

*To be Argued by:*  
J. CHRISTINE CHIRIBOGA  
(Time Requested: 10 Minutes)

Appellate Division Docket No. CA 08-01401  
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**New York Supreme Court**  
**Appellate Division – Fourth Department**

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LISA HINCKLEY, Individually as wife of JOHN HINCKLEY, Deceased,  
and as Administratrix of The Estate of JOHN HINCKLEY, Deceased,

*Plaintiff-Appellant,*

– against –

CSX TRANSPORTATION, INC.,

*Defendant-Respondent,*

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**BRIEF FOR DEFENDANT-RESPONDENT**

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
PRELIMINARY STATEMENT .....	1
QUESTIONS PRESENTED.....	3
COUNTER-STATEMENT OF FACTS .....	4
ARGUMENT .....	9
I. Plaintiff Failed To Establish A Genuine Issue Of Material Fact As To Either Causation Or Negligence .....	9
A. Plaintiff’s Theories Of Negligence And Causation Are Pure Speculation .....	9
1. Plaintiff Failed To Establish Facts Sufficient To Support An Inference Of Negligence .....	11
2. There Is No Record Evidence That CSX Had Actual Or Constructive Notice Of The Allegedly Hazardous Conditions On The Tiftt Street Access Road.....	13
3. Plaintiff’s Theory Of Causation Rests On Impermissible Surmise And Conjecture .....	15
B. The “ <i>Noseworthy</i> Doctrine” Is Inapplicable .....	19
1. <i>Noseworthy</i> Is Inapplicable In FELA Cases Because It Is A Substantive Rule Of Law That Is Peculiar To New York .....	19
2. <i>Noseworthy</i> Is Inapplicable As A Matter Of New York Law Because CSX’s Knowledge Of Hinckley’s Death Is No Greater Than Plaintiff’s .....	24
II. The Undisputed Facts Show That Hinckley Was A Superseding And Intervening Cause Of His Death .....	26
III. CSX Is Entitled To Summary Judgment Under The Storm-In-Progress Doctrine .....	28
A. The Storm-In-Progress Doctrine Applies In FELA Cases.....	28
B. Plaintiff Failed To Raise A Genuine Issue Of Material Fact As To The Storm-In-Progress Doctrine .....	33
1. CSX Established That It Is Entitled To Summary Judgment Under The Storm-In-Progress Rule .....	33
2. The Meteorologist’s Affidavit Confirms The Applicability Of The Storm-In-Progress Doctrine .....	36
IV. CSX Was Under No “Duty To Warn” Hinckley Because Hinckley Called Off Of Work And Because Weather Conditions Were Readily Observable.....	38
CONCLUSION.....	42

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
 <b><u>Cases</u></b>	
<i>Am. Dredging Co. v. Miller</i> , 510 U.S. 443 (1994).....	20
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	40
<i>Atchison, Topeka &amp; Santa Fe Ry. Co. v. Toops</i> , 281 U.S. 354 (1930).....	15, 17, 23
<i>Bachrach v. Farbenfabriken Bayer AG</i> , 42 A.D.2d 514 (1st Dep’t 1973) .....	40
<i>Baia v. Allright Parking Buffalo, Inc.</i> , 27 A.D.3d 1153 (4th Dep’t 2006).....	33
<i>Barrett v. Toledo, Peoria &amp; W. R.R. Co.</i> , 334 F.2d 803 (7th Cir. 1964) .....	28, 29
<i>Batista v. Rivera</i> , 5 A.D.3d 308 (1st Dep’t 2004) .....	40
<i>Bernstein v. City of New York</i> , 69 N.Y.2d 1020 (1987) .....	10
<i>Bevan v. N.Y., Chi. &amp; St. Louis R.R. Co.</i> , 6 N.E.2d 982 (Ohio 1937).....	14
<i>Boyce Motor Lines v. State</i> , 280 A.D. 693 (3d Dep’t 1952) .....	10, 18
<i>Boyko v. Limowski</i> , 223 A.D.2d 962 (3d Dep’t 1996).....	34
<i>Bressler v. Rule Realty Co.</i> , 219 A.D. 529 (1st Dep’t 1927) .....	31
<i>Brierley v. Great Lakes Motor Corp.</i> , 41 A.D.3d 1159 (4th Dep’t 2007).....	33, 34, 36
<i>C. Vt. Ry. Co. v. White</i> , 238 U.S. 507 (1915).....	19

**TABLE OF AUTHORITIES**  
(cont'd)

	<b>Page(s)</b>
<i>Camacho v. Garcia</i> , 273 A.D.2d 835 (4th Dep't 2000).....	33, 36
<i>Chicago, Milwaukee &amp; St. Paul Ry. Co. v. Coogan</i> , 271 U.S. 472 (1926).....	12, 17, 21, 23
<i>Consol. R. Corp. v. Gottshall</i> , 512 U.S. 532 (1994).....	22, 24, 29, 32
<i>Convertini v. Stewart's Ice Cream Co.</i> , 295 A.D.2d 782 (3d Dep't 2002).....	36
<i>Coyne v. Talleyrand Partners, L.P.</i> , 22 A.D.3d 627 (2d Dep't 2005).....	35
<i>Cramer v. County of Erie</i> , 23 A.D.3d 1145 (4th Dep't 2005).....	40
<i>Crawford v. Norfolk &amp; W. Ry. Co.</i> , 901 S.W.2d 252 (Mo. Ct. App. 1995).....	40
<i>Daniels v. Myers</i> , 50 A.D.3d 1613 (4th Dep't 2008).....	36
<i>Di Ponzio v. Riordan</i> , 224 A.D.2d 139 (4th Dep't 1996).....	42
<i>Dowden v. Long Island R.R. Co.</i> , 305 A.D.2d 631 (2d Dep't 2003).....	35
<i>Egan v. A.J. Constr. Corp.</i> , 94 N.Y.2d 839 (1999).....	27
<i>Erie R.R. Co. v. Tompkins</i> , 304 U.S. 64 (1938).....	20
<i>Estate of Novack v. R.D.C. Realty, Inc.</i> , 1 F. Supp. 2d 163 (D. Conn. 1998).....	24
<i>Estate of Ratcliffe v. Pradera Realty Co.</i> , 2008 WL 53115 (S.D.N.Y. Jan. 2, 2008).....	17, 18, 20, 24, 25
<i>Feigles v. Coastal Lumber Co.</i> , 32 F. Supp. 2d 109 (W.D.N.Y. 1998).....	35

**TABLE OF AUTHORITIES**  
(cont'd)

	<b>Page(s)</b>
<i>Gallick v. Baltimore &amp; Ohio R.R. Co.</i> , 372 U.S. 108 (1963).....	13
<i>Garrett v. Moore-McCormack Co.</i> , 317 U.S. 239 .....	20, 21
<i>Gasperini v. Ctr. for the Humanities, Inc.</i> , 518 U.S. 415 (1996).....	20
<i>Gayle v. City of New York</i> , 256 A.D.2d 541 (2d Dep’t 1998) .....	25
<i>Goodman v. Corn Exch. Nat’l Bank &amp; Trust Co.</i> , 200 A. 642 (Pa. 1938).....	31
<i>Gordon v. Am. Museum of Natural History</i> , 67 N.Y.2d 836 (1986) .....	14
<i>Gordon v. E. Ry. Supply, Inc.</i> , 82 N.Y.2d 555 (1993) .....	26
<i>Haas v. Del. &amp; Hudson Ry. Co.</i> , 2008 WL 2566699 (2d Cir. June 24, 2008) .....	14
<i>Hogan v. Consolidated Rail Corp.</i> , 1991 WL 5142 (W.D.N.Y. Jan. 15, 1991).....	16, 19, 20
<i>Ioele v. Wal-Mart Stores Inc.</i> , 290 A.D.2d 614 (3d Dep’t 2002) .....	36
<i>Jacobs v. Reading Co.</i> , 130 F.2d 612 (3d Cir. 1942).....	21
<i>Jarvis v. LaFarge N. Am., Inc.</i> , 52 A.D.3d 1179 (4th Dep’t 2008).....	24
<i>Kalinowski v. Joseph T. Ryerson &amp; Son, Inc.</i> , 242 A.D.2d 43 (4th Dep’t 1934).....	10, 18
<i>Kazanoff v. United States</i> , 945 F.2d 32 (2d Cir. 1991).....	21
<i>Kellerman v. Car City Chevrolet-Nissan, Inc.</i> , 713 N.E.2d 1285 (Ill. App. Ct. 1999) .....	32

**TABLE OF AUTHORITIES**  
(cont'd)

	<b>Page(s)</b>
<i>Kelley v. Manhattan Ry. Co.</i> , 112 N.Y. 443 (1889) .....	31, 38
<i>Kelson v. Cent. of Ga. R.R. Co.</i> , 505 S.E.2d 803 (Ga. Ct. App. 1998) .....	26, 27
<i>Kent v. Erie R.R. Co.</i> , 228 N.Y. 94 (1920) .....	21
<i>Klepal v. Penn. R.R. Co.</i> , 129 F. Supp. 668 (S.D.N.Y. 1955) .....	21
<i>Kuravskaya v. Samjo Realty Corp.</i> , 281 A.D.2d 518 (2d Dep't 2001) .....	24, 25
<i>Love v. Baltimore &amp; Ohio R.R. Co.</i> , 244 A.D. 72 (4th Dep't 1935) .....	12, 17, 21, 23
<i>Lynn v. Lynn</i> , 216 A.D.2d 194 (1st Dep't 1995) .....	25
<i>Lyons v. Cold Brook Creek Realty Corp.</i> , 268 A.D.2d 659 (3d Dep't 2000) .....	35
<i>Mack v. Altmans Stage Lighting Co.</i> , 98 A.D.2d 468 (2d Dep't 1984) .....	27
<i>MacPherson v. Boston &amp; Maine Corp.</i> , 439 F.2d 1089 (1st Cir. 1971) .....	40
<i>Martin v. Wagner</i> , 30 A.D.3d 733 (3d Dep't 2006) .....	37
<i>Mattson v. St. Luke's Hosp. of St. Paul</i> , 89 N.W.2d 743 (Minn. 1958) .....	31, 36
<i>Megin v. Ramsdell</i> , 163 A.D. 232 (2d Dep't 1914) .....	31
<i>Metro-N. Commuter R.R. Co. v. Buckley</i> , 521 U.S. 424 (1997) .....	22
<i>Micheler v. Gush</i> , 256 A.D.2d 1051 (3d Dep't 1998) .....	35

**TABLE OF AUTHORITIES**  
(cont'd)

	<b>Page(s)</b>
<i>Monessen Sw. Ry. Co. v. Morgan</i> , 486 U.S. 330 (1988).....	19, 22, 24, 33
<i>Munsill v. United States</i> , 14 F. Supp. 2d 214 (D.R.I. 1998) .....	30, 32, 36
<i>N. Pac. Ry. Co. v. Mely</i> , 219 F.2d 199 (9th Cir. 1954) .....	40
<i>New Orleans &amp; Ne. R.R. Co. v. Harris</i> , 247 U.S. 367 (1918).....	19
<i>Nieskes &amp; Craig, Inc. v. Schoonerman</i> , 40 A.D.2d 931 (4th Dep’t 1972).....	10
<i>Norfolk &amp; W. Ry. Co. v. Ayers</i> , 538 U.S. 135 (2003).....	22, 29
<i>Norfolk S. Ry. Co. v. Sorrell</i> , 127 S. Ct. 799 (2007).....	22, 24
<i>Noseworthy v. City of New York</i> , 298 N.Y. 76 (1948) .....	<i>passim</i>
<i>Nw. Pac. R.R. Co. v. Bobo</i> , 290 U.S. 499 (1934).....	17, 23
<i>Oginski v. Rosenberg</i> , 115 A.D.2d 463 (2d Dep’t 1985) .....	10, 21
<i>Olejniczak v. E.I. du Pont de Nemours and Co.</i> , 998 F. Supp. 2d 274 (W.D.N.Y. 1998).....	30
<i>Olejniczak v. E.I. du Pont de Nemours &amp; Co.</i> , 79 F. Supp. 2d 209 (W.D.N.Y. 1999).....	33
<i>Palmer v. Penn. Co.</i> , 111 N.Y. 488 (1888) .....	31
<i>Parker v. Rust Plant Servs., Inc.</i> , 9 A.D.3d 671 (3d Dep’t 2004) .....	37
<i>Pierson v. Dayton</i> , 168 A.D.2d 173 (4th Dep’t 1991).....	20

**TABLE OF AUTHORITIES**  
(cont'd)

	<b>Page(s)</b>
<i>Powell v. MLG Hillside Assocs.</i> , 290 A.D.2d 345 (1st Dep’t 2002) .....	34, 35, 38
<i>Raudenbush v. Baltimore &amp; Ohio R.R. Co.</i> , 160 F.2d 363 (3d Cir. 1947).....	29
<i>Reuter v. Iowa Trust &amp; Sav. Bank</i> , 57 N.W.2d 225 (Iowa 1953) .....	31, 36
<i>Ruppert v. Brooklyn Heights R.R. Co.</i> , 154 N.Y. 90 (1897) .....	10
<i>Rusk v. Manhattan Ry. Co.</i> , 46 A.D. 100 (1st Dep’t 1899) .....	31
<i>S. J. Capelin Assocs., Inc. v. Globe Mfg. Corp.</i> , 34 N.Y.2d 338 (1974) .....	40
<i>Schuster v. Dukarm</i> , 38 A.D.3d 1358 (4th Dep’t 2007).....	37
<i>Siegel v. Molino</i> , 236 A.D.2d 879 (4th Dep’t 1997).....	35
<i>Simeon v. City of New York</i> , 41 A.D.3d 344 (1st Dep’t 2007) .....	34, 35
<i>Sinclair v. Long Island R.R.</i> , 985 F.2d 74 (2d Cir. 1993).....	14
<i>St. Louis Sw. Ry. Co. v. Dickerson</i> , 470 U.S. 409 (1985).....	19
<i>Strobel v. Chicago, Rock Island &amp; Pac. R.R. Co.</i> , 96 N.W.2d 195 (Minn. 1959).....	26, 27
<i>Tedesco v. Norfolk S. Corp.</i> , 2002 WL 1628874 (W.D.N.Y. June 6, 2002).....	14, 15
<i>Texasgulf, Inc. v. Colt Elec. Co.</i> , 615 F. Supp. 648 (S.D.N.Y. 1984) .....	21
<i>Thomas v. New York City Transit Auth.</i> , 194 A.D.2d 663 (2d Dep’t 1993) .....	10

**TABLE OF AUTHORITIES**  
(cont'd)

	<b>Page(s)</b>
<i>Turner v. Norfolk &amp; W. Ry. Co.</i> , 785 S.W.2d 569 (Mo. Ct. App. 1990).....	14
<i>Walker v. Mem'l Hosp.</i> , 45 S.E.2d 898 (Va. 1948).....	31, 36
<i>Walsh v. Murphy</i> , 267 A.D.2d 172 (1st Dep't 1999) .....	24, 25
<i>Wank v. Ambrosino</i> , 307 N.Y. 321 (1954) .....	12, 13, 19, 21
<i>Werny v. Roberts Plywood Co.</i> , 40 A.D.3d 977 (2d Dep't 2007) .....	37
<i>Wheeler v. Grande'vie Senior Living Cmnty.</i> , 31 A.D.3d 992 (3d Dep't 2006) .....	33
<i>Woods v. Naumkeag Steam Cotton Co.</i> , 134 Mass. 357 (1883) .....	32
<i>Wright v. N.Y. City Hous. Auth.</i> , 208 A.D.2d 327 (1st Dep't 1995) .....	24
<i>Yaeger v. UCC Constr., Inc.</i> , 281 A.D.2d 990 (4th Dep't 1990).....	9, 12
<i>Zarecki v. Nat'l R.R. Passenger Corp.</i> , 914 F. Supp. 1566 (N.D. Ill. 1996) .....	40
<i>Zima v. N. Colonie Cent. Sch. Dist.</i> , 225 A.D.2d 993 (3d Dep't 1996) .....	35
<b><u>Miscellaneous</u></b>	
22A AM. JUR. 2d <i>Death</i> § 350 (West, Westlaw through May 2008).....	23
65A C.J.S. <i>Negligence</i> § 585 .....	30
Affidavit of Michael Cejka, <i>Raimond v. United States</i> , No. 02-CV-0620E(Sr) (W.D.N.Y.), available at 2004 WL 5534557 .....	34
American Meteorological Society, GLOSSARY OF METEOROLOGY (Todd Glickman ed., 2d ed. 2000) .....	34, 38

**TABLE OF AUTHORITIES**  
**(cont'd)**

	<b>Page(s)</b>
Michael J. Hutter, <i>2000-2001 Survey of New York Law: Evidence</i> , 52 SYRACUSE L. REV. 397 (2001) .....	25
Steven D. Jannace, <i>The Noseworthy Doctrine: A Three-Part Rule for Its Application</i> , 6 TOURO L. REV. 269 (1990).....	20
Supplemental Affidavit of Michael Cejka, <i>Raimond v. United States</i> , No. 02-CV- 0620E(Sr) (W.D.N.Y.), available at 2004 WL 3680374.....	34
Jack B. Weinstein, <i>The Uniformity-Conformity Dilemma Facing Draftsmen of the Federal Rules of Evidence</i> , 69 COLUM. L. REV. 353 (1969).....	23
Jennifer Williams, Case Note, <i>Budzko v. One City Center Associates Limited Partner- ship: Maine's Unique Approach to Business Owners' Duty to Remove Ice and Snow</i> , 55 ME. L. REV. 517 (2003) .....	30, 33

## PRELIMINARY STATEMENT

In December 2001, Buffalo experienced a severe snowstorm that blanketed the city with approximately seven feet of snow. On December 29, 2001, while the storm was still ongoing, John Hinckley reported to work at defendant-respondent CSX Transportation's Seneca Yard, worked a full shift, departed and returned home without incident around 3:00 P.M. The next day, Hinckley left his house around 6:30 A.M. On that morning, it was still snowing, and gale-force winds in the vicinity of Seneca Yard were causing blowing snow and poor visibility.

Two days later, Hinckley's car was found in working condition on the Tiff Street access road into Seneca Yard. Several days later, Hinckley's body was discovered a quarter-mile from his car in a group of trees. He had apparently wandered away from his car wearing only jeans, a t-shirt, a flannel shirt, and a leather jacket. He was not wearing gloves, boots, or a hat. Inexplicably, Hinckley had left his radio (which was fully operational) and gloves in his car. A subsequent autopsy determined that morphine and opiates were present in Hinckley's system at the time of his death.

Plaintiff-appellant Lisa Hinckley, John Hinckley's widow, commenced this action under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, alleging that CSX negligently permitted the Tiff Street access road to become impassable and negligently failed to warn Hinckley of the allegedly dangerous conditions at Seneca Yard.

CSX moved for summary judgment on the grounds that there was no evidence from which negligence or causation could be inferred, that Hinckley's own negligence was the superseding and intervening cause of his death, and that the common-law storm-in-progress doctrine relieved CSX of any obligation to remove snow during the course of the ongoing storm. Judge Mintz granted CSX's motion on the ground that there were no genuine issues of material fact because plaintiff's theories of negligence and causation were "pure speculation."

Judge Mintz's ruling should be affirmed for the reasons stated in his decision. Put simply, plaintiff has established no facts from which negligence or causation can be inferred. She has established no more than that two other CSX employees experienced difficulty entering Seneca Yard via other access roads and/or hours after Hinckley disappeared. Accordingly, after full discovery, her claims remain a matter of pure conjecture and speculation and fail to exclude reasonable inferences that CSX was not negligent and that any such negligence did not cause Hinckley's death.

In addition, this Court may affirm Judge Mintz's ruling on two distinct alternative grounds. First, assuming for the sake of argument that plaintiff could establish facts from which negligence and causation could be inferred, Hinckley's inexplicable decision to wander away from his working car in the midst of a snowstorm, underdressed for the severe Buffalo weather and leaving behind his fully operational radio and gloves, constitutes an unforeseeable superseding cause sufficient to break the chain of causation. Second, although Judge Mintz assumed for purposes of his ruling that the snowstorm had ceased by the time of Hinckley's disappearance, CSX is also entitled to summary judgment under the storm-in-progress doctrine because there is no genuine dispute that snow and gale-force winds continued through the morning of Hinckley's disappearance.

## **QUESTIONS PRESENTED**

1. Whether Judge Mintz properly entered summary judgment in favor of CSX because there are no genuine issues of material fact and plaintiff presented no evidence of negligence or causation and therefore cannot establish those elements of her claim except by “pure speculation.” (*See* R. 17-18).

Answer of the Court Below:            Yes

2. Alternatively, whether Hinckley’s own negligence in leaving behind a functioning car and fully operational radio to wander out into a snowstorm without gloves, boots, a hat, or any means of emergency communication constitutes a superseding/intervening cause of his death.

Answer of the Court Below:            Not addressed

3. Alternatively, whether CSX was entitled to summary judgment because the storm-in-progress doctrine and/or other applicable principles of federal common law relieved it of any obligation to remove snow and ice from Seneca Yard during the course of an ongoing storm characterized by continuing snowfall, gale-force winds, and poor visibility.

Answer of the Court Below:            Not addressed. (The Court accepted *arguendo* plaintiff’s position that the storm had ceased for purposes of resolving the motion.)

4. Alternatively, whether CSX had no duty to warn Hinckley of conditions at Seneca Yard because Hinckley had already advised CSX that he would not be reporting to work and, further, because the severe winter weather in and around Seneca Yard was readily observable by the use of Hinckley’s own senses.

Answer of the Court Below:            Not addressed. (The Court accepted *arguendo* plaintiff’s position that he did not so advise CSX for purposes of resolving the motion.)

## COUNTER-STATEMENT OF FACTS

CSX operates several railroad yards in the Buffalo area (R. 99). The main classification yard—*i.e.*, a yard used to separate and classify incoming trains and assemble outgoing trains—in Buffalo and western New York is Frontier Yard (R. 108, 147). A majority of the freight trains in western New York are routed through Frontier yard (R. 147). Seneca Yard, where decedent John Hinckley worked, is a smaller, satellite yard, about a half-mile from Lake Erie in Buffalo (R. 503, 536).

At the time of Hinckley's death, there were four access roads leading into Seneca Yard (R. 113, 237). The primary access road was off of Lake Avenue (the yard's mailing address) (R. 113, 237). Other access roads included one off of Ohio Street, one through the South Buffalo Railroad, and one off of Tifft Street, which utilized an easement over property owned by Herbert F. Darling (R. 113, 237). The Tifft Street access road was an unpaved dirt road that wound for one-half to three-quarters of a mile from Tifft Street to the yard office (R. 238, 240). The yard office—a small building with four small offices and a break room—was the only building in Seneca Yard (R. 509-10). Within Seneca Yard there were a total of six to seven miles of roadway (R. 111-12).

In late December 2001, Buffalo was hit by an exceptionally severe snowstorm, with snowfalls of approximately seven feet over a four- to five-day period (R. 106). Snowfalls during the storm were very localized (R. 107). For example, Kenmore (just north of the city) and Silver Creek (just south of the city) received only about ten inches of snow, but “[i]n between”—including at Seneca Yard—“you had seven feet of snow.” (R. 107; *see also* R. 114 [“the tracks [at Seneca Yard] had become buried with seven feet of snow”]; R. 514 [“I don't think that since I was there that we really had a storm that was that bad.”]). This unprecedented storm ultimately brought work at both Frontier Yard and Seneca Yard to a complete halt (R. 112, 243, 517).

After heavy snows began falling on Christmas Eve (R. 473-74), CSX's snow removal efforts were ongoing, with crews working around the clock through New Year's Day (R. 111-12, 148). James Thoman, CSX's Engineer of Track in Buffalo, was responsible for coordinating CSX's snow removal efforts in Buffalo (R. 98, 106-07). He and his engineering department worked sixteen-hour days during the storm (R. 121). The Engineer of Track in Syracuse was also brought in to assist and worked twelve-hour days during the storm (R. 116). In addition to using its own personnel and equipment (*e.g.*, backhoes, payloaders, and industrial snowblowers [R. 119]), CSX hired a number of outside contractors to assist in these efforts, some from as far away as Boston and Baltimore (*see* R. 107-08, 119-20, 137-42). All told, CSX spent over two million dollars on contractors during the storm—more money than Thoman had ever before spent on snow removal (R. 137, 143).

Even with the help of outside contractors, however, snow was accumulating faster than it could be removed (*e.g.*, R. 112 [“[A]ll the snow kept coming. We couldn't keep up with it.”]; R. 148 [“it was just like being on a treadmill and the treadmill just was going faster and faster”]). CSX therefore made a decision to focus its efforts on Frontier Yard and then branch out to smaller yards such as Seneca Yard and the Ohio Street Yard (R. 107-08, 110-12, 147-48, 168). Frontier Yard was made a priority because “it's a major classification yard and the majority of the freight in Western New York [is routed through it]” (R. 147; *accord* R. 108) and because it had more employees and “more people going in and out” (R. 533). This approach—clearing the main classification yard first in order to minimize disruption and maximize employee safety—was consistent with CSX protocol for dealing with severe snowstorms and emergencies generally: CSX evaluated the severity of the storm, identified objectives, and adjusted its objectives as conditions changed (R. 106). As Thoman put it, “[w]e had like seven feet of snow over like

four or five days, so as we started into trying to keep the railroad operating, things had to change because the magnitude of the weather got the best of us.” (*Id.*)

But even though Frontier Yard became CSX’s focus, significant snow removal efforts also continued at Seneca Yard. Winter’s Railroad Service, Inc., a local contractor, provided snow removal services at Seneca Yard on December 27, 28, 29, and 31 and on New Year’s Day (R. 140-41, 216-18). Another contractor, Hulcher Services, worked at Seneca Yard in the late afternoon on December 30 (R. 120, 138-39, 195-98). And consistent with CSX’s overall plan of concentrating first on Frontier Yard and then dispersing contractors to the smaller yards (R. 120), C.P. Ward Inc., a contractor from Rochester, provided snow removal services at Seneca Yard between December 28 and January 2 (R. 137, 193-94), and Michael Serafini, Inc., a local contractor, worked at Seneca Yard during the timeframe of December 24 to January 4 (R. 140, 199-215). In addition to utilizing outside contractors, CSX also continued to operate Seneca Yard’s own snow removal equipment—a payloader, a snowplow, and a pickup truck with a plow (R. 445)—every day during the storm (*see* R. 512 [snow removal equipment was operated at Seneca Yard on December 24 through December 29]; R. 515, 518 [payloader, which had been moved to Frontier Yard sometime prior to 6:30 A.M. on the 30th, was returned to Seneca Yard for use by 11:30 A.M. on the 30th]).

On Saturday, December 29, Hinckley worked the first shift—from 7:00 A.M. to 3:00 P.M.—at Seneca Yard (R. 251, 258, 543). Hinckley usually used the Tiff Street access road at Seneca Yard (R. 412-13), and there is no indication that he did otherwise on the 29th. Hinckley returned home from work on the 29th, and there is no evidence that he encountered any trouble entering or exiting Seneca Yard on that day.

On the morning of Sunday, December 30, it was still snowing at Seneca Yard (*see* R. 451, 511, 515, 519). In addition, visibility was very poor at Seneca Yard because of high winds and blowing snow (R. 535 [“It was blowing snow. \* \* \* It was bad. I mean I wouldn’t say it was a blizzard, but it was bad, low visibility.”]). As James Hamerski (the yardmaster at Seneca Yard) explained, because snow continued to blow, “you could plow and two hours later it would blow back in.” (R. 530; *see also, e.g.*, R. 512 [Hamerski: “[E]verything was blown in and we couldn’t do any work. It was just a large accumulation.”]; R. 475 [meteorologist Michael Cejka: “At the Buffalo [U.S. Coast Guard] Station”—just two miles from Seneca Yard—“snow flurries were observed at 9:00 AM, 11:00 AM, 1:00 PM, and 3:00 PM[,] and there [were] frequent wind gusts between 44-46 mph”—*i.e.*, gale-force winds.]; R. 409 [Lisa Hinckley: “I do believe it was snowing” on December 30.]).

Hinckley was again scheduled to work the first shift on December 30 (R. 253). Plaintiff testified that Hinckley left his house that day around 6:30 A.M. wearing jeans, a t-shirt, a flannel shirt, and a leather jacket (R. 407-08). Hamerski testified, without contradiction, however, that between 7:00 A.M. and 8:00 A.M., Hinckley called to say that he was unable to make it into work due to the weather (R. 520-21; *see also* R. 259-60 [if employees were unable to show up for work, “they were to notify either the men who were working at that time[] or \* \* \* the yardmaster”]). Hamerski relayed this information to Mike Work, the only other CSX employee who showed up for work in Seneca Yard that day (R. 522). Work left after four hours because no work could be done as a result of the snow (R. 258-59). Two other employees on Hinckley’s shift also called off of work because of the snow (R. 253-54, 526-27), and the second shift—3:00 P.M. to 11:00 P.M.—was cancelled altogether (R. 524-26).

Hinckley did not return home on the 30th or the 31st (R. 302-03). On January 1, his car was found on the Tifft Street access road approximately 100 yards from Tifft Street (R. 266). Hinckley's gloves and radio were still inside the car (R. 305), and the radio was working properly (R. 270-71 [an employee at the scene "asked for a radio check from the yardmaster at the Seneca yard office, and the radio reply back was loud and clear"]; R. 308-09). Although there were no difficulties with radio transmission during the time that Hinckley was missing, Hinckley never radioed the yard office (R. 332 [radio transmission tapes for Seneca Yard for December 30, 2001]; R. 507). Hinckley's car was in working condition when it was found (R. 310-11).

Ten days later, on January 11, Hinckley's body was found in a group of trees approximately one-quarter of a mile from where his car had been found (R. 273-74). Despite the severe winter weather, Hinckley was wearing only jeans, a t-shirt, a flannel shirt, and a leather jacket (R. 433; *see also* R. 30, 407-08). He was not wearing gloves, boots, or a hat (R. 30, 433). An autopsy identified "cold exposure" as the cause of death. The autopsy also determined that Hinckley had morphine and opiates in his system at the time of his death (R. 438-39). (In her opening brief, plaintiff notes that Judge Mintz initially misspoke and stated that Hinckley had cocaine in his system (*see* Hinckley Br. 30 (citing R. 14)); plaintiff fails to acknowledge, however, that just minutes later Judge Mintz correctly stated that morphine and opiates, not cocaine, were in Hinckley's system (R. 18)).

On July 31, 2003, plaintiff filed suit against CSX, alleging that CSX's snow removal efforts were negligent and that CSX negligently failed to warn Hinckley about dangerous weather conditions (R. 37-42). On December 12, 2007, CSX moved for summary judgment (R. 19-20).

At a hearing on April 1, 2008, the Supreme Court (Judge Mintz) granted CSX's motion for summary judgment, finding that "some facts are not in dispute":

- that Hinckley reported to work at CSX and worked a full shift on the 29th, the day before his disappearance;
- that Hinckley disappeared on the 30th;
- that his car was found on the Tiff Street access road on the 1st;
- that his body was found away from the car in a group of trees;
- that Hinckley “was not wearing winter clothes” when he was found—*i.e.*, he was wearing a leather jacket and sneakers but no boots or gloves; and
- that Hinckley left his gloves and a fully operational radio in his car when he abandoned it.

(R. 14-15).

For the purposes of resolving the motion for summary judgment, the Court accepted plaintiff’s positions that the snowstorm was no longer “in progress” at the time of Hinckley’s death and that Hinckley never called off of work on the 30th (R. 15-17). Nonetheless, on the basis of the undisputed facts, the Court granted CSX’s motion for summary judgment because, “except by speculation,” plaintiff could not show (1) “that the access road was unplowed at the time [Hinckley] drove into it” or (2) “that any lack of plowing was the proximate cause of [Hinckley’s] death.” (R. 17-18). Accordingly, the Court concluded that the plaintiff’s case was “pure speculation.” (R. 18).

## **ARGUMENT**

### **I. Plaintiff Failed To Establish A Genuine Issue Of Material Fact As To Either Causation Or Negligence.**

#### **A. Plaintiff’s Theories Of Negligence And Causation Are Pure Speculation.**

“A motion for summary judgment will not be defeated by speculation that a defendant was negligent \* \* \*.” *Yaeger v. UCC Constr., Inc.*, 281 A.D.2d 990, 990 (4th Dep’t 1990); *see*

also *Oginski v. Rosenberg*, 115 A.D.2d 463, 463 (2d Dep't 1985) (even in cases governed by the *Noseworthy* doctrine, "if competing inferences are equally reasonable, the inference in accord with nonnegligence must be drawn"). In addition, "[w]here the facts proven show that there are several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was the result of one cause as the other, plaintiff cannot have a recovery, since he has failed to prove that the negligence of the defendant caused the injury." *Bernstein v. City of New York*, 69 N.Y.2d 1020, 1021-22 (1987) (citation omitted); accord, e.g., *Kalinowski v. Joseph T. Ryerson & Son, Inc.*, 242 A.D.2d 43, 46 (4th Dep't 1934). Accordingly, "[c]ases grounded on wholly circumstantial evidence require a showing of sufficient *facts* from which the negligence of the defendant and the causation of the accident by that negligence can be reasonably inferred." *Thomas v. New York City Transit Auth.*, 194 A.D.2d 663, 664 (2d Dep't 1993) (emphasis added). Furthermore, the facts from which negligence and causation are to be inferred must be established by "positive proof" and "not left to rest in conjecture." *Ruppert v. Brooklyn Heights R.R. Co.*, 154 N.Y. 90, 94 (1897). "It is not necessary to exclude every other possible hypothesis, but every other reasonable hypothesis must be excluded." *Boyce Motor Lines v. State*, 280 A.D. 693, 696 (3d Dep't 1952); accord, e.g., *Ruppert*, 154 N.Y. at 94 ("it must appear that the inference [that plaintiff's death was caused by defendant's negligence] is the only one which can fairly and reasonably be drawn from [the] facts"); *Nieskes & Craig, Inc. v. Schoonerman*, 40 A.D.2d 931, 932 (4th Dep't 1972) (quoting *Boyce*); *Thomas*, 194 A.D.2d at 664 ("the record must render [all] possible causes [other than the defendant's negligence] sufficiently remote to enable the trier of fact to reach a verdict based upon the logical inferences to be drawn from the evidence, not upon speculation").

Here, the undisputed facts on which the trial court based its ruling can be succinctly summarized as follows: Hinckley worked a full shift on December 29. There is no evidence that he encountered any difficulty entering or departing from Seneca Yard via the Tift Street access road. On December 30, Hinckley left his house around 6:30 A.M., and plaintiff believed that he was going to work. Two days later his car was found on the Tift Street access road, approximately 100 yards from Tift Street. Hinckley had left his fully operational radio and his gloves in his car. Several days later, his body was found approximately one-quarter of a mile away in a group of trees. He had left his car and wandered out into severe winter weather wearing only jeans, a t-shirt, a flannel shirt, and a leather jacket. He was not wearing gloves, boots, or a hat.

Under these circumstances, plaintiff's contentions (i) that CSX negligently permitted the Tift Street access road to become "impassable," (ii) that CSX had actual or constructive knowledge of any such hazardous condition, and (iii) that CSX's alleged negligence caused Hinckley's car to become "snowbound" or otherwise caused Hinckley's death are, in the words of the trial court, "pure speculation."

**1. Plaintiff Failed To Establish Facts Sufficient To Support An Inference Of Negligence.**

The only record facts that plaintiff cites in support of her claim that CSX negligently permitted the Tift Street access road to become "impassable" are: (a) Hamerski's truck "almost got stuck" (but did not) on a *different* access road that morning (R. 444, 450); (b) Thoman's SUV did get stuck twice (and was pulled out both times) sometime between noon and 1:30 P.M. that *afternoon* (R. 453-55)—*i.e.*, at least five hours after Hinckley was scheduled to report for work—and (c) when Hamerski arrived at work at 6:30 A.M. that morning, Seneca Yard's snow removal equipment was not in its usual place next to the yard office, and Hamerski had no idea how long it had been gone (R. 449-50). *See* Hinckley Br. 18-19.

Thus, plaintiff has presented no evidence that the Tiff Street access road was “impassable”—or that it was left unplowed for an unreasonable period of time—when Hinckley disappeared early on the morning of December 30. These are facts that “must be proved, and not themselves presumed.” *Love v. Baltimore & Ohio R.R. Co.*, 244 A.D. 72, 74 (4th Dep’t 1935) (quoting *Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan*, 271 U.S. 472, 477 (1926)). Moreover, it is undisputed that both CSX’s own employees and snow-removal equipment and third-party contractors were employed at Seneca Yard throughout the day on December 29 (*see* page 6, *supra*), that the Tiff Street access road *was* passable when Hinckley departed from work that afternoon, and that CSX’s snow-removal equipment and, later, contractors were again utilized on December 30, beginning by 11:30 A.M. (*see* R. 120, 138-39, 195-98, 515-18). Under these circumstances, plaintiff’s contentions amount to no more than “speculation that [CSX] was negligent” and are therefore insufficient to defeat a motion for summary judgment. *Yaeger*, 281 A.D.2d at 990.

The Court of Appeals held, for example, that a claim of negligence was “pure conjecture” where it was shown that the defendant’s car ran over the decedent and dragged his body for approximately 170 feet but “there [was] nothing at all to show how that came about.” *Wank v. Ambrosino*, 307 N.Y. 321, 323 (1954). The Court held that the evidence could not support an inference of negligence even though the driver admitted to having defective vision in his left eye and there was evidence that he had stopped his car at a traffic light and had been proceeding slowly for no more than 50 feet before striking the decedent. *Id.* at 323-24; *see also id.* at 324-28 (Conway, J., dissenting). The Court also acknowledged the applicability of the *Noseworthy* doctrine in unwitnessed death cases (*see* Part I.B, *infra*) but explained that even under *Noseworthy* “there must be a showing of facts from which negligence may be inferred.” *Wank*, 307 N.Y. at 324.

*Wank* is instructive here because, to an even greater degree than in that case, “there is nothing at all to show how [Hinckley’s death] came about.” The only relevant facts that plaintiff can establish are that Hinckley disappeared on December 30, his car was found two days later on the Tifft Street access road, and his body was found several days later a quarter-mile from the car. Even under *Noseworthy* (*but see* Part I.B, *infra*), plaintiff failed to supply any facts from which negligence reasonably can be inferred. “Only by a process of pure conjecture could [the evidence] be a basis for a verdict of negligence” against CSX. *Wank*, 307 N.Y. at 324.

It is also worth noting that plaintiff’s position that the Tifft Street access road was “impassable” is in considerable, if not irreconcilable, tension with her argument against the storm-in-progress doctrine, which is addressed in Part II, *infra*. Plaintiff asserts unequivocally that “the snowstorm had ceased on December 28th.” Hinckley Br. 24; *see also* R. 476 (asserting that “there was not an ongoing snow storm in the vicinity of the accident site on December 29th through 30th 2001”). If, (a) as plaintiff asserts, the storm was over by December 28, and (b) as the evidence shows, Hinckley worked on December 29 and returned home via the Tifft Street access road, then there is no rational explanation for plaintiff’s further contention that the same access road was “impassable” on December 30. Plaintiff cannot and does not explain what created this allegedly hazardous condition if, as she claims, the storm ended on December 28 (Hinckley Br. 24) and had already “moved south of the city” (R. 476).

**2. There Is No Record Evidence That CSX Had Actual Or Constructive Notice Of The Allegedly Hazardous Conditions On The Tifft Street Access Road.**

The U.S. Supreme Court has long held that “reasonable foreseeability of harm is an essential ingredient of [FELA] negligence.” *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 117 (1963) (collecting cases). This “essential element of reasonable foreseeability \* \* \* requires proof of actual or constructive notice to the employer of the defective condition that caused the

injury.” *Haas v. Del. & Hudson Ry. Co.*, 2008 WL 2566699, at \*3 (2d Cir. June 24, 2008) (unpublished opinion) (quoting *Sinclair v. Long Island R.R.*, 985 F.2d 74, 77 (2d Cir. 1993)). “To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit a defendant’s employees to discover and remedy it.” *Gordon v. Am. Museum of Natural History*, 67 N.Y.2d 836, 837 (1986) (New York common law); *see also, e.g., Turner v. Norfolk & W. Ry. Co.*, 785 S.W.2d 569, 572 (Mo. Ct. App. 1990) (constructive notice is established under FELA if a hazardous condition is “so apparent that it can only be said that the railroad knew or should have known of the condition”); *Bevan v. N.Y., Chi. & St. Louis R.R. Co.*, 6 N.E.2d 982, 985 (Ohio 1937) (“recovery has been allowed” under FELA only when the plaintiff presents “sufficient facts” proving actual notice of a hazard or that the hazard “had remained \* \* \* long enough to charge the company with notice of its existence”). “A general awareness that some dangerous condition *may* be present is insufficient to constitute constructive notice.” *Tedesco v. Norfolk S. Corp.*, 2002 WL 1628874, at \*4 (W.D.N.Y. June 6, 2002).

Here, the evidence is undisputed that Hinckley worked a full shift on December 29 and returned home by way of the Tiff Street access road. There is no indication that Hinckley encountered any difficulty on the access road when left work on the 29th, just sixteen hours prior to his scheduled start time on the 30th. And plaintiff has presented no evidence that, in that sixteen-hour interim, hazardous conditions developed on the access road of which CSX actually became aware—or that such conditions were apparent for long enough to charge CSX with knowledge of their existence. Nor is there any “evidence in the record that any complaints were made about [the access road] that would support [plaintiff’s] contention that [CSX] should be charged with constructive notice thereof.” *Id.* All that plaintiff has shown is CSX’s “general awareness”

that snow was accumulating in all of its Buffalo yards (a condition that CSX was working diligently to address (*see generally* pages 5-6, *supra*)). Such a general awareness is insufficient to establish constructive notice. *Tedesco*, 2002 WL 1628874, at \*4.

Plaintiff may invoke the fact that Thoman's vehicle became stuck on a different part of the Tift Street access road *at least five hours* after Hinckley's disappearance or the fact that Hamerski's truck "almost got stuck" (but did not) on a *different* road that morning. *See* page 11, *supra*. Neither fact, however, permits an inference of constructive notice. The incident involving Thoman obviously cannot do so because it occurred well after Hinckley's disappearance. Moreover, neither incident is sufficient to establish constructive notice because a plaintiff "must proffer 'evidence establishing constructive notice of the *particular* condition'" alleged to have caused injury. *Tedesco*, 2002 WL 1628874, at \*4 (citation omitted; emphasis in original). At most, these incidents suggest a "general awareness" of possible hazards "throughout the [r]ailroad [y]ard," which is insufficient as a matter of law. *Id.*

### **3. Plaintiff's Theory Of Causation Rests On Impermissible Surmise And Conjecture.**

"[P]roof of negligence alone does not entitle the plaintiff to recover under [FELA]. The negligence complained of must be the cause of the injury," and "[t]he jury may not be permitted to speculate as to its cause." *Atchison, Topeka & Santa Fe Ry. Co. v. Toops*, 281 U.S. 354, 354 (1930). Assuming solely for the sake of argument that the evidence is sufficient to support an inference of negligence, CSX is still entitled to summary judgment because, as Judge Mintz concluded, plaintiff provided no evidence that Hinckley's death was caused by such negligence. The only evidence related to this issue is that Hinckley's car was discovered on the Tift Street access road two days after his disappearance and that Hinckley, for reasons known only to him and with morphine and opiates in his system, wandered a quarter-mile away to a group of trees,

leaving his gloves and fully operational radio in his car. Under these circumstances, plaintiff's repeated assertions that the Tiff Street access road was unplowed and that Hinckley's car became "snowbound" amount to pure speculation.

*Hogan v. Consolidated Rail Corp.*, 1991 WL 5142 (W.D.N.Y. Jan. 15, 1991) is instructive. *Hogan* was an unwitnessed death case in which the *Noseworthy* doctrine concededly was applicable. *Id.* at \*2. The plaintiff alleged that a brush-cutting machine flung a piece of wood that struck the decedent, rendering him unconscious and causing him to be run over by a passing truck. *Id.* at \*3. The plaintiff argued that a piece of wood found eighteen inches from the decedent's head and testimony from the decedent's coworkers that they were concerned because the brush-cutting machine was causing pieces of wood to be thrown at an "extremely high" velocity toward the area where the decedent was working provided adequate circumstantial support for her theory. *Id.* at \*1, \*3. Nonetheless, the federal district court granted the defendant's motion for summary judgment because this evidence provided no more than a "speculative[]" link" between the machine and the decedent's death. *Id.* at \*3. As the court put it, "[w]hile it is *possible* that [the decedent] may have been hit by a piece of flying debris, such a conclusion simply cannot be reached without speculation" because "[t]here are too many unknowns and too many other possible reasons for the accident." *Id.* at \*4 (emphasis added).

The same is true in this case. Although plaintiff simply notes that Hinckley's car was found in the snow two days after his disappearance and that there were snow accumulations in other parts of the yard, as in *Hogan*, this evidence leaves a plethora of "unknowns" and gives rise to no more than a "speculative link[]" between the alleged negligence and Hinckley's death.

Similarly, in a FELA case in which the decedent was struck and killed by a train outside the presence of any witnesses, this Court held that the plaintiff's theory of causation was imper-

missibly speculative because there was no proof as to how the decedent came to be onto the track and, hence, no proof that the accident was caused by the engineer's failure to sound a bell or whistle before moving the train or by the head brakeman's failure to keep an adequate lookout. *See Love*, 244 A.D. at 73-77. The U.S. Supreme Court has reached similar results in FELA cases involving unwitnessed deaths. *See, e.g., Nw. Pac. R.R. Co. v. Bobo*, 290 U.S. 499, 502-03 (1934) (although there was evidence that defendant negligently maintained the stairway on which decedent worked, "there [was] nothing whatsoever to show that [such negligence] was the proximate cause of the unfortunate death," and a verdict to that effect "would be pure speculation"); *Toops*, 281 U.S. at 354-57 (plaintiff's theory that accident was caused by defendant's failure to position a flagman or hang a light on the rear of the train that struck decedent was impermissible "surmise and conjecture" in the absence of proof as to why or when decedent came onto the track); *Coogan*, 271 U.S. at 474-78 (because "[t]here was no eyewitness," and "nothing to show that [defendant's negligence] had any connection with the accident," "[t]he record leaves the matter in the realm of speculation and conjecture," and "[t]hat is not enough").

Finally, in a recent case in which the decedent died as a result of an unwitnessed fall down a flight of stairs, the federal district court held that the plaintiff's theory that the fall was caused by a loose handrail and other defects in the stairway was impermissibly speculative. *Estate of Ratcliffe v. Pradera Realty Co.*, 2008 WL 53115, at \*4-\*6 (S.D.N.Y. Jan. 2, 2008). The plaintiff submitted an expert report documenting defects in the stairway and opining that these defects caused the fall, but the court rejected the report as mere "guesswork about the cause of [the] fall." *Id.* at \*5. The court also noted that the plaintiff's theory of causation was speculative because plaintiff's own evidence failed to account for other possible causes such as the decedent's consumption of alcohol prior to the fall. *Id.* at \*6.

Like the plaintiff in *Ratcliffe*, plaintiff attempts to bridge the causation gap with the affidavit of a purported expert, John Allin. See Hinckley Br. 19-20, 22, 29; R. 478, ¶ 1 (“I am a snow removal and snow and ice safety expert \* \* \*.”). As in *Ratcliffe*, however, plaintiff cannot transform unsupported speculation into “evidence” of causation by submitting an affidavit that explicitly adopts that speculation as fact (see R. 482, ¶ 9 [opining that “[i]t is reasonable to *assume*” that Hinckley was not “able to navigate the [Tiff Street] access road” because the road was not “properly maintained (cleared of snow) by \* \* \* CSX”] (emphasis added)).

Also like the plaintiff in *Ratcliffe*, plaintiff has failed to account for other possible causes. Wearing only jeans, a flannel shirt, and a leather jacket, Hinckley inexplicably left his gloves and fully operational radio in his car and walked a quarter-mile in severe winter weather into a group of trees. A subsequent autopsy determined that morphine and opiates were present in his system at the time of his death. In light of these undisputed facts, a “strong competing inference” remains that Hinckley’s car was not “snowbound” and that he did not walk away from it for that reason. Among other possibilities, he could have left the car because his judgment was impaired by morphine and opiates, or he could have left the car in order to take the morphine and opiates. Accordingly, “a jury’s finding that [CSX’s alleged negligence] caused [Hinckley’s death] would constitute impermissible speculation.” *Ratcliffe*, 2008 WL 53115, at \*6; accord, e.g., *Boyce*, 280 A.D.2d at 696 (“Circumstantial evidence \* \* \* may support a verdict” only if “the inference[] of \* \* \* proximate cause [is] the only one[] that can fairly and reasonably be deduced from the facts.”); *Kalinowski*, 240 A.D. at 46 (“When the precise cause of an accident is left to conjecture and may be as reasonably attributed to a condition for which no liability attaches as to one for which it does, then the plaintiff is not entitled to recover \* \* \*.”).

## **B. The “*Noseworthy* Doctrine” Is Inapplicable.**

The trial court correctly concluded that, even granting plaintiff the benefit of the *Noseworthy* doctrine, CSX was entitled to summary judgment because plaintiff’s case remained in the realm of “pure speculation.” (R. 17-18). As Judge Mintz explained, “*Noseworthy* \* \* \* does give the plaintiff a lesser burden of proof,” but it “does *not* avoid the plaintiff’s responsibility to prove a prima facie case in order to get to a jury,” which plaintiff could not do (*id.* (emphasis added)). Judge Mintz correctly interpreted *Noseworthy*: “before that rule comes into play there must be *some* showing of negligence, however slight” (*Wank*, 307 N.Y. at 323-24 (emphasis added)), and the doctrine does not permit a “plaintiff [to] maintain a wrongful death cause of action based only upon speculation or guesses” as to causation (*Hogan*, 1991 WL 5142, at \*2). Accordingly, this Court could affirm for precisely the same reasons given by the court below. But should the Court find it necessary or desirable to address the issue, the *Noseworthy* doctrine does not apply (1) in FELA cases because it is a unique substantive rule of New York law and (2) in cases, such as this one, in which the cause of the decedent’s death is as unknown to the defendant as to the plaintiff. Accordingly, plaintiff’s (misplaced) reliance on *Noseworthy* as a means for filling the gaping holes in her proof is unjustifiable under applicable of law.

### **1. *Noseworthy* Is Inapplicable In FELA Cases Because It Is A Substantive Rule Of Law That Is Peculiar To New York.**

“FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal.” *St. Louis Sw. Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985); *accord, e.g., Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 335 (1988) (“State courts are required to apply federal substantive law in adjudicating FELA claims.”). Rules allocating burden of proof are substantive and therefore are governed by federal law in FELA cases. *C. Vt. Ry. Co. v. White*, 238 U.S. 507, 510-12 (1915); *New Orleans & Ne. R.R. Co. v. Harris*, 247 U.S.

367, 371 (1918) (state law deeming “proof of injury inflicted by an engine propelled by steam \* \* \* *prima facie* evidence of negligence” is preempted by FELA because it is “clear that the question of burden of proof is a matter of substance and not subject to control by laws of the several states”); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 242-49 (the Jones Act, which “is based upon and incorporates [FELA] by reference,” preempts state law allocating burden of proof to the party challenging the validity of a release); *see also, e.g., Am. Dredging Co. v. Miller*, 510 U.S. 443, 454 (1994) (“For many years, \* \* \* [burden of proof] has been viewed as a matter of substance \* \* \*.”).

Under these decisions, the *Noseworthy* doctrine is a matter of substance because it holds that, in a subset of wrongful death cases, the “plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence.” *Noseworthy v. City of New York*, 298 N.Y. 76, 80 (1948); *accord, e.g., Pierson v. Dayton*, 168 A.D.2d 173, 175 (4th Dep’t 1991); *see also, e.g., Ratcliffe*, 2008 WL 53115, at \*6 (“the *Noseworthy* doctrine, \* \* \* under certain limited circumstances, entitles a plaintiff to lower burden of proof on causation”); *Hogan*, 1991 WL 5142, at \*2 (under *Noseworthy*, “a plaintiff is emburdened by a lower standard of proof”); Steven D. Jannace, *The Noseworthy Doctrine: A Three-Part Rule for Its Application*, 6 TOURO L. REV. 269, 269 (1990) (under *Noseworthy*, “a wrongful death plaintiff is entitled to a reduced burden of proof”).

In an analogous context, federal district courts have recognized that *Noseworthy* is substantive and have therefore held that it is applicable under the familiar rule that “federal courts sitting in diversity apply state substantive law and federal procedural law” (*Gasperini v. Ctr. for the Humanities, Inc.*, 518 U.S. 415, 427 (1996) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). *See, e.g., Hogan*, 1991 WL 5142, at \*2 (applying the *Noseworthy* doctrine pursuant to

the *Erie* rule); *Klepal v. Penn. R.R. Co.*, 129 F. Supp. 668, 670 & n.2 (S.D.N.Y. 1955) (Weinfeld, J.) (“The case is governed in its substantive aspects \* \* \* by New York law,” including the *Noseworthy* doctrine.); *see also Texasgulf, Inc. v. Colt Elec. Co.*, 615 F. Supp. 648, 660 (S.D.N.Y. 1984) (applying *Noseworthy* as New York substantive law under the Federal Tort Claims Act). *But see Kazanoff v. United States*, 945 F.2d 32, 35 n.4 (2d Cir. 1991) (“although this court has recognized the *Noseworthy* rule in negligence actions governed by New York law,” its applicability in federal court is actually an open question in the Second Circuit).

*Noseworthy* alternatively has been described as “pertain[ing] to the weight which \* \* \* circumstantial evidence may be afforded \* \* \*, not to the standard of proof the plaintiff must meet” (*Oginski*, 115 A.D.2d at 463) or as “a method of, or approach to, weighing evidence” (*Wank*, 307 N.Y. at 324). Such descriptions of the doctrine confirm that it is a matter of substance.

The U.S. Supreme Court has explained that FELA “requires uniform interpretation” under federal law, and “[t]his uniformity requirement extends to the type of proof necessary for judgment.” *Garrett*, 317 U.S. at 244. The Court of Appeals similarly has rejected a trial court’s holding that “the method of proving \* \* \* liability, or the kind of evidence which shall be sufficient to make out a case, rests entirely within the state law, unless otherwise pointed out by [FELA].” *Kent v. Erie R.R. Co.*, 228 N.Y. 94, 98 (1920); *see also, e.g., Love*, 244 A.D. at 73 (“The kind or amount of evidence required to establish a [FELA claim] is not subject to the control of the several states.”) (quoting *Coogan*, 271 U.S. at 474). “[T]he weight of evidence” also “must be determined not by the decisions of state tribunals ruling on questions of negligence under the laws of the states but by the decisions of the federal courts interpreting [FELA].” *Jacobs v. Reading Co.*, 130 F.2d 612, 614 & n.1 (3d Cir. 1942). Thus, because *Noseworthy* not only ad-

justs the burden of proof but also specifies the kind or type of evidence that can sustain a claim and the weight that such evidence should be afforded, its substantive nature is evident.

Because *Noseworthy* is a rule of substance, not procedure, it cannot be applied in FELA cases unless it constitutes generally applicable federal common law. “[A]lthough common-law principles are not necessarily dispositive of questions arising under FELA, unless they are expressly rejected in the text of the statute, they are entitled to great weight.” *Consol. R. Corp. v. Gottshall*, 512 U.S. 532, 544 (1994). The “common-law principles” adopted by the Supreme Court in FELA cases are typically those applied by a majority of common-law courts. *See, e.g., Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 150-151 & n.11, 156 n.16 (2003) (adopting the “clear majority” common-law rule, rejecting “[c]ontrary precedent [as] slim in comparison,” and criticizing the dissent’s willingness to depart from the “majority rule”); *Gottshall*, 512 U.S. at 550 (recognizing a right to recover that “is nearly universally recognized” under common law); *id.* at 555 (adopting a test for recovery that, though not a majority rule, “presently is followed by 14 jurisdictions” and “therefore remains \* \* \* a well-established common-law concept of negligence”) (internal quotation marks omitted); *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 432 (1997) (rejecting claim for emotional distress damages because “common-law precedent [did] not favor” it under the facts of the case). The U.S. Supreme Court also gives great weight to the state of the common law at the time of FELA’s enactment in 1908. *Norfolk S. Ry. Co. v. Sorrell*, 127 S. Ct. 799, 807 (2007); *Ayers*, 538 U.S. at 149, 164; *Gottshall*, 512 U.S. at 550, 554; *Morgan*, 486 U.S. at 337-38. As the Court has explained, FELA’s express departure from specific common-law doctrines (*e.g.*, contributory negligence as a complete defense) is persuasive evidence of legislative intent *not* to modify the common law in other respects. *Gottshall*, 512 U.S. at 550, 554; *Morgan*, 486 U.S. at 337-38.

The *Noseworthy* doctrine is not now, and never has been, a widely adopted common-law rule. Indeed, our research indicates that it has not been adopted by any other state. In a 1969 law review article, Judge Weinstein of the U.S. District Court for the Eastern District of New York cited *Noseworthy* for the proposition that “in New York, as in *some* other states, [a wrongful death plaintiff] may go to the jury on a case which would be less than enough were the [plaintiff’s decedent] alive.” Jack B. Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of the Federal Rules of Evidence*, 69 COLUM. L. REV. 353, 365 & n.53 (1969) (emphasis added). Judge Weinstein did not, however, cite a single case from the “other states” that supposedly followed the rule. *See id.* Similarly, after setting out the generally applicable rules governing burden of proof in wrongful death cases, supported by decisions from a number of different states, *American Jurisprudence* alerts the reader that “[u]nder what has become known as the *Noseworthy* doctrine, the plaintiff in a wrongful-death case *in New York* is not held to as high a degree of proof as if the injured person were present to describe the occurrence.” 22A AM. JUR. 2d *Death* § 350 (West, Westlaw through May 2008) (emphasis added). Finally, although the U.S. Supreme Court has discussed proof of negligence and causation in several unwitnessed FELA death cases, it has never once suggested that a lesser “degree of proof”—or a different “method of, or approach to, weighing evidence”—applies in such cases. *See, e.g., Bobo*, 290 U.S. at 500-03 (insufficient evidence of negligence or causation); *Toops*, 281 U.S. 351 (insufficient evidence of causation); *Coogan*, 271 U.S. at 474-78 (same); *see also Love*, 244 A.D. at 76-77 (applying, *inter alia*, *Bobo*, *Toops*, and *Coogan* in a FELA case).

To the extent that there can be any doubt as to *Noseworthy*’s uniqueness, the fact that the doctrine came into being forty years after FELA’s enactment confirms that it should not be applied in FELA cases. That is, *Noseworthy* certainly does not reflect “the state of the common

law in 1908, when FELA was enacted.” *Gottshall*, 512 U.S. at 554; *accord Morgan*, 486 U.S. at 337-38 (holding that prejudgment interest is not available under FELA primarily because it was not available under the common law as it stood in 1908).

The *Noseworthy* doctrine is thus precisely the sort of “unique” and “idiosyncratic approach” that the Supreme Court declines to permit in FELA cases. *Sorrell*, 127 S. Ct. at 806, 808. As the Court recently emphasized, although “FELA was indeed enacted to benefit railroad employees, as [its] express abrogation of [specific] common-law defenses \* \* \* make[s] clear,” “[i]t does not follow \* \* \* that this remedial purpose requires [courts to resolve] every uncertainty \* \* \* in favor of employees.” *Id.* at 808; *see also Gottshall*, 512 U.S. at 551 (when an issue “is not explicitly addressed [by FELA], [its] common-law background” cannot be “disregarded [simply because it] stand[s] in the way of recovery”). Accordingly, whether or not *Noseworthy* would enable plaintiff to avoid summary judgment if she had a claim under New York law—and, to be clear, Judge Mintz correctly concluded that it would not (R. 17-18)—it cannot avail her or anyone else under FELA.

**2. *Noseworthy* Is Inapplicable As A Matter Of New York Law Because CSX’s Knowledge Of Hinckley’s Death Is No Greater Than Plaintiff’s.**

Even if *Noseworthy* were applicable in FELA cases, the doctrine would still not avail plaintiff in *this* case. It is now well-settled that “the *Noseworthy* doctrine has no application” when, as in this case, “plaintiff and defendant are similarly situated insofar as accessibility to the facts of the deceased’s death is concerned” because those facts are “as unknown to defendant as [they are] to plaintiff.” *Wright v. N.Y. City Hous. Auth.*, 208 A.D.2d 327, 332 (1st Dep’t 1995); *accord, e.g., Jarvis v. LaFarge N. Am., Inc.*, 52 A.D.3d 1179 (4th Dep’t 2008); *Kuravskaya v. Samjo Realty Corp.*, 281 A.D.2d 518 (2d Dep’t 2001); *Walsh v. Murphy*, 267 A.D.2d 172 (1st Dep’t 1999); *Ratcliffe*, 2008 WL 53115, at \*6; *Estate of Novack v. R.D.C. Realty, Inc.*, 1 F. Supp.

2d 163, 166 (D. Conn. 1998) (applying New York law); Michael J. Hutter, *2000-2001 Survey of New York Law: Evidence*, 52 SYRACUSE L. REV. 397, 405-06 (2001). This limitation on the doctrine derives from the considerations underlying and facts of the *Noseworthy* case itself. In *Noseworthy*, the plaintiff's decedent was killed when he was run over by the defendant's subway train. 298 N.Y. at 78. In its decision, the Court of Appeals stressed that "no one except the [defendant's] motorman knew what took place early that morning in that deserted subway station." *Id.* at 81; *see also id.* at 78 ("Defendant's motorman was the only eyewitness."). Under these circumstances, the Court reasoned that a reduced burden of proof was appropriate because "the management and control of the thing which has produced the injury is exclusively vested in the defendant, [and] it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present." *Id.* at 80-81 (internal quotation marks omitted).

Courts have thus held that the doctrine is inapplicable when the facts of the decedent's death are unknown to both parties. For example, courts have refused to apply the rule in a number of cases arising out of unwitnessed falls down stairs (*Kuravskaya*, 281 A.D.2d at 518; *Walsh*, 267 A.D.2d at 172; *Lynn v. Lynn*, 216 A.D.2d 194, 194-95 (1st Dep't 1995); *Ratcliffe*, 2008 WL 53115, at \*6), as well as in unwitnessed car accidents (*Gayle v. City of New York*, 256 A.D.2d 541, 541-42 (2d Dep't 1998)). For the same reasons, *Noseworthy* cannot avail plaintiff here (even if it were applicable in FELA cases in general) because the facts of Hinckley's death are "as unknown to [CSX] as \* \* \* to plaintiff," and CSX is not in exclusive possession of any evidence concerning the cause of Hinckley's death.

## **II. The Undisputed Facts Show That Hinckley Was A Superseding And Intervening Cause Of His Death.**

Even if plaintiff had adduced evidence sufficient to permit inferences that CSX was negligent and that its negligence contributed in some manner to Hinckley's death, CSX would still be entitled to summary judgment because the undisputed facts show that Hinckley's own actions were a superseding cause of his death. As discussed above, the undisputed facts show that, rather than radioing the Seneca Yard office for assistance, Hinckley left his car and set out into a fiercely blowing wind and poor visibility. Hinckley left his gloves and a working radio behind in his car and was wearing only jeans, a flannel shirt, and a leather jacket. He was not wearing boots or a hat. Although both his radio and the radio in the yard office were functioning, there is no evidence that he ever sought assistance. He was found days later in a group of trees a quarter-mile away from his car. An autopsy later determined that morphine and opiates were present in his system.

"It is elementary that a superseding, intervening act of a \* \* \* plaintiff will break the chain of causation set in force by the defendant and insulate defendant's negligence as a direct cause of the injury" if it "follow[s] the original negligent act" and was not "reasonably foreseeable." *Strobel v. Chicago, Rock Island & Pac. R.R. Co.*, 96 N.W.2d 195, 200-01 (Minn. 1959) (FELA); accord, e.g., *Gordon v. E. Ry. Supply, Inc.*, 82 N.Y.2d 555, 562 (1993) (New York law). This traditional common-law doctrine applies in FELA cases. See, e.g., *Strobel*, 96 N.W.2d at 200-01; *Kelson v. Cent. of Ga. R.R. Co.*, 505 S.E.2d 803, 809-10 (Ga. Ct. App. 1998).

For example, in *Kelson*, although there was evidence that the railroad negligently permitted the ground near the tracks around which the plaintiff was working to become covered with slippery corn syrup that had spilled from nearby tanks, the court held that the plaintiff's decision to avoid the syrup by riding the end ladder of a train and attempting to maneuver between mov-

ing train cars was a superseding cause of the injuries he sustained when he fell from the train. *See* 505 S.E.2d at 808-10. The court reasoned that, assuming that the railroad was negligent and that the plaintiff's actions were a response to that negligence, his actions were dangerous and unnecessary under the circumstances and therefore constituted an intervening and efficient cause of the accident. *See id.*; *cf.*, *e.g.*, *Egan v. A.J. Constr. Corp.*, 94 N.Y.2d 839, 841 (1999) (plaintiff's decision to jump out of a stalled elevator rather than waiting for it to be repaired "was not foreseeable" and therefore "superseded defendants' conduct and terminated defendants' liability for his injuries"); *Mack v. Altmans Stage Lighting Co.*, 98 A.D.2d 468 (2d Dep't 1984) (plaintiff's attempt to descend from the roof of a building via a rope was "unforeseeable and independent of defendant's" failure to properly secure a ladder that was blown over and, hence, constituted a "superseding cause").

The same is true here. For the reasons discussed above in Section I.A, plaintiff has failed to adduce sufficient evidence from which negligence and causation can be inferred. But even if her unsupported theory were accepted at face value, Hinckley's decision to leave his functioning car and fully operational radio and venture out into severe winter weather without proper clothing was dangerous, unnecessary, and not "reasonably foreseeable" (*Strobel*, 96 N.W.2d at 201) under the circumstances. CSX advises its employees to remain in their cars and to run the heater sparingly in such circumstances (R. 347) and would have expected Hinckley to radio the yard office if he had encountered any trouble reaching Seneca Yard. If, as plaintiff speculates, Hinckley left his car in response to it becoming "snowbound" on the Tift Street access road, then that inexplicable decision (perhaps the result of judgment impaired by narcotics) constitutes a superseding cause, and CSX is entitled to summary judgment on that ground (as an independent and adequate alternative to the grounds relied on by Judge Mintz).

### **III. CSX Is Entitled To Summary Judgment Under The Storm-In-Progress Doctrine.**

For purposes of resolving CSX’s motion for summary judgment, the trial court accepted plaintiff’s position that the storm was no longer ongoing as of the morning of December 30. Accordingly, this Court need not reach the issue if it affirms for the reasons stated by Judge Mintz and discussed above in Section I.A. However, for the reasons discussed below, it is undisputed that snow and gale-force winds continued through the time of Hinckley’s disappearance. Under well-settled common-law principles, applicable in FELA cases, CSX cannot be held liable for a failure to remove snow during such an ongoing storm.

#### **A. The Storm-In-Progress Doctrine Applies In FELA Cases.**

Plaintiff erroneously argues that the storm-in-progress doctrine does not apply in FELA cases. *See* Hinckley Br. 23. Plaintiff cites no support for this contention other than the general rule that state courts must apply federal substantive law in FELA cases (*see id.*); in the court below, plaintiff also relied heavily on the fact that one FELA opinion—*Barrett v. Toledo, Peoria & W. R.R. Co.*, 334 F.2d 803 (7th Cir. 1964)—does not mention the doctrine.

Plaintiff’s arguments are unpersuasive. In *Barrett*, the court began by stating that, “[i]n [its] view, no more than a sketchy outline of the evidence as to the circumstances under which plaintiff sustained his injuries [was] needed to show that the judgment [had to] be affirmed.” *Id.* at 803. In that one-paragraph “sketchy outline” of the facts, the court briefly summarized that “[f]or many hours prior and continuing almost to the time of the accident, there had been a severe snow storm,” thus indicating that the storm was over by the time of the accident. *Id.*; *see also id.* at 804 (“there had been a violent wind and snow storm \* \* \* for many hours prior to the accident”). The defendant phrased “[t]he precise question” on appeal as whether its failure to “discover the ice and remove it” was “imprudent, unreasonable and negligent” under the circum-

stances. *Id.* (quoting defendant’s brief). There is no indication in the terse, two-page opinion that the defendant relied on the storm-in-progress doctrine. *See id.*

Furthermore, although not referring to the storm-in-progress doctrine by name, the Third Circuit has applied the doctrine in substance in a FELA case. *Raudenbush v. Baltimore & Ohio R.R. Co.*, 160 F.2d 363, 367 (3d Cir. 1947) (railroad’s failure to remove snow was not negligent as a matter of law “in view of the recentness of the storm and the slight nature of the snowfall,” distinguishing cases in which large snowfalls had been “allowed to remain for extended periods of time”). Thus, even if plaintiff were correct that the storm-in-progress doctrine is not applicable by name in FELA cases, *Raudenbush* shows that federal common law under FELA would reach precisely the same result. As *Raudenbush* recognized, FELA requires employers to provide “a reasonably safe place to work”—“a term of relative application” that does not require “the absolute elimination of dangers, but the elimination of those dangers which can be removed by the exercise of reasonable care.” *Id.* During December 2001’s exceptionally severe snowstorm, CSX’s snow removal efforts (*see* pages 5-6, *supra*) easily cross the “reasonable care” threshold.

In the absence of precedent clearly rejecting or establishing the storm-in-progress doctrine, this Court should look to the common law to determine its applicability. *See generally* Part I.B.1, *supra*. As noted above, traditional “common-law principles \* \* \* are entitled to great weight” in FELA cases “unless they are expressly rejected in the text of the statute.” *Gottshall*, 512 U.S. at 544. Unlike the *Noseworthy* doctrine, the storm-in-progress doctrine is applicable in FELA cases because it is the majority common-law rule (*see, e.g., Ayers*, 538 U.S. at 150-151 & n.11, 156 n.16; *Gottshall*, 512 U.S. at 550) and, moreover, was recognized “in 1908, when FELA was enacted” (*Gottshall*, 512 U.S. at 554).

As a federal district court surveying the common law governing a business owner's duty to remove snow concluded, "[t]he majority of jurisdictions follow what New York has labeled the 'storm in progress' doctrine, where an occupier of business premises 'is afforded a reasonable time after the cessation of the storm or temperature fluctuations to correct the situation.'" *Munsill v. United States*, 14 F. Supp. 2d 214, 220 (D.R.I. 1998) (quoting *Olejniczak v. E.I. du Pont de Nemours and Co.*, 998 F. Supp. 274, 280 (W.D.N.Y. 1998)) (alteration omitted); see also Jennifer Williams, Case Note, *Budzko v. One City Center Associates Limited Partnership: Maine's Unique Approach to Business Owners' Duty to Remove Ice and Snow*, 55 ME. L. REV. 517, 519, 522-25 (2003) (storm-in-progress doctrine is followed by "[t]he majority of jurisdictions that have considered" the issue, including Rhode Island, West Virginia, Virginia, New York, Connecticut, Minnesota, Iowa, and Pennsylvania); 65A C.J.S. *Negligence* § 585 (a landowner has "a reasonable time after the cessation of the storm or temperature fluctuations that create the dangerous condition" within which to correct it). In contrast, the district court in *Munsill* could identify "only one jurisdiction, Michigan, that holds that the reasonableness of a \* \* \* failure to remove snow and ice during a storm may be a question for the jury." *Munsill*, 14 F. Supp. 2d at 221. And even in Michigan, the court was unable to locate any case actually imposing liability for failure to remove snow during a storm. *Id.* at 221 n.3; Williams, *supra*, 55 ME. L. REV. at 519 (identifying only three "states that have [imposed] unique duties \* \* \* to clear snow and ice" during an ongoing storm).

The storm-in-progress doctrine not only reflects the current majority view on the subject but also has a long history that predates FELA's enactment in 1908. For example, in 1889 the Court of Appeals held that the "failure to throw ashes or sawdust, or something of that character, upon \* \* \* steps during [a] storm cannot be regarded as negligence, because the continuance of

the storm would soon render the steps as slippery as before.” *Kelley v. Manhattan Ry. Co.*, 112 N.Y. 443, 452 (1889), *overruled on other grounds by Bethel v. N.Y. City Transit Auth.*, 92 N.Y.2d 348 (1998). The Court further explained that “culpable negligence cannot be predicated upon the failure to clean off the steps between the time the storm ceased, which was between three and four o’clock in the morning, and the time when the accident happened” because “[s]o brief a period as that, at such a time in the night, cannot \* \* \* be regarded as any evidence of a lack of that reasonable care which the defendant was bound to exercise.” *Kelley*, 112 N.Y. at 452; *accord, e.g., Palmer v. Penn. Co.*, 111 N.Y. 488, 493-94 (1888); *Rusk v. Manhattan Ry. Co.*, 46 A.D. 100, 103 (1st Dep’t 1899); *Megin v. Ramsdell*, 163 A.D. 232, 233 (2d Dep’t 1914) (“It appears without dispute that snow and sleet had fallen on the morning in question, and it had only ceased storming about an hour before the accident. \* \* \* No negligence could be predicated upon failure to remove snow or ice within an hour after it had fallen.”); *Bressler v. Rule Realty Co.*, 219 A.D. 529 (1st Dep’t 1927).

Courts in other states have also applied the doctrine for decades. *See, e.g., Goodman v. Corn Exch. Nat’l Bank & Trust Co.*, 200 A. 642, 643 (Pa. 1938) (“Where the precipitation is recent or continuous, the duty to remove such obstruction as it forms cannot be imposed \* \* \*.”); *Walker v. Mem’l Hosp.*, 45 S.E.2d 898, 902 (Va. 1948) (“The authorities are in substantial accord in support of the rule that a business establishment, landlord, carrier, or other inviter, in the absence of unusual circumstances, is permitted to await the end of the storm and a reasonable time thereafter to remove ice and snow \* \* \*.”); *Reuter v. Iowa Trust & Sav. Bank*, 57 N.W.2d 225, 227 (Iowa 1953) (same); *Mattson v. St. Luke’s Hosp. of St. Paul*, 89 N.W.2d 743, 745 (Minn. 1958) (“[I]t is the general rule that a business establishment or other inviter may \* \* \*

await the end of a freezing rain or sleetstorm and a reasonable time thereafter before removing ice and snow \* \* \*.”).

It also should be noted that several jurisdictions apply a rule that is far more protective of defendant-landowners than the storm-in-progress doctrine. Under “[t]he natural-accumulation rule,” “a landowner does not have a duty to a business invitee to remove natural accumulations of snow and ice”—“[e]ven if the snow and ice remain on the property for an ‘unreasonable’ length of time.” *Kellerman v. Car City Chevrolet-Nissan, Inc.*, 713 N.E.2d 1285, 1288 (Ill. App. Ct. 1999); *see also Munsill*, 14 F. Supp. 2d at 221 (“several courts follow \* \* \* the so-called ‘natural accumulation rule,’” under which “a business owner owes absolutely no duty to remove the natural accumulation of snow and ice during or after a snowstorm”). This rule, also known as the “Massachusetts rule,” is commonly traced to the Massachusetts Supreme Judicial Court’s 1883 ruling that, whatever the precise contours of a landlord’s duty to remove ice and snow from the common passageways and stairs of an apartment, “there was no duty on [his] part \* \* \* to remove \* \* \* the ice and snow which naturally accumulated thereon.” *Woods v. Naumkeag Steam Cotton Co.*, 134 Mass. 357, 361 (1883); *see Munsill*, 14 F. Supp. 2d at 220 (citing *Woods*). Thus, at the time of FELA’s enactment, the storm-in-progress doctrine was a relatively “progressive rule of liability that was less restrictive than” than the natural-accumulation rule, and it “would have been more consistent \* \* \* with FELA’s broad remedial goals.” *Gottshall*, 512 U.S. at 555 (citing this consideration as a basis for selecting between two common-law standards applied by courts at the time of FELA’s enactment).

In contrast to the storm-in-progress doctrine and the natural-accumulation rule, which both date back more than a century and predate FELA’s enactment, the few cases imposing “unique duties \* \* \* to clear snow and ice” during an ongoing storm were decided in 1940 (D.C.

Circuit), the 1970s and 1980s (Michigan), and 2001 (Maine). *See Williams, supra*, 55 ME. L. REV. at 518, 526-28. The absence of cases imposing such unique duties at the time of FELA’s enactment further weighs against their imposition in FELA cases today. *See, e.g., Morgan*, 486 U.S. at 337-38 & n.5.

In short, because the storm-in-progress doctrine is the majority rule and was recognized at the time of FELA’s enactment—and was the more “progressive” of the common-law tests then recognized—it should be applied in FELA cases today.

**B. Plaintiff Failed To Raise A Genuine Issue Of Material Fact As To The Storm-In-Progress Doctrine.**

**1. CSX Established That It Is Entitled To Summary Judgment Under The Storm-In-Progress Rule.**

“It is well settled that landowner is not responsible for a failure to remove snow and ice until a reasonable time has elapsed after cessation of the storm.” *Brierley v. Great Lakes Motor Corp.*, 41 A.D.3d 1159, 1160 (4th Dep’t 2007) (collecting cases; internal quotation marks and alterations omitted). Nor is the landowner under a duty to warn of such conditions during the ongoing storm. *Wheeler v. Grande’vie Senior Living Cmnty.*, 31 A.D.3d 992, 993 (3d Dep’t 2006). The storm-in-progress rule continues to apply “even if there was a lull or break in the storm around the time of the plaintiff’s accident.” *Baia v. Allright Parking Buffalo, Inc.*, 27 A.D.3d 1153 (4th Dep’t 2006) (internal quotation marks, alterations omitted); *accord, e.g., Camacho v. Garcia*, 273 A.D.2d 835, 835 (4th Dep’t 2000). Moreover, the “doctrine is not limited to situations where blizzard conditions exist; it also applies in situations where there is some type of less severe, yet still inclement, winter weather.” *Olejniczak v. E.I. du Pont de Nemours & Co.*, 79 F. Supp. 2d 209, 216 (W.D.N.Y. 1999) (holding that “extreme cold, \* \* \* high winds, and \* \* \* blowing snow combined to create an ongoing hazardous situation [that defendant] was under no duty to correct until a reasonable time after those conditions ceased”). Rather, it re-

mains in effect so long as “continuing precipitation *or high winds* are simply re-covering the [affected areas] as fast as they are cleaned, thus rendering the effort fruitless.” *Powell v. MLG Hillside Assocs.*, 290 A.D.2d 345, 345 (1st Dep’t 2002) (emphasis added); *accord Simeon v. City of New York*, 41 A.D.3d 344, 344 (1st Dep’t 2007); *see also, e.g., Boyko v. Limowski*, 223 A.D.2d 962, 963 (3d Dep’t 1996) (“the storm-in-progress doctrine ... affords landowners a reasonable time *after the cessation of a storm or temperature fluctuations which created the hazardous condition* to take corrective action”) (emphasis in original); American Meteorological Society, GLOSSARY OF METEOROLOGY 730 (Todd Glickman ed., 2d ed. 2000) (defining “storm” as “[a]ny disturbed state of the atmosphere, especially as affecting the earth’s surface, implying inclement or possibly destructive weather”), *available at* <http://amsglossary.allenpress.com/glossary/search?id=storm1> and cited as authoritative in the Affidavit and Supplemental Affidavit of Michael Cejka filed in *Raimond v. United States*, No. 02-CV-0620E(Sr) (W.D.N.Y.), *available at* 2004 WL 5534557 and 2004 WL 3680374, respectively.

The undisputed facts show that the storm-in-progress doctrine applies in this case and, therefore, that CSX “is not responsible for [the] failure to remove snow” that plaintiff alleges. *Brierley*, 41 A.D.3d at 1160. James Hamerski testified that between 6:30 A.M. and 10:00 A.M. on December 30 it was still snowing, snow was still accumulating, and conditions were worsening (*see* R. 451, 511, 515, 519). Plaintiff herself “believe[d] it was snowing” on December 30 when Hinckley left for work (R. 409). In addition, there were high winds, and visibility was poor: “It was blowing snow. \* \* \* It was bad. I mean I wouldn’t say it was a blizzard, but it was bad, low visibility.” (R. 535; *see also id.* [Hamerski had to use his windshield wipers to prevent snow from accumulating on the windshield of his truck]). Because the snow continued to blow,

“you could plow and two hours later it would blow back in.” (R. 530; *see also* R. 512 [“everything was blown in and we couldn’t do any work”]).

The foregoing facts stand undisputed and require judgment in favor of CSX under the storm-in-progress rule. First, the rule applies because it was still snowing at the time of Hinckley’s disappearance. *See, e.g., Siegel v. Molino*, 236 A.D.2d 879 (4th Dep’t 1997) (“Defendant established his entitlement to summary judgment by submitting proof that, at the time plaintiff fell, freezing drizzle was falling and a glaze of ice from that drizzle had formed on his sidewalk.”); *Coyne v. Talleyrand Partners, L.P.*, 22 A.D.3d 627, 628-29 (2d Dep’t 2005); *Dowden v. Long Island R.R. Co.*, 305 A.D.2d 631, 631 (2d Dep’t 2003); *Lyons v. Cold Brook Creek Realty Corp.*, 268 A.D.2d 659, 660 (3d Dep’t 2000); *Micheler v. Gush*, 256 A.D.2d 1051, 1052 (3d Dep’t 1998); *Zima v. N. Colonie Cent. Sch. Dist.*, 225 A.D.2d 993, 994 (3d Dep’t 1996); *Feigles v. Coastal Lumber Co.*, 32 F. Supp. 2d 109, 112-13 (W.D.N.Y. 1998). Second, even if it were not snowing at the precise time of Hinckley’s disappearance—and, to be clear, the unrefuted evidence is that it was snowing at Seneca Yard throughout the morning—that fact would be immaterial because it is also undisputed that blowing snow caused by “continuing \* \* \* **high winds** [was] simply re-covering the [affected areas at Seneca Yard] as fast as they [were] cleaned, thus rendering the effort fruitless.” *Powell*, 290 A.D.2d at 345 (emphasis added); *accord Simeon*, 41 A.D.3d at 344. This too is sufficient to bring this case within the scope of the storm-in-progress rule.

Finally, even if there remained any disputed issue of fact as to whether snow and/or heavy winds were ongoing at the precise time of Hinckley’s disappearance, any such dispute would still be insufficient to raise a **triable** or **material** issue of fact. As a matter of law, a mere “lull or break in the storm around the time of [an] accident” does not trigger any obligation on

the part of the landowner to remove snow or ice from its property. *Camacho*, 273 A.D.2d at 835. Moreover, a landowner also has “a reasonable time \* \* \* *after* cessation of the storm” in order to begin removing snow and ice. *Brierley*, 41 A.D.3d at 1160 (emphasis added); *accord, e.g., Walker*, 45 S.E.2d at 902 (“end of the storm and a reasonable time thereafter”); *Reuter*, 57 N.W.2d at 227 (same); *Mattson*, 89 N.W.2d at 745 (same); *Munsill*, 14 F. Supp. 2d at 221; *see also, e.g., Convertini v. Stewart’s Ice Cream Co.*, 295 A.D.2d 782, 783 (3d Dep’t 2002) (storm-in-progress rule applied because accident occurred “a mere 20 minutes after the freezing precipitation ceased”); *Ioele v. Wal-Mart Stores Inc.*, 290 A.D.2d 614, 616 (3d Dep’t 2002) (a “three-hour lull” between an initial snowfall of seven-tenths of an inch and a second snowfall of three-tenths of an inch “do[es] not amount to a cessation of the storm which would impose the duty on a defendant to clear snow and ice”). Thus, given the undisputed evidence of conditions at Seneca Yard throughout the morning of December 30th, plaintiff’s (unsupported) arguments amount to, at most, an assertion that there was some sort of “lull or break” in the storm or that the storm had very recently ceased. Either claim—even if plaintiff were able to support it with evidence—is insufficient to create a triable issue of fact under the storm-in-progress rule.

## **2. The Meteorologist’s Affidavit Confirms The Applicability Of The Storm-In-Progress Doctrine.**

In an attempt to create an issue of fact under the storm-in-progress doctrine, plaintiff submitted an affidavit from broadcast meteorologist Michael Cejka (R. 471). Cejka’s affidavit raises no issue of material fact. Indeed, the affidavit *confirms* that CSX is entitled to summary judgment.

To begin with, as this Court has held in two recent cases involving affidavits submitted by meteorologists, because Cejka “failed \* \* \* to attach to his affidavit copies of the records upon which he relied in forming his opinion, \* \* \* his affidavit has no probative value.” *Daniels*

*v. Myers*, 50 A.D.3d 1613, 1614 (4th Dep’t 2008); accord *Schuster v. Dukarm*, 38 A.D.3d 1358, 1358 (4th Dep’t 2007); *Werny v. Roberts Plywood Co.*, 40 A.D.3d 977, 978 (2d Dep’t 2007). This rule applies even if, as in this case (*see* R. 472, ¶¶ 4-5), the meteorologist identifies the National Weather Service records on which he relies. *See Schuster*, 38 A.D.3d at 1360 (Hurlbutt and Smith, JJ., dissenting).

The Cejka affidavit also fails to raise a triable issue of fact because it does nothing to “contradict [CSX’s] affirmative proof that it was snowing at the time [Hinckley disappeared].” *Martin v. Wagner*, 30 A.D.3d 733, 735 (3d Dep’t 2006) (emphasis in original). The bulk of the Cejka affidavit simply summarizes conditions at the Buffalo-Niagara International Airport, a location *more than nine miles* from the site of the accident (and inland from Lake Erie) (*see* R. 472-75, ¶¶ 6-14). Cejka’s summary of the weather at the airport simply does not raise a triable issue of fact because it does not contradict the unrefuted sworn testimony that it was snowing at Seneca Yard, that snow was accumulating at Seneca Yard, and that sustained high winds were negating CSX’s snow removal efforts *at Seneca Yard*. *Cf. Parker v. Rust Plant Servs., Inc.*, 9 A.D.3d 671, 673 (3d Dep’t 2004) (meteorologist’s affidavit did not create a triable issue of fact because it neither “specifically address[ed] the exact location where plaintiff fell nor directly refute[d] the notion that plaintiff fell due to conditions created by the storm in progress”).

But in any event, Cejka’s affidavit ultimately confirms the applicability of the storm-in-progress rule. When, in the next-to-last paragraph of his affidavit, Cejka finally reports the weather conditions at the observation point nearest to the accident site—the Buffalo U.S. Coast Guard Station, just two miles from Seneca Yard (*see* R. 472, ¶ 6)—he is obliged to acknowledge that “[o]n December 30, 2001, snow flurries were observed at 9:00 AM, 11:00 AM, 1:00 PM, and 3:00 PM[,] and there [were] frequent wind gusts between 44-46 mph” (R. 475, ¶ 15)—*i.e.*,

***gale-force*** winds (*see* GLOSSARY OF METEOROLOGY, *supra*, at 326, *available at* <http://ams.glossary.allenpress.com/glossary/browse?s=G&p=1> [defining a gale as a wind of 32-63 mph]). As noted above, such continuing “snow flurries” and “frequent wind gusts” easily bring this case within the storm-in-progress rule because the doctrine applies when “continuing \* \* \* ***high winds*** are simply re-covering the [affected areas] as fast as they are cleaned, thus rendering the effort fruitless,” and during “temporary lull[s] or break[s] in the storm.” *Powell*, 290 A.D.2d at 345 (emphasis added); *see also Kelley*, 112 N.Y. at 452 (where a storm ceased between 3:00 A.M. and 4:00 A.M. and an accident occurred between 5:30 A.M. and 6:00 A.M., “[s]o brief a period as that, at such a time in the night, cannot \* \* \* be regarded as any evidence of a lack of \* \* \* reasonable care”).

In short, CSX established its entitlement to summary judgment under the storm-in-progress rule through direct, unrefuted testimony that it was snowing and that high winds were negating all efforts to remove snow at Seneca Yard on December 30. Plaintiff’s evidence—including her own testimony that she “believe[d] it was snowing” when Hinckley left for work on December 30 and a meteorologist’s confirmation that, just two miles away from the accident site, “snow flurries” and “frequent” gale-force winds continued on the 30th—*confirms* CSX’s evidence.

#### **IV. CSX Was Under No “Duty To Warn” Hinckley Because Hinckley Called Off Of Work And Because Weather Conditions Were Readily Observable.**

As noted above, between 7:00 A.M. and 8:00 A.M. on December 30, Hinckley called Hamerski to tell him that he would be unable to make it into work due to the weather (R. 520-21; *see also* R. 259-60 [if employees were unable to show up for work, “they were to notify either the men who were working at that time[] or \* \* \* the yardmaster”]). Hamerski relayed this in-

formation to Mike Work, the only other CSX employee who showed up for work in Seneca Yard that day (R. 522).

Plaintiff questions Hamerski's credibility on the ground that Hamerski stated at his deposition that he "believe[d]" that the day that Hinckley called off of work "was a Saturday" (R. 505), which would have been the 29th, not the 30th. *See* Hinckley Br. 28. However, Hamerski's misstatement as to the day of the week does not create any triable issue of fact. First, the evidence is undisputed that Hinckley *did* come to work and worked a full shift on the 29th. (R. 251, 258, 543). Second, Hamerski was clear that his conversation with Hinckley took place on the same day as his phone calls to Thoman about snow accumulations at Seneca Yard (*see* R. 451, 519-22); as plaintiff herself emphasizes, it is undisputed that the phone calls between Hamerski and Thoman occurred on the 30th (*see, e.g.*, R. 399; Hinckley Br. 19). Thus, Hamerski was clear that Hinckley called off of work on the day of his disappearance; Hamerski's unremarkable misstatement, five years after the fact, that the day in question was a Saturday rather than a Sunday does not create a triable issue of fact. Indeed, plaintiff herself made the same mistake at her own deposition (R. 407-08 [plaintiff testified that she last saw Hinckley alive on "[t]he morning of December 30th" and that December 30 was a Saturday]).

Plaintiff also relies on her belief that Hinckley intended to go to work when he left home at 6:30 A.M. (*see* R. 407-08) and the fact that Hinckley's call to Hamerski apparently did not come from his home phone or his cell phone (*see* Hinckley Br. 6-7). However, neither plaintiff's belief as to Hinckley's intentions nor the phone records for Seneca Yard contradict Hamerski's testimony that he spoke with Hinckley between 7:00 A.M. and 8:00 A.M. that morning (R. 520-21). Indeed, given that plaintiff herself testified that Hinckley left his cell phone at home that morning at 6:30 A.M. (R. 410), there would be no reason to expect a record of a call from his

cell number or his home number to Seneca Yard between 7:00 A.M. and 8:00 A.M. Plaintiff cannot avoid summary judgment simply by suggesting that the jury might disbelieve Hamerski without adducing facts that actually contradict his testimony. *See, e.g., S. J. Capelin Assocs., Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341-42 (1974); *Batista v. Rivera*, 5 A.D.3d 308, 309 (1st Dep’t 2004); *see also, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (“without offering any concrete evidence,” a plaintiff cannot avoid summary judgment “by merely asserting that the jury might, and legally could, disbelieve the defendant’s” testimony); *Bachrach v. Farbenfabriken Bayer AG*, 42 A.D.2d 514, 515 (1st Dep’t 1973).

Because Hamerski’s testimony that Hinckley called off of work stands un rebutted, it necessarily follows that CSX was under no duty to warn Hinckley of conditions at Seneca Yard. Put simply, CSX had no duty to warn Hinckley of conditions that it had no reason to believe he would encounter. *See, e.g., Zarecki v. Nat’l R.R. Passenger Corp.*, 914 F. Supp. 1566, 1575 (N.D. Ill. 1996) (“Absent foreseeability, there can be no duty to warn” under FELA.).

Furthermore, “it is well established that there is no duty to warn of a hazard that is readily observable by the use of one’s own senses.” *Cramer v. County of Erie*, 23 A.D.3d 1145, 1146 (4th Dep’t 2005) (collecting cases). This principle applies in FELA cases as well. *See, e.g., Crawford v. Norfolk & W. Ry. Co.*, 901 S.W.2d 252, 254-55 (Mo. Ct. App. 1995); *MacPherson v. Boston & Maine Corp.*, 439 F.2d 1089, 1091 n.3 (1st Cir. 1971); *N. Pac. Ry. Co. v. Mely*, 219 F.2d 199, 203 (9th Cir. 1954). A seven-foot snowfall that brought work at Seneca Yard to a complete halt and prompted the city to issue a driving ban certainly fits the description of conditions “readily observable by the use of one’s own senses.”

Accordingly, with respect to Hinckley’s “duty to warn” theory of negligence, Judge Mintz’s order granting CSX’s motion for summary judgment may be affirmed on the alternative

grounds that Hinckley notified CSX that he was not coming to work on December 30 and/or that any snow accumulation on the Tifft Street access road constituted a readily observable condition. It is important to note that Judge Mintz did not rely on either of these grounds in granting CSX's motion. Rather, he ruled that any dispute as to whether Hinckley called Hamerski was not "material" because plaintiff failed to present any evidence that the Tifft Street access road was "unplowed at the time [Hinckley] drove into it" or "that any lack of plowing was the proximate cause of [Hinckley's] death" (R. 17-18). In other words, because plaintiff failed to prove that any dangerous condition existed or caused Hinckley's death, whether CSX would have been under an obligation to warn him of such conditions was irrelevant. Thus, this Court need not address these issues if it affirms on the grounds relied on by the trial court, as it should for the reasons discussed above in Section I.A.

In addition, plaintiff's attempt to transform Hamerski's un rebutted testimony that Hinckley called off of work into a triable issue of fact as to Hinckley's status as an "employee" on the day of his disappearance (*see* Hinckley Br. 25-28) is also unavailing. In her brief, plaintiff states that CSX moved for summary judgment on the ground that Hinckley was not an "employee" for purposes of FELA at the time of his disappearance. *See* Hinckley Br. 26 (citing R. 35). Plaintiff's characterization of CSX's position is inaccurate. CSX cited Hamerski's testimony for the points discussed in this section of the brief: that CSX had no reason to warn Hinckley of conditions at the yard once Hinckley told them that he was not coming to work, and that the snow accumulations in Buffalo were readily observable (*see* R. 35). Unsurprisingly given the absence of any argument that Hinckley wasn't an employee, Judge Mintz assumed that he was in granting the motion for summary judgment. In short, plaintiffs' argument now that there was a dispute as to whether Hinckley was an employee is a red herring.

Finally, plaintiff’s argument that Hinckley’s phone call to Hamerski presents a triable issue of fact because she might pursue a “common-law theory of negligence” against CSX if Hinckley was not an “employee” at the time of his disappearance (*see* Hinckley Br. 25, 28) ignores that such claims would fail for precisely the same reasons as her FELA claim—namely, a lack of evidence of negligence and/or causation, Hinckley’s own actions as a superseding cause, and the storm-in-progress doctrine. Just like FELA claims, common-law negligence claims require proof of negligence, foreseeability, and proximate causation. *See, e.g., Di Ponzio v. Riordan*, 224 A.D.2d 139, 141-46 (4th Dep’t 1996). Plaintiff would gain nothing by converting her FELA claim into a common-law negligence claim. Indeed, that would put an end to her argument that the storm-in-progress doctrine does not apply to this case.

### **CONCLUSION**

The judgment of the trial court should be affirmed.

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