, 21
<i>Lockhart v. Adirondack Transit Lines, Inc.</i> , 305 A.D.2d 766 (3d Dep’t 2003)	28
<i>Loder v. Greco</i> , 5 A.D.3d 978 (4th Dep’t 2004).....	24
<i>Lopez v. Kenmore-Tonawanda Sch. Dist.</i> , 275 A.D.2d 894 (4th Dep’t 2000).....	3, 30, 32
<i>Lora v. City of N.Y.</i> , 305 A.D.2d 171 (1st Dep’t 2003)	28

TABLE OF AUTHORITIES

(continued)

	Page(s)
<i>Mascia v. Olivia</i> , 299 A.D.2d 883 (4th Dep’t 2002).....	5, 17
<i>McDonald v. Pless</i> , 238 U.S. 264 (1915).....	29
<i>Moazzem v. Port Auth. of N.Y. & N.J.</i> , 6 Misc. 3d 137(A), 800 N.Y.S.2d 350, 2005 WL 494352, 2005 N.Y. Slip Op. 50253(U) (App. Term 2005).....	23, 28
<i>Murphy v. Holzinger</i> , 6 A.D.3d 1072 (4th Dep’t 2004).....	28
<i>Pappas v. Santiago</i> , 329 A.2d 337 (N.J. 1974).....	29
<i>People v. De Lucia</i> , 20 N.Y.2d 275 (1967)	29, 32
<i>People v Propp</i> , 172 Misc. 314, 318 (Franklin County Ct. 1939), rev’d on other grounds, 284 N.Y. 491 (1940)	35
<i>Procter & Gamble Co. v. Haugen</i> , 2008 WL 2518716 (D. Utah June 20, 2008).....	31
<i>Raymo v. Textron, Inc.</i> , 89 F.3d 826 (table), 1995 WL 722826 (2nd Cir. Nov. 14, 1995).....	36, 37
<i>Raymo v. Textron, Inc.</i> , 846 F. Supp. 203 (N.D.N.Y. 1994), <i>aff’d</i> , 89 F.3d 826 (table), 1995 WL 722826 (2nd Cir. Nov. 14, 1995).....	36, 37
<i>Relyea v. Schuylerville Cent. Sch. Dist.</i> , 65 A.D.2d 672 (3d Dep’t 1978)	31
<i>Rodriguez v. Baker</i> , 91 A.D.2d 143 (1st Dep’t 1983), <i>aff’d</i> , 61 N.Y.2d 804 (1984)	3, 33
<i>Rubin v. Pecoraro</i> , 141 A.D.2d 525 (2d Dep’t 1988).....	24

TABLE OF AUTHORITIES

(continued)

	Page(s)
<i>Sharrow v. Dick Corp.</i> , 86 N.Y.2d 54 (1995)	29
<i>Shay v. Vitting</i> , 8 Misc.3d 132(A), 801 N.Y.S.2d 781, 2005 WL 1630921, 2005 N.Y. Slip Op. 51082(U) (App. Term 2005).....	21
<i>Skowronski v. Mordino</i> , 4 A.D.3d 782 (4th Dep’t 2004).....	17, 27
<i>Szymanski v. Holenstein</i> , 15 A.D.3d 941 (4th Dep’t 2005).....	28
<i>Waild v. Boulos</i> , 2 A.D.3d 1284 (4th Dep’t 2003).....	18
<i>Williams v. Brosnahan</i> , 295 A.D.2d 971 (4th Dep’t 2002).....	34
<i>Woods v. Pac. Greyhound Lines</i> , 205 P.2d 738 (Cal. Ct. App. 1949)	33
 OTHER AUTHORITIES	
20 AM. JUR. 2d <i>Courts</i> § 149	35
28 N.Y. JUR. 2d <i>Courts and Judges</i> § 215	34
CPLR 4404(a)	28

PRELIMINARY STATEMENT

Plaintiff David Canazzi, a former conductor for defendant CSX Transportation, Inc., was injured when he stepped in front of a train in CSX's Frontier Yard in Buffalo. Canazzi filed suit against CSX under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, alleging that CSX was negligent and that its negligence caused his injuries. Over the course of a twelve-day jury trial, Canazzi presented the jury with at least seven distinct theories of negligence but did not request a verdict form that would have required the jury to specify which of those theories it accepted. In addition to contesting each of Canazzi's theories of negligence, CSX vigorously disputed that it had caused Canazzi's injuries. By way of example only and as discussed in detail below, while Canazzi claimed that he crossed the track (and was struck) in order to avoid debris that CSX negligently allowed to accumulate between the tracks, there was substantial evidence from which the jury rationally could have concluded that he crossed the track simply to obtain a better view of his train. There was also a rational basis for the jury to conclude that Canazzi's own negligence was the sole cause of the accident because the train that struck him would have been visible to him for sixteen to thirty seconds prior to the accident had he ever used his lantern to look for it. At the conclusion of the trial, the jury returned a verdict in favor of CSX, finding that CSX was negligent but that its negligence did not cause Canazzi's injuries.

Canazzi moved to set aside the verdict, arguing that (1) the verdict was inconsistent and against the weight of the evidence because the issues of negligence and causation were "inextricably interwoven" and (2) the verdict was tainted by two jurors' alleged discussion of the possibility that Canazzi would receive workers' compensation benefits. The sole basis for Canazzi's latter contention was the uncorroborated affidavit of the lone dissenting member of the jury. The

Supreme Court granted Canazzi's motion to set aside the verdict as inconsistent and against the weight of the evidence and also directed a verdict in Canazzi's favor on the issue of causation. The court stated that it would also set aside the verdict on the basis of the two jurors' alleged discussion of workers' compensation.

The trial court's ruling setting aside the verdict must be reversed because a jury verdict that a defendant was negligent but that its negligence did not cause the plaintiff's injuries *must* be upheld unless the two issues are "so inextricably interwoven as to make" the verdict "logically impossible." Stated differently, if there is *any* valid line of reasoning that *could* lead a rational jury to find negligence but not causation, then judgment must be entered on the verdict because the prevailing party—here, CSX—is entitled to the presumption that the jury adopted that line of reasoning. In this case, the issues of negligence and causation are not inextricably interwoven. Indeed, in light of Canazzi's scattershot approach to the issue of negligence, the evidence presented at trial could sustain several valid and rational explanations for the jury's findings. Because any one such explanation is sufficient to sustain the verdict, the judgment of the court below must be reversed.

Furthermore, even if the trial court were correct that the jury's findings on negligence and causation were inconsistent, the appropriate remedy is a new trial on all issues, not a directed verdict in favor of Canazzi on the issue of causation.

The trial court's alternative holding that the verdict would have to be set aside based on the lone dissenting juror's claim that two other jurors discussed workers' compensation is also erroneous. The familiar, common-law rule in New York and elsewhere is that jurors may not impeach their own verdicts through after-the-fact allegations of misconduct in the jury room. And while an exception is made to the general rule when the jury's deliberations are subjected to

an “outside influence,” that exception is inapplicable in this case. Consistent with the decisions of other courts, this Court has previously held that a juror affidavit materially identical to the one submitted in this case could not be used to impeach a verdict because the discussion of workers’ compensation benefits by jurors is not an “outside influence[.]” or an “exceptional circumstance[.]” *Lopez v. Kenmore-Tonawanda Sch. Dist.*, 275 A.D.2d 894, 896-97 (4th Dep’t 2000). Moreover, the only support for Canazzi’s claim—the uncorroborated assertions of a dissenting juror as to statements made by fellow jurors “during secret deliberations within the sanctity of the jury room”—“cannot be a basis for impeachment of a verdict.” *Rodriguez v. Baker*, 91 A.D.2d 143, 148 (1st Dep’t 1983), *aff’d*, 61 N.Y.2d 804 (1984). Finally, because the possibility that Canazzi might be entitled to workers’ compensation benefits is wholly unrelated to the issue of causation, Canazzi cannot show that any discussion of that possibility affected the jury’s verdict and hence was prejudicial to him.

QUESTIONS PRESENTED

1. Whether the jury's verdict must be upheld because there exists "**a** valid line of reasoning and permissible inferences based upon the evidence at trial that could lead rational persons to the conclusion that [CSX's] negligence" did not cause Canazzi's injury. *Hollamon v. Vinson*, 38 A.D.3d 1159, 1160 (4th Dep't 2007) (emphasis added).

ANSWER OF THE SUPREME COURT: NO.

2. Whether the uncorroborated allegation of the sole dissenting juror that two other jurors discussed workers' compensation during deliberations required setting aside the jury's verdict despite the absence of proof that the alleged comments actually affected the verdict and the fact that workers' compensation benefits relate, if at all, only to the issue of damages, **not** to the issue of causation.

ANSWER OF THE SUPREME COURT: YES.

STATEMENT OF FACTS

A. Standard Of Review Of The Evidence

CSX is entitled to all “permissible inferences based upon the evidence at trial that could lead rational persons to the conclusion that [its] negligence was not a proximate cause of the accident.” *Hollamon*, 38 A.D.3d at 1160. Further, if the “verdict can be reconciled with a[ny] reasonable view of the evidence, [CSX] is entitled to the presumption that the jury adopted that view.” *Id.* (internal alterations, quotation marks omitted) (quoting *Mascia v. Olivia*, 299 A.D.2d 883, 883 (4th Dep’t 2002)).

B. Background

The accident that is the subject of this case occurred in the north yard area of CSX’s Frontier Yard, a classification yard in Buffalo. The primary purposes of a classification yard are to separate and classify cars from incoming trains and to assemble outgoing trains that will go out onto the main line, or the “main.” The yardmaster who directs movements in the north yard is located in the Bailey tower (R. 204). The yardmaster on the night of the accident was Joseph LaPorta (R.647, 659-60, 1054). Plaintiff’s Exhibit 2, which identifies the tracks in the north yard, is reproduced at R. 338.

Prior to the accident, Canazzi’s train (“Q271”) was parked on the “North Feeder,” approximately 1000 feet east of the Bailey tower (R. 2549-54). When the accident occurred, Q271 was in the process of moving forward (west) from the North Feeder onto the “Five-Yard Lead,” which connects the North Feeder to “the main” or “the main line.” (R.1053-54, 2094). Canazzi, the conductor on Q271, had dismounted from his train and was communicating with his engineer, Richard Wool, by radio (R. 1058-60, 2126-30). Canazzi was preparing to make a “cut” between the twenty-ninth and thirtieth cars on his train—*i.e.*, disconnect the engine and first

twenty-nine cars from the remainder of the train (R. 1051, 2075-82). He was injured when he stepped into the path of another train (“Y216”) that was in the process of “shoving” back (east) along the “Erie Straight,” an approximately 7300-to-7400-foot track that runs to the north of and roughly parallel to the North Feeder (R. 220, 303-04, 2158-60). The east end of the Erie Straight is a “stub” or “dead end.” (R. 220).

In a “shoving” movement, the engine pushes, rather than pulls, the cars connected to it. The train’s engineer therefore relies on his conductor to “protect” the shove by proceeding ahead of the lead car, examining the track ahead for any obstructions, and giving “car counts” as the train approaches its designated stopping point (*i.e.*, counting down the number of car lengths remaining between the lead car and the stopping point) (R. 3143-45, 3175, 3193-94, 3199, 3204-05, 3208-09). The conductor protecting the shove on Y216 was Rich Mussehl. At the time of the accident, Mussehl was riding in a “cab” or “jitney” alongside the Erie Straight and slightly ahead of the Y216 and communicating with his engineer, Dave Frenzel, by radio (R. 3143-45, 3193-94, 3199, 3208-09). The headlights from the cab illuminated the Erie Straight for at least ten car lengths, enabling Mussehl to protect the shove (R. 3227). The supervisor of Frenzel and Mussehl described them as “very thorough” and “extremely safe” employees (R. 3285-86; *see also* R. 324-25).

Prior to shoving back on the Erie Straight, Mussehl and Frenzel had been in the process of assembling Y216 in the “bowl” area of the yard. The bowl is the lower area of the yard in which cars are assembled into complete trains (R. 212, 715, 3131-34). When Y216 came up out of the bowl, in order to get into position to shove back onto the Erie Straight, Frenzel pulled forward (west) onto the main and then onto the “Sycamore Lead,” which branches off of the main (R.210-12, 272-73). Once Y216 (an approximately 7000-foot train [R. 649]) was ready to be

shoved back onto the Erie Straight, the engine and about half of the train cars were positioned on the Sycamore Lead and the remainder were on the main (R. 272-73).

C. The Accident

On March 2, 2004, Wool and Canazzi drove Q271, an 88-car CSX freight train, from Selkirk Yard near Albany west to Frontier Yard in Buffalo (R. 1035-36). Canazzi and Wool entered into the north yard area of Frontier Yard on the North Feeder just after midnight, stopped on the North Feeder just short of the Five-Yard Lead pursuant to the instructions of yardmaster LaPorta, and awaited further directions from LaPorta (R. 718, 728-29, 1041, 1049-50). After about twenty minutes, LaPorta directed them to continue west (forward) for a distance of twenty-nine cars, at which point Canazzi was to make a cut between the twenty-ninth and thirtieth cars, leaving the remainder of the cars on the North Feeder (R. 729-31, 1772-85).

While Canazzi and Wool were waiting on the North Feeder, Frenzel and Mussehl were in the final stages of assembling or “making up” their train (“Y216”) in the bowl area of the yard (R. 212, 715, 3131-34). After Y216 was fully made up, Frenzel was instructed to bring it out of the bowl and proceed west (forward) out onto the Sycamore Lead (R. 719, 3029). Once Y216 was positioned on the Sycamore Lead, Frenzel and Mussehl were to shove the train east (backward) all the way to the east end of the Erie Straight (*see* R. 220, 3142). From his waiting position on the North Feeder, Canazzi was able to see Y216 proceed in front of his train out onto the Sycamore Lead (*see* R. 780, 1500-01; *see also* R. 2551 [Canazzi acknowledging that trains such as Y216 come out of the bowl “right in front” of where he was waiting on the North Feeder]). Because he was on a radio frequency for jobs coming off the main line (*i.e.*, a “road channel”) and did not hear any radioed instructions to the crew going out onto the Sycamore Lead (*i.e.*, Frenzel and Mussehl with Y216), it would have been obvious to Canazzi that it was a yard crew

getting instructions on a “yard channel.” (*See* R. 712-13). As an experienced CSX employee, it would have been evident to Canazzi that Y216 would have no option but to shove back onto the Erie Straight, because yard crews do not go out on the main (R. 283-84, 717-20, 780-81).

Once Y216 was fully assembled and proceeding west onto the Sycamore Lead, Mussehl had CSX’s cab service or “jitney” drive him to a spot on West Shore Road in the vicinity of a track crossing in front of the Bailey tower and near the beginning of the Erie Straight (R. 3035, 3202). West Shore Road runs parallel to the Erie Straight, to the north and just outside the railroad yard (R. 3143-44). Mussehl then left the jitney and walked to the Bailey Avenue crossing, a private yard crossing located wholly within the railroad yard (R. 3035, 3142-43). The jitney driver waited for Mussehl on West Shore Road (R. 986-87).

When yardmaster LaPorta gave Y216 conductor Mussehl permission to shove Y216 onto the Erie Straight, Mussehl relayed LaPorta’s instructions to Y216 engineer Frenzel by radio, and Frenzel began shoving the train onto the Erie Straight (R. 3142). As Y216’s rear car approached the private crossing near the start of the Erie Straight, Mussehl radioed Frenzel a car count to let him know that the engine was approximately thirty car-lengths away from the crossing (R. 3201-02). Mussehl did not give Frenzel any further car counts at that time because he was not required to do so by any rule and it was not common practice to stop at a private crossing (*i.e.*, one located within the yard) or before entering onto the Erie Straight (R. 3161-62, 3201-02, 3214, 3274). Mussehl did, however, remain positioned at the private crossing until Y216’s rear car had passed by and continued east onto the Erie Straight. Mussehl did so to make certain that other employees did not try to beat the train over the crossing—*i.e.*, cross the track just before the train arrived at the crossing (R. 3143, 3035-37). While Mussehl was in the vicinity of the private crossing, both he and the jitney, which was parked on West Shore Road, would have been visible

from the North Feeder where Canazzi and Wool were still waiting in their engine less than 400 feet away from the crossing (*see* R. 559-61, 2553-54, 3211-14).

As soon as the Y216's rear car had passed the private crossing, Y216 conductor Mussehl returned to the jitney. He and the jitney driver then "started proceeding east checking the Erie Straight for any obstruction," first by driving along West Shore Road and then by proceeding along a railroad yard right of way, which also runs parallel to the Erie Straight (R. 3143-44, 3187-88, 966). To allow Mussehl to protect the shove, the jitney proceeded ahead of Y216's easternmost (rear) car, and Mussehl checked the Erie Straight for obstructions such as cars, equipment, or "banner tests" (simulated obstructions used to test engineers and conductors) (R. 3193-94, 3144-45, 3175, 320-21, 557). Mussehl explained that the jitney needed to be ahead of Y216's easternmost car so that he could spot any obstruction on the track and provide Frenzel with enough advance warning to stop the train (R. 3208, 725-26). Proceeding ahead of the shove in this manner, Mussehl did not see any obstructions or banner tests and therefore did not instruct Frenzel to stop or give him any additional car counts until Frenzel approached the "stub end" of the Erie Straight—*i.e.*, the far east end of the track, which is a "dead end" that cannot be accessed from any other track (R. 3144-45, 3204, 220, 245-46; *see also* R. 3174 [Mussehl: "I didn't go directly back [to the stub end]. [I was] slowly checking the track for any obstruction."]). Once he reached the stub end of the Erie Straight, Mussehl gave Frenzel a car count down to end of the straight, and Frenzel brought the train to a stop (R. 996, 3204-05).

There was no sense of urgency to finish shoving Y216 onto the Erie Straight, a routine move within the yard, as Mussehl and Frenzel had more than two hours left until they would be going out of service (R. 258, 345-15, 699, 3129-31). During the move, Y216 never exceeded a speed of six miles per hour (R. 3245-47, 326). Canazzi's own expert acknowledged that this was

“well within the realm of allowable speed” and not a violation of the “restricted speed rule” applicable in the yard (R.1519-20).

Meanwhile, before Y216 reached the Erie Straight, yardmaster LaPorta instructed the Q271 crew (Canazzi and engineer Wool) to pull Q271 forward onto the Five-Yard Lead (R. 2094, 2102). In response to this instruction, Canazzi dismounted from his engine and began walking east, while Wool began pulling the engine west (R. 2126-30). As he was walking, Canazzi began giving Wool a count of the car lengths remaining to traverse until the train would have proceeded far enough for Canazzi to make his cut between the twenty-ninth and thirtieth cars (R. 2131-33).

Canazzi testified that he was giving this car count from the area between the North Feeder and Erie Straight and that, as he was walking east and nearing the end of his count, he “spotted some debris on the ground” between the two tracks (R. 2133). According to Canazzi, just as he had reached “one” in his car count, he attempted to cross to the north side of the Erie Straight, *away* from his own train, in order to avoid that debris (R. 2136, 2141, 2151-52). He testified that, as he was crossing the Erie Straight, the rear car of the Y216 “came out of the mist like it was a misty night”—and that he never saw the train even though he had looked just two seconds earlier (R. 2161-62). According to Canazzi, “it was a very eerie Buffalo night * * *. It was like a moving fog. Not a heavy fog, but just like a moving fog. The light was kind of dim kind of like an eerie Buffalo night * * *.” *Id.* Canazzi claimed that, just before he was struck by the oncoming train, he “grabbed [the] grab handle” on the rear car of Y216, that he was then thrown under the car and nearly thrown into the wheels of the car, and, finally, that he “just did a twisting, leaping, Peter Pan, you might as well call it,” to throw himself clear of the train and the track (R. 2166; *see also, e.g.*, R. 2498 [“I grabbed for that little grab bar and twisted myself out

of that and made a leap, and—I call it a Peter [P]an, twist and leap, Peter [P]an.”); *but see* 3427-32 [CSX summation]). It was undisputed that, at the time of this alleged “twisting, leaping, Peter Pan” maneuver, Canazzi weighed 300 pounds, could not walk more than a hundred yards or climb a flight of stairs without experiencing shortness of breath, suffered from, among other ailments, “morbid obesity,” “arthritic * * * knees,” and a “history of gout,” and was being urged by his doctors to undergo a gastric bypass surgery to address his obesity (R. 1224-27, 1247-49, 1253-54).

Notwithstanding Canazzi’s testimony, the jury was presented with substantial evidence that, when Canazzi was giving his car count, he *already* was on the north side of the Erie Straight and that he was struck either as he was standing (too close) to the track on the north side of the Erie Straight or as he began crossing back over to the south side of the track toward his own train. For instance, Canazzi’s injuries were to his right side and ankle (R. 2258-59, 1179-92; *see also* R. 3397-99 [CSX summation]). Had Canazzi been facing north as he claimed, the train, which was shoving east, would have struck him on his left side. Furthermore, Canazzi wore his radio on his right hip or between his groin and his right hip (R. 2568-70, 2738-39). The radio was badly damaged (*e.g.*, R. 2564-65), which also indicates that he was struck on the right side of his body and is consistent with the contention that he was crossing back from the north side to the south side of the Erie Straight (*see generally* R. 3393-97 [CSX summation]).

The notes taken by the paramedic on the scene also reflect that Canazzi told him that the “ladder” on the Y216 “hit his right leg[,] spinning him around.” (R. 167-68, 334; *see also* R. 176, 2602). And in a cell phone call made shortly after the accident, Canazzi told LaPorta that he had been “*standing* on the *other* side of the Erie [S]traight * * * counting cars” and that the car that hit him was “zipping right *by*” him, further indicating that he was struck by the ladder on

the rear car as he started to cross back to the south side of the Erie Straight—and further undermining his claim that he was in the middle of the tracks, directly in the path of an oncoming train (R. 2704 (emphasis added), 2711-12, 393; *see also* R. 289-90 [explaining that it is unsafe to stand near the outer edge of the railroad ties of a track because a train is likely to be wider than the ties]). Indeed, Canazzi’s own contemporaneous statements that he was “standing” when he was hit by a car “zipping by him” easily provided the jury with a rational basis for disregarding the account of the accident that he testified to at trial.

Even Canazzi’s own expert (Art Dowd) and his engineer (Wool) acknowledged that they could not understand why Canazzi would cross to the north side of the Erie Straight just before he had completed his car count (R. 1553 [Dowd: “I don’t know what’s in his head.”]; R. 1813). Wool thought that it made more sense that Canazzi moved to the north side of the Erie Straight because it would be easier to see the numbers on his cars from that distance and that he was then struck in the course of crossing back to the south side (R. 1813-17). *See also, e.g.*, R. 3253-56 (CSX’s investigation concluded that Canazzi had already moved to the north side of the Erie Straight and was struck while crossing back), R. 3349 (testimony of Roderick Wilson, Frontier Yard Assistant Terminal Superintendent, that Canazzi’s claim that he crossed the Erie Straight just prior to completing his car count “doesn’t make sense”); R. 3388-3400, 3417 (CSX summation on the issue).

D. Canazzi’s Theories Of Negligence, The Verdict, And Post-Trial Motions

Canazzi filed suit against CSX under the Federal Employers’ Liability Act (“FELA”), 45 U.S.C. § 51 *et seq.*, seeking recovery for his injuries. A twelve-day jury trial commenced on November 8, 2007. At trial, Canazzi attempted to prove that CSX was negligent under numerous different theories: First, Canazzi and his witnesses repeatedly asserted that CSX was at fault be-

cause there was debris in the yard between the Erie Straight and the North Feeder (*see, e.g.*, R. 229-30, 234-35, 656, 1001, 1071-72, 1417-18, 1435-39, 2487, 3020-21, 3335-37, 3512-13). CSX, however, took the position, supported by photographs taken the morning following the accident, that the relevant area between the Erie Straight and North Feeder was free of debris and, therefore, did not create a tripping hazard. While there was some debris (*e.g.*, brake pads) in the gauge of the track (*i.e.*, between the rails), that is where railroad workers are trained to toss debris precisely “because [employees are] not supposed to be walking there.” (R. 3337; *see* R. 228-34, 624-25, 1417-18, 3419-23 [CSX summation], 346-50, 351-54, 355-58; *see also, e.g.*, R. 3257 [if debris obstructed Canazzi’s path, he should have “stopped his movement” and “contact[ed] the yardmaster” to have “the appropriate people * * * come and remove it”]).

Second, he alleged that yardmaster LaPorta (and hence CSX) was negligent in failing to notify him of the shove move taking place on the Erie Straight and in failing to hold a “job briefing.” (*E.g.*, R. 1439, 2026). He also alleged that the utility conductor, Kevin Conlan, was negligent for the same reason (R. 2100). *But see, e.g.*, R. 554 (Frenzel: CSX employees are taught that all tracks are presumed to be live); R. 703 (LaPorta: all tracks must be treated as if they are live regardless of whether you are specifically told that); R. 2472 (Canazzi: “Every track is like a live track * * *.”); R. 3257 (Wilson’s testimony that Canazzi, not the yardmaster, was responsible for initiating a job briefing once Canazzi made the decision to cross over the Erie Straight); R. 3314 (Wilson’s testimony that the yardmaster is not required to notify crew members of work on adjacent tracks, though they frequently do so as a “courtesy”).

Third, Canazzi claimed that Y216 conductor Mussehl should have given Y216 engineer Frenzel a car count all the way to the private crossing in front of the Bailey Avenue tower and brought the train to a stop at that crossing (R. 2052, 2058). Canazzi speculated that, had Mussehl

done so, “this accident would have never happened because if [Mussehl] stopped and protected the crossing, it would have been a good chance he would have seen me because he stopped the movement.” (R. 2052). Other witnesses, however, testified that there was no such requirement at a private crossing located within a railroad yard such as the one in front of the Bailey Avenue tower (*see, e.g.*, R. 3161-62, 3201-02, 3204, 3274). This is because Mussehl could safely protect the crossing and ensure that no employees crossed in front of the train without bringing the train to a complete stop (*see, e.g.*, R. 3157, 3035-37).

Fourth, Canazzi claimed that Y216 conductor Mussehl was negligent because Y216 was violating Canazzi’s interpretation of the “restricted speed” rule of the Northeast Operating Rules Advisory Committee or “NORAC.” (*see* R. 2046-49, 534-35). Specifically, Canazzi relied on the principle that a train must be traveling at a speed that will permit it to stop within half the distance of the conductor’s range of vision or half the distance to any obstruction. *See id.* Canazzi asserted that the moment he stepped in front of the train he became an “obstruction” and that Y216 violated the restricted speed rule simply because he was struck (*see, e.g.*, R. 2324-25). Other witnesses testified, however, that a moving person is not an “obstruction” under the rule (*see, e.g.*, R. 572-73, 3159, 3225-26, 3242-43, 3341, 3351; *see also* R. 1519-20 [testimony of Canazzi’s expert acknowledging that the restricted speed rule is not violated simply because an employee “suddenly move[s] foul of the track” “[b]ecause that would be impossible to comply with”]).

Fifth, Canazzi alleged that Y216 conductor Mussehl was negligent for failing to ride on Y216’s rear car or failing to walk within a half a car length of the rear car throughout the shoving movement (R. 2051-52, 2109). However, there was also testimony that riding cars long distances was to be avoided for safety reasons and that it was perfectly reasonable for Mussehl to

have protected the shove by preceding the move in the jitney (*see, e.g.*, R. 557-59, 3038, 3044-46, 3050, 3188, 3199; *see also* 3414-15 [summation]).

Sixth, Canazzi also claimed that Mussehl was negligent for failing to hang a lantern or a “fusee” (a type of flare) on the end of Y216’s rear car (*e.g.*, R. 1429-30; *but see, e.g.*, R. 267-68 [an “end-of-train device” that, among other things, “blinks when it’s dark” is not required on a “yard train,” *i.e.*, a train such as Y216 that “stays within [the railroad yard] for the most part”]; R. 564 [Mussehl would have violated procedures if he had hung his lantern on the end of Y216]; R. 3046-47 [no fusee is required within the railroad yard]; R. 3162-63 [it was not “normal procedure * * * to illuminate your rear end” within the railroad yard on a yard train]; R. 3188 [“you get *more* illumination from the jitney’s two headlights than you do from a conductor’s lantern”] (emphasis added); R. 3240-41 [explaining that the NORAC rule requiring a “white light” on the lead car of the shove did not apply to Y216]).

And seventh, Canazzi even suggested that CSX violated procedures by failing to stop Y216 *after* he walked into its path and was knocked to the side of the track (*see, e.g.*, R. 691-92, 1075-78, 1080-81, 2177-78 [Canazzi agreeing that CSX had “an obligation * * * to tell [Y]216 to stop because no one ha[d] heard from [him] for eight minutes”—that “[s]omeone’s supposed to tell [Frenzel] to stop”]).

In addition to challenging each of Canazzi’s theories of negligence, CSX vigorously disputed the allegation that it had, in any sense, caused Canazzi’s injuries. In its summation, CSX repeatedly urged the jury to find, based on the evidence presented, that Canazzi was solely at fault (*e.g.*, R. 3388, 3393). CSX emphasized that Canazzi’s evident strategy was just to “throw mud, throw mud, throw mud, and see what’s going to stick.” (R. 3424). Given Canazzi’s scatter-shot approach to the case, CSX invited the jurors to consider each of the claims that Canazzi had

“throw[n] * * * out” and to then “ask [themselves], [‘W]hat does that have to do with Mr. Canazzi walking into the path of a train?[]’” *Id.*; *see also, e.g.*, R. 3432-33 (“It doesn’t matter [if there is a ‘light * * *, a fusee, [or] a disco ball’ on the end of the train], because if [Canazzi] doesn’t look, then he doesn’t see what’s there to be observed * * *. It has nothing to do with how this incident occurred * * *. [H]e didn’t look, because if he had looked, he wouldn’t have walked into the path of a train.”); R. 3494 (“[N]ot looking * * * where he was walking * * * caused him to be struck and fall to the ground, caused him to sustain this injury[.]”).

Despite proceeding under at least seven different theories of negligence, Canazzi did not request any sort of special verdict indicating which of those theories the jury accepted. At the conclusion of the case, the jury—by a vote of 5-to-1—returned a verdict in favor of CSX (R. 3575-76). Specifically, although finding in favor of Canazzi on the issue of negligence, the jury also found that CSX’s negligence did *not* cause Canazzi’s injuries “in whole or in part.” *Id.* The jury was polled, and the jurors individually confirmed that the verdict was true and accurate. (R. 3576-78). The general verdict provided no indication as to the basis of the jury’s finding of negligence.

Canazzi moved to set aside the verdict and for a directed verdict that, contrary to the jury’s findings, CSX’s negligence caused his injuries. Canazzi also moved to set aside the verdict on the ground that the lone dissenting juror had submitted an affidavit asserting that, during deliberations, two other jurors discussed the possibility that Canazzi would receive workers’ compensation payments. The trial court “not only set[] aside the verdict as to causation, but [also] direct[ed] a verdict that, as a matter of law, the negligence of [CSX] * * * was the cause, in whole or in part, of” Canazzi’s injury (R. 13). The court stated that it also would have set

aside the verdict based on the lone dissenting juror's allegation that two other jurors discussed workers' compensation benefits during deliberations (R. 13).

ARGUMENT

I. The Trial Court Erred In Setting Aside The Jury's Verdict In Favor Of CSX And Directing A Verdict In Favor Of Canazzi.

A. The Jury's Verdict Must Be Upheld Because It Is Supported By A Valid, Rational Line Of Reasoning And The Issues Of Negligence And Causation Are Not Inextricably Interwoven.

Under New York law, a jury finding of negligence but no causation “is inconsistent and against the weight of the evidence only when the issues are ‘so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause.’” *Lebron v. Said*, 51 A.D.3d 1384, 1384 (4th Dep’t 2008) (quoting *Cona v. Dwyer*, 292 A.D.2d 562, 563 (4th Dep’t 2002)); *see also Skowronski v. Mordino*, 4 A.D.3d 782 (4th Dep’t 2004) (verdict should not be set aside unless a finding of causation “inevitably flow[s] from the finding of culpable conduct”). “Further, where an apparently inconsistent or illogical verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view.” *Hollamon*, 38 A.D.3d at 1160 (internal alterations, quotation marks omitted) (quoting *Mascia*, 299 A.D.2d at 883).

Thus, the jury's verdict in favor of CSX *must* be upheld if there is *any* “valid line of reasoning and permissible inferences based upon the evidence at trial that could lead rational persons to the conclusion that [CSX's] negligence was not a proximate cause of the accident.” *Hollamon*, 38 A.D.3d at 1160; *see also Kim v. N.Y. City Transp. Auth.*, 29 A.D.3d 984, 985 (2d Dep’t 2006) (“A jury verdict should not be set aside * * * unless the jury could not have reached its verdict on any fair interpretation of the evidence,” and “great deference” must be “accorded to the fact-finding function of the jury, as it is in the foremost position to assess the witnesses’

credibility.”). It therefore follows that, because Canazzi chose to present the jury with at least seven different theories of negligence, the jury’s verdict must be upheld unless the issues of negligence and causation are “inextricably interwoven” under *each* of those theories. *See, e.g., Waild v. Boulos*, 2 A.D.3d 1284, 1285 (4th Dep’t 2003) (“[P]laintiff introduced evidence of and alluded on summation to several different alleged deviations from accepted standards * * *. Some of those alleged deviations were ‘inextricably interwoven’ with [the issue of causation], but others were not.”); *Lebron*, 51 A.D.3d at 1385 (motion to set aside verdict was properly denied where “[p]laintiff presented various theories of negligence at trial” and at least some were not “inextricably interwoven” with the issue of causation).

This Court and other New York courts have consistently applied these standards of review in FELA cases. *See, e.g., Fleiss v. S. Buffalo Ry. Co.*, 280 A.D.2d 1004 (4th Dep’t 2001); *Cruz v. Long Island R.R. Co.*, 22 A.D.3d 451, 454 (2d Dep’t 2006). To the extent applicable, however, federal law requires the same, if not greater, deference to the jury’s verdict. *See, e.g., Lavender v. Kurn*, 327 U.S. 645, 653 (1946) (in FELA cases a verdict should be set aside “[o]nly when there is a complete absence of probative facts to support the conclusion reached”); *see also Hyatt v. Metro-N. Commuter R.R.*, 16 A.D.3d 218, 219 (1st Dep’t 2005) (with regard to “factual issues under FELA,” “the jury’s power to draw inferences [is] greater than in a common-law action”).

Here, there are several different rational explanations for the jury’s verdict. Indeed, one or more fair interpretations of the evidence support the jury’s verdict under most, if not all, of the negligence theories argued by Canazzi. This is particularly evident because the jury rationally could have concluded that Canazzi willfully testified falsely on certain issues—*e.g.*, why he

crossed the Erie and whether he crossed prior to being struck (*see* below and pages 10-12, *supra*)—and therefore rationally could have disregarded the entirety of his testimony (*see* R. 3541).

I. As noted above, Canazzi repeatedly argued to the jury that CSX had negligently permitted debris to collect between the Erie Straight and the North Feeder. *See* pages 12-13, *supra*. Canazzi asserted that he crossed to the other side of the Erie Straight because there was debris between the tracks, which constituted a tripping hazard (*e.g.*, R. 2487 [Canazzi: “I was crossing to avoid debris on the ground * * * to avoid a trip, slip, and fall accident.”]; R. 3512-13 [Canazzi summation: “Was it reasonable for * * * Canazzi to cross over the Erie Straight to get in the clear to avoid debris * * *? I submit [that] it was * * *.”]).

However, there was also evidence that there was no debris where Canazzi was walking between the North Feeder and the Erie Straight on the night of the accident and that, even if Canazzi did encounter such debris, his response should have been to stop his movement. *See* page 13, *supra*. But assuming that the jury did find negligence on this basis, the jury was also entitled to conclude that Canazzi had crossed the Erie Straight much earlier simply because it was easier for him to see the numbers on the cars of his train from that vantage point. *See* pages 11-12, *supra*. Accordingly, if the jury did conclude that CSX was negligent in allowing debris to remain on the ground between the tracks, then it would also have been perfectly rational for it to find that Canazzi did *not* cross the track because of the debris—*i.e.*, that he crossed because the north side of the Erie Straight provided a better vantage point. Under this fair interpretation of the evidence, while it may have been negligent for CSX to allow debris to accumulate between the North Feeder and Erie Straight, any such negligence played no part in Canazzi’s injury.

Moreover, even assuming that Canazzi did cross the Erie Straight to avoid debris, the jury was still entitled to conclude that the debris did not cause his injury and that Canazzi was struck

by Y216 solely because of his own negligence. In a very similar FELA case, the plaintiff-railroad conductor alleged that slippery corn syrup had spilled from tanks onto the ground around the railroad tracks, making it dangerous to walk along the tracks; that the railroad was aware of the hazard and negligently failed to clean it up; that, in order to avoid the hazard, it was necessary for him to ride on the side ladder of a train car and then maneuver between the cars in order to dismount; and that the railroad's negligence therefore caused the injuries he sustained in a fall from the train car he was riding. *Kelson v. Cent. of Ga. R.R. Co.*, 505 S.E.2d 803, 808-09 (Ga. Ct. App. 1998). The Georgia Court of Appeals, however, held as a matter of law that the plaintiff's own negligence, not the syrup, was the sole cause of his injuries, noting that he "made no showing of necessity or emergency" that necessitated his negligent course of conduct. *Id.* at 810.

Likewise, the jury in this case was entitled to conclude that Canazzi's own negligence in failing to presume that the Erie Straight was a live track and use his lantern to check for an oncoming train—not the debris between the tracks—was the sole cause of his injuries (*see, e.g.*, R. 3325 [Canazzi would have been able to see Y216 had he used his lantern appropriately]). There was also testimony that, even if Canazzi's range of vision down the Erie Straight was inadequate, "all he had to do was call up the yardmaster and get a peg. * * * [A] peg * * * blocks the track that you want to cross to where no one can shove or access that track until you physically call up the yardmaster and give the peg back to the yardmaster. Then he would have been protected." (R. 3328). Alternatively, if he encountered impassible debris, Canazzi should have stopped his move and contacted the yardmaster to have the debris removed (R. 3257). In short, under a fair interpretation of the evidence, the jury could have found that Canazzi's own failure to use his lantern or his negligent conduct in the face of poor visibility—not the presence of debris—was the sole cause of his injuries.

Further, Canazzi claimed that the presence of debris near the tracks was always an issue (*see, e.g.*, R. 1071-72 [“Q: [H]ave you complained about debris on the track out there before? [Canazzi]: Yeah. Especially when I was working as a conductor. Yes, all the time.”]). Given that Canazzi apparently was able to work in the presence of debris for years without incident, the jury rationally could have inferred that, even if CSX negligently allowed debris to accumulate between the tracks, that was not the cause of Canazzi’s injuries. *See Lebron*, 51 A.D.3d at 1384 (holding that a jury could have rationally concluded that defendant’s negligence in failing to repair unsafe conditions in an apartment stairwell did not cause plaintiff’s injuries because “those conditions * * * existed for approximately two months before the accident” and “[t]he evidence further established that plaintiff had used the stairwell without incident before the accident”). That is, “[u]nder the facts of the instant case, the jury could have found that [CSX] * * * created unsafe conditions, that [CSX was] negligent in permitting such unsafe conditions to exist, but that it was the conduct of plaintiff himself which was the cause of his accident.” *Shay v. Vitting*, 8 Misc.3d 132(A) (table), 801 N.Y.S.2d 781 (table), 2005 WL 1630921, 2005 N.Y. Slip Op. 51082(U) (App. Term 2005); *cf. Bent v. Anderson*, 207 A.D.2d 370, 370-71 (2d Dep’t 1994) (affirming denial of motion to set aside the verdict where “[t]here was evidence that * * * [defendant negligently] failed to follow its own internal guidelines” but also evidence that its failure did not cause the plaintiff’s injury).

2. Nor does a finding of causation “inevitably flow” from a possible determination that yardmaster LaPorta negligently failed to notify Canazzi that Y216 was shoving in on the Erie Straight or hold a “job briefing.” First, there was ample evidence for the jury to conclude that Canazzi *already knew* that Y216 would be shoving down the Erie Straight because he was in position to observe it going out onto the Sycamore Lead and should have understood that it nec-

essarily would have been shoving back onto the Erie Straight. *See* pages 7-8, *supra*. There was also ample evidence that Canazzi would have seen Y216 conductor Mussehl (and the parked jitney) while Mussehl was protecting the private crossing less than 400 feet from where Canazzi was sitting in his engine. *See* pages 8-9, *supra*. Accordingly, it would have been perfectly rational for the jury to conclude that LaPorta’s failure to conduct a “job briefing” or give an informal “heads up,” though negligent, did not cause Canazzi’s injuries because Canazzi was *already aware* of the information that LaPorta would have imparted to him.

Moreover, witness after witness—including Canazzi—testified that a critical rule of railroad safety is that employees must presume that all tracks are “live.” *See* page 13, *supra*. In other words, the heads up that Canazzi claimed he should have been given would have told him no more than what he was already under an obligation to presume. In light of this testimony, it certainly would have been rational for the jury to conclude that Canazzi’s own negligence—namely, his failure to use his lantern to check the Erie Straight or, if for some reason the lantern did not provide adequate visibility, his failure to take other precautions (*see* page 20, *supra*)—not yardmaster LaPorta’s omission, was the sole cause of Canazzi’s injuries.

3. As to Canazzi’s claim that Y216 conductor Mussehl was negligent because he did not conduct a car count or bring Y216 to a stop at the private crossing in front of the Bailey tower, even Canazzi himself never suggested that the alleged negligence definitively caused the accident. Several witnesses testified that Mussehl was not negligent because there is no need to give a car count or bring a train to stop at a private crossing. *See* page 14, *supra*. But assuming that the jury found otherwise, Canazzi testified only that if Mussehl had “stopped and protected the crossing, it would have been a *good chance* he would have seen me because he stopped the movement.” (R. 2052) (emphasis added). Canazzi did not explain why, if Mussehl should have

seen him, he did not see Mussehl (and several witnesses testified that he should have (*see* pages 8-9, *supra*)). But in any event, for purposes of this appeal it is enough to show that it was not logically impossible for the jury to disregard Canazzi's self-serving speculation that Mussehl might have seen him had he stopped Y216 at the crossing, and find instead that, although Mussehl should have done something different to protect the crossing, his negligence did not cause Canazzi's injury. *See Moazzem v. Port Auth. of N.Y. & N.J.*, 6 Misc. 3d 137(A) (table), 800 N.Y.S.2d 350 (table), 2005 WL 494352, 2005 N.Y. Slip Op. 50253(U) (App. Term 2005) (holding that where plaintiff himself could not testify for certain that defendant's negligence caused his injuries, the jury rationally could have concluded that it did not).

4. As noted above, Canazzi also claimed that CSX was negligent because Y216 was violating his personal interpretation of the restricted speed rule. *See* page 14, *supra*. Several different witnesses testified that Canazzi's interpretation of the rule was fundamentally flawed (*see* page 14, *supra*), and there was ample evidence that Y216 was not violating the rule. For example, Y216 conductor Mussehl testified that the jitney's headlights enabled him to see ten car lengths down the Erie Straight "easy" (R. 3227)—*i.e.*, at least 500 to 900 feet (R. 295-96). Mussehl also testified that Y216 engineer Frenzel could have brought the Y216 to a stop in ten to fifteen seconds had he instructed Frenzel to do so (R. 3208). Given that Y216's maximum speed was less than nine feet per second (R. 3245-47, 3407), Mussehl and Frenzel could have brought the train to a complete stop within 100 feet or less—*i.e.*, far less than half of Mussehl's ten-car-lengths range of vision (R. 3176).

But assuming that the jury could have concluded that CSX was negligent because Y216 was proceeding at an excessive speed, it also could have found that such negligence did not cause Canazzi's injury. If, as the jury was entitled to conclude, Canazzi negligently stepped into

the path of the train at the last moment, then Y216's speed was irrelevant because Canazzi's own negligence provided it with *no* opportunity to stop. In the analogous situation in which a car traveling at an excessive speed strikes a pedestrian who "bolt[s]" or "dart[s]" in front of the car at the last moment, this Court has held that it is perfectly rational for a jury to find negligence (speeding) but *not* causation. *Loder v. Greco*, 5 A.D.3d 978 (4th Dep't 2004); *accord, e.g., Rubin v. Pecoraro*, 141 A.D.2d 525, 526-527 (2d Dep't 1988) ("[T]he jury could reasonably have found that the injured plaintiff * * *, without looking, walked into the right side of the appellant's car. Further, the jury could reasonably have found that although the appellant was negligent in the operation of the vehicle under the broad duties and obligations of a driver, * * * that negligence was not a proximate cause of the accident."). The speed of the car—or, here, the train—"merely furnishe[s] the occasion for the accident, but [is] not a cause thereof." *Loder*, 5 A.D.3d at 978.

5. The issue of causation also is not inextricably interwoven with Canazzi's claim that Y216 conductor Mussehl should have ridden on or walked alongside Y216's rear car. *See* pages 14-15, *supra*. Assuming for the sake of argument that the jury was persuaded that Mussehl's decision to ride parallel to the tracks in the jitney was negligent, the jury was also free to credit Mussehl's testimony that you get more illumination from the jitney's two headlights than you do from a conductor's lantern. (R. 3188; *see also* R. 3227 [Mussehl: "With my headlights in the jitney and with the West Shore lights, I would say [that I could see ten car lengths on the Erie Straight] easy.']). Thus, to the extent that Canazzi's theory of causation was that Mussehl would have seen him had Mussehl ridden or walked alongside the rear car, Mussehl's testimony flatly contradicted that theory and provided a valid and rational basis for the jury's verdict. The jury was entitled to credit Mussehl's testimony and conclude that, because

Mussehl's visibility was *better* from the jitney than it would have been had he ridden on or walked near the rear of the train, his decision to ride in the jitney did not cause the injuries that Canazzi suffered when he walked into the path of the train.

Moreover, to the extent that Canazzi's theory was that he would have seen Mussehl positioned on the end of the train, the jury was entitled to reject that theory and find that Canazzi did not see the train because he failed to use his lantern to look for it. This is, after all, precisely the position that CSX argued to the jury in its summation:

That's how you know he didn't look, because * * * even if [his lantern] was the sole source of illumination, which it was not, but even if it was, he still would have been able to see that tank car. That's why it doesn't matter what's on the back of that tank car. He has to look to see it. He has to look.

(R. 3480-81).

There was ample evidence to support this argument. For example, there was testimony that a conductor's lantern enables a conductor to see for a distance of at least three to four car lengths at night—*i.e.*, at least 150 to 270 feet—if not further (R. 295-96; *see also* R. 3325 [“When I use my light at night, I can see pretty well * * *.”]). And the evidence was conclusive that Y216 never exceeded a speed of six miles per hour—*i.e.*, less than nine feet per second (R. 3245-47, 3407). As such, the jury rationally could have concluded that, had he ever looked for it, Canazzi would have been able to see Y216 for *at least* 16 to 30 seconds before he walked into its path. Moreover, Canazzi never explained how it was that he apparently believed that he could see the numbers on his train's cars on the North Feeder from the far side of the Erie Straight (*see* R. 2485-87; *see also* R. 1813-17) and yet could not see the Y216 *on* the Erie Straight. It thus would have been rational for the jury to conclude that it would not have mattered a whit if Mussehl had been standing on the end of the train because Canazzi never once used his lantern to

look for the train. That being a “permissible inference[,]” CSX, as “the successful party[,] is entitled to the presumption that the jury adopted that view.” *Hollamon*, 38 A.D.3d at 1160.

6. For the same reasons, if, notwithstanding substantial evidence to the contrary, the jury believed that Mussehl’s decision not to hang his lantern or a fusee on the end of Y216 was negligent (*see* page 15, *supra*), it certainly could have concluded in addition that his negligence did not cause Canazzi’s injuries because, again, Canazzi never looked to see whether a train was coming down the tracks. As CSX put it in its summation:

[I]t wouldn’t have mattered if they did [put a light on the end of the car], because if he didn’t look to the west, it wouldn’t have mattered if that thing had a light on it, a fusee, a disco ball. It doesn’t matter, because if he doesn’t look, then he doesn’t see what’s there to be observed. So whether or not there’s a white light, another throw mud and see what sticks. It has nothing to do with how this incident occurred. * * * [H]e didn’t look, because if he had looked, he wouldn’t have walked into the path of a train. That’s how you know he didn’t look, because this incident occurred.

(R. 3432-33). As noted above, there was ample evidence to support CSX’s position that, if Canazzi had ever looked, he would have seen the approaching train for 16 to 30 seconds prior to the accident. That being the case, the jury was free to conclude—and, accordingly, CSX is entitled to a presumption that it *did* conclude—that Canazzi’s own negligence caused his injuries and that the absence of a “fusee” that he never would have seen anyway was beside the point.

7. Finally, insofar as Canazzi presented evidence that CSX was negligent in failing to bring Y216 to a stop *after* he had already walked into its path and was lying injured next to the track, it is clear beyond any shadow of a doubt that such negligence did not cause his injuries and that a verdict of negligence without causation premised on this allegation is therefore rational.

* * * * *

For all the reasons discussed above, with respect to *each* of the theories of negligence that Canazzi presented at trial, a jury rationally could have found an absence of causation under a

fair interpretation of the evidence. To take just a couple of the most obvious examples, there was ample evidence that Canazzi crossed the Erie Straight for reasons other than the presence of debris between the tracks, and there was also substantial evidence that Canazzi's failure to use his lantern to check the Erie Straight for an approaching train effectively rendered moot several other allegations of negligence. Because the existence of *any one* such valid line of reasoning is sufficient to sustain the verdict, the trial court's ruling must be reversed, and judgment must be entered on the verdict in favor of CSX.

B. Canazzi's Claim Of Inconsistency Between The Jury's Findings On The Issues Of Negligence And Causation Cannot, Under Any Circumstances, Justify A Directed Verdict On Either Issue.

Canazzi contended below that the jury's verdict in favor of CSX on causation was inconsistent with its finding of negligence because the two issues were inextricably interwoven (*e.g.*, R. 3595-96, 3692-93). As a technical matter, Canazzi "failed to preserve [his] contention that the verdict [was] inconsistent by failing to raise that contention before the jury was discharged." *Skowronski*, 4 A.D.3d at 782. However, this Court has concluded that such a failure has no practical significance precisely because the unpreserved inconsistency claim is the functional equivalent of Canazzi's preserved claim that the verdict was against the weight of the evidence. *Id.*

However the claim is technically denominated, though, such an alleged inconsistency cannot, by its very nature, provide a basis for the trial court's decision entering a verdict in Canazzi's favor as to both negligence and causation. Given that the evidence as to both issues was sufficient to go to the jury, the trial court's ruling that the jury's findings on the two issues were inconsistent—which, to be clear, was erroneous for the reasons explained in Section A—should have led it to set aside both findings and to order a new trial on all issues. That is, accepting solely for the sake of argument Canazzi's premise that the jury's verdict as to causation is irra-

tional because it is irreconcilable with the finding of negligence, then there is an equivalent basis for concluding that the finding of negligence is irrational because it is irreconcilable with the jury's verdict as to causation. If the two findings truly are hopelessly inconsistent, then it is arbitrary to resolve that inconsistency by affirming the finding that favors the plaintiff while throwing out—indeed, *reversing*—the one that favors the defendant. Thus, if this Court agrees with the trial court that the findings are inconsistent, then they must both be set aside.

Numerous cases confirm that the appropriate remedy in this precise situation is a new trial on all issues. For example, in *Di Cesare v. Glasgow*, 295 A.D.2d 1007 (4th Dep't 2002), this Court "conclude[d] that the verdict was inconsistent and should have been set aside" because "the issues of negligence and proximate cause [we]re so 'inextricably interwoven,' it [was] impossible to find negligence without proximate cause." *Id.* at 1008 (citation omitted). The Court then explicitly addressed the issue of the appropriate remedy: "Defendant contends that, if we set aside the verdict on proximate cause, the issue of negligence should also be retried. We agree." *Id.* Many other decisions, both from this Court and the other Departments, likewise ordered this remedy after determining that the jury's findings of negligence and causation were inconsistent. *See, e.g., Szymanski v. Holenstein*, 15 A.D.3d 941 (4th Dep't 2005); *Murphy v. Holzinger*, 6 A.D.3d 1072 (4th Dep't 2004); *Ahr v. Karolewski*, 32 A.D.3d 805 (2d Dep't 2006); *Lockhart v. Adirondack Transit Lines, Inc.*, 305 A.D.2d 766 (3d Dep't 2003); *Lora v. City of N.Y.*, 305 A.D.2d 171 (1st Dep't 2003); *see also, e.g., Moazzem*, 6 Misc. 3d 137(A) (table), 800 N.Y.S.2d 350 (table), 2005 WL 494352, at *1, 2005 N.Y. Slip Op. 50253(U) ("Even [if the jury's findings on negligence and causation were irreconcilably inconsistent], the appropriate procedure would have been for the court below to have ordered a new trial instead of directing a verdict in favor of plaintiff.") (citing CPLR 4404(a)). The New Jersey Supreme Court has also

held that a new trial on all issues is appropriate under these circumstances. *Pappas v. Santiago*, 329 A.2d 337, 338-39 (N.J. 1974) (“conclud[ing] that a new trial should have been granted on the full issue of * * * liability, *i.e.*, negligence and proximate cause” because “the jury verdict * * * finding negligence but absence of proximate cause[] was patently inconsistent”); *accord*, *e.g.*, *Giantonnio v. Taccard*, 676 A.2d 1110, 1116 (N.J. Super. Ct. App. Div. 1996).

In sum, accepting *arguendo* that the jury’s findings on negligence and causation were inconsistent, the only permissible remedy is a new trial on both issues.

II. The Trial Court’s Alternative Holding Is Erroneous.

The Court of Appeals has cautioned that, “[i]n general, a juror is not permitted to impeach his own verdict.” *Alford v. Sventek*, 53 N.Y.2d 743, 744 (1981). The primary “policy reason for [this] rule is * * * to [dis]courage the post-trial harassing of jurors for statements.” *People v. De Lucia*, 20 N.Y.2d 275, 278 (1967). The rule also serves the “important policies” of “ensuring the finality of verdicts” and “encouraging ‘frankness and freedom of discussion and conference’ among the jurors.” *Sharrow v. Dick Corp.*, 86 N.Y.2d 54, 60-61 (1995) (quoting *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915)). As the Court of Appeals has put it, “[c]ommon experience” teaches that “scarcely any verdict might remain unassailable[] if such statements were admissible.” *De Lucia*, 20 N.Y.2d at 278. “Permitting jurors to testify regarding such occurrences would create chaos.” *Id.*

The Court of Appeals has carved out a narrow “exception * * * to the general rule”: Juror affidavits may be received “when jurors are subject to an outside influence”—for example, when “a juror makes an unauthorized viewing of the scene of the crime”—if the party seeking to upset the verdict on that basis can make a strong showing of prejudice from the outside influence. *See Alford*, 53 N.Y.2d at 744-45; *accord De Lucia*, 20 N.Y.2d at 279. But Canazzi’s claim does not

fit within this narrow exception for two reasons: First, the alleged discussion of workers' compensation, if it occurred, does not constitute an outside influence. Second, the uncorroborated affidavit of the lone, dissenting juror is insufficient to establish that the discussion even occurred or, if it did, that it prejudiced Canazzi in any way.

A. The Alleged Discussion Of Workers' Compensation Benefits Does Not Constitute An Outside Influence Or "Exceptional Circumstance" Sufficient To Warrant Setting Aside The Verdict.

In *Lopez v. Kenmore-Tonawanda School District*, 275 A.D.2d 894, 896 (4th Dep't 2000), this Court considered and rejected a materially indistinguishable attempt to impeach a verdict based on an alleged outside influence. In *Lopez*, the plaintiffs moved "to set aside the verdict on the ground that the jury was affected by improper outside influences," relying, just as Canazzi does in this case, on "the affidavit of a juror stating that the jury had speculated that plaintiff would receive worker's compensation benefits and Social Security disability benefits, thereby causing the jury to award lesser damages than it otherwise would have awarded" and, further, "that another juror had expressed concern that her school taxes would be affected by the verdict." *Id.* at 896-97. This Court held that the trial "court properly denied plaintiffs' post-trial motion" because the case did not present "exceptional circumstances" and, therefore, "the juror's affidavit * * * [could] not be used to attack the jury verdict." *Id.*

Given that the alleged outside influence in this case—that the jury improperly considered workers' compensation—is identical to one of the alleged outside influences in *Lopez*, it is clear that this case also does not involve the sort of "exceptional circumstances" that would justify the use of a juror affidavit to attack the verdict. *Lopez* is in accord with the weight of authority holding that "[a] juror's personal experiences unrelated to the litigation," such as their experiences with workers' compensation, "are not external influences" and, therefore, cannot provide a basis

for attacks on a verdict in the form of juror affidavits. *James v. Swindell*, 2000 WL 1195683, at *5 (Tenn. Ct. App. Aug. 23, 2000) (“[T]he mention by a juror during deliberations in the jury room of workers’ compensation is not extraneous and, therefore, the juror’s affidavit is not competent evidence. Thus, we cannot consider as grounds for a new trial the Plaintiff’s assertions * * * that the jury based the verdict on the theory that workers’ compensation had paid all or a portion of the Plaintiff’s expenses.”); *accord, e.g., Geiger v. Sherrodd, Inc.*, 866 P.2d 1106, 1109 (Mont. 1993) (jurors’ discussion of workers’ compensation is an “internal influence” rather than an “external influence” and therefore is not a sufficient basis for granting a new trial or receiving juror affidavits); *Relyea v. Schuylerville Cent. Sch. Dist.*, 65 A.D.2d 672 (3d Dep’t 1978) (jurors’ “discuss[ion of] insurance and whether the school district would have to pay plaintiff’s medical expenses” “f[ell] within the general rule” “that testimony of jurors is not competent to impeach their duly rendered verdict” rather than any “exception[.]” to that rule”); *Holden v. Porter*, 405 F.2d 878, 879 (10th Cir. 1969) (fact that “during * * * deliberation[s] a juror had stated that all military personnel in foreign service carried liability insurance” was not an “extraneous and improper influence” and therefore was “totally incompetent evidence”); *Procter & Gamble Co. v. Haugen*, 2008 WL 2518716, at *3 (D. Utah June 20, 2008) (“[T]he juror[’s] statements allege[d] only that several jurors discussed with other jurors their own past experiences with legal fees— matters within those juror’s [sic] general life experience”—“not extraneous information.”); *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 366, 370 (Tex. 2000) (juror’s speculation that “plaintiff had probably already gotten a big settlement from [a third party] and did not need any more money out of this case” was not an “outside influence[.]”).

Declining to treat discussions of workers’ compensation as an external influence is also consistent with the purposes and policies underlying the traditional rule barring jurors from im-

peaching their own verdicts and the narrow exception for outside influences. In *De Lucia*, while affirming the significance of the policies underlying the traditional rule, the Court of Appeals was willing to recognize a narrow exception for juror statements concerning outside influences because it concluded that such influences “occur[] less frequently and [are] more susceptible to adequate proof” than run-of-the-mill claims of improper deliberations. 20 N.Y.2d at 279.

Thus, a fundamental premise of the outside-influence exception is that such influences will occur infrequently and, when they do, will result in “easily proven prejudice.” *De Lucia*, 20 N.Y.2d at 279. “Common experience” (*id.* at 278), however, indicates that the same cannot be said of matters within “[a] juror’s personal experiences unrelated to the litigation.” *James*, 2000 WL 1195683, at *5. Whereas it is highly unusual for jurors to take it upon themselves to visit a crime scene and reenact the crime (*De Lucia*, 20 N.Y.2d at 279), many, if not most, jurors will bring with them into the jury room experience with matters such as workers’ compensation, insurance, legal fees, or settlements. Moreover, as illustrated by this case, the effect of such discussions on deliberations will seldom, if ever, be “easily proven.” *Id.* Thus, while doing nothing to protect deliberations from distortions created by true outside influences, attacks on verdicts of the sort attempted by Canazzi in this case will invite and encourage juror harassment, undermine the finality of verdicts and the secrecy and openness of jury deliberations, and, ultimately, “create chaos.” *Id.* at 278.

B. A Single, Uncorroborated Affidavit Of A Dissenting Juror Alleging Discussions That Are Not Logically Related To The Issue Of Causation Is An Inadequate Basis For Upsetting The Verdict Or Proving Prejudice.

Even assuming for the sake of argument that, contrary to *Lopez*, juror discussion of workers’ compensation does constitute an “exceptional circumstance[]” sufficient to justify the use of a “juror’s affidavit * * * to attack the jury verdict” (275 A.D.2d at 897), such discussion

would not warrant setting aside the verdict in this case because Canazzi cannot show any prejudice. To prevail on the basis of an alleged outside influence, the party seeking to upset the verdict must present clear and substantial evidence of juror misconduct and prejudice. *Cf., e.g., King v. United States*, 576 F.2d 432, 438 (2d Cir. 1978) (“To overcome [the judicial] reluctance * * * to authorize a post-verdict inquiry [into the jury’s deliberations], there must be ‘clear evidence,’ ‘strong evidence,’ ‘clear and incontrovertible evidence,’ ‘substantial if not wholly conclusive evidence’” to support the allegations of the moving party.), *cited with approval in Kauffman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 460 (1985); *Kauffman v. Eli Lilly & Co.*, 116 Misc.2d 351, 355 (Sup. Ct. 1982) (“Before a Court will permit the involuntary deposition of a juror under the *outside* influence rule, it must be presented with ‘substantial if not wholly conclusive evidence.’”) (quoting *King*, 576 F.2d at 438), *aff’d*, 99 A.D.2d 695 (1st Dep’t 1984), *aff’d in relevant part*, 65 N.Y.2d 449.

Thus, as the First Department held in an opinion that subsequently was adopted by the Court of Appeals, “[u]ncorroborated references by [one juror] to statements made by [another juror] during secret deliberations within the sanctity of the jury room cannot be a basis for impeachment of a verdict”—“especially” when, as in this case, the uncorroborated affidavit is signed by a “dissenting juror.” *Rodriguez*, 91 A.D.2d at 148, *aff’d*, 61 N.Y.2d 804 (“affirmed * * * for the reasons stated * * * at the Appellate Division”). Sound policy and common sense supports this rule. As the California Court of Appeal reasoned, “collateral attacks prompted by ulterior motives, corruption or deliberate changes of minds” are “more likely to be made by dissenting jurors who had been heated by earnest debate and defeated by the final vote.” *Woods v. Pac. Greyhound Lines*, 205 P.2d 738, 741 (Cal. Ct. App. 1949). Accordingly, because Canazzi presented only a single, uncorroborated affidavit from a dissenting juror, his motion to set aside

the verdict on the basis of alleged juror misconduct should have been denied for that reason alone.

Moreover, even if Canazzi's exclusive reliance on a single, uncorroborated affidavit from the lone dissenting juror were not in and of itself fatal to his claim, he still fails to establish prejudice. First, as a matter of logic, the issue of workers' compensation benefits was irrelevant to the question whether Canazzi had established causation. Any consideration of workers' compensation benefits would have implicated only the issue of damages, which the jury never reached.

Furthermore, the affidavit submitted by Canazzi contains nothing more than the lone dissenting juror's speculations as to what two other jurors "thought" or "seemed to feel" about the issue of workers' compensation (R. 3610-11). Such vague speculation cannot overcome the well-settled rule that "[t]he jury is * * * presumed to have followed the court's instructions" (*Williams v. Brosnahan*, 295 A.D.2d 971, 973 (4th Dep't 2002)), including in this case, the court's specific instructions that the jurors were "bound to accept the law as" it was given to them, that they were not to "accept or consider any advice about the law from anyone but [the court]," that they "should consider only the evidence," and that they were "not to be affected by * * * any consideration outside the case as it [was] presented to [them] in [the] courtroom." (R. 3540, 3543).

In ruling to the contrary—that the jury's verdict was "tainted" by misconduct—the trial court relied on this Court's decision in *Fitzgibbons v. New York State Construction Fund*, 177 A.D.2d 1033, 1034 (4th Dep't 1991). That reliance was misplaced. As an initial matter, to the extent that it conflicts with this Court's more recent decision in *Lopez*, *Fitzgibbons* is no longer good law. 28 N.Y. JUR. 2d *Courts and Judges* § 215 ("A trial court must follow the latest deci-

sion of the controlling appellate court, even though such decision is diametrically opposed to an earlier expression by the same court * * *.”); *In re Weinbaum’s Estate*, 51 Misc.2d 538, 539 (Sur. Ct. 1966) (“a trial court must follow the last decision of the controlling appellate court”); *People v Propp*, 172 Misc. 314, 318 (Franklin County Ct. 1939) (“[I]n construing * * * the opinions of the Courts the law most recently established as the law of this state prevails over conflicting law previously established.”), *rev’d on other grounds*, 284 N.Y. 491 (1940); *Gottesman v. Goldberg*, 149 Misc. 50, 52 (N.Y. Mun. Ct. 1933) (“later rulings [that] mark the last expression of the Appellate Court * * * should be followed where a diametrically opposite view is taken in an earlier decision”); *see also* 20 AM. JUR. 2d *Courts* § 149 (“[A] later decision overrules prior decisions which conflict with it regardless of whether such prior decisions are mentioned or commented on.”). Because *Lopez* rejected a claim that is materially indistinguishable from the claim in this case, this Court should simply apply that decision as controlling and reject Canazzi’s claim.

However, to the extent that the Court determines that *Fitzgibbons* can be distinguished from *Lopez* and, hence, retains some precedential value, the same distinctions would render it readily distinguishable and inapposite in this case. In *Fitzgibbons*, this Court held that,

By persuading the other jurors that plaintiff was eligible to have his medical bills paid and to receive other workers’ compensation benefits for the rest of his life, the juror improperly introduced her own legal notions into the case, thereby leading the jurors to depart from the law set forth in the court’s charge. Plaintiff sufficiently proved prejudice as a result of those communications. According to the unrefuted affidavits of two jurors, the jury awarded plaintiff less for medical bills and other items of damages than it would have awarded absent those communications.

Id. at 1034 (citations, alteration, and internal quotation marks omitted).

Thus, in *Fitzgibbons* this Court held that the verdict should be set aside only because the jury as a whole was actually “persuad[ed]” that the plaintiff would receive lifetime medical bene-

fits and other workers' compensation benefits, and because the "[p]laintiff sufficiently proved prejudice" based on "unrefuted" evidence that the jury actually reduced its damages award because it believed that the plaintiff would receive such benefits.

In the instant case, by contrast, Canazzi failed to establish an *actual* effect on the jury's verdict or any *actual* prejudice. In support of his claim that he was prejudiced because a juror made comments about workers' compensation, Canazzi submitted only an affidavit from the lone dissenting juror that does not even assert that the alleged comments impacted the jury's verdict. Rather, that juror merely speculated as to what another juror "thought" and as to what another juror "seemed to feel." Furthermore, this case is unlike *Fitzgibbons* because, as discussed above, the possibility of workers' compensation benefits logically relates to the issue of damages, not the issue of causation. And in *Fitzgibbons*, "[a]ccording to the unrefuted affidavits of two jurors, the jury awarded plaintiff less for medical bills and other items of damages" because of its assumptions regarding workers' compensation. Here, in contrast, Canazzi seeks to attribute to the jury the illogical step of ruling against him on causation based on the assumption that he would receive some amount of compensation through the workers' compensation system.

In light of Canazzi's failure to establish any prejudice resulting from one juror's alleged comments on workers' compensation, this case is readily distinguishable from *Fitzgibbons*. It is also on all fours with a decision by then-Chief Judge McAvoy of the U.S. District Court for the Northern District of New York *denying* a motion for a new trial based on indistinguishable allegations. *Raymo v. Textron, Inc.*, 846 F. Supp. 203, 207-08 (N.D.N.Y. 1994), *aff'd*, 89 F.3d 826 (table), 1995 WL 722826 (2nd Cir. Nov. 14, 1995). In *Raymo*, "the plaintiffs contend[ed] that the jury discussed matters outside of the scope [of] the evidence admitted at trial and that such discussions severely prejudiced" them. 846 F. Supp. at 207. Specifically, similar to this case,

“[i]n support of [their] contention the plaintiffs * * * submitted affidavits from two jurors [stating, *inter alia*,] that during deliberations the jury expressed concern that [one] plaintiff was already receiving payments through workers’ compensation and that a verdict for the plaintiff would allow him to * * * recover twice for the same injuries.” *Id.* While acknowledging that a verdict is subject to impeachment based on “improper outside influences” (*id.* (emphasis omitted)), Chief Judge McAvoy nonetheless rejected the plaintiffs’ claim because they “failed to establish clear, strong and incontrovertible evidence to warrant impeachment of the jury’s verdict.” *Id.* at 208. The Second Circuit affirmed, stating that “the juror misconduct allegation [was] meritless, for substantially the reasons stated by the district court in its decision.” 1995 WL 722826, at *1. The Second Circuit “add[ed] only that federal courts have refused to grant new trials on the basis of juror affidavits revealing speculation about the plaintiff’s insurance coverage” (*id.* (citing *Holden*, 405 F.2d 879)), thus suggesting that, consistent with the decisions noted in Section II.A, *supra*, any alleged discussion of workers’ compensation was not an outside influence to begin with.

* * * * *

In sum, Canazzi’s claim of “juror misconduct” should be rejected under *Lopez* and other decisions because it is not an outside influence. But even setting aside this threshold issue, Canazzi’s claim must fail because a single, uncorroborated affidavit from a dissenting juror cannot satisfy the high standard for establishing prejudice—particularly given that the allegations in that affidavit logically relate, if at all, only to the issue of damages, not the issue of causation.

CONCLUSION

The judgment of the trial court should be reversed, and judgment should be entered in favor of CSX in accordance with the jury's verdict. At minimum, for the reasons noted in Section I.B, the judgment of the trial court must be vacated and the case remanded for a new trial on all issues.

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