

---

No. 07-2437

---

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

---

Donald C. Cooper,

*Appellant,*

vs.

CSX Transportation, Inc.,

*Appellee.*

---

On Appeal from the United States District Court  
for the Eastern District of Michigan, Southern Division  
No. 2:05-cv-73392-PDB-MKM  
The Honorable Paul D. Borman

---

**BRIEF OF DEFENDANT-APPELLEE**

**CSX TRANSPORTATION, INC.**

---

James R. Carnes  
ANSPACH MEEKS ELLENBERGER LLP  
300 Madison Avenue, Suite 1600  
Toledo, Ohio 43604  
Telephone: (419) 246-5757  
Fax: (419) 321-6979

Evan M. Tager  
Andrew E. Tauber  
MAYER BROWN LLP  
1909 K Street, N.W.  
Washington, DC 20006-1101  
Telephone: (202) 263-3000  
Fax: (202) 263-3300

*Attorneys for Appellee CSX Transportation, Inc.*

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Appellee CSX Transportation, Inc. states that it is 100% owned by CSX Corporation.

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iv
STATEMENT IN SUPPORT OF ORAL ARGUMENT .....	1
STATEMENT OF THE ISSUES.....	2
STATEMENT OF THE CASE.....	3
STATEMENT OF FACTS .....	4
A. Statutory and Regulatory Background.....	4
1. The Federal Employers’ Liability Act.....	4
2. The Federal Railroad Safety Act of 1970.....	5
3. Regulations promulgated by the FRA. ....	9
B. Ballast.....	13
C. Plaintiff’s FELA Claim.....	15
D. Proceedings Below.....	17
SUMMARY OF ARGUMENT .....	18
STANDARD OF REVIEW .....	22
ARGUMENT .....	23
I. THE FRSA AND THE FRA REGULATIONS PROMULGATED THEREUNDER PRECLUDE PLAINTIFF’S FELA CLAIM. ....	23
A. FRA Regulations Preclude FELA Claims Covering The Same Subject Matter.....	24
1. Virtually every federal court to have considered the issue has held that the FRSA can preclude FELA claims. ....	24
2. Contrary to Plaintiff’s assertions, the FRSA has preclusive force. ....	30

**TABLE OF CONTENTS**  
**(continued)**

	Page
a.    The FRSA evinces Congress’s intent to displace federal common law.....	30
b.    Congress authorized the issuance of preclusive regulations.....	35
B.    The FRA Ballast Regulation Covers The Same Subject Matter As Plaintiff’s FELA Claim.....	37
C.    The Recent FRSA Amendment Confirms That Plaintiff’s FELA Claim Is Precluded.....	43
II.    PLAINTIFF’S FELA CLAIM IS TIME-BARRED .....	48
A.    Plaintiff Knew Or Had Reason To Know Of His Alleged Injury Before September 1, 2002.....	49
B.    Plaintiff Knew Or Had Reason To Know That His Alleged Injury Was Work-Related Before September 1, 2002.....	54
III.   BECAUSE PLAINTIFF’S OTHER ALLEGED “CLAIMS” WERE NEVER PLED, THE DISTRICT WAS CORRECT TO DISMISS PLAINTIFF’S ACTION IN ITS ENTIRETY .....	57
CONCLUSION.....	58
CERTIFICATE OF COMPLIANCE.....	59

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Aparicio v. Norfolk &amp; Western Railway Co.</i> , 84 F.3d 803 (6th Cir. 1996).....	51, 52, 53
<i>Astoria Federal Savings &amp; Loan Association v. Solimino</i> , 501 U.S. 104 (1991).....	31
<i>Bealer v. Missouri Pacific Railroad Co.</i> , 951 F.2d 38 (5th Cir. 1991).....	55
<i>Black v. Baltimore &amp; Ohio Railroad Co.</i> , 398 N.E.2d 1361 (Ind. Ct. App. 1980).....	37
<i>Burlington Northern &amp; Santa Fe Railway Co. v. Doyle</i> , 186 F.3d 790 (7th Cir. 1999) .....	38
<i>Campbell v. Grand Trunk Western Railroad Co.</i> , 238 F.3d 772 (6th Cir. 2001) .....	48, 50, 51, 56
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	22
<i>Chrysler Corp. v. Commissioner of Internal Revenue</i> , 436 F.3d 644 (6th Cir. 2006) .....	36
<i>Crabbe v. Consolidated Rail Corp.</i> , 2007 WL 3227584 (E.D. Mich. Nov. 1, 2007).....	27, 40, 46
<i>CSX Transportation, Inc. v. Easterwood</i> , 507 U.S. 658 (1993).....	<i>passim</i>
<i>CSX Transportation, Inc. v. City of Plymouth</i> , 283 F.3d 812 (6th Cir. 2002) .....	38
<i>CSX Transportation, Inc. v. Miller</i> , 858 A.2d 1025 (Md. App. 2004) .....	41
<i>DeGrasse v. CSX Transportation, Inc.</i> , No. 1:00-CV-55 (N.D. Ind. 2001).....	42

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
<i>Dickerson v. Staten Trucking, Inc.</i> , 428 F. Supp. 2d 909 (E.D. Ark. 2006) .....	28
<i>Earwood v. Norfolk Southern Railway Co.</i> , 845 F. Supp. 880 (N.D. Ga. 1993).....	29, 30
<i>Ferra v. Canadian National/Illinois Central Railroad</i> , 2007 U.S. Dist. LEXIS 88457 (E.D. Mich. May 4, 2007) .....	27, 32, 40
<i>Fonseca v. Consolidated Rail Corp.</i> , 246 F.3d 585 (6th Cir. 2001).....	53
<i>Freightliner Corp. v. Myrick</i> , 514 U.S. 280 (1995).....	31
<i>Fries v. Chicago &amp; Northwestern Transportation Co.</i> , 909 F.2d 1092 (7th Cir. 1990) .....	49, 55
<i>Geier v. American Honda Motor Co.</i> , 529 U.S. 861 (2000).....	31
<i>Grimes v. Norfolk Southern Railway Co.</i> , 116 F. Supp. 2d 995 (N.D. Ind. 2000).....	27, 41
<i>Herndon v. National Railroad Passenger Corp.</i> , 814 A.2d 934 (D.C. Ct. App. 2003).....	28
<i>Hicks v. Hines Inc.</i> , 826 F.2d 1543 (6th Cir. 1987).....	48
<i>Hillsborough County v. Automated Medical Laboratories, Inc.</i> , 471 U.S. 707 (1985).....	34
<i>Hitchcock v. National Railroad Passenger Corp.</i> , 20 F. Supp. 2d 429 (N.D.N.Y. 1998).....	50
<i>In re Amtrak “Sunset Limited” Train Crash</i> , 188 F. Supp. 2d 1341 (S.D. Ala. 2000) .....	28
<i>In re Derailment Cases</i> , 416 F.3d 787 (8th Cir. 2005).....	37
<i>Johnson v. Norfolk &amp; Western Railway Co.</i> , 836 S.W.2d 83 (Mo. Ct. App. 1992).....	50

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
<i>Lane v. R.A. Sims, Jr., Inc.</i> , 241 F.3d 439 (5th Cir. 2001).....	<i>passim</i>
<i>Lorillard v. Pons</i> , 434 U.S. 575 (1978) .....	44
<i>Lundeen v. Canadian Pacific Railway Co.</i> , 507 F. Supp. 2d 1006 (D. Minn. 2007).....	45, 46
<i>Major v. CSX Transportation</i> , 278 F. Supp. 2d 597 (D. Md. 2003) .....	28
<i>Mastrocola v. Southeastern Pennsylvania Transportation Authority</i> , 2007 WL 4632142 (Pa. Cmwlth. Ct. Jan. 8, 2008) .....	46
<i>Matson v. Burlington Northern Santa Fe Railroad</i> , 240 F.3d 1233 (10th Cir. 2001) .....	49, 55
<i>Mehl v. Canadian Pacific Railway, Ltd.</i> , 417 F. Supp. 2d 1104 (D.N.D. 2006).....	45, 46
<i>Merrill Lynch, Pierce, Fenner &amp; Smith, Inc. v. Curran</i> , 456 U.S. 353 (1982).....	45
<i>Milwaukee v. Illinois</i> , 451 U.S. 304 (1981).....	29, 31
<i>Mosco v. Baltimore &amp; Ohio Railroad</i> , 817 F.2d 1088 (4th Cir. 1987).....	34
<i>Mounts v. Grand Trunk Western Railroad</i> , 198 F.3d 578 (2000) .....	22, 23, 51, 53
<i>Nickels v. Grand Trunk Western Railroad, Inc.</i> , 2007 U.S. Dist. LEXIS 88481 (E.D. Mich. May 30, 2007) .....	40
<i>Norfolk &amp; Western Railway Co. v. Burns</i> , 587 F. Supp. 161 (E.D. Mich. 1984) .....	40
<i>Norfolk Southern Railway Co. v. Shanklin</i> , 529 U.S. 344 (2000) .....	25
<i>Norris v. Central of Georgia Railroad Co.</i> , 635 S.E.2d 179 (Ga. Ct. App. 2006) .....	13, 14, 41

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
<i>PDV Midwest Refining, L.L.C. v. Armada Oil &amp; Gas Co.</i> , 305 F.3d 498 (6th Cir. 2002) .....	44
<i>Perez v. Oakland County</i> , 466 F.3d 416 (6th Cir. 2006) .....	30
<i>Reeves v. Sanderson Plumbing Products, Inc.</i> , 530 U.S. 133 (2000) .....	51
<i>Rice v. Cincinnati, New Orleans &amp; Pacific Railway Co.</i> , 955 F. Supp. 739 (E.D. Ky. 1997) .....	28, 33
<i>Richards v. Consolidated Rail Corp.</i> , 330 F.3d 428 (6th Cir. 2003) .....	22
<i>Riegel v. Medtronic, Inc.</i> , 128 S. Ct. 999 (2008) .....	33
<i>Smith v. Babcock</i> , 19 F.3d 257 (6th Cir. 1994) .....	37
<i>Stemler v. City of Florence</i> , 126 F.3d 856 (6th Cir. 1997) .....	58
<i>Thanasiu v. CSX Transportation, Inc.</i> , No. CI 0200506962 (Ohio C.P.) .....	32
<i>Thirkill v. J.B. Hunt Transportation, Inc.</i> , 950 F. Supp. 1105 (N.D. Ala. 1996) .....	28, 29
<i>Townley v. Norfolk &amp; Western Railway Co.</i> , 887 F.2d 498 (4th Cir. 1989) .....	50
<i>Tucker v. Union of Needletrades, Industrial, &amp; Textile Employees</i> , 407 F.3d 784 (6th Cir. 2005) .....	58
<i>United States v. Kubrick</i> , 444 U.S. 111 (1979) .....	48
<i>United States v. Texas</i> , 507 U.S. 529 (1993) .....	31
<i>Urie v. Thompson</i> , 337 U.S. 163 (1949) .....	4, 30, 31, 51
<i>Van Gorder v. Grand Trunk Western Railroad, Inc.</i> , 509 F.3d 265 (6th Cir. 2007) .....	22

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
<i>Waymire v. Norfolk &amp; Western Railway Co.</i> , 65 F. Supp. 2d 951 (S.D. Ind. 1999).....	<i>passim</i>
<i>Waymire v. Norfolk &amp; Western Railway Co.</i> , 218 F.3d 773 (7th Cir. 2000).....	<i>passim</i>
<i>Weaver v. Missouri Pacific Railroad Co.</i> , 152 F.3d 427 (5th Cir. 1998).....	34
<i>Whitman v. CSX Transportation, Inc.</i> , 887 F. Supp. 983 (E.D. Mich. 1995) .....	54, 55
<i>Williams v. Southern Pacific Transportation Co.</i> , 813 F. Supp. 1227 (S.D. Miss. 1992) .....	54, 55
 <b>Statutes, Regulations and Rules</b>	
45 U.S.C. § 51 .....	4
45 U.S.C. §§ 51–60 .....	3
45 U.S.C. §§ 53–54 .....	5
45 U.S.C. § 56 .....	5, 48
49 U.S.C. § 20101 .....	6, 29, 33
49 U.S.C. § 20103(a) .....	6, 35, 36, 37
49 U.S.C. § 20106 .....	<i>passim</i>
49 U.S.C. § 20142(a) .....	11
49 U.S.C. § 20142(a)(3).....	11, 41
49 U.S.C. § 20142(b) .....	11
Pub. L. No. 91-458, 84 Stat. 972 (1970).....	6
Pub. L. No. 102-365, 106 Stat. 972 (1992).....	10
Pub. L. No. 103-440, 108 Stat. 4615 (1994).....	10

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
49 C.F.R. § 1.49(m) .....	6, 23
49 C.F.R. §§ 213.1–369 .....	10
49 C.F.R. § 213.2 .....	12, 24
49 C.F.R. § 213.33 .....	14, 39
49 C.F.R. § 213.37 .....	14, 39
49 C.F.R. § 213.55 .....	13, 14, 38, 42
49 C.F.R. § 213.57 .....	13, 14, 38, 42
49 C.F.R. § 213.63 .....	13, 14, 38, 42
49 C.F.R. § 213.103 .....	10, 11, 13, 37
49 C.F.R. § 213.103(d) .....	38, 42
49 C.F.R. § 213.119 .....	46
36 Fed. Reg. 20,336 (Oct. 20, 1971).....	9
43 Fed. Reg. 10,583 (Mar. 14, 1978).....	<i>passim</i>
44 Fed. Reg. 52,104 (Sept. 6, 1979) .....	9
47 Fed. Reg. 39,398 (Sept. 7, 1982) .....	10
62 Fed. Reg. 36,138 (July 3, 1997).....	13
63 Fed. Reg. 33,992 (June 22, 1998) .....	<i>passim</i>
66 Fed. Reg. 1894 (Jan. 10, 2001) .....	10
71 Fed. Reg. 59,677 (Oct. 11, 2006).....	10
Fed. R. Civ. P. 56(c).....	22

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
<b>Miscellaneous</b>	
H.R. Rep. No. 91-1194 (1970), <i>reprinted in</i> 1970 U.S.C.C.A.N. 4104.....	<i>passim</i>
H.R. Rep. No. 110-259 (2007), <i>reprinted in</i> 2007 U.S.C.C.A.N. 119.....	8, 9, 44, 45
Federal Railroad Administration Track Safety Standards Compliance Manual (Apr. 1, 2007), <i>available at</i> <a href="http://www.fra.dot.gov/us/content/460">http://www.fra.dot.gov/us/content/460</a> .....	14
Webster’s Third New International Dictionary (1986) .....	3

## **STATEMENT IN SUPPORT OF ORAL ARGUMENT**

The federal preclusion issue in this case is a recurring issue of great importance. Its proper resolution will require familiarity with the statutory regime, the regulatory history, and the factual circumstances in which the issue arises. Defendant-Appellee CSX Transportation, Inc. (“CSXT”) respectfully submits that oral argument on that issue would therefore be of assistance to the Court. CSXT does not request argument on the statute-of-limitations issue, which involves application of settled law to case-specific facts.

## STATEMENT OF THE ISSUES

Plaintiff is a former employee of Defendant CSX Transportation, Inc. (“CSXT”). He brought suit against CSXT under the Federal Employers’ Liability Act (“FELA”), alleging that he suffered an injury to his right leg as a result of walking on ballast, the stone material that supports railroad tracks. It is uncontested that the ballast used by CSXT fully complied with the applicable federal regulation governing ballast, which was promulgated by the Federal Railroad Administration (“FRA”) pursuant to the Federal Railroad Safety Act (“FRSA”). Plaintiff acknowledges that he began to experience daily “right leg pain” in 2000 and that he specifically associated that pain with walking on ballast.

The questions presented are:

- (1) Whether Plaintiff’s FELA claim is precluded by the FRSA and the ballast regulation promulgated thereunder.
- (2) Whether Plaintiff’s FELA claim is barred by the statute of limitations.

## STATEMENT OF THE CASE

On September 1, 2005, Plaintiff filed the present lawsuit against CSX Transportation, Inc. (“CSXT”), seeking recovery under the Federal Employers’ Liability Act (“FELA”), 45 U.S.C. §§ 51–60. Plaintiff’s complaint alleges that CSXT “provide[d] Plaintiff with an unsafe place to work by requiring ambulation on unsuitable ballast.” (R.1 Compl. ¶ 3, JA6)<sup>1</sup> Railroad ballast is “gravel or broken stone laid in a roadbed . . . to provide a firm surface for the track, to hold the track in line, and to facilitate drainage.” Webster’s Third New International Dictionary 167 (1986). According to Plaintiff, the ballast used by CSXT was “unsuitable” because it was “mainline” ballast (rather than smaller-sized “yard” ballast). Walking on mainline ballast, Plaintiff alleges, caused him to develop avascular necrosis (“AVN”), a degenerative bone disease, in his right hip.

CSXT moved for summary judgment, arguing, *inter alia*, that Plaintiff’s FELA claim is (i) precluded by federal regulations promulgated by the Federal Railroad Administration (“FRA”) pursuant to the Federal Railroad Safety Act (“FRSA”) and (ii) untimely under FELA’s three-year limitations period. (R.25 Def.’s S.J. Mot. 1–2, JA82–JA83) The district court granted CSXT’s motion for summary judgment on preclusion and timeliness grounds. (R.40 Slip op., JA405) This appeal followed.

---

<sup>1</sup> All citations to JA\_\_\_ are citations to the Joint Appendix.

## STATEMENT OF FACTS

### A. Statutory and Regulatory Background

#### 1. The Federal Employers' Liability Act.

FELA creates a federal cause of action for railroad employees who are injured as a result of their employer's negligence. The pertinent provision provides:

Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51.

FELA neither prohibits nor requires specific conduct on the part of a railroad. Instead, FELA is “founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms.” *Urie v. Thompson*, 337 U.S. 163, 182 (1949). Because the statute “does not define negligence, leaving that question to be determined . . . by the common law principles as established and applied in the federal courts” (*id.* at 174) (internal quotation marks omitted), claims brought under FELA are decided by juries on an *ad hoc* basis.

Although common-law defenses such as contributory negligence and assumption of risk are inapplicable (*see* 45 U.S.C. §§ 53–54), Congress has placed an important limitation on recovery in FELA cases: Under 45 U.S.C. § 56, “[n]o action shall be maintained under [FELA] unless commenced within three years from the day the cause of action accrued.”

## **2. The Federal Railroad Safety Act of 1970.**

In 1969, the Secretary of Transportation established a Task Force on Railroad Safety comprising “representatives of the railroad industry, railroad labor organizations, and State regulatory commissions.” *See* H.R. Rep. No. 91-1194 (1970) (Appendix F), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4125–31. Its mandate was to “examine railroad safety and to advise the Secretary” accordingly. *Id.* at 4125.

Despite the “longstanding differences among the three groups represented on the task force” (*id.* at 4128), the task force issued a unanimous final report specifically concluding that “legislation authorizing broad federal regulatory powers should be enacted.” *Id.* at 4129. Dissatisfied with the inadequacy and inconsistency of existing state and federal regulations, the task force concluded that railroad safety required “a more comprehensive national approach” (*id.* at 4127) led by the Federal Railroad Administration (“FRA”), which, the task force determined, should “have authority to promulgate reasonable and necessary rules

and regulations establishing safety standards in all areas of railroad safety.” *Id.* at 4129.

Heeding the task force’s recommendation for comprehensive and uniform federal railroad safety regulations (*see* H. Rep. No. 91-1194 at 7, 1970 U.S.C.C.A.N. at 4104–05), Congress enacted the Federal Railroad Safety Act of 1970 (“FRSA”), now codified as amended at 49 U.S.C. § 20101 *et seq.* Consistent with the task force’s recommendation, the FRSA directs the Secretary of Transportation to “prescribe regulations and issue orders for *every area of railroad safety*” in an effort to “promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.” 49 U.S.C. §§ 20101, 20103(a) (emphasis added).<sup>2</sup>

Recognizing that the railroad industry has “a truly interstate character calling for a uniform body of regulation and enforcement” (H.R. No. 91-1194 at 13, 1970 U.S.C.C.A.N. at 4110), Congress “declare[d] that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable.” Pub. L. No. 91-458, 84 Stat. 972, § 205 (1970). As the House Report accompanying the FRSA concluded, “[t]he committee does not believe that safety in the Nation’s railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative

---

<sup>2</sup> The Secretary of Transportation subsequently delegated this authority to the Federal Railroad Administrator. *See* 49 C.F.R. § 1.49(m).

systems.” H.R. Rep. No. 91-1194 at 11, 1970 U.S.C.C.A.N. at 4109. “To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.” *Id.* at 13, 1970 U.S.C.C.A.N. at 4110–11. Accordingly, “where the federal government has authority, with respect to rail safety, *it preempts the field.*” *Id.* at 11, 1970 U.S.C.C.A.N. at 4108 (emphasis added).

Although amended since its initial passage, the FRSA continues to expressly provide that “[l]aws, regulations, and orders related to railroad safety . . . *shall be nationally uniform to the extent practicable.*” 49 U.S.C. § 20106(a)(1) (emphasis added). The statute allows a state to “adopt or continue in force a law, regulation, or order related to railroad safety,” *but only* “*until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement.*” 49 U.S.C. § 20106(a)(2) (emphasis added).<sup>3</sup>

Congress recently amended Section 20106 as part of the 9/11 Commission Act of 2007. The amendment retained the prior preemption provision in its entirety, renumbering it as Subsection 20106(a), and added two additional subsections. As noted at the time it was adopted, the restructuring of the preemption provision was “not intended to indicate any substantive change in the

---

<sup>3</sup> The statute also contains a narrowly circumscribed exception, not relevant to this case, that allows states under certain conditions to adopt laws “necessary to eliminate or reduce an essentially local safety or security hazard.” 49 U.S.C. § 20106(a)(2)(A).

meaning of the provision.” H.R. Rep. No. 110–259 at 351 (2007) (Conf. Rep.), *reprinted in* 2007 U.S.C.C.A.N. 119, 183. Newly added subsection (b), upon which Plaintiff mistakenly relies, was enacted to “clarify the intent and interpretations of the existing preemption statute” and in particular “to rectify the Federal court decisions related to the Minot, North Dakota accident.” *Id.* Those cases held certain state-law tort claims to be preempted notwithstanding the defendant railroad’s alleged failure to comply with FRA regulations.<sup>4</sup> To effectuate that limited purpose, subsection (b) provides:

(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party—

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

---

<sup>4</sup> Here, by contrast, there is no allegation that CSXT violated any applicable FRA regulation.

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.<sup>5</sup>

49 U.S.C. § 20106(b). This provision clarifies therefore that an FRSA preemption defense does not apply if the defendant violated (i) a governing federal regulation (*see* § (b)(1)(A)), (ii) an internal standard adopted pursuant to such a regulation (*see* § (b)(1)(B)), or (iii) a state law “that is not incompatible with subsection (a)(2)” —that is to say, a state law that *is not otherwise preempted by subsection (a)(2)*.

### **3. Regulations promulgated by the FRA.**

Soon after passage of the FRSA, the FRA promulgated initial Track Safety Standards, which “prescribe[d] initial minimum safety requirements for railroad track.” 36 Fed. Reg. 20,336, 20,338 (Oct. 20, 1971). “[B]ased on the safety practices of the rail industry at that time, available track-related data, and public comments and testimony” (44 Fed. Reg. 52,104, 52,107 (Sept. 6, 1979)), these initial standards were intended to operate as an evolving set of safety requirements that would “be continually reviewed and revised by FRA in light of technical innovation, the results of the FRA research and development program, and [regulatory] experience.” 36 Fed. Reg. at 20,336. In fact, the FRA has revised and expanded the Track Safety Standards several times since their initial promulgation.

---

<sup>5</sup> January 18, 2002, is “the date of the Minot, North Dakota derailment.” H.R. Rep. No. 110–259 at 351, 2007 U.S.C.C.A.N. at 183–84.

*See, e.g.*, 71 Fed. Reg. 59,677 (Oct. 11, 2006); 66 Fed. Reg. 1894 (Jan. 10, 2001); 63 Fed. Reg. 33,992 (June 22, 1998); 47 Fed. Reg. 39,398 (Sept. 7, 1982).

Divided into several interconnected subparts, the standards regulate, *inter alia*, train speed, track alignment, track elevation, cross-ties, drainage, and vegetation control. *See* 49 C.F.R. §§ 213.1–.369. Ballast, the subject of this case, is one of the matters specifically regulated by the FRA. The FRA regulation governing ballast provides:

§ 213.103 Ballast; general.

Unless it is otherwise structurally supported, all track shall be supported by material which will –

- (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
- (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;
- (c) Provide adequate drainage for the track; and
- (d) Maintain proper track crosslevel, surface and alinement.

49 C.F.R. § 213.103.

Significantly, the ballast regulation was expressly reaffirmed by the FRA after a congressionally mandated safety review. Congress—through the Rail Safety Enforcement and Review Act of 1992, Pub. L. No. 102-365, 106 Stat. 972 (1992), as amended by the Federal Railroad Safety Authorization Act of 1994, Pub. L. No. 103-440, 108 Stat. 4615 (1994)—ordered the FRA to review all of its

“regulations related to track safety standards.” 49 U.S.C. § 20142(a). That review was specifically required to include, among other things, “employee safety.” 49 U.S.C. § 20142(a)(3). At the conclusion of the mandatory review, the FRA was required to “revise track safety standards, considering safety information presented during the review.” 49 U.S.C. § 20142(b). Pursuant to the congressional directive, the FRA convened a working group which—after having “systematically surveyed the existing regulations to identify those sections and subsections that needed updating” (63 Fed. Reg. at 33,993)—unanimously recommended that the FRA ballast regulation set forth in 49 C.F.R. § 213.103 “remain as currently written.” 63 Fed. Reg. at 34,006. The FRA “agree[d] with the recommendation,” adopted it as its own, and affirmatively decided to let 49 C.F.R. § 213.103 stand unchanged. *Id.*

The FRA ballast regulation is just one part of “an integrated undertaking” that comprises “numerous elements.” Policy Statement, 43 Fed. Reg. 10,583, 10,585 (Mar. 14, 1978). Given their interdependence, “[a]s a general rule, it is not possible to regulate an individual hazard without impacting on other, related working conditions, nor without impacting on the safe transportation of persons and property.” *Id.* For that reason, “piecemeal regulation . . . would be disruptive and contrary to the public interest.” *Id.* at 10,586. It is, therefore, “essential that the safety of railroad operations be the responsibility of a single agency and that

that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on long-standing industry practices and pre-existing regulations.” *Id.* at 10,585. The FRA is that agency. The FRA has “special competence” in “traditional areas of railroad operations” and has “developed a special expertise which makes [it] uniquely qualified to play the primary role in the Federal Government’s efforts to assure safe employment for railroad employees engaged in activities related to railroad operations.” *Id.* Of particular relevance to this case, the agency’s expertise includes the “walkways beside the tracks in yards or along the right-of-way.” *Id.* at 10,587. Indeed, walkways “are areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety.” *Id.*

Lest “piecemeal regulation” interfere with the agency’s “integrated undertaking,” in 1998 the FRA promulgated a regulation underscoring the preemptive effect of its track safety standards, which of course include the ballast regulation. *See* 49 C.F.R. § 213.2 (reiterating that “[u]nder 49 U.S.C. 20106, issuance of these regulations preempts any State law, regulation, or order covering the same subject matter” except under certain narrowly defined circumstances). Although the regulation merely restates the FRSA preemption provision, the FRA felt compelled to “provide[] a statement of agency intent” that “promotes national

uniformity of regulation in accordance with the statute.” Track Safety Standards, 62 Fed. Reg. 36,138, 36,146 (July 3, 1997).

## **B. Ballast.**

For good reason, the FRA ballast regulation does not require the use of a particular size of ballast. Deciding which size of ballast is the most appropriate for a particular location—and the most likely to satisfy the functional requirements set forth in 49 C.F.R. § 213.103 (as well as, for example, the interconnected cross-level, surface, and alignment requirements set forth in 49 C.F.R. §§ 213.55, 213.57, and 213.63)—is a complex process that must be undertaken with detailed knowledge of the local conditions.

Plaintiff’s theory of the case is that CSXT was negligent in using larger-sized “mainline” ballast instead of smaller-sized “yard” ballast in various locations where he had to walk during the performance of his duties. Because it is smaller than mainline ballast, however, yard ballast provides less structural support for the tracks than mainline ballast.<sup>6</sup> Thus, use of yard ballast is more likely to result in swaying trains and derailments, each of which presents its own significant safety

---

<sup>6</sup> See, e.g., *Norris v. Cent. of Ga. R.R. Co.*, 635 S.E.2d 179, 181–82 (Ga. Ct. App. 2006) (noting evidence that mainline ballast was necessary in yard to provide adequate support for switch); see also, e.g., R.30 Pl.’s S.J. Opp., Ex. G, Cameron Depo. 22–24, JA209 (noting that larger mainline ballast “helps for the restraint of the track to keep it in position”); R.25 Def.’s S.J. Mot., Ex. D, Dunn Depo. 51–52, JA137 (admitting that mainline ballast is preferable to yard ballast “from the standpoint of supporting and the maintenance of the main track”).

hazards to railroad workers. Similarly, because it traps more dirt and other debris than mainline ballast, yard ballast tends to allow more mud to form and more vegetation to grow alongside the tracks, conditions that can both undermine the tracks' structural integrity and pose hazards to workers.<sup>7</sup> Yard ballast may be sufficient in locations where trains move very slowly and precipitation is rare. But even then, yard ballast may be inappropriate and mainline ballast necessary, for example where open cars are likely to spill materials, such as phosphate or coal, that can easily clog the voids between the ballast stones. For these reasons, the FRA has decided to leave the choice of ballast in a particular location to the railroad, which alone possesses the requisite local knowledge to ensure that the ballast selected will, under the given conditions, fulfill the functional requirements set forth, in exacting detail, in 49 C.F.R. §§ 213.33, 213.37, 213.55, 213.57, and 213.63. Of course, the FRA conducts inspections to ensure compliance with these requirements. *See* Federal Railroad Administration Track Safety Standards Compliance Manual (Apr. 1, 2007), *available at* <http://www.fra.dot.gov/us/content/460>.

---

<sup>7</sup> *See, e.g., Norris*, 635 S.E.2d at 182 (noting testimony that mainline ballast was required “[f]or the water drainage”); *see also, e.g., R.30 Pl.’s S.J. Opp., Ex. G, Cameron Depo. 22–24, JA209* (acknowledging that yard ballast would “mud up” and “breakdown under the loads causing muddy conditions and unstable track surfaces” and “inhibit[] the drainage as well”).

### C. Plaintiff's FELA Claim.

Plaintiff was a CSXT employee from 1967 to 1968 and from 1970 to 2003. (R.30 Pl.'s S.J. Opp., Ex. A, Cooper Depo. 6–21, JA175–JA178) During his tenure at CSXT, Plaintiff held a number of operator and clerk positions. Some of these jobs required him to walk on railroad ballast to varying degrees at a variety of locations. (*Id.*, Ex. A, Cooper Depo. 8–22, JA175–JA179)

Beginning in 2000—five years before filing this suit—Plaintiff began experiencing “right leg pain.” (*Id.*, Ex. A, Cooper Depo. 26–27, JA180) Plaintiff admitted that he experienced this pain on a daily basis (*id.*, Ex. A, Cooper Depo. 27, JA180) and that the pain occurred when “[w]alking on . . . ballast” (*id.*, Ex. A, Cooper Depo. 31, JA181). Plaintiff could not identify any other activities that caused him pain. (*Id.*, Ex. A, Cooper Depo. 31, JA181). The pain, Plaintiff testified, would run “[f]rom [his] upper leg to [his] . . . toes” and would feel “like something was being pinched.” (*Id.*, Ex. A, Cooper Depo. 26, JA180)

Plaintiff first sought treatment for this pain from his primary care provider, Dr. David Rosenberg, in 2000. (*Id.*, Ex. A, Cooper Depo. 27–28, JA180) Dr. Rosenberg referred Plaintiff to two specialists to investigate possible back and circulatory causes for his leg pain. (*Id.*, Ex. A, Cooper Depo. 29–31, JA180–JA181; *Id.*, Ex. B, Jennings Depo. 5, JA188) According to Plaintiff, neither Dr. Rosenberg nor either of the specialists helped him. (*Id.*, Ex. A, Cooper Depo. 33,

35, JA181, JA182) An x-ray taken in 2000 was “unremarkable.” (*Id.*, Ex. B, Jennings Depo. Ex. 2, JA191)

Plaintiff returned to Dr. Rosenberg in September 2002 for further evaluation of his leg and back pain. (*Id.*, Ex. A, Cooper Depo. 33, JA181) At that time, Dr. Rosenberg referred Plaintiff to Dr. Peter Bono. (*Id.*, Ex. A, Cooper Depo. 33, 73, JA181, JA184) In October 2002, Dr. Bono ordered an x-ray of Plaintiff’s pelvis and right hip, which indicated that Plaintiff might have avascular necrosis (“AVN”). (*Id.*, Ex. C, JA192) Dr. Bono then sent Plaintiff to Dr. Homer Leonard, a hip specialist, who subsequently confirmed the diagnosis. (*Id.*, Ex. A, Cooper Depo. 47–48, JA183; R.25 Def.’s S.J. Mot., Ex. A, Cooper Depo. 51–52, JA114)

After being diagnosed with AVN, Plaintiff continued to work. It was not until February 2003 that he left his job and sought further medical care. (R.30 Pl.’s S.J. Opp., Ex. A, Cooper Depo. 25, JA179) On March 12, 2003, Plaintiff saw Dr. Steven Habusta, an orthopedic surgeon, who confirmed the AVN diagnosis. (*Id.*, Ex. A, Cooper Depo. 82, JA186; *id.*, Ex. D, Habusta Depo. 9, 11–13, JA194–JA195) Dr. Habusta opined that Plaintiff’s AVN was likely caused by walking on railroad ballast throughout his career. (*Id.*, Ex. D, Habusta Depo. 14–18, JA195–JA196) Dr. Habusta admitted, however, that he could neither quantify the extent to which walking on mainline ballast in particular had (allegedly) contributed to Plaintiff’s AVN nor differentiate between the (alleged) effects of walking on

mainline ballast and those of walking on yard ballast. (R.25 Def.’s S.J. Mot., Ex. C, Habusta Depo. 21–22, JA125–JA126; *id.*, Ex. F, Habusta Depo. 47, JA145)

**D. Proceedings Below.**

Plaintiff filed suit against CSXT on September 1, 2005, alleging that CSXT “provide[d] Plaintiff with an unsafe place to work by requiring ambulation on unsuitable ballast.” (R.1 Compl. ¶ 3, JA6) After the parties conducted discovery, CSXT moved for summary judgment, arguing, *inter alia*, that Plaintiff’s claim is precluded by the FRSA and that it was filed outside of FELA’s three-year limitations period.

The district court granted CSXT’s motion. With regard to the preclusion claim, the court recognized that “piecemeal litigation” would undermine Congress’s avowed goal of “national uniformity” in railroad regulation. It accordingly held that, just as state-law tort claims are preempted when FRA regulations cover the same subject matter, tort actions brought under FELA are likewise precluded when relevant FRA regulations cover the same subject matter. (R.40 Slip op. 5–7, JA409–JA411) Finding that the federal regulation governing ballast covers the subject matter of Plaintiff’s claim, the district court, agreeing with the other district courts in this Circuit to have reached the issue, held that Plaintiff’s FELA claim is precluded. (*Id.* at 7, JA411)

The district court further held that, even if Plaintiff's FELA claim were not precluded, it is nevertheless barred by the three-year statute of limitations. (*Id.* at 10, JA414). "Taking the record in a light most favorable to Plaintiff," the court held that Plaintiff either knew or should have known of his injury and its cause more than three years before filing this suit on September 1, 2005. (*Id.* at 9, JA413). The court held that "Plaintiff was aware prior to September 1, 2002, that he had persistent leg pain which was aggravated and instigated by walking on ballast, but no other surface or other activities." (*Id.*, JA413) Therefore, the court held, "Plaintiff was in possession of the facts which should have given him reason to know of the existence of an injury and its connection to his walking on ballast prior to September 1, 2002." (*Id.* at 10, JA414)

### **SUMMARY OF ARGUMENT**

1. Plaintiff asks this Court to create a circuit split where none currently exists. Each of the other circuits to have reached the issue has concluded, like the district court below, that the FRSA precludes a FELA claim when the FRA has promulgated a regulation covering the subject of that claim. That result, which is faithful to Congress's stated intent that railroad safety regulation "be nationally uniform to the extent practicable," is plainly correct.

If FELA claims were allowed to proceed despite the existence of a federal regulation covering the same subject, railroad safety would be diminished, not

advanced. As the FRA—the expert agency charged with regulating railroad safety—has stated, railroad safety regulations are an “integrated undertaking.” A change in one standard necessarily impacts many other standards. A lay jury, called upon to hear an isolated FELA claim, lacks the knowledge and expertise required to comprehend the cascading and perhaps counterintuitive effects that imposition of *ad hoc* common-law standards would have on railroads’ ability to comply with the FRA’s carefully calibrated, interdependent regulations. Moreover, were claims such as Plaintiff’s allowed to proceed, there would be a high risk that railroads would be subject to multiple, conflicting common-law standards. One jury, hearing a claim brought by a worker suffering AVN, might hold a railroad liable for using mainline ballast in a particular yard, while another jury, hearing a claim brought by a worker injured in a derailment, might hold that same railroad liable for not using mainline ballast in the very same yard. Such a result would, contrary to congressional intent, “result in an undue burden on interstate commerce.” For these reasons, among others, Congress not only vested the FRA with regulatory authority, but imbued the FRA’s regulations with preemptive—and preclusive—force.

Plaintiff’s suggestion that the recent amendment to the FRSA changes the legal landscape is mistaken. Given that Congress retained the pre-existing preemption provision in its entirety (and continued to label that provision

“National Uniformity of Regulation”), there is no basis for concluding that Congress suddenly (and silently) decided to abandon its long-standing policy of preempting and precluding tort claims in areas covered by FRA regulations; on the contrary, Congress’s retention of the preemption provision constitutes an affirmation of the many judicial decisions that have held FELA claims precluded by FRA regulations that cover the same subject matter. Plaintiff’s assertion that a common-law standard is now preempted or precluded only if it is in direct conflict with an FRA regulation rests on a basic misreading of the amended statute, which, as before, allows a damages action to proceed only if the claim does not rest on an otherwise preempted common-law requirement. As is clear from both its legislative history and its effective date, the recent amendment was intended to accomplish a limited purpose, namely to abrogate certain judicial decisions that had exonerated a railroad from liability despite the railroad’s alleged violation of FRA regulations. Here, there is no allegation that CSXT violated any FRA regulation, and no statutory basis for holding that the amended FRSA is any less preclusive of Plaintiff’s claim than the pre-amendment FRSA.

Contrary to Plaintiff’s contention, the FRA ballast regulation covers the same subject as Plaintiff’s FELA claim and therefore precludes that claim under the FRSA. The fact that the regulation does not require the use of a particular size of ballast is of no moment. Taking into account the various interlocking

operational and safety considerations that it must simultaneously balance, the FRA has, in its expert judgment, concluded that railroads should retain flexibility when determining which ballast is most appropriate in a particular location. Indeed, the FRA reaffirmed that position and left the ballast regulation unchanged after a congressionally mandated safety review that specifically reexamined the ballast regulation in light of employee safety. It is thus clear that Plaintiff's claim, which alleges that CSXT should have used a different ballast than it did, covers the same subject as the FRA ballast regulation, which leaves the choice of ballast to railroads' discretion. Because the FRA regulation covers the subject matter of Plaintiff's claim, that claim is precluded.

2. The district court was correct to find Plaintiff's claim time-barred under FELA's three-year limitations period. The question is not whether Plaintiff filed suit within three years of receiving a formal medical diagnosis of his injury, but whether Plaintiff either knew or should have known of both his injury and its cause more than three years before initiating this action. There is no dispute that Plaintiff began experiencing pain approximately five years before filing this lawsuit. Moreover, Plaintiff has testified that the only activity he associated with the pain was walking on ballast. Given these facts, the district court correctly concluded that the action is untimely.

3. Finally, the district court was correct to ignore Plaintiff's purported "claims" alleging a failure to warn and a failure to implement an ergonomic program. Those "claims" appear nowhere in Plaintiff's complaint; rather, they were propounded for the first time in Plaintiff's opposition to CSXT's motion for summary judgment. As this Court has repeatedly held, claims initially raised in opposition to a motion for summary judgment are, as here, properly disregarded.

### **STANDARD OF REVIEW**

This Court reviews a grant of summary judgment *de novo*. See *Mounts v. Grand Trunk W. R.R.*, 198 F.3d 578, 580 (2000). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, and any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The moving party has the burden of proving the absence of genuine issues of material fact and its entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has met its burden, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Richards v. Consol. Rail Corp.*, 330 F.3d 428, 432 (6th Cir. 2003). "The party bearing the burden of proof must present a jury question as to each element of its case." *Van Gorder v. Grand Trunk W. R.R., Inc.*, 509 F.3d 265,

268 (6th Cir. 2007). When determining whether the non-movant has met this burden, the court must view the evidence in the light most favorable to the non-moving party. *Mounts*, 198 F.3d at 580.

## **ARGUMENT**

### **I. THE FRSA AND THE FRA REGULATIONS PROMULGATED THEREUNDER PRECLUDE PLAINTIFF'S FELA CLAIM.**

Plaintiff argues that regulations promulgated pursuant to the FRSA can never preclude FELA claims and that, even if they could, they do not do so in this case. Plaintiff is wrong on both counts.

Congress has expressly provided that the standards relating to railroad safety “shall be nationally uniform to the extent practicable.” 49 U.S.C. § 20106(a)(1). Responsibility for developing such uniform safety standards has been vested in the FRA, the expert agency most familiar with railroad operations. *See* 49 C.F.R. § 1.49(m). In the agency’s expert judgment, “piecemeal regulation” of matters falling within its purview “would be disruptive and contrary to the public interest.” 43 Fed. Reg. at 10,586. Common-law litigation is the paradigmatic form of piecemeal regulation. It makes no difference whether such litigation arises under state or federal law; each is equally disruptive of national uniformity in railroad safety standards. Accordingly, Section 20106(a)(1) requires that tort claims brought under FELA be precluded to the same extent as tort claims brought under

state law—namely, whenever the FRA has issued regulations under the FRSA that cover the same subject matter as the tort claim.

It is well established that FRA regulations issued under the FRSA preempt any state-law requirement with respect to the “subject matter” covered by the regulations, including any requirement imposed through common-law tort actions. 49 U.S.C. § 20106(a)(2); *see also* 49 C.F.R. § 213.2. In this case, Plaintiff alleges that CSXT should have used a particular size of ballast. The FRA has, however, promulgated a regulation specifically governing the use of ballast as part of the agency’s “integrated” track safety requirements. 43 Fed. Reg. at 10,585. Not only does the ballast regulation constitute an integral part of the agency’s broader regulatory scheme, but the FRA expressly decided to leave the regulation unchanged after conducting a congressionally mandated review of the regulation’s impact on employee safety. *See* 63 Fed. Reg. at 34,006. Given its content, history, and structure, the ballast regulation covers the subject of, and therefore precludes, Plaintiff’s FELA claim.

**A. FRA Regulations Preclude FELA Claims Covering The Same Subject Matter.**

**1. Virtually every federal court to have considered the issue has held that the FRSA can preclude FELA claims.**

The vast majority of courts to have considered the issue, including the two circuits that have done so, have held that FRA regulations promulgated pursuant to

the FRSA can preclude FELA claims to the same extent that such regulations preempt state-law claims. As the Seventh Circuit observed, “[t]o treat cases brought under federal law differently from cases brought under state law would defeat FRSA’s goal of uniformity.” *Waymire v. Norfolk & W. Ry. Co.*, 218 F.3d 773, 777 (7th Cir. 2000).

In *Waymire*, the Seventh Circuit considered whether a train conductor’s FELA claims arising from a train/truck collision were precluded by the FRSA and certain regulations issued thereunder. The plaintiff claimed that the train was traveling at an excessive speed and that the railroad had installed inadequate warning devices at the crossing where the accident took place. The train, however, was traveling within the federally prescribed speed limit, and the warning devices installed at the crossing complied with federal standards. *Id.* at 776–77. Recognizing that the Supreme Court had found comparable state law claims to be preempted by the FRSA in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344, 354 (2000), the Seventh Circuit held that it “must strike the same result” in FELA cases “in order to uphold FRSA’s goal of uniformity.” *Waymire*, 218 F.3d at 776. Accordingly, the court held that both of the plaintiff’s claims were precluded. *Id.* at 777. With reference to the plaintiff’s inadequate warning devices claim, but in words equally applicable to the excessive speed claim, the court stated: “Given

that the federal agency empowered by Congress to establish uniform, comprehensive federal safety standards related to warning devices at grade crossings has promulgated such regulations, federal common law and statutes on these issues are necessarily displaced.” *Id.*

The Fifth Circuit has joined the Seventh Circuit in holding that FELA claims are precluded by FRSA regulations covering the subject matter of those claims. *See Lane v. R.A. Sims, Jr., Inc.*, 241 F.3d 439 (5th Cir. 2001). In *Lane*, a railroad employee sought damages under FELA for injuries he sustained in a railroad crossing collision. The plaintiff argued that the train was traveling at an unsafe speed at the time of the collision, even though it was going below the speed limit established by FRSA regulations. *Id.* at 441. The district court granted summary judgment to the railroad on preclusion grounds, and the plaintiff appealed. Recognizing “Congress’ intent that railroad safety regulations be nationally uniform to the extent practicable” (*id.* at 443), the Fifth Circuit affirmed. It explained that “[d]issimilar treatment” of federal and state common-law claims “would have the untenable result of making the railroad safety regulations established under the FRSA virtually meaningless: ‘The railroad could at one time be in compliance with federal railroad safety standards with respect to certain classes of plaintiffs yet be found negligent under the FELA with respect to other classes of plaintiffs for the very same conduct.’” *Id.* (quoting *Waymire v. Norfolk*

& *W. Ry. Co.*, 65 F. Supp. 2d 951, 955 (S.D. Ind. 1999), *aff'd*, 218 F.3d 773 (7th Cir. 2000)). Moreover, the court observed:

[A]llowing juries in FELA cases to find negligence based on excessive speed, even though it did not exceed that set by the FRSA regulations, would further undermine uniformity, because it would result in the establishment, through such verdicts, of varying, uncertain speed limits at different crossings, as well as different speed limits at the same crossing, depending on the time of day, traffic conditions, and other variables.

*Id.* at 443–44.

*Waymire* and *Lane* represent the near unanimous view among the federal courts to have considered the issue.<sup>8</sup> With just one exception of which we are aware, every federal court presented with the question has held that FELA claims are precluded by FRSA regulations covering the same subject matter. *See, e.g., Crabbe v. Consol. Rail Corp.*, 2007 WL 3227584, at \*5 (E.D. Mich. Nov. 1, 2007) (“allowing Plaintiff to proceed with a FELA claim alleging that Defendant was negligent in its choice of ballast would undermine the FRSA’s goal of national uniformity”) (Duggan, J.); *Ferra v. Canadian Nat’l/Ill. Cent. R.R.*, 2007 U.S. Dist. LEXIS 88457, at \*15 (E.D. Mich. May 4, 2007) (Battani, J.) (noting “danger that

---

<sup>8</sup> *Grimes v. Norfolk Southern Railway Co.*, 116 F. Supp. 2d 995 (N.D. Ind. 2000), mistakenly states that “the Circuits that have considered the issue” of whether the FRSA precludes FELA claims “are split.” *Id.* at 1003. *Grimes* cites *Waymire*, 218 F.3d at 776, in support of this assertion, but the conflict discussed in *Waymire* is among the various *district* courts. As noted above, the two circuits to have considered the issue, the Fifth and the Seventh, have both concluded that FRSA regulations preclude FELA claims covering the same subject matter. *See Waymire*, 218 F.3d at 777; *Lane*, 241 F.3d 443.

Congress's strived-for uniformity would be undermined by 'allowing juries in FELA cases to find negligence based on' choice of ballast even though it complied with the requirements set forth in the FRSA regulations"); *Dickerson v. Staten Trucking, Inc.*, 428 F. Supp. 2d 909, 913–14 (E.D. Ark. 2006) (noting that "courts have precluded FELA claims when the railroad's underlying conduct was in compliance with specific FRSA regulations" and holding FELA claim challenging crashworthiness of locomotive precluded by FRSA); *Major v. CSX Transp.*, 278 F. Supp. 2d 597, 608–10 (D. Md. 2003) ("the district courts are agreed that a FELA claim may be preempted by the FRSA"); *In re Amtrak "Sunset Limited" Train Crash*, 188 F. Supp. 2d 1341, 1349 (S.D. Ala. 2000) ("Like common law negligence claims, FELA negligence claims may not be used to impose duties beyond those imposed by Congress or the FRA—that is, FELA claims may, indeed, be subject to pre-emption."); *Rice v. Cincinnati, New Orleans & Pac. Ry. Co.*, 955 F. Supp. 739, 740 (E.D. Ky. 1997) ("[t]o the extent that they are inconsistent, the FRSA will supersede the FELA based on the policy embodied in the FRSA to ensure uniformity in law pertaining to railway safety"); *Thirkill v. J.B. Hunt Transp., Inc.*, 950 F. Supp. 1105, 1107 (N.D. Ala. 1996) (concluding that FELA claim was precluded by FRSA regulations covering train speed); *see also*, e.g., *Herndon v. Nat'l R.R. Passenger Corp.*, 814 A.2d 934, 936–37 (D.C. Ct. App.

2003) (finding differentiation between state and FELA common-law claims in context of FRSA to be “a distinction without a policy difference”).

Only one federal-court decision of which we are aware has even arguably held that the FRSA cannot preclude FELA claims. That lone decision, *Earwood v. Norfolk Southern Railway Co.*, 845 F. Supp. 880 (N.D. Ga. 1993), has been rightly rejected as “not persuasive.” *Waymire*, 65 F. Supp. 2d at 955; *see also, e.g., Lane*, 241 F.3d at 443 (“we find *Waymire*, *Thirkill*, and *Rice* far more persuasive than *Earwood*”). *Earwood* suggests that a federal statute can abrogate, and thus preclude the application of, federal common law only if the statute “addresses the problem formerly governed by federal common law.” 845 F. Supp. at 890 (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 315 n.8 (1981)). Although it did not expressly foreclose the possibility of the FRSA ever precluding a FELA claim, the *Earwood* court declined to give preclusive force to the FRSA speed regulations because those regulations were, according to the court, “not directed at the issue of employee safety.” *Id.* at 891. But as the Fifth Circuit has observed, “*Earwood*’s conclusion that the regulations promulgated pursuant to the FRSA were *not* directed at railroad employee safety is inconsistent with that Act, which expressly states its purpose is ‘to promote safety in *every area of railroad operations* and reduce railroad-related accidents and incidents.’” *Lane*, 241 F.3d at 444 (quoting 49 U.S.C. § 20101; emphasis supplied by the court). Moreover, *Earwood* fails

even to acknowledge—much less give due regard to—Congress’s directive that laws related to railroad safety “be nationally uniform to the extent practicable.” 49 U.S.C. § 20106(a)(1). Apparently recognizing the decision’s infirmity, Plaintiff does even cite, let alone rely on *Earwood*.

**2. Contrary to Plaintiff’s assertions, the FRSA has preclusive force.**

Largely ignoring the near unanimous consensus that FELA claims are precluded by FRSA regulations covering the same subject matter, Plaintiff advances two arguments why such regulations do not preclude FELA claims. First, he asserts that the FRSA lacks preclusive force because it does not expressly supersede FELA. Second, he contends that the FRSA does not authorize the promulgation of preclusive regulations. Neither argument is meritorious.<sup>9</sup>

**a. The FRSA evinces Congress’s intent to displace federal common law.**

Plaintiff argues that the FRSA cannot possibly preclude FELA claims because the FRSA does not do so expressly. *Cf.* Cooper Br. 20–21. Plaintiff is mistaken. FELA is “founded on common-law concepts of negligence and injury,” and because it “does not define negligence” (*Urie*, 337 U.S. at 182), its application

---

<sup>9</sup> In any event, Plaintiff forfeited these arguments because he did not present them below. *See Perez v. Oakland County*, 466 F.3d 416, 429 (6th Cir. 2006). In the district court, Plaintiff did not challenge the proposition that the FRSA can in principle preempt FELA claims; he argued only that his particular claim was not precluded because, according to Plaintiff, the FRA ballast regulation does not cover the subject of his claim.

rests on “common law principles as established and applied in the federal courts” (*id.* at 174, 182). It is well-established that when enacting a statute that abrogates the common law, “Congress need not ‘affirmatively proscribe’ the common-law doctrine at issue.” *United States v. Texas*, 507 U.S. 529, 534 (1993).<sup>10</sup> *See also Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (abrogation of common law does not require a clear statement of congressional intent). Rather, the relevant “inquiry is whether the statutory purpose evinces a congressional intent contrary to the federal common law.” *Waymire*, 65 F. Supp. 2d at 957.<sup>11</sup> In enacting the FRSA, Congress clearly evinced an intent contrary to the unbridled application of federal common law in FELA actions.

---

<sup>10</sup> It is also well established that the inclusion of an express preemption provision in a statute does not foreclose the possibility that the statute will also impliedly preempt contrary laws even if such laws do not fall within the scope of the preemption provision. As the Supreme Court has stated, an express “preemption provision, by itself, does not foreclose (through negative implication) ‘any possibility of implied [conflict] pre-emption.’” *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000) (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995)). So too here: The mere fact that the FRSA expressly preempts, under certain circumstances, the application of state law does not foreclose the possibility that it also impliedly precludes, under equivalent circumstances, the application of federal law.

<sup>11</sup> Notably, less evidence of congressional intent is required to support the abrogation of federal common law than is required to support the preemption of state common law. Because federalism “concerns are not implicated in the same fashion when the question is whether federal statutory or federal common law governs, . . . the same sort of evidence of a clear and manifest purpose is not required.” *Milwaukee*, 451 U.S. at 315–17.

Permitting FELA negligence actions to proceed notwithstanding FRSA regulations that cover the same subject matter would undermine the statutory goal that railroad safety regulation “be nationally uniform to the extent practicable.” 49 U.S.C. § 20106(a)(1). FELA actions, like all common-law actions, are subject to case-by-case adjudication. Thus, liability might be imposed in one case but not another even though the railroad’s conduct in the two cases was identical. Faced with inconsistent verdicts returned by different juries, railroads would not know what conduct is required of them. Verdicts that are not merely inconsistent but outright contradictory pose an even greater threat. For example, one jury, hearing a claim brought by a worker suffering AVN, might hold a railroad liable for using mainline ballast in a particular yard, while another jury, hearing a claim brought by a worker injured in a derailment, might hold that same railroad liable for not using mainline ballast in the very same yard.<sup>12</sup> The railroad would be in an impossible quandary, and Congress’s goal of national uniformity in railroad safety regulation would be defeated “by piecemeal litigation.” R.40 Slip op. 7, JA411; *see also Ferra*, 2007 U.S. Dist. LEXIS 88457, at \*15 (noting “danger that Congress’s strived-for uniformity would be undermined” because “juries could reach different

---

<sup>12</sup> This is no mere hypothetical risk. The plaintiff in this case alleges that CSXT used ballast that was too *large*; the plaintiff in *Thanasiu v. CSX Transportation, Inc.*, No. CI 0200506962 (Ohio C.P.) (Deposition of Tory Thanasiu) (relevant pages included in Addendum), by contrast, alleged that CSXT used ballast that was too *small*.

verdicts in similar employee negligence cases”). Accordingly, “[t]o the extent that they are inconsistent, the FRSA will supersede the FELA based on the policy embodied in the FRSA to ensure uniformity in law pertaining to railway safety.” *Rice*, 955 F. Supp. at 740.

Allowing FELA actions to proceed notwithstanding FRSA regulations that cover the same subject matter not only would defeat Congress’s goal of national uniformity but also would undermine Congress’s goal of “promot[ing] safety in every area of railroad operations.” 49 U.S.C. § 20101. Each FRA regulation is part of “an integrated undertaking” that comprises “numerous elements.” 43 Fed. Reg. at 10,585. Given their interdependence, “[a]s a general rule, it is not possible to regulate an individual hazard without impacting on other related working conditions, nor without impacting on the safe transportation of persons and property.” *Id.* But the jury that is called upon to hear a particular FELA claim considers that claim in relative isolation without due regard for the myriad implications its decision might have on railroad operations.<sup>13</sup> Moreover, even if it did look beyond the plaintiff’s narrow claim, a lay jury would lack the knowledge

---

<sup>13</sup> In a recent decision finding preemption in the medical device arena, the Supreme Court emphasized that “tort law[] applied by juries” produces distorted results because it fails to emulate the cost-benefit analysis that an expert agency would employ. *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008) (“A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.”).

and expertise required to comprehend the far-reaching effects that imposition of a particular common-law standard would have on railroad operations. Precisely because such “piecemeal regulation . . . would be disruptive and contrary to the public interest,” it is, in the FRA’s view, “essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on long-standing industry practices and pre-existing regulations.” 43 Fed. Reg. at 10,585–86.<sup>14</sup> Because FELA tort actions are antithetical to that “informed and deliberate” process, they undermine Congress’s goal of “promot[ing] safety in every area of railroad operations” and are therefore precluded to the extent FRA regulations cover the same subject matter.<sup>15</sup>

---

<sup>14</sup> The FRA’s determination that “piecemeal regulation . . . would be disruptive” is entitled to deference. 43 Fed. Reg. at 10,586. *Cf. Hillsborough County v. Auto. Med. Labs., Inc.*, 471 U.S. 707, 714–15 (1985) (when Congress has delegated authority to an expert federal agency to implement and enforce a federal regulatory scheme, the agency’s determination that state law threatens to upset federal objectives “is dispositive . . . unless either the agency’s position is inconsistent with clearly expressed congressional intent, . . . or subsequent developments reveal a change in that position”) (citation omitted).

<sup>15</sup> Plaintiff cites *Weaver v. Missouri Pacific R.R. Co.*, 152 F.3d 427 (5th Cir. 1998), and *Mosco v. Baltimore & Ohio R.R.*, 817 F.2d 1088 (4th Cir. 1987) in support of the proposition that “FRA regulations compliment [sic] the FELA rather than suspend its protections.” Cooper Br. 40. Plaintiff’s reliance is misplaced. The regulations at issue in *Weaver* and *Mosco* were promulgated under the Locomotive Inspection Act and its predecessor, the Boiler Inspection Act, neither of which—unlike the FRSA—has an express preemption provision or an avowed goal of “national[] uniform[ity] to the extent practicable.”

**b. Congress authorized the issuance of preclusive regulations.**

Plaintiff contends that the FRSA does not authorize the promulgation of preclusive regulations. *Cf.* Cooper Br. 22–23. That assertion rests on 49 U.S.C. § 20103(a), which provides that “[t]he Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970.” According to Plaintiff, because “the Secretary’s authority is expressly limited to ‘*supplementing* laws and regulations in effect on October 16, 1970,” (Cooper Br. 22 (emphasis added)), the Secretary lacks the authority to supplant FELA or any other laws. Plaintiff misreads the statute.

Contrary to Plaintiff’s suggestion, the phrase he emphasizes does not limit the Secretary’s authority. Rather, as the legislative history explains, the phrase merely clarifies that the regulatory safety statutes in force at the time the FRSA was adopted would remain in force upon its enactment. *See* H.R. Rep. 91-1194 at 16, 1970 U.S.C.C.A.N. at 4113–14 (“The committee added the words ‘supplementing provisions of law and regulations in effect on the date of enactment of this title’ to the Secretary’s rulemaking authority to make clear that this grant of jurisdiction does not replace the existing rail safety statutes and implementing regulations transferred to the Department of Transportation when it was established.”). Those regulatory statutes, listed in an appendix to the relevant

committee report, include, for example, the Locomotive Inspection Act and the Safety Appliance Act. *See* H.R. Rep. 91-1194, App. B. The phrase, which has nothing to do with FELA, was meant to ensure that a regulatory vacuum was not created upon the FRSA's enactment; it was not intended to limit in any way the Secretary's authority under the FRSA.

Plaintiff's proposed interpretation of § 20103(a) violates basic principles of statutory construction. On Plaintiff's reading, the provision, which does not distinguish between federal and state law, allows the Secretary only to supplement, but not displace "existing law." *Cooper Br.* 23–24. But Plaintiff concedes, as he must, that under the FRSA's express preemption provision a railroad safety regulation issued by the Secretary preempts any preexisting state law covering the same subject matter. *See* 49 U.S.C. § 20106(a)(2) ("A State may . . . continue in force a law, regulation, or order related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement."). Thus, Plaintiff concedes that Section 20106(a)(2) authorizes the Secretary to do precisely that which Plaintiff contends Section 20103(a) forbids. An interpretation that yields such a contradictory result is strongly disfavored. *See, e.g., Chrysler Corp. v. Comm'r of Internal Rev.*, 436 F.3d 644, 654–55 (6th Cir. 2006) ("[W]e must construe a statute as a whole and, in so doing, we must strive to interpret provisions so that other provisions in the

statute are not rendered inconsistent, superfluous, or meaningless.”) (internal quotation marks omitted); *Smith v. Babcock*, 19 F.3d 257, 263 (6th Cir. 1994) (“interpretations which yield internal inconsistencies or render some portion of the text superfluous are to be avoided”). Because it is not compelled by the statutory text, is contrary to the legislative history, and produces an absurd result, Plaintiff’s construction of Section 20103(a) should be rejected.

**B. The FRA Ballast Regulation Covers The Same Subject Matter As Plaintiff’s FELA Claim.**

Plaintiff contends that even if the FRSA can in principle preempt FELA claims, his claim is not precluded because, he says, “the track safety standards codified at 49 CFR, *et. seq.*, do not subsume or cover the same subject matter” as his claim. Specifically, he argues that the FRA regulation governing ballast, 49 C.F.R. § 213.103, does not cover the subject matter of his claim because the regulation “makes no reference whatsoever to the size of ballast” required. *Cooper Br.* 34. Plaintiff’s argument rests on a fundamental misconception of the law.

As an initial matter, the fact that the ballast regulation does not require the use of a particular size ballast is immaterial. As the Eighth Circuit has observed, the FRSA’s “regulatory framework need not impose bureaucratic micromanagement in order to substantially subsume a particular subject matter.” *In re Derailment Cases*, 416 F.3d 787, 794 (8th Cir. 2005); *see also Black v. Baltimore & Ohio R.R. Co.*, 398 N.E.2d 1361, 1363 (Ind. Ct. App. 1980) (holding

that FRSA track structure regulations collectively preempted public service commission order addressing muddy yard conditions despite “absence of a specific regulation dealing with muddy conditions”).

Furthermore, the ballast regulation may not be viewed in isolation. On the contrary, when a court is deciding whether a regulation covers a particular subject matter, it must view the regulation in “the context of the overall structure of the regulations.” *Easterwood*, 507 U.S. at 674. Thus, whether preclusion will be found “does not depend on a single federal regulation itself covering the subject matter.” *Burlington N. & Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790, 795 (7th Cir. 1999). Rather, preclusion will also be found when several regulations in conjunction together cover a given subject matter. *See, e.g., CSX Transp., Inc. v. City of Plymouth*, 283 F.3d 812, 817 (6th Cir. 2002) (holding that speed and brake regulations in combination covered subject of how long trains could permissibly block a crossing).

The FRA ballast regulation is part of “an integrated undertaking.” 43 Fed. Reg. at 10,585. For example, subpart (d) of the regulation requires that the ballast “[m]aintain proper track crosslevel, surface and alinement” (49 C.F.R. § 213.103(d)), three technical characteristics for which highly detailed requirements are in turn set forth in 49 C.F.R. §§ 213.57, 213.63, and 213.55

respectively.<sup>16</sup> Similarly, the selection of ballast directly affects drainage and vegetation growth, which are themselves regulated by 49 C.F.R. §§ 213.33 and 213.37 respectively. Given the intricate matrix of regulations of which the ballast regulation is one part, it is clear that a railroad cannot change the ballast it uses “without impacting on other related working conditions” and “without impacting on the safe transportation of persons and property.” 43 Fed. Reg. at 10,585. Indeed, it is precisely because ballast walkways “are so much a part of the operating environment” that the FRA believes that “they must be regulated by the agency with primary responsibility for railroad safety.” *Id.* at 10,587.<sup>17</sup>

---

<sup>16</sup> The technical specifications established by the cross-level, surface, and alinement regulations are defined in fractions of inches.

<sup>17</sup> Allowing ballast claims such as Plaintiff’s to proceed would open a Pandora’s box. As noted above (at page 32, note 12), while the plaintiff in this case alleges that CSXT used ballast that was too large, the plaintiff in another case alleged that CSXT used ballast that was too small. Moreover, if this plaintiff can proceed with a claim based on the size of the ballast, nothing would stop other plaintiffs from basing claims on other aspects of the ballast. For example, a plaintiff in another case might challenge the shape of the ballast used, contending that angular ballast is more difficult to walk on than smooth ballast, while another plaintiff in yet another case might challenge the material used as ballast, alleging that granite ballast is more taxing on the legs than limestone ballast. But, as is true when deciding which size ballast to use in a particular location, railroad engineers must make complex calculations based on local conditions when selecting the most appropriate shape and material to use. Smooth ballast may be easier to walk on, but precisely because it is smooth it permits greater slippage than angular ballast, and is thus less able to satisfy the functional requirements imposed by the FRA track safety regulations. Similarly, limestone ballast may be softer underfoot, but precisely because it compacts more readily than granite, it provides less support for the tracks, and is thus also less capable of fulfilling the technical specifications set forth in the FRA regulations. If ballast claims are not precluded, there could be an

In light of this dense regulatory structure, many courts have concluded, like the court below, that the FRA ballast regulation covers the subject of—and therefore precludes—ballast safety claims such as Plaintiff’s. Indeed, every district court in this circuit to have reached the issue has so held. *See Crabbe*, 2007 WL 3227584, at \*4 (“to the extent that Plaintiff’s FELA claim rests upon Defendant’s use of improper or oversized ballast, such a claim is precluded”); *Nickels v. Grand Trunk W. R.R., Inc.*, 2007 U.S. Dist. LEXIS 88481, at \*7 (E.D. Mich. May 30, 2007) (Cleland, J.) (FRA “ballast requirements substantially subsume the subject matter of Plaintiff’s theory of recovery” notwithstanding the fact that “the regulations offer no specific metric for the size, mixture or looseness of the ballast”); *Ferra*, 2007 U.S. Dist. LEXIS 88457, at \*18 (ballast claim was precluded because the ballast regulation “‘covers’ or ‘substantially subsumes’ the subject matter of ballast selection” “[e]ven though the regulations at issue do not dictate the size of the ballast”); *cf. Norfolk & W. Ry. Co. v. Burns*, 587 F. Supp. 161, 169–70 (E.D. Mich. 1984) (Guy, J.) (holding state law purporting to regulate railroad walkways preempted given “the relationship of the walkways to the railbed” and the fact that “the FRA has taken under its wing the area of the track, the track roadbed, and such related features as ballast, cross ties, switches, [and]

---

unending stream of such cases, each subject to *ad hoc* adjudication and each contrary to Congress’s twin goals of national uniformity in railroad regulation and safety in every area of railroad operations.

frogs”). Courts in other jurisdictions have also concluded that claims such as Plaintiff’s are precluded by the FRA’s ballast regulation. *See, e.g., Norris*, 635 S.E.2d at 182–83 (“[t]he fact that the regulation does not specify any size for the various purposes of the ballast does not alter the fact that the regulation nonetheless ‘covers’ or ‘substantially subsumes’ the subject matter”).

As Plaintiff notes, some courts have held to the contrary. Those decisions, however, suffer from several common flaws. As an initial matter, they view the ballast regulation in isolation rather than as part of an “integrated undertaking” (43 Fed. Reg. at 10,585), thereby ignoring the Supreme Court’s admonition that a given regulation must be considered in “the context of the overall structure of the regulations.” *Easterwood*, 507 U.S. at 674. They also erroneously characterize the ballast regulation as being concerned with “the safety of the train, the prevention of derailments, and not the quality of the workplace provided for employees.” *CSX Transp., Inc. v. Miller*, 858 A.2d 1025, 1050 (Md. App. 2004); *see also Grimes*, 116 F. Supp. 2d at 1003. That characterization is factually incorrect because the prevention of derailments is itself an important aspect of worker safety, and because the ballast regulation was expressly reaffirmed by the FRA after a congressionally mandated review that specifically considered employee safety. *See* 49 U.S.C. § 20142(a)(3); 63 Fed. Reg. at 34,006. Moreover, even if the characterization regarding the regulation’s purpose were accurate, it is legally

irrelevant. As the Supreme Court held in *Easterwood*, 49 U.S.C. § 20106(a)(2) “does not . . . call for an inquiry into the Secretary’s purposes, but instead directs the courts to determine whether regulations have been adopted that in fact cover the subject matter.” 507 U.S. at 675; *see also Waymire*, 218 F.3d at 776 (“the preemption clause does not require an inspection of the regulation’s motivation”).

Finally, placing undue weight on the fact that the ballast regulation does not specify a particular size of ballast, the decisions that have denied preclusive effect to the regulation reach the potentially erroneous and in any event irrelevant conclusion that “a FELA cause of action . . . will not impose duties on a railroad that would be inconsistent with the duties imposed by the FRA safety regulations.” *DeGrasse v. CSX Transp., Inc.*, No. 1:00-CV-55, at \*8 (N.D. Ind. 2001). The conclusion is potentially erroneous because although ballast is not required to be a specific size, it is required to perform certain functions, the adequate performance of which, within narrowly defined tolerances, may well depend on its size. *See* 49 C.F.R. § 213.103(d); *cf.* 49 C.F.R. §§ 213.55, 213.57, 213.63. The conclusion is in any event irrelevant because the issue is not whether the common-law duty Plaintiff seeks to impose would conflict with the regulation, but rather whether the regulation “covers” the subject matter of the claim. If a conflict between the common-law duty and the FRA regulation were necessary for either preemption (or preclusion) under 49 U.S.C. § 20106(a)(2), then the result in *Easterwood* would

have been different. In that case, the plaintiff alleged that a train had been traveling at a negligent speed notwithstanding the fact that it was operating within the FRA-imposed speed limit. Because the train could have traveled at a lower speed without violating the FRA regulation, there was no “conflict” between the purported common-law duty and the FRA regulation. Nonetheless, the Supreme Court held the claim to be preempted under the FRSA. *See Easterwood*, 507 U.S. at 675; *see also Waymire*, 218 F.3d at 776 (holding FELA negligence claim based upon speed of train precluded notwithstanding fact that applicable FRA regulation imposed maximum, not minimum, speed). Thus, the decisions that conclude that ballast claims brought under FELA are not precluded because there (allegedly) is no conflict between the common-law duty asserted and the FRA ballast regulation are contrary to Supreme Court precedent.

**C. The Recent FRSA Amendment Confirms That Plaintiff’s FELA Claim Is Precluded.**

Plaintiff contends that the recent amendment to the FRSA “legislatively overruled” the judicial decisions holding FELA claims such as his to be precluded under 49 U.S.C. § 20106. But Plaintiff has it backwards. If anything, the recent amendment confirms that such claims are precluded. In any event, Plaintiff misreads the new statutory language.

When enacting the recent amendment, Congress retained the prior preemption provision in its entirety, simply renumbering it as Subsection 20106(a).

Consistent with the express declaration that the restructuring was “not intended to indicate any substantive change in the meaning of the provision” (H.R. Rep. No. 110–259 at 351, 2007 U.S.C.C.A.N. at 183), the renumbered provision continues to be entitled “National Uniformity of Regulation” and continues to provide that “[l]aws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable.” 49 U.S.C. § 20106(a)(1).

Congress amended 49 U.S.C. § 20106 in 2007, well after the federal courts—almost without exception—began to hold that FRA regulations promulgated pursuant to the FRSA preclude FELA claims covering the same subject matter. *See* pages 25–29, *supra*. It is well established that “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.” *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *see also PDV Midwest Ref., L.L.C. v. Armada Oil & Gas Co.*, 305 F.3d 498, 512 (6th Cir. 2002) (recognizing and applying this principle). That principle applies equally “where, as here, Congress adopts a new law incorporating sections of a prior law.” *Lorillard*, 434 U.S. at 581. Because Congress is “presumed to have had knowledge of the interpretation given to the incorporated law” (*id.*), the fact that the amended FRSA “left intact the statutory provisions under which the federal courts had implied” preclusion of FELA claims “is itself evidence that Congress affirmatively intended to preserve” that result.

*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381–82 (1982).

The conclusion that Congress intended to leave *Waymire*, *Lane*, and the many other preclusion decisions undisturbed when it amended section 20106 is reinforced by the history and text of the subsections added by the amendment. The amendment was indeed designed “to rectify” certain judicial decisions, but—as explained in the Conference Report—specifically those “related to the Minot, North Dakota accident.” H.R. Rep. No. 110–259 at 351, 2007 U.S.C.C.A.N. at 183. This limited purpose is clearly reflected in the amendment’s retroactive effective date of January 18, 2002 (*cf.* 49 U.S.C. § 20106(b)(2)), which is “the date of the Minot, North Dakota derailment.” H.R. Rep. No. 110–259 at 351, 2007 U.S.C.C.A.N. at 183–84. The decisions that Congress sought to “rectify” (*id.*)—*Lundeen v. Canadian Pac. Ry. Co.*, 507 F. Supp. 2d 1006 (D. Minn. 2007), and *Mehl v. Canadian Pac. Ry., Ltd.*, 417 F. Supp. 2d 1104 (D.N.D. 2006)—had concluded that the FRSA preempts state-law tort claims so long as an FRA regulation covers the subject matter even if the defendant railroad failed to comply with those regulations and the internal standards it was required to adopt pursuant to those regulations. It was in response to *those* decisions that Congress adopted Section 20106(b)(1), which provides that claims are not preempted when the defendant “failed to comply with the Federal standard of care established by a

regulation” or “failed to comply with its own plan, rule, or standard that it created pursuant to a regulation.” *See Crabbe*, 2007 WL 3227584, at \*5; *Mastrocola v. Se. Pa. Transp. Auth.*, 2007 WL 4632142, at \*6 n.12 (Pa. Cmwlth. Ct. Jan. 8, 2008). Nothing in the history or text of the amended Section 20106 suggests that Congress intended to abrogate *Waymire*, *Lane*, or any of the other decisions in which courts have concluded that FRA regulations promulgated pursuant to the FRSA preclude FELA claims covering the same subject matter.

Relying on Subsection 20106(b)(1)(B), Plaintiff argues that even if the amended FRSA can in theory preclude FELA claims it does not do so in this case because CSXT purportedly failed to follow its own procedures when it allegedly used mainline ballast in rail yards. Plaintiff’s reliance is misplaced. Subsection 20106(b)(1)(B) allows tort claims to proceed if a railroad “failed to comply with its own plan, rule, or standard *that it created pursuant to a regulation*” (emphasis added). Consistent with its history and purpose, Subsection 20106(b)(1)(B) addresses only plans, such as the continuous welded rail plans at issue in *Lundeen* and *Mehl*, whose adoption is affirmatively required by an FRA regulation. *Cf.* 49 C.F.R. § 213.119 (requiring each track owner to adopt “a plan that contains written procedures which address: the installation, adjustment, maintenance, and inspection of CWR; inspection of CWR joints; and a training program for the application of those procedures”). There is no FRA requirement that a railroad

adopt a plan, rule, or standard with respect to ballast. Accordingly, CSXT’s ballast procedures were not “created pursuant to a regulation,” and Subsection 20106(b)(1)(B) is inapplicable to this case.

Plaintiff’s reliance on Subsection 20106(b)(1)(C) is also misplaced. According to Plaintiff, under that subsection “preclusion may not occur unless the claim being made is ‘incompatible’ with an FRA regulation.” Cooper Br. 31. Plaintiff misreads the statute. Subsection 20106(b)(1)(C) allows a tort claim to proceed, but only when a railroad has failed to comply with a law, regulation, or order “that is not incompatible *with subsection (a)(2)*” (emphasis added). A law—including a common-law standard—is incompatible with subsection (a)(2) whenever the Secretary of Transportation, acting through the FRA, has issued a regulation “covering the subject matter” of that law. 49 U.S.C. § 20106(a)(2). Thus, contrary to Plaintiff’s assertion, a common-law claim is still precluded if an FRA regulation issued under the FRSA covers the same subject matter as the claim.<sup>18</sup>

---

<sup>18</sup> In any event, Plaintiff’s FELA claim, which would impose a common-law standard requiring that CSXT use smaller ballast than it did, is, at minimum, potentially “incompatible” with FRA regulations given that (1) the FRA regulations allow the railroads to choose the appropriate size of ballast, while Plaintiff’s FELA claim would not; and (2) the ballast a railroad uses must be sufficient to satisfy the FRA’s highly specific cross-level, alignment, and surface standards, which are more readily met through use of mainline ballast. See page 42, *supra*.

## II. PLAINTIFF'S FELA CLAIM IS TIME-BARRED

The district court held, in the alternative, that Plaintiff's claim is barred by FELA's statute of limitations. Of course, the Court need not reach this issue if it agrees with us that the claim is precluded under the FRSA. If the Court does reach the issue, however, it should hold that the district court was correct in concluding that Plaintiff's claim was time barred.

An action cannot be maintained under FELA "unless commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56. In cases such as this, in which the plaintiff alleges progressive injury, the accrual date is determined by applying the "discovery rule." Under that rule, "the statute of limitations begins to run when the reasonable person knows, or in the exercise of due diligence should have known, both his injury and the cause of that injury." *Campbell v. Grand Trunk W. R.R. Co.*, 238 F.3d 772, 775 (6th Cir. 2001) (emphasis omitted); accord *Hicks v. Hines Inc.*, 826 F.2d 1543, 1544 (6th Cir. 1987) (under the discovery rule, a claim accrues on "the date by which the plaintiff reasonably should have discovered both cause and injury").

As the Supreme Court has explained, "[a] plaintiff . . . , armed with facts about the harm done to him, can protect himself by seeking advice in the medical and legal community." *United States v. Kubrick*, 444 U.S. 111, 123 (1979). Accordingly, "upon experiencing symptoms a plaintiff has a duty to investigate

both the injury and any suspect cause.” *Fries v. Chicago & Nw. Transp. Co.*, 909 F.2d 1092, 1096 (7th Cir. 1990); accord *Matson v. Burlington N. Santa Fe R.R.*, 240 F.3d 1233, 1235 (10th Cir. 2001).

Applying these well-established legal principles and “[t]aking the record in a light most favorable to Plaintiff” (R.40 Slip op. 9, JA413), the district court held that Plaintiff’s FELA claim, filed on September 1, 2005, was untimely. As the district court concluded, CSXT is entitled to summary judgment on statute-of-limitations grounds because Plaintiff “admitted that he suffered from pain as early as 2000” and “that the only activity which caused the pain and aggravated it was walking on ballast.” (*Id.* at 10, JA414) Because Plaintiff knew or should have known of his injury and its cause more than three years before filing this suit, the district court’s judgment is correct and should be affirmed.

**A. Plaintiff Knew Or Had Reason To Know Of His Alleged Injury Before September 1, 2002.**

Plaintiff argues that the district court’s holding was erroneous because “no hip pathology was diagnosed until October 15, 2002” and, accordingly, “there is no possible way that [Plaintiff] could have had knowledge of the existence of a hip injury prior to that date.” Cooper Br. 48. But as the district court recognized (R.40 Slip op. 8, JA412), a plaintiff need not receive a formal medical diagnosis of a particular injury for the limitations period to commence. Indeed, it is well-established that “a medical diagnosis is not a prerequisite to the commencement of

the limitation period” and that “the period may, and often does, begin to run before any diagnosis.” *Hitchcock v. Nat’l R.R. Passenger Corp.*, 20 F. Supp. 2d 429, 432–33 (N.D.N.Y. 1998); *see also, e.g., Townley v. Norfolk & W. Ry. Co.*, 887 F.2d 498, 501 (4th Cir. 1989) (rejecting argument that “statute of limitations on [plaintiff’s] claim did not begin to run until his [condition] was formally diagnosed”); *Johnson v. Norfolk & W. Ry. Co.*, 836 S.W.2d 83, 86 (Mo. Ct. App. 1992) (FELA claim for occupational disease accrues “not at the time of medical diagnosis, but upon the experiencing of symptoms”).

This Court has recognized that a claim accrues before a formal diagnosis if the plaintiff had previously experienced symptoms that should have alerted the plaintiff to his injury. In *Campbell*, for example, a FELA plaintiff brought suit alleging that he developed carpal tunnel syndrome as a result of his employer’s negligence. *See* 238 F.3d at 774. This Court affirmed the trial court’s grant of summary judgment for the defendant on limitations grounds, concluding that, although the plaintiff had filed his suit within six months of the diagnosis, he admitted “experienc[ing] the symptoms of his disorder on a daily basis for several years” and therefore knew or should have known of his injury well before the limitations date. *Id.* at 776.

The same is true here. As the district court found, Plaintiff admitted experiencing daily pain in his right leg beginning in 2000. (R.40 Slip op. 8–9,

JA412–JA413 (citing R.30 Pl.’s S.J. Opp., Ex. A, Cooper Depo. 26–32, JA180–JA181)) According to Plaintiff, this pain “would run right all the way down [his] leg, like something was being pinched” and continued for more than two years before he was formally diagnosed with avascular necrosis in October 2002. (R.30 Pl.’s S.J. Opp., Ex. A, Cooper Depo. 82, JA186) As *Campbell* aptly demonstrates, this persistent pain was sufficient to put Plaintiff on notice well before September 1, 2002 that he had suffered an injury.<sup>19</sup>

The fact that Plaintiff’s injury may have worsened after he first experienced persistent symptoms in 2000 does not alter the analysis. It is well established in this circuit that “aggravation of an original injury . . . is not a severable action under the Federal Employers’ Liability Act.” *Aparicio v. Norfolk & W. Ry. Co.*, 84 F.3d 803, 815 (6th Cir. 1996), *abrogated on other grounds*, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000)); *accord Mounts*, 198 F.3d at 582 (“[a] cause of action [can] accrue before the injury reach[es] its maximum severity”). Once the “accumulated effects” of the tortious conduct manifest themselves (*Urie*, 337 U.S. at 170), the limitations period begins to run. Because Plaintiff began

---

<sup>19</sup> Plaintiff makes much of his testimony that he experienced this pain “on and off” rather than constantly. But that misses the point. Plaintiff testified that he began having pain “every day” in his right leg beginning in 2000. (R.30 Pl.’s S.J. Opp., Ex. A, Cooper Depo. 27, JA180) The fact that he experienced the leg pain only when “[w]alking on . . . ballast” (*id.*, Ex. A, Cooper Depo. 31, JA181) affirmatively supports the district court’s conclusion that Plaintiff was or should have been aware of the purported injury and its cause well before September 1, 2002.

experiencing persistent leg pain in 2000, and acknowledged its association with walking on ballast, the district court was correct to conclude that Plaintiff knew or should have known of his injury and its cause at some point before September 1, 2002 (two years after he first experienced persistent symptoms and more than three years before he filed suit).

We recognize that, in some cases, a FELA plaintiff may rebut a showing of untimeliness by introducing evidence suggesting that the injury giving rise to his complaint is separate and distinct from an earlier injury that occurred more than three years before the filing of suit. For example, in *Aparicio* a FELA plaintiff brought suit in May 1993 alleging that his employer negligently exposed him to “harmful cumulative trauma to his hands, wrists and arms due to the equipment with which he performed his work.” 84 F.3d at 806. The plaintiff acknowledged experiencing “numbness and tingling in his right hand” as early as 1987, but claimed that, after seeking treatment from his doctor that year, those “symptoms resolved themselves.” *Id.* In 1992, the plaintiff had further pain in his hands and wrists and was diagnosed with carpal tunnel syndrome. *Id.* The Court recognized that any claim based on his 1987 injury would be time barred, even though the plaintiff at that time had not yet been diagnosed with carpal tunnel syndrome. *See id.* at 814–15. The Court concluded, however, that summary judgment for the defendant was improper as to the 1992 injuries because the plaintiff had submitted

a medical affidavit specifically opining that his “1992 injuries were separate from his 1987 injury.” *Id.* at 815.

Similarly, in *Fonseca v. Consolidated Rail Corp.*, 246 F.3d 585 (6th Cir. 2001), the plaintiff brought a FELA action alleging that his employer’s negligence caused him to develop carpal tunnel syndrome. The plaintiff testified that, although he had experienced “temporary discomfort” in his hands for three decades before the operative limitations date, he did not develop “persistent pain in his hands” until sometime within the limitations period. *Id.* at 587. This Court held that summary judgment on limitations grounds was improper because there was a genuine issue of material fact as to “whether the symptoms that [plaintiff] complained of within 3 years of his lawsuit is a separate injury from the symptoms that he experienced for the preceding 27 years.” *Id.* at 590.

These cases are of no avail to Plaintiff here, however. Unlike the plaintiffs in *Aparicio* and *Fonseca*, Plaintiff has failed to carry his burden (*see Mounts*, 198 F.3d at 582) to demonstrate that his AVN is a separate injury from the leg pain he experienced more than five years before bringing this suit. When, as here, a plaintiff admits having experienced persistent symptoms more than three years before filing suit but fails to introduce evidence of having suffered a distinct injury within the limitations period, summary judgment for the defendant is proper. *See, e.g., id.* (affirming grant of summary judgment for defendant where plaintiff began

to experience hearing loss more than three-years before filing suit and did “not submit[] affidavits or other evidence from medical professionals indicating that the hearing loss suffered over the past few years [was] a separate injury”).

Moreover, Plaintiff’s own testimony precludes any distinct-injury claim. Throughout his deposition, Plaintiff *never* distinguished between the “right leg pain” he experienced as early as 2000 and the “right leg pain” that eventually led him to receive the medical diagnosis of avascular necrosis in October 2002. In fact, Plaintiff repeatedly described his symptoms both before and after the diagnosis of AVN as “right leg pain.” (R.30 Pl.’s S.J. Opp., Ex. A, Cooper Depo. 25–26, JA179–JA180) There is no evidence suggesting that the injury Plaintiff began to experience in 2000 is in any way distinct from that which led him to bring this action.

For these reasons, the district court correctly concluded that Plaintiff knew or should have known of his alleged injury more than three years before filing this suit.

**B. Plaintiff Knew Or Had Reason To Know That His Alleged Injury Was Work-Related Before September 1, 2002.**

Although Plaintiff concedes “that knowledge of the *specific cause* of a work related injury is not required to trigger the statute of limitations” (Cooper Br. 52 (emphasis in original); accord *Whitman v. CSX Transp., Inc.*, 887 F. Supp. 983, 992 (E.D. Mich. 1995); *Williams v. S. Pac. Transp. Co.*, 813 F. Supp. 1227, 1232

(S.D. Miss. 1992)), he argues that the district court erred in granting summary judgment because he had no reason to know that his alleged injury was work-related before September 1, 2002. Plaintiff's primary basis for this argument is his claim that "no doctor suggested a causal relationship between his hip injury and walking on ballast until April 10, 2003." Cooper Br. 50.

Plaintiff misconceives the law. It is not "necessary that the plaintiff be formally advised by a physician or receive a formal diagnosis as to the cause of injury for the action to accrue." *Williams*, 813 F. Supp. at 1232; *accord Fries*, 909 F.2d at 1096; *Whitman*, 887 F. Supp. at 992. As the district court correctly held, the limitations period begins to run as soon as "Plaintiff knew, or in the exercise of reasonable diligence ***should have known***, . . . the potential cause of the injury." (R.40 Slip op. 8, JA412(emphasis added)).

Plaintiff has not cited and CSXT is not aware of any authority requiring a professional determination of an injury's cause before the limitations clock is triggered. Indeed, for a claim to accrue, an "injured plaintiff need not be certain which cause, if many are possible, is the governing cause but only need know or have reason to know of a ***potential*** cause." *Fries*, 909 F.2d at 1095 (emphasis added); *see also Matson*, 240 F.3d at 1236 ("a FELA claim accrues when the plaintiff knows or should know that his injury is merely work-related"); *Bealer v.*

*Mo. Pac. R.R. Co.*, 951 F.2d 38, 39 (5th Cir. 1991) (a FELA “claim accrues when a plaintiff knows or should know that his injury is work related”).

This Court’s decision in *Campbell* is again illustrative. There, the plaintiff brought a FELA claim in September 1998 based on an injury allegedly resulting from the use of power tools. 238 F.3d at 774. Although the plaintiff had not been medically diagnosed with carpal tunnel syndrome until March or April 1998, the district court concluded that his action was untimely given his testimony that beginning in approximately 1994 he experienced “tingling and numbness on a daily basis” while using the power tools. *Id.* Notwithstanding that the plaintiff had sued within a few months of receiving the diagnosis of his injury, this Court affirmed on appeal, holding that summary judgment for the defendant was proper because, “[a]ccording to his own admissions, the plaintiff experienced the symptoms of his disorder on a daily basis for several years and reasonably must have recognized the connection with his operation of power tools and equipment.” *Id.* at 776.

Similarly, Plaintiff’s testimony demonstrates that he knew, or should have known, that his leg pain was caused by walking on ballast:

Q: Okay. Were there certain activities that gave you more pain or bothered your leg?

A: Yeah. Walking on their ballast.

Q: Walking on ballast?

A: Absolutely.

(R.30 Pl.'s S.J. Opp., Ex. A, Cooper Depo. 31, JA181) Indeed, Plaintiff could not identify anything other than walking on ballast that could have been causing his leg pain. (*Id.*, Ex. A, Cooper Depo. 31, JA181)

Because Plaintiff began experiencing his leg pain as early as 2000, and admitted its association with walking on ballast, the district court was correct to conclude that there was no genuine dispute that Plaintiff knew or should have known of his injury and its alleged cause before September 1, 2002.

**III. BECAUSE PLAINTIFF'S OTHER ALLEGED "CLAIMS" WERE NEVER PLED, THE DISTRICT COURT WAS CORRECT TO DISMISS PLAINTIFF'S ACTION IN ITS ENTIRETY**

Plaintiff asserts that, in addition to his ballast claim, he also brought "claims of negligence stemming from [CSXT's] failure to warn and failure to implement and discharge an appropriate ergonomics program." Cooper Br. 6. He argues that, because the district court never addressed those purported claims, it erred in granting CSXT summary judgment and the case should be remanded for consideration of those claims. Cooper Br. 54.

But Plaintiff *never* pled any claim other than the ballast claim. (R.1 Compl., JA6) Nowhere in his complaint did Plaintiff allege either a failure-to-warn or a failure-to-implement claim. Plaintiff attempted to smuggle those claims into the case by raising them in his opposition to CSXT's motion for summary judgment,

but that tactic is prohibited in this Circuit. *See, e.g., Tucker v. Union of Needletrades, Indus., & Textile Employees*, 407 F.3d 784, 787–89 (6th Cir. 2005) (affirming district court’s refusal to consider alternative theory of liability where theory was raised for the first time in opposition to motion for summary judgment); *Stemler v. City of Florence*, 126 F.3d 856, 872 (6th Cir. 1997) (same).

Because Plaintiff’s alternative theories of liability were never pled, the district court was correct to grant full summary judgment for CSXT.

### CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

James R. Carnes  
ANSPACH MEEKS ELLENBERGER LLP  
300 Madison Avenue, Suite 1600  
Toledo, Ohio 43604  
Telephone: (419) 246-5757  
Fax: (419) 321-6979

---

Evan M. Tager  
Andrew E. Tauber  
MAYER BROWN LLP  
1909 K Street, N.W.  
Washington, DC 20006-1101  
Telephone: (202) 263-3000  
Fax: (202) 263-3300

*Attorneys for Appellee CSX Transportation, Inc.*

April 17, 2008

## CERTIFICATE OF COMPLIANCE

I, Andrew E. Tauber, hereby certify that: (1) this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B) because it contains 13,963 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and, (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface, namely Times New Roman 14, using Microsoft Word 2002.

---

Andrew E. Tauber  
MAYER BROWN LLP  
1909 K Street, N.W.  
Washington, DC 20006-1101  
Telephone: (202) 263-3000  
Fax: (202) 263-3300  
*Counsel for CSX Transportation, Inc.*

Dated: April 17, 2008

## CERTIFICATE OF SERVICE

I, Andrew E. Tauber, hereby certify that on April 17, 2008, I caused copies of the **BRIEF OF DEFENDANT-APPELLEE CSX TRANSPORTATION, INC.** in the above-captioned matter to be served by overnight courier on the following:

Kirk E. Karamanian, Esq.  
O'Bryan Baun Cohen Kuebler Karamanian  
401 S. Old Woodward, Ste. 450  
Birmingham, MI 48009

---

Andrew E. Tauber  
MAYER BROWN LLP  
1909 K Street, N.W.  
Washington, DC 20006-1101  
Telephone: (202) 263-3000  
Fax: (202) 263-3300  
*Counsel for CSX Transportation, Inc.*

## **ADDENDUM**

*Thanasiu v. CSX Transportation, Inc.*, No. CI 0200506962 (Ohio C.P.) (excepts of  
Tory Thanasiu deposition)