

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2006-CA-001931

CSX TRANSPORTATION, INC.

MOVANT

v.

MOTION FOR DISCRETIONARY REVIEW

MICHAEL E. COOKE

RESPONDENT

I. INTRODUCTION

This case involves the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, the statute that governs claims by railroad employees against their employers for workplace injuries. The question presented is whether, to recover under FELA, a plaintiff must prove that the defendant's negligence was the proximate cause of the plaintiff's injury. The Court of Appeals erroneously answered that question no.

A jury found that movant CSX Transportation, Inc. (CSXT) was not liable under FELA for injuries allegedly sustained by respondent Michael E. Cooke (Cooke). The Court of Appeals reversed and remanded for a new trial, finding that the Circuit Court's instruction on causation was not in conformity with the Court of Appeals' decision in *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272 (Ky. Ct. App. 2006), which was issued after the verdict in this case. In *Hamilton*, the Court of Appeals determined that proximate causation is not an element of a claim under FELA, a conclusion it believed was compelled by the U.S. Supreme Court's decision in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957).

The Court of Appeals' belief was mistaken. As the U.S. Supreme Court recently reaffirmed in *Norfolk Southern Railway Co. v. Sorrell*, 127 S. Ct. 799 (2007), a post-*Hamilton* decision, FELA incorporates common-law principles of negligence unless the statute expressly

provides otherwise. Because proximate causation was a firmly established element of common-law negligence when FELA was enacted (as it is today), and because the statute does not expressly abrogate that rule, proximate causation is an element of a FELA claim. As three Justices explained in a concurring opinion in *Sorrell*, moreover, the Court's decision in *Rogers* is not to the contrary. *Rogers* was about "the occasional *multiplicity* of causations" and, in particular, about whether a railroad is liable when the injury is caused in part by factors other than the railroad's negligence; it was not about proximate causation—"the necessary *directness* of cognizable causation." *Id.* at 811 (Souter, J., joined by Scalia and Alito, JJ., concurring) (emphasis added).

For several reasons, this Court should grant review to decide whether a FELA plaintiff must establish proximate causation. First, under the settled methodology for determining the elements of a FELA cause of action, the Court of Appeals' rejection of the proximate-cause standard is flatly wrong. Second, the Court of Appeals' rejection of that standard upsets the careful balance struck by Congress in FELA, which abrogates some common-law prerequisites to recovery but not others. Third, the Court of Appeals rejected the proximate-cause standard without the benefit of the thorough and carefully reasoned concurring opinion of three Justices in *Sorrell*, which disagrees with the Court of Appeals' conclusion that the standard is irreconcilable with *Rogers*. Fourth, the Court of Appeals' decision conflicts with decisions of courts in other jurisdictions, which hold that proximate causation is an element of a FELA plaintiff's claim. Fifth, the question whether proximate causation is an element of the plaintiff's claim is present in every FELA case, and thus the question is one of recurring importance. Finally, unless there is a prompt decision by this Court correcting the Court of Appeals' fundamental misinterpretation of

FELA, juries in the Commonwealth will continue to receive erroneous instructions, and verdicts will continue to be reviewed under an erroneous sufficiency-of-the-evidence standard.

II. INFORMATION REQUIRED BY CR 76.20(3)

A. Movant CSXT, the defendant-appellee below, is represented by Edward H. Stopher and Rod D. Payne, Boehl Stopher & Graves LLP, 2300 Aegon Center, 400 West Market Street, Louisville, Kentucky 40202.

B. Respondent Cooke, the plaintiff-appellant below, is represented by Alva A. Hollon, Jr. and John O. Hollon, Sams & Hollon, P.A., 9424 Baymeadows Road, Suite 160, Jacksonville, Florida 32256, and Allen K. Gruner, 300 West Liberty Street, Suite 3, Louisville, Kentucky 40202.

C. The Court of Appeals filed its opinion on December 7, 2007 (App. B) and denied CSXT's petition for rehearing on April 8, 2008 (App. C).

D. No supersedeas bond has been executed.

E. No party has a petition for rehearing or motion for reconsideration pending in the Court of Appeals.

III. STATEMENT OF MATERIAL FACTS

Respondent Cooke worked in the paint booth at movant CSXT's rail-car repair facility in Raceland, Kentucky. He filed suit against CSXT under FELA, seeking recovery for two slip-and-fall injuries allegedly sustained in the paint booth in 2000. The jury returned a verdict in favor of CSXT and the Circuit Court entered judgment accordingly. Cooke appealed, challenging, among other things, a jury instruction on causation. App. A; App. B at 2; CSXT C.A. Br. 1-4.

While the appeal was pending, the Court of Appeals held in *Hamilton* that the Circuit Court in that case had committed reversible error by instructing the jury to decide whether the defendant's negligence, if any, was a "substantial cause" of the plaintiff's injuries. 208 S.W.3d at 275. Relying on the U.S. Supreme Court's decision in *Rogers*, the *Hamilton* Court explained that the instruction was erroneous because a FELA plaintiff need only establish that the employer's negligence "played any part, even the slightest," in producing the injury. *Id.* (quoting *Rogers*, 352 U.S. at 506). The Court of Appeals went on to say that "language of traditional 'proximate cause'"—indeed, even "a reference to 'proximate cause'"—should also be "avoided" when instructing the jury, because, in the Court of Appeals' view, "FELA and *Rogers* depart from traditional common-law tests of proximate causation." *Id.* at 278; *see also id.* at 278 n.2, 279.

Relying on *Hamilton*, the Court of Appeals reached the same conclusion in this case. App. B. The jury instruction challenged by Cooke read as follows: "Do you believe from the evidence that CSX failed to exercise that care required of it, and that failure, no matter how slight, was a substantial factor in causing injury to the Plaintiff?" *Id.* at 2. In a published opinion, the Court of Appeals held that the instruction was erroneous, both because it included the term "substantial factor" and because it did not include "the causation language required by *Hamilton* and *Rogers*." *Id.* at 3. After finding that Cooke's challenge to the instruction had not been forfeited, that the error was not harmless, and that a retrial was therefore required (*id.* at 3-5), the Court of Appeals directed that, on retrial, the Circuit Court give a jury instruction on causation consistent with *Hamilton* (*id.* at 5-6).

CSXT filed a petition for rehearing in the Court of Appeals. Relying, in part, on the U.S. Supreme Court's post-*Hamilton* decision in *Sorrell*, CSXT argued that circuit courts in FELA

cases should be directed to give a jury instruction on causation that incorporates principles of proximate causation. CSXT C.A. Pet. for Reh'g 2-8. In *Sorrell*, the Court reaffirmed the rule that FELA incorporates common-law principles of negligence unless there is express language in the statute to the contrary. 127 S. Ct. at 805. Applying common-law principles, the Court held that the defendant's negligence and the plaintiff's contributory negligence are governed by the same standard of causation. *Id.* at 805-09. The Court did not address the question of what that standard is (*id.* at 803-05), but a three-Justice concurring opinion explained that proximate causation was required in FELA cases before *Rogers* and that *Rogers* did not abrogate that requirement (*id.* at 809-12 (Souter, J., joined by Scalia and Alito, JJ., concurring)). The Court of Appeals denied CSXT's petition for rehearing. App. C.

IV. QUESTION OF LAW INVOLVED

Whether, to recover under FELA, a plaintiff must prove that the defendant's negligence was the proximate cause of the plaintiff's injury.

V. REASONS WHY THE JUDGMENT SHOULD BE REVIEWED

The Court of Appeals directed the Circuit Court, on retrial, to give a causation instruction consistent with the Court of Appeals' decision in *Hamilton*. App. B at 3, 5-6. *Hamilton* determined that proximate causation is not an element of a claim under FELA and that juries in FELA cases therefore should not be instructed on proximate causation. 208 S.W.3d at 278-79 & n.2. The rule adopted in *Hamilton*, and followed here, is incorrect. This Court should grant review and hold that proximate causation is required by FELA.

A. FELA Incorporates The Common-Law Standard Of Proximate Causation

Enacted in 1908, FELA provides a compensation scheme for injuries sustained by railroad employees in the workplace. The statute preempts state-law remedies. *Sorrell*, 127 S. Ct. at 805. Unlike worker's compensation laws, however, which typically provide relief

without regard to fault, FELA requires an injured railroad employee to prove that his or her employer was negligent. 45 U.S.C. § 51. FELA provides for concurrent jurisdiction of state and federal courts (*id.* § 56), but “[w]hat constitutes negligence for the statute’s purposes is a federal question” (*Urie v. Thompson*, 337 U.S. 163, 174 (1949)).

Under long-settled precedent of the U.S. Supreme Court, including its recent decision in *Sorrell*, the elements of a FELA claim, and the defenses to such a claim, are determined “by reference to the common law,” unless the statute contains “express language to the contrary.” *Sorrell*, 127 S. Ct. at 805; *accord, e.g., Urie*, 337 U.S. at 182. Express language in FELA abrogates a number of “common-law tort defenses that had effectively barred recovery by injured workers,” including the fellow-servant rule, contributory negligence, and assumption of risk. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542-43 (1994) (citing 45 U.S.C. §§ 51, 53-55). Otherwise, however, FELA is “founded on common-law concepts of negligence.” *Urie*, 337 U.S. at 182. Thus, the Court has followed the common law in holding that FELA authorizes the recovery of damages for occupational disease (*id.*), negligent infliction of emotional distress (*Gottshall*, 512 U.S. at 549-50), and fear of developing cancer (*Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 149 (2003)). The Court has also followed the common law in holding that FELA does not allow apportionment of damages between railroad and non-railroad causes of injury (*id.* at 163-65) and that FELA applies the same causation standard to the defendant’s negligence and the plaintiff’s contributory negligence (*Sorrell*, 127 S. Ct. at 805-09).

One of the most fundamental “common-law concepts of negligence” (*Urie*, 337 U.S. at 182) is proximate causation—the requirement that there be “some direct relation between the injury asserted and the injurious conduct alleged” (*Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)). The requirement reflects the recognition that, “[i]n a philosophical

sense, * * * the causes of an event go back to the dawn of human events, and beyond”; that “any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts”; and that a “boundary must [therefore] be set to liability for the consequences of any act.” W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 41, at 264 (5th ed. 1984). A contrary rule would “set society on edge” and “fill the courts with endless litigation.” *Id.* (quoting *North v. Johnson*, 59 N.W. 1012, 1012 (Minn. 1894)).

“Prior to FELA, it was clear common law that a plaintiff had to prove that a defendant’s negligence caused his injury proximately, not indirectly or remotely.” *Sorrell*, 127 S. Ct. at 810 (Souter, J., concurring).¹ That remains the common-law rule today.² And there is no language in FELA, much less any *express* language, that dispenses with that common-law requirement. On the contrary, “FELA said nothing * * * about the familiar proximate cause standard.” *Id.* Accordingly, under a straightforward application of the established interpretive methodology, proximate causation is an element of a FELA claim.

Consistent with that view, the U.S. Supreme Court has “recognized and applied proximate cause as the proper standard in FELA suits” virtually from the time of the statute’s enactment. *Id.*³ Indeed, the Court not only has recognized and applied the requirement, but has

¹ See, e.g., 1 Thomas G. Shearman & Amasa A. Redfield, *A Treatise on the Law of Negligence* § 26, at 27 (5th ed. 1898) (“The breach of duty, upon which an action is brought, must be not only the cause, but the *proximate cause*, of the damage to the plaintiff.”); 3 John D. Lawson, *Rights, Remedies & Practice* § 1028, at 1740 (1890) (“Natural, proximate, and legal results are all that damages can be recovered for, even under a statute entitling one ‘to recover *any* damage.’”).

² See, e.g., Keeton, *supra*, § 41, at 263 (“An essential element of the plaintiff’s cause of action for negligence * * * is ‘proximate cause[.]’”); Dan B. Dobbs, *The Law of Torts* § 180, at 443 (2001) (“To prevail in a negligence action, the plaintiff must bear the burden of showing that the defendant’s negligent conduct was not only a cause in fact of the plaintiff’s harm, but also a proximate or legal cause.”).

³ See, e.g., *St. Louis-S.F. Ry. Co. v. Mills*, 271 U.S. 344, 347 (1926) (“Nor is there evidence from which the jury might infer that petitioner’s [negligence] was the proximate cause of decedent’s death.”); *Northwestern Pac. R.R. Co. v. Bobo*, 290 U.S. 499, 503 (1934) (“If petitioner was negligent * * *, there is nothing whatsoever to show that this was the proximate cause of the unfortunate death.”); *Coray v. Southern Pac. Co.*, 335 U.S. 520, 523 (1949) (“[the plaintiff] was entitled to recover if this defective equipment was the sole or a contributory proximate cause of the decedent employee’s death”); *Urie*, 337 U.S. at 177 (complaint stated a claim under FELA because “[a]ll the usual elements [we]re comprehended, including want of due or ordinary care, proximate causation of the injury, and

stated it in the clearest possible terms. “In order to recover under [FELA],” the Court has said, “it [i]s incumbent upon [the plaintiff] to prove that [the defendant] was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident.” *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 32 (1944).

B. The U.S. Supreme Court Did Not Adopt A Different Standard In *Rogers*

Like some federal courts of appeals (*see Sorrell*, 127 S. Ct. at 809 n.* (Souter, J., concurring)), the Court of Appeals in *Hamilton* understood the U.S. Supreme Court’s decision in *Rogers* to have adopted a rule of causation that “depart[s] from traditional common-law tests of proximate causation” (208 S.W.3d at 278). That understanding is fundamentally mistaken. As Justice Souter explained in the three-Justice concurrence in *Sorrell*, “*Rogers* did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm.” 127 S. Ct. at 809-10 (Souter, J., joined by Scalia and Alito, concurring). Instead, “the case merely instructed courts how to proceed when there are multiple cognizable causes of an injury.” *Id.* at 810.

1. At common law, a plaintiff’s contributory negligence “operated as an absolute bar to relief.” *Sorrell*, 127 S. Ct. at 805. FELA abolished that common-law defense, replacing it with the doctrine of comparative negligence. *Gottshall*, 512 U.S. at 542. Under the statute, a defendant is liable for the plaintiff’s injury or death “resulting in whole *or in part*” from the defendant’s negligence (45 U.S.C. § 51 (emphasis added)), and the plaintiff’s damages are reduced “in proportion to the amount of negligence attributable to [the defendant]” (*id.* § 53).

Rogers was about comparative negligence. The Court’s opinion quoted FELA’s comparative-negligence provisions. 352 U.S. at 506 n.12 (quoting 45 U.S.C. § 53); *id.* at 507 &

injury”); *Carter v. Atlanta & St. Andrew’s Bay Ry. Co.*, 338 U.S. 430, 435 (1949) (“if the jury determines that the defendant’s breach is ‘a contributory proximate cause’ of injury, it may find for the plaintiff”).

n.14 (quoting 45 U.S.C. § 51). It observed that a defendant is liable if its negligence “played any part, even the slightest,” in producing the plaintiff’s injury, even if the result is also attributable to “other causes.” *Id.* at 506. It noted that the issue under FELA is whether the defendant’s negligence “played any part, however small,” in the plaintiff’s injury (*id.* at 508) and that a jury question is presented if the conclusion may reasonably be drawn that the defendant’s negligence “played any part at all” in the injury (*id.* at 507). It stated—repeatedly—that Congress’s intent was that the jury decide whether the employer’s negligence “played any part” in the plaintiff’s injury. *Id.* at 508-10. And it held that the evidence in that case was sufficient to support a finding that the defendant’s negligence “played a part” in the plaintiff’s injury. *Id.* at 503. That is the language of comparative negligence. As Justice Souter explained in *Sorrell*, the holding of *Rogers* is that a FELA plaintiff may recover “even when the defendant’s action was a partial cause of injury but not the sole one,” and “even when [the defendant’s] contribution to injury was slight in relation to all other legally cognizable causes.” 127 S. Ct. at 811 (Souter, J., concurring).

Rogers thus addressed only “the occasional multiplicity of causations.” *Id.* It did not address “the necessary directness of cognizable causation.” *Id.* The two concepts are distinct. As the U.S. Supreme Court has elsewhere explained, “a given proximate cause need not be, and frequently is not, the exclusive proximate cause of harm.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004). The Court’s opinion in *Rogers* said that, under FELA, “[t]he employer is stripped of his common-law defenses” (352 U.S. at 507-08), including the defense of contributory negligence. It did not say that FELA relieves the employee of his or her obligation to prove the common-law elements of negligence, including proximate causation.

2. Far from having *rejected* proximate causation as the applicable standard under FELA, the Court in *Rogers* assumed that proximate causation is an element of a claim under the statute. For example, the jury instruction in *Rogers* required a determination that the defendant's negligence was the "proximate cause" of the plaintiff's injuries. 352 U.S. at 505 n.9. That aspect of the instruction was "free of controversy" and one with which the Court "took no issue." *Sorrell*, 127 S. Ct. at 811 (Souter, J., concurring)). Indeed, in sustaining the jury's finding of negligence, the Court assumed that "the verdict was obedient to the trial judge's charge." *Rogers*, 352 U.S. at 505.

Prior decisions on which the Court relied in *Rogers*, moreover, explicitly hold that a FELA plaintiff must establish proximate causation. Thus, for the proposition that the test under FELA is whether the defendant's negligence "played any part, even the slightest," in producing the plaintiff's injury (*id.* at 506), the Court cited *Coray v. Southern Pacific Co.*, 335 U.S. 520, 523 (1949), which holds that a FELA plaintiff may recover if the defendant's negligence was "the sole or a contributory proximate cause" of the injury. *See Rogers*, 352 U.S. at 506 n.11. And for the proposition that the question in a FELA case is whether a jury may reasonably conclude that the defendant's negligence "played any part at all" in the plaintiff's injury (*id.* at 507), the Court cited *Carter v. Atlanta & St. Andrews Bay Railway Co.*, 338 U.S. 430, 435 (1949), which holds that a jury may find for a FELA plaintiff if it determines that the defendant's negligence is "a contributory proximate cause" of the injury. *See Rogers*, 352 U.S. at 507 n.13.

In short, *Rogers* is entirely consistent with the requirement of proximate cause. As Justice Souter explained in *Sorrell*, the Court's decision "is no authority for anything less than proximate causation in an action under FELA." 127 S. Ct. 812 (Souter, J., concurring).

C. This Court Should Grant Review To Decide Whether The Court Of Appeals Misinterpreted FELA

This Court's review of the Court of Appeals' decision is warranted for several reasons.

First, as explained above, the Court of Appeals' interpretation of FELA is manifestly wrong. Under the methodology consistently employed by the U.S. Supreme Court since FELA's enactment a century ago, the elements of a FELA claim are determined by reference to the common law, unless the statute contains express language to the contrary. The established common-law rule, both today and at the time of FELA's enactment, is that a plaintiff must prove that the defendant's negligence caused his injury proximately, not indirectly or remotely. FELA expressly abrogates some common-law rules, but it says nothing about that one. Accordingly, proximate causation is an element of a claim under FELA. This Court should not permit a clearly erroneous interpretation of an important federal statute to stand.

Second, in holding that proximate causation is not an element of a FELA cause of action, the Court of Appeals has upset the balance struck by Congress in the statute. Congress eliminated a number of common-law defenses, making it easier for plaintiffs to prevail in certain cases where recovery would otherwise be barred (*see Gottshall*, 512 U.S. at 542-43), but it did not relieve plaintiffs of their obligation to prove that their injury was directly caused by the defendant's negligence. The rule adopted by the Court of Appeals significantly broadens the category of cases in which plaintiffs will be able to recover under FELA, and in which defendants will be required to pay judgments, to cover those in which the employer's negligence only *indirectly* causes the plaintiff's injury—those in which the defendant's negligence “merely creates an incidental condition or situation in which the accident, otherwise caused, results in [the plaintiff's] injury.” *Davis v. Wolfe*, 263 U.S. 239, 243 (1923). This Court should not permit

the Court of Appeals to accomplish through adjudication what Congress chose not to do through legislation.

Third, as explained above, the U.S. Supreme Court's intervening decision in *Sorrell* calls into question the Court of Appeals' decision in *Hamilton*, and thus its decision in this case. In *Hamilton*, the Court of Appeals did not take issue with the interpretive methodology described above; it did not dispute that the common law requires a showing of proximate causation; and it did not suggest that FELA expressly abrogates that requirement. Instead, the Court of Appeals believed that requiring a FELA plaintiff to prove proximate causation was foreclosed by *Rogers*. In a thorough and carefully reasoned opinion issued after *Hamilton* was decided, however, three Justices of the Supreme Court explained that *Rogers* did not even *address* the question whether proximate causation is an element of a FELA claim, much less hold that it is not, as a number of lower courts had mistakenly concluded. *Sorrell*, 127 S. Ct. at 809-12 (Souter, J., joined by Scalia and Alito, JJ., concurring). Because the Court of Appeals did not have the benefit of that analysis when it decided *Hamilton*, and because the Court of Appeals apparently deemed itself bound to follow *Hamilton* here, this Court should grant review to decide whether the Court of Appeals' understanding of *Rogers* is mistaken.

Fourth, insofar as it held that a FELA plaintiff need not establish proximate causation, the Court of Appeals' decision in *Hamilton* not only is wrong but conflicts with decisions of several other States' courts of last resort. Even before the U.S. Supreme Court's decision in *Sorrell*, those courts correctly recognized that FELA incorporates the common-law proximate-cause standard, and they did not read the *Rogers* decision to require a different result.⁴ Thus, as

⁴ See *Chapman v. Union P. R.R.*, 467 N.W.2d 388, 395 (Neb. 1991) ("To recover under the [FELA], an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury."); *Marazzato v. Burlington N. R.R. Co.*, 817 P.2d 672, 675 (Mont. 1991) ("The plaintiff [in a FELA case] has the burden of proving that the defendant's negligence was the proximate cause in whole or in part

the law currently stands, a FELA plaintiff in a Kentucky court may recover even if his injury was not proximately caused by the defendant's negligence, but a plaintiff in a West Virginia court directly across the border may not. *Compare Hamilton*, 208 S.W.3d at 278-79 & n.2, with *Gardner v. CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997). This Court should grant review to bring Kentucky in line with West Virginia and the other jurisdictions whose courts have correctly interpreted FELA.

Fifth, the question of what a plaintiff must prove to establish causation under FELA is a recurring one. Indeed, it is present in every case in which a railroad employee sues his employer for a workplace injury. It is thus critically important that the question be resolved correctly. Because the Court of Appeals has resolved it *incorrectly*, this Court's review is needed.

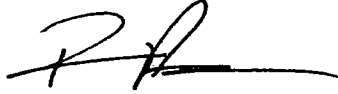
Finally, this case is the right one for deciding the question. In light of *Hamilton*, and the Court of Appeals' denial of rehearing in this case, circuit courts in Kentucky, including the Circuit Court on retrial in this case, will not give a proximate-cause instruction in FELA cases. Likewise, courts at every level in Kentucky, including the lower courts after remand in this case, will apply "a lower of standard of proof" (*Hamilton*, 208 S.W.3d at 275) in deciding whether there is sufficient evidence to justify a finding in favor of a FELA plaintiff on the issue of causation. A prompt decision by this Court that FELA requires proof of proximate causation is necessary to correct the fundamental error that will otherwise infect all FELA suits in Kentucky, including this one, as a consequence of the Court of Appeals' decision in *Hamilton*.

of plaintiff's [death]."); *Snipes v. Chicago, Cent. & Pac. R.R. Co.*, 484 N.W.2d 162, 164 (Iowa 1992) ("Recovery under the FELA requires an injured employee to prove that the defendant employer was negligent and that the negligence proximately caused, in whole or in part, the accident."); *Gardner v. CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997) ("[T]o prevail on a claim under [FELA], a plaintiff employee must establish that the defendant employer acted negligently and that such negligence contributed proximately, in whole or in part, to plaintiff's injury." (citation omitted)).

VI. CONCLUSION

For the foregoing reasons, discretionary review should be granted.

Respectfully submitted,



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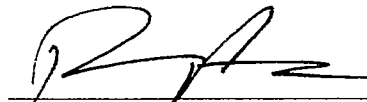
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CERTIFICATE OF SERVICE

I do hereby certify that, on this 13th day of May, 2008, copies of this Motion for Discretionary Review were served by U.S. Express Mail, postage prepaid, on: Alva A. Hollon, Jr., Esq., Sams & Hollon, P.A., 9424 Baymeadows Road, Suite 160, Jacksonville, Florida 32256, counsel for respondent; Allen K. Gruner, 300 West Liberty Street, Suite 3, Louisville, Kentucky 40202, co-counsel for respondent; Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and Susan Gibson, Judge, Jefferson Circuit Court, Division 12, 700 W. Jefferson St., Louisville, KY 40202.



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