

09-2548

United States Court of Appeals for the Second Circuit

ARTHUR J. LYMAN,

Plaintiff-Appellant,

v.

CSX TRANSPORTATION, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of New York
No. 1:07-CV-1255 (Hon. David N. Hurd)

**BRIEF FOR DEFENDANT-APPELLEE
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CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee CSX Transportation, Inc. has a parent company, CSX Corporation, which is publicly traded. No other publicly held company owns more than 10 percent of Defendant-Appellee's stock.

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STATEMENT OF THE ISSUES

Plaintiff-Appellant Arthur J. Lyman sued his employer, Defendant-Appellee CSX Transportation, Inc. (“CSXT”), for injuries allegedly sustained when he bumped his knee on a plastic license-plate holder fastened to the front of a vehicle he was unloading from a railcar. Lyman sought relief under the Federal Employers’ Liability Act, 45 U.S.C. §§ 51-60 (“FELA” or “Act”), alleging that CSXT was negligent in failing to warn him of the presence of the license-plate holder. The district court granted summary judgment to CSXT. The questions presented are:

1. Whether the district court correctly granted summary judgment on Lyman’s failure-to-warn claim on the ground that he failed to produce sufficient evidence to create an issue of fact on either the element of negligence or the element of causation.

2. Whether the district court correctly granted summary judgment on Lyman’s other claims on the grounds that he raised the claims for the first time in opposition to summary judgment and in any event failed to produce sufficient evidence to create an issue of fact on either the element of negligence or the element of causation.

3. Whether the district court granted summary judgment without relying on any principle of assumption of risk or contributory negligence.

STATEMENT OF THE CASE

On December 3, 2007, Lyman filed this FELA action in the United States District Court for the Northern District of New York. JA 19-22. On April 16, 2009, CSXT moved for summary judgment. JA 10-11. On May 22, 2009, the district court granted the motion and dismissed the case. JA 6-7, 262-79. On June 12, 2009, Lyman filed a notice of appeal. JA 8.

STATEMENT OF FACTS

A. Statutory Background

FELA establishes a compensation scheme for injuries sustained by railroad employees in the workplace. The Act provides for concurrent jurisdiction of state and federal courts, 45 U.S.C. § 56, but substantively FELA actions are governed by federal law, *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 165 (2007). State-law remedies are preempted. *Id.*

Unlike workers' compensation laws, which typically provide relief without regard to fault, FELA requires an injured railroad employee to prove negligence. Section 1 of FELA provides:

Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

45 U.S.C. § 51.

The two basic elements of a FELA cause of action are thus “(1) negligence, i.e., [breach of the duty] of care, and (2) causation, i.e., the relation of the negligence to the injury.” *Sorrell*, 549 U.S. at 169 (internal quotation marks omitted). An “essential ingredient” of negligence, in turn, is foreseeability. *Gallick v. Balt. & O. R.R.*, 372 U.S. 108, 117 (1963). In a FELA action, therefore, “the plaintiff must prove the traditional common law elements of negligence: duty, breach, foreseeability, and causation.” *Tufariello v. Long Island R.R.*, 458 F.3d 80, 87 (2d Cir. 2006). FELA does abolish, however, two affirmative defenses that were available at common law: contributory negligence and assumption of risk. 45 U.S.C. §§ 53, 54.

B. Factual Background

1. Lyman began working for CSXT in April 2000. JA 36-38. In the seven years prior to the incident at issue, Lyman primarily worked as a stevedore at the Selkirk auto terminal in Albany, New York. In

this position, Lyman was responsible for loading and unloading automobiles that had been transported by rail. JA 37-38.

To prevent movement during transport, automobiles are secured inside railcars using canvas straps and “chocks.” The chocks are placed both behind and in front of the two tires on either the passenger’s or driver’s side of the vehicle, and the two chocks for each tire are connected with a strap. JA 71, 75. Before an automobile can be unloaded from the railcar, therefore, a stevedore must release the straps and remove the chocks. JA 68-76.

The space within which the stevedores can maneuver to perform these tasks is necessarily limited. Stevedores often cannot stand fully upright when unloading cars from the lower deck of the railcar. JA 90-91. In a railcar like the one at issue here, moreover, there are approximately ten to twelve inches of space between the automobiles and the side walls of the railcar, and approximately five to six inches of space between the front and rear bumpers of the automobiles themselves. JA 90-92.

2. On the morning of January 22, 2007, Lyman began his day of work at the Selkirk yard. His three-man crew was responsible for

unloading seven tri-level railcars, each carrying either Nissan or Honda automobiles. JA 50-51, 60-62. As the worker with the least seniority on his crew, Lyman was assigned the “A deck,” the lowest level of a tri-level railcar. JA 64-65.

At approximately 9:00 a.m., Lyman began to unshackle a Nissan automobile identified as unit “A5”—the fifth vehicle on the A deck. JA 81, 97-98. The automobile had been tightly secured with straps and chocks on the passenger’s side. JA 81, 83. When Lyman released the tension in the strap over the rear tire, the vehicle rolled slightly forward until it was stopped by the chock in front of the tire—a distance of approximately half an inch. JA 81, 89. Lyman removed the rear chock, but with the tire pressing against it, he could not remove the front chock easily. JA 84.

When Lyman went to remove the strap on the front tire, the same thing happened: he released the strap, and the car shifted approximately half an inch forward onto the chock in front of the tire. JA 87-88. As a consequence, Lyman was able to remove the rear chock but not the front one. JA 87.

In order to release the remaining chocks, Lyman decided to get in the car, start it, and back it up a few inches. JA 156. To do so, he needed to move from the passenger's side to the driver's side. *Id.* Rather than cross in the open area at the front or the back of the railcar, however, Lyman looked at the space between the A5 vehicle and the A4 vehicle in front of it, estimated that there was "quite enough" space through which he could pass his legs, and scooted between the two vehicles. JA 91-92. In the process, he struck his knee on a plastic license-plate holder that was affixed to the front of the A5 unit. JA 91-92, 99.

Immediately after bumping his knee, Lyman let out a yell, paused, and then returned to work. JA 120. A few minutes later he showed a co-worker his knee, which was red but not cut or bleeding—"[m]aybe just a contusion to the skin, * * * [n]o bruise, nothing." JA 108, 121.

3. About an hour later, after experiencing pain climbing ladders, Lyman reported his injury to a supervisor. JA 124-25. He then sought medical attention at a hospital, where physicians performed a physical examination, took an x-ray, and ultimately prescribed him ibuprofen. JA 126.

Lyman followed up with another physician, who gave him a knee brace and told him to stop working for seven days. JA 128. At the end of that period, the physician released him from treatment, stating that he “didn’t see any physical reason why [Lyman] had pain.” JA 131. Lyman then visited an orthopedic doctor recommended by his attorney’s office. JA 132. An MRI showed no damage to his knee, and the orthopedist prescribed him physical therapy. JA 132-34.

Lyman returned to work in May 2007, approximately four months after the accident. JA 135.

C. Proceedings In The District Court

On December 3, 2007, Lyman filed this action against CSXT, asserting a boilerplate negligence claim under FELA. JA 19-22. CSXT subsequently served Lyman with interrogatories, several of which requested that he specify his claims. The only basis for negligence that Lyman identified in response to the interrogatories was CSXT’s alleged failure to “warn its employees of the dangerous condition created by the existence of license plate brackets on cars loaded on autorack rail cars.” JA 156.

After the close of discovery, CSXT moved for summary judgment, contending that it had no duty to warn its employees of the existence of license-plate holders on vehicles, that the failure to warn did not cause Lyman's injury, and that the injury was not reasonably foreseeable. JA 10-18, 175-91. Lyman opposed the motion on the ground that CSXT should have warned him about the presence of license-plate holders on the vehicle in question. JA 208. He also asserted two new theories of negligence: (1) CSXT's alleged failure to institute "policies and procedures" to prevent the over-tightening of chocks; and (2) CSXT's alleged failure to provide more lighting in the railcar. JA 208-09.

On May 22, 2009, the district court granted CSXT's motion for summary judgment. JA 6-7, 274-78. With respect to "the basic allegations," the district court ruled that Lyman had "failed to establish that there was any duty to warn about license plate holders" and that, in any event, the failure to warn "could not be considered a proximate cause of th[e] accident." JA 277-78. With respect to the allegations of over-tightening and inadequate lighting, the court ruled that they "need not be considered," because the allegations had been "first brought up in response to the summary judgment motion." JA 277. In the alterna-

tive, the court ruled that CSXT was entitled to summary judgment on those allegations because Lyman could not establish either negligence or causation. JA 277.

SUMMARY OF ARGUMENT

The district court correctly granted summary judgment to CSXT.

A. The court correctly granted summary judgment on Lyman's failure-to-warn claim because Lyman cannot prove foreseeability, an essential element of a FELA claim. There is no evidence that would support a finding that CSXT knew or should have known either that the Nissan vehicle at issue had a front license-plate holder or that license-plate holders in general were likely to cause injury. Lyman himself, an experienced stevedore, testified that he had never seen a front license-plate holder on a new Nissan and that he was unaware of anyone who had been injured by a license-plate holder before.

Summary judgment was also required on Lyman's failure-to-warn claim for two other, independent, reasons. First, CSXT had no duty to warn its employees about an open and obvious fixture common to many vehicles. Second, Lyman's accident was caused, not by any act or omission on the part of CSXT, but by his own decision to squeeze his body

through the narrow space between vehicles rather than walk around to the front or back of the railcar.

B. The district court correctly granted summary judgment on Lyman's other claims because they were not timely raised. Lyman did not raise his allegations concerning over-restraint of the vehicle or inadequate lighting in the railcar until he filed his opposition to summary judgment, after discovery had closed. Until that point, Lyman's sole theory of negligence was that CSXT should have warned him about the presence of the license-plate holder, and thus CSXT had no reason to develop evidence on any other claim. Under these circumstances, the district court acted well within its discretion in finding that the new claims had been forfeited.

The district court was also correct in its alternative ruling that Lyman did not adduce sufficient evidence to make out a *prima facie* case on his new claims. First, there is no evidence to support a finding either that CSXT knew or should have known that the alleged over-restraining of vehicles could lead to injury or that CSXT failed to exercise due care in addressing the issue of over-tightening. Second, there is no evidence, apart from a conclusory assertion in Lyman's deposition,

that the lighting in the railcar was in fact inadequate, and Lyman backed away even from that assertion. Third, Lyman's accident was caused, not by CSXT's negligence, but by his own decision to walk through a narrow space. For these reasons, Lyman cannot prove either negligence or causation.

C. Contrary to Lyman's assertion, the district court did not rely on any principle of assumption of risk or contributory negligence—two common-law defenses abrogated by FELA—in dismissing Lyman's complaint. The court granted summary judgment to CSXT because it concluded, correctly, that Lyman could not establish the elements of a FELA cause of action—negligence and causation—for any of his claims and because two of his three claims were not timely raised.

STANDARD OF REVIEW

A district court must grant summary judgment “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). Summary judgment is thus required when a party “fails to make a showing sufficient to establish the existence of an element essential to

that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). This Court reviews a grant of summary judgment *de novo*, *Caiozzo v. Koreman*, 581 F.3d 63, 68 (2d Cir. 2009), and reviews a district court's refusal to consider claims raised for the first time in opposition to summary judgment for abuse of discretion, *Greenidge v. Allstate Ins. Co.*, 446 F.3d 356, 361 (2d Cir. 2006).

ARGUMENT

THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO CSXT

While unloading automobiles from a railcar, Lyman bumped his knee on a plastic license-plate holder affixed to the front bumper of one of the vehicles. He filed suit against CSXT, alleging that it had breached its duty to warn him about the license-plate holder. The district court granted summary judgment to CSXT on that claim, concluding that Lyman could not make out a *prima facie* case of negligence. As we explain in Point A below, the district court correctly granted summary judgment on Lyman's failure-to-warn claim.

For the first time in his brief in opposition to CSXT's motion for summary judgment, Lyman raised two new claims for relief: that CSXT

was negligent in failing to prevent the over-tightening of chocks that held the vehicles in place; and that CSXT was negligent in failing to provide more lighting in the railcar. The district court granted summary judgment to CSXT on those claims as well, concluding that they were not properly before the court and that, in any event, Lyman could not make out a *prima facie* case of negligence. As we explain in Point B below, the district court correctly granted summary judgment on Lyman's other claims.

On appeal, Lyman asserts that the judgment below must be reversed because, in granting summary judgment to CSXT, the district court relied on two doctrines abolished by FELA: assumption of risk and contributory negligence. As we explain in Point C below, that assertion is mistaken; the court did not rely on either doctrine.

A. The District Court Correctly Granted Summary Judgment On Lyman's Failure-To-Warn Claim

FELA is neither "a workers' compensation statute" nor "an insurance statute," *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543, 554 (1994), and does not impose "strict liability for workplace injuries," *Sinclair v. Long Island R.R.*, 985 F.2d 74, 77 (2d Cir. 1993). An employee may recover under the Act only for injuries "resulting in whole or in

part from the *negligence* of * * * [the] carrier.” 45 U.S.C. § 51 (emphasis added). That means that a railroad is not liable unless the plaintiff proves both “(1) negligence, i.e., [breach of the duty] of care, and (2) causation, i.e., the relation of the negligence to the injury.” *Sorrell*, 549 U.S. at 169 (internal quotation marks omitted).

As far as his duty-to-warn claim is concerned, Lyman can prove neither. He cannot show that CSXT was negligent in not warning its employees that vehicles might come equipped with front license-plate holders, and he cannot show that the alleged negligence was the cause of his injury. For these two independent reasons, the district court correctly granted summary judgment to CSXT.*

* This Court has said that “the plaintiff’s burden in making a showing of causation and negligence is lighter under FELA than it would be at common law.” *Tufariello v. Long Island R.R.*, 458 F.3d 80, 87 (2d Cir. 2006). But many courts have concluded otherwise. *See, e.g., Sorrell*, 549 U.S. at 173 n.* (Souter, J., joined by Scalia and Alito, JJ., concurring) (citing causation cases); *Williams v. Long Island R.R.*, 196 F.3d 402, 406 (2d Cir. 1999) (observing that “some circuits * * * apply traditional standards to the duty of care owed”). The decisions holding that FELA incorporates common-law principles of negligence and causation are correct, particularly in light of the Supreme Court’s recent decision in *Sorrell*. That case confirms that the elements of a FELA claim are determined “by reference to the common law” unless the Act includes “express language to the contrary,” 549 U.S. at 165-66, and there is no language—much less *express* language—in FELA that abrogates the common-law standards of negligence and causation, *see, e.g., Sorrell*,

1. Lyman Cannot Prove Negligence

A railroad is negligent under FELA when it breaches a duty to protect against a foreseeable risk. The components of the element of negligence are thus “duty, breach, [and] foreseeability.” *Tufariello*, 458 F.3d at 87. Lyman cannot establish that CSXT was negligent because he cannot prove either (a) that his injury was foreseeable or (b) that CSXT had a duty to warn.

a. Lyman cannot prove that his injury was foreseeable to CSXT

(1) “Reasonable care is determined in light of whether or not a particular danger was foreseeable,” *Syverson v. Consol. Rail Corp.*, 19 F.3d 824, 826 (2d Cir. 1994), and thus “reasonable foreseeability of harm is an essential ingredient of [FELA] negligence,” *Gallick*, 372 U.S. at 117. A FELA plaintiff must therefore prove that the railroad “knows

549 U.S. at 174 (Souter, J., concurring) (FELA “said nothing” to suggest a relaxed standard of causation); *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 338 (5th Cir. 1997) (en banc) (“nothing in the text” of FELA suggests a relaxed standard of negligence”). This Court need not agree with CSXT on this point to affirm the district court’s grant of summary judgment, however, because Lyman has not offered sufficient evidence to create a triable issue under *any* standard of negligence or causation.

or should know of a potential hazard in the workplace, yet fails to exercise reasonable care to inform and protect its employees.” *Sinclair*, 985 F.2d at 76 (internal quotation marks omitted). As this Court has put it, “[t]he catalyst which ignites th[e] duty [of care] is knowledge, either actual or constructive.” *Gallose v. Long Island R.R.*, 878 F.2d 80, 85 (2d Cir. 1989). Lyman cannot establish either.

Lyman cannot prove that CSXT had actual knowledge of the presence of the license-plate holder in question. The record contains no evidence that anyone had ever notified CSXT of the presence of license-plate holders on the new Nissan vehicles it was transporting. Nor is there evidence that employees had complained about any difficulties caused by front license-plate holders in general.

Lyman also cannot prove that CSXT had *constructive* knowledge of the presence of the license-plate holder. Lyman himself testified that, on the hundreds of occasions he unloaded new Nissan vehicles, he had never before seen a front license-plate holder, and that its presence was “unusual” and unexpected. JA 119, 156-57, 207. Nothing in the record suggests that CSXT had any reason to expect the presence of a license-plate holder that its own stevedore, who had unloaded hundreds

of automobiles in his years working for CSXT, had not foreseen. Nor does anything in the record suggest that CSXT should have known that the presence of a license-plate holder would have been likely to cause injury. On the contrary, Lyman himself testified that he was unaware of anyone who had been injured by a license-plate holder before. JA 137.

(2) This case is very much like *Van Gorder v. Grand Trunk Western Railroad*, 509 F.3d 265 (6th Cir. 2007), *cert. denied*, 129 S. Ct. 489 (2008), in which the FELA plaintiff sought to recover for an injury caused by a defective door on a railcar. The district court granted summary judgment to the railroad, and the Sixth Circuit affirmed. The basis for the court of appeals' decision was that the plaintiff himself "testified that he had never encountered a door with a defect like the one in question"; "agreed that the door in question was unusual"; and "presented no evidence that [the railroad] knew or had reason to know of the particular defect in the door or that such a defect would cause the injury." 509 F.3d at 271.

For similar reasons, this case is very much *unlike* *Ulfik v. Metro-North Commuter Railroad*, 77 F.3d 54 (2d Cir. 1996), on which Lyman

relies (Br. 19-20). In that case, the plaintiff alleged that the railroad was negligent in failing to warn employees about or protect them from paint fumes. The plaintiff in *Ulfik* presented evidence that the railroad knew that paint was being sprayed in the underground railroad tunnels. 77 F.3d at 58. He also presented evidence that, prior to the incident at issue, at least two other employees had been exposed to paint fumes and become ill, and that the railroad had actual knowledge of their illnesses. *Id.* This evidence, the Court held, was sufficient to survive a motion for summary judgment on the question of foreseeability, even if the railroad may not have known that the paint was in fact toxic. Here, by contrast, Lyman not only failed to adduce evidence that CSXT knew that the license-plate holder was dangerous, he failed to present any evidence that the railroad either was or should have been aware that the vehicle in question was even *outfitted* with a front license-plate holder.

Lyman's reliance (Br. 20-21) on *Syverson v. Consolidated Rail Corp.*, 19 F.3d 824 (2d Cir. 1994), is equally misplaced. There the plaintiff presented evidence that the railroad had actual knowledge that the "weeds" area surrounding its yard was "a magnet for vagrants, many of

whom were alcoholics or drug addicts.” *Id.* at 827. He also presented evidence that railroad officials had ignored police officers who voiced concerns to them about the safety of the yard. *Id.* On this evidence, the Court held, a reasonable jury could find that the plaintiff’s injury, which resulted from an attack by a trespasser in the yard, was foreseeable. *Id.* at 827-28. No comparable evidence exists here. Lyman’s own testimony was that the new Nissans transported by the railroad typically did not have front license-plate holders, and he offered no evidence that CSXT was otherwise made aware of their existence before his accident.

(3) Relying on *Gadsden v. Port Authority Trans-Hudson Corp.*, 140 F.3d 207 (2d Cir. 1998), Lyman contends that a reasonable jury could find CSXT liable because the railroad has a basic duty to inspect its workplace for dangerous conditions. Br. 18, 25. But *Gadsden* specifically distinguished the circumstances of that case, which involved the lack of additional handholds and footboards on the outside of a vehicle “in plain view,” from the very different circumstance of a case involving a “hidden defect.” 140 F.3d at 209. Although the license-plate holder was open and obvious from the perspective of Lyman, who had the opportunity to look at the front of the A5 vehicle, from CSXT’s perspective

the holder was unique, unexpected, and not at all in plain view. In such circumstances, Lyman must provide evidence that CSXT either knew or should have known of the allegedly dangerous condition and failed to warn him. He has not done so. *Cf. O'Hara v. Long Island R.R.*, 665 F.2d 8, 9-10 (2d Cir. 1981) (per curiam) (affirming grant of summary judgment for railroad in FELA case where employee tripped over loose or missing tile because plaintiff offered no evidence that railroad had notice of defect).

Although the railroad has a basic duty to inspect its employees' workplaces, moreover, that duty is limited to *reasonable* inspections. *See Haas v. Delaware & Hudson Ry.*, 282 F. App'x 84, 88 (2d Cir. 2008) (summary order) (affirming summary judgment because plaintiff did not demonstrate that railroad failed to exercise reasonable care in inspecting work spaces). Not only has Lyman failed to demonstrate that the license-plate holder should have been discovered on a reasonable inspection of the railcar, he also has offered no evidence or reason to believe that, even if discovered, the license-plate holder would have been identified as a dangerous condition. Lyman admitted that the holder itself was not defective, JA 107, and any danger created by a plastic li-

license-plate holder, a common fixture on automobiles, is not otherwise apparent. *See, e.g., Deans v. CSX Transp., Inc.*, 152 F.3d 326, 330 (4th Cir. 1998) (affirming summary judgment because, even when post-accident inspection revealed that equipment had been defective, plaintiff “introduced no evidence to show that an earlier inspection would have revealed or cured the problem * * * or that the railroad had notice of the defect prior to the accident,” and because “any suggestion that CSX was negligent rests on mere speculation and conjecture”); *Puthe v. Exxon Shipping Co.*, 2 F.3d 480, 483 (2d Cir. 1993) (affirming dismissal of Jones Act claim because plaintiff failed to show that risk was foreseeable and noting that allegations involved “seemingly common occurrences for seamen”).

Indeed, Lyman has offered no evidence that instituting a system to track license-plate holders (as he suggested to the district court at oral argument, JA 273) or performing a license-plate inspection prior to unloading cargo from the railcars (as he suggested in his opening brief here, Br. 25) would be at all reasonable. *Cf. Van Gorder*, 509 F.3d at 270 (affirming grant of summary judgment because plaintiff “fails to point to any standard of care to which [the railroad] failed to conform

and * * * does not explain what kind of inspection would have been reasonable”). Surely a railroad cannot be expected to open each railcar and inspect each item of cargo before allowing its employees to unload it, on the off chance that there will be something slightly different from previous cargo loads about which it might warn its employees. As the district court asked at oral argument, “What was the company supposed to do?” JA 271. Lyman has been unable to answer that question.

b. Lyman cannot prove that CSXT had a duty to warn

Even if Lyman *did* adduce sufficient evidence to survive summary judgment on the issue of foreseeability, the district court correctly granted summary judgment because CSXT had no duty to issue a warning about the license-plate holder.

(1) Although the presence of the unexpected license-plate holder was not apparent to CSXT, it was an open and obvious condition from the perspective of Lyman, an experienced stevedore who had worked with other vehicles equipped with front license-plate holders and had an opportunity to view the license-plate holder on the front of the vehicle he was unshackling. JA 99-100. “A possessor of land is not liable to his invitees for physical harm caused to them by any activity or con-

dition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.” Restatement (Second) of Torts § 343A(1) (1965); *accord, e.g., Ellis v. Chase Commc’ns, Inc.*, 63 F.3d 473, 476 (6th Cir. 1995) (“an owner is not subject to liability for failure to warn or protect * * * against obvious, apparent, or known dangers”). This is particularly true in circumstances like those here, where the employee has a better opportunity than the employer to view and evaluate the potential danger. *See Meyers v. M/V Eugenio C*, 919 F.2d 1070, 1073 (5th Cir. 1990) (ship owner was entitled to summary judgment on ground that he had no duty to warn where allegedly dangerous condition was open and obvious and person asserting duty to warn was in better position to appreciate danger).

CSXT had no reason to believe that a non-defective license-plate holder—an open and obvious fixture common to many vehicles—would be a dangerous condition to its auto-yard employees, who were experienced in working with various types of vehicles. Indeed, Lyman testified that he had unloaded several types of vehicles equipped with front license-plate holders during his time with CSXT, JA 118-19, and that

his own vehicle had a front license-plate holder, JA 100. That Lyman allegedly did not notice the license-plate holder in this case cannot make CSXT negligent for failing to warn him about it. *Cf. Shatzkin v. Vill. of Croton-on-Hudson*, 858 N.Y.S.2d 362 (2d Dept. 2008) (holding that summary judgment was proper in case involving softball player injured when she ran into chain-link fence while chasing fly ball because fence was open and obvious).

Under Lyman's theory of negligence, a railroad could be held liable for failing to inform its stevedores that the vehicles they are unloading may have other obvious parts, such as bumpers, side mirrors, antennae, or door handles, and that they should watch where they are walking. FELA could not possibly require such an absurd result.

(2) Lyman maintains that the allegedly dark and cramped conditions of the railcar somehow rendered the front license-plate holder non-obvious. Br. 22-26. Of course, Lyman does not explain why he attempted to squeeze through an allegedly dark and cramped space to get to the driver's side of the vehicle, rather than walk around to the front or back of the railcar. More importantly, he has offered no evidence that CSXT should have anticipated that he would do so.

In *MacPherson v. Boston & Maine Corp.*, 439 F.2d 1089 (1st Cir. 1971), a train conductor brought a FELA action to recover damages for injuries sustained when he slipped while attempting to climb over a pile of snow. He alleged that the railroad was negligent in failing to warn him or to remove the snow pile, which had been left near the location where he customarily stopped and exited the train. The First Circuit held as a matter of law that the railroad had no reason to expect that the conductor, who had full control over where to stop and exit the train, would have chosen to climb over the pile of snow rather than stop the train elsewhere or simply walk around. *Id.* at 1091. The court held that the railroad was entitled to a directed verdict because “there was no occasion for defendant to suppose that, for no purpose, [the plaintiff] would walk over [the pile of snow] instead of avoiding it.” *Id.* “Having no reason to anticipate plaintiff’s procedure,” the First Circuit held, “there was no negligence.” *Id.*

So too here, Lyman has presented no evidence that CSXT should have foreseen his attempt to squeeze his body through a space he testified was no more than five to six inches wide. JA 207. As Judge Posner has explained, because “negligence is failing to take the care necessary

and proper to prevent injury to *reasonably careful* persons,” a defendant “cannot be deemed negligent for failing to take precautions against an accident that potential victims could avoid by the exercise of elementary care.” *Pomer v. Schoolman*, 875 F.2d 1262, 1268 (7th Cir. 1989) (emphasis added). There is thus “no duty to warn against an obvious danger, for an obvious danger is no danger to a reasonably careful person.” *Id.*

2. Lyman Cannot Prove Causation

Even if CSXT was negligent in failing to warn Lyman of the presence of a license-plate holder on the front of the vehicle, Lyman cannot prove that this failure to warn was the cause of his injury. CSXT did not require Lyman to squeeze his body through the narrow space between vehicles in the railcar. Rather than simply walk around to the front or back of the railcar, where he indisputably would have had room to maneuver, Lyman looked at the space between the vehicles, decided that it was sufficient, and then scooted through. JA 92, 200, 220. As the district court explained, Lyman “himself[] testified that he judged the space and determined he could get through.” JA 277. The court was therefore correct in ruling that the failure to warn “could not be

considered” a “cause of this accident.” JA 277-78. And if “the employee’s own negligence was the sole cause of the accident,” the railroad cannot be liable under FELA. *Toth v. Grand Trunk R.R.*, 306 F.3d 335, 351 (6th Cir. 2002); *see* 45 U.S.C. § 51 (railroad is liable if employee’s injury results “in whole or in part” from railroad’s negligence).

B. The District Court Correctly Granted Summary Judgment On Lyman’s Other Claims

For the first time in its opposition to CSXT’s motion for summary judgment, Lyman raised two new claims of negligence: that CSXT “neglected to implement policies and procedures to prevent” the “over tightening of chocks in autorack cars”; and that CSXT should have “created a better lighted work place.” JA 208. The district court granted summary judgment on these claims on two alternative grounds. First, the court ruled that the claims “need not be considered” because they “were first brought up in response to the summary judgment motion.” JA 277. Second, the court ruled that, “even if considered,” summary judgment on the claims was appropriate because Lyman did not offer sufficient evidence to create a triable issue on negligence or causation. *Id.* As we explain below, the district court permissibly ruled that Lyman’s new

claims have been forfeited, and it correctly ruled that the claims in any event do not present a triable issue.

1. Lyman's Other Claims Have Been Forfeited

a. Lyman's complaint, which alleged generic and boilerplate violations of FELA, did not include, as a theory of liability, either overtightening of the chocks or inadequacy of the lighting. *See* JA 20-21. Lyman also failed to mention either theory in his answers to CSXT's interrogatories, which specifically asked him to identify "any specific rule, regulation, order, instruction, or practice which you claim defendant should have had in effect but did not," JA 156; "any condition of ground, object, structure or place which you claim helped to bring about each of your injuries," JA 157; and "each negligent act or omission of defendant, its agents, or employees which you claim caused or contributed to each of [y]our injuries," JA 158. Lyman identified only one theory of liability in his interrogatory answers: that CSXT had failed to warn him about the presence of the front license-plate holder. *See* JA 156 ("The defendant failed to notify its employees, including the plaintiff, that the cars on the autorack rail car had license plate brackets mounted to the front bumpers, which condition reduced the amount of distance between the

cars on autorack rail cars and created a hazardous condition.”); *id.* (“The defendant should have had regulations and/or policies in place to warn its employees of the dangerous condition created by the existence of license plate brackets on cars loaded on autorack rail cars.”); JA 157 (“[T]he defendant should have issued a warning or some other type of notification as to the existence of license plate brackets on the front of the cars the plaintiff was working with.”); *see also* JA 157-58 (cross-referencing these responses).

On October 28, 2008, three months after responding to the interrogatories in this manner, Lyman was deposed. JA 25-140. During the deposition, Lyman gave no indication that his theory of liability had changed. The only discussion of alleged over-tightening of chocks occurred in the context of explaining why he had attempted to move from the passenger’s side of the vehicle to the driver’s side. JA 81-90. And although Lyman did mention that “[d]arkness” may have obstructed his view of the vehicles because “[i]t’s very dark in the ‘A’ deck in January at 7:00 in the morning,” JA 93, he retreated from this position almost immediately after being confronted with the fact that the accident occurred at approximately 9:00 a.m., during “daylight” visibility, JA 93-

99, 161-62. Moreover, despite several statements in his interrogatory answers that “[d]iscovery is ongoing and the plaintiff reserves the right to supplement this answer accordingly,” *e.g.*, JA 156-58, Lyman never supplemented any answers, either before or after his deposition.

After the close of discovery, CSXT moved for summary judgment, contending that it had no duty to warn its employees of the existence of front license-plate holders on vehicles, that the failure to warn did not cause Lyman’s injury, and that his injury was not reasonably foreseeable. JA 175-91. Only then, in his opposition to summary judgment, did Lyman offer his two new claims of negligence. JA 202-17. The district court ruled that the claims had been forfeited. JA 277.

b. A district court may refuse to consider new theories of liability alleged for the first time in opposition to summary judgment. *Greenidge*, 446 F.3d at 361; *see also ReAmerica, S.A. v. Wells Fargo Bank Int’l*, 577 F.3d 102, 104 n.2 (2d Cir. 2009). “[P]laintiffs who failed to include a claim in their complaint can move to amend the complaint,” but “a district court does not abuse its discretion when it fails to grant leave to amend a complaint without being asked to do so.” *Greenidge*, 446 F.3d at 361; *accord Fuqua v. Lindsey Mgmt. Co.*, 321 F. App’x 732,

734-35 (10th Cir. 2009) (“new theory of liability” articulated in opposition to motion for summary judgment but “not adequately raised in the complaint will not be considered,” particularly when the plaintiffs “never sought leave to file an amended complaint, * * * never asked that their response to summary judgment be treated as a request to amend, and * * * never filed an amended complaint”); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292-94 (9th Cir. 2000) (plaintiffs could not proceed with different theory of liability after close of discovery when defendant would be prejudiced by inability to develop newly relevant evidence and defenses).

The district court did not abuse its discretion in refusing to consider theories that were not raised until Lyman filed his opposition to summary judgment. A broad and boilerplate claim of “negligence” in a complaint is not a catch-all cause of action that allows a plaintiff to change his theory of liability throughout the case. If it were, defendants would be forced to contend with a constantly moving target, never knowing what claims to refute and what evidence to develop during discovery.

Here, for example, CSXT focused its deposition questions almost exclusively on Lyman's failure-to-warn theory. Had it been on notice of an alleged failure to "implement policies and procedures" to prevent the over-tightening of straps securing Nissan vehicles, JA 208, CSXT could have developed evidence concerning (among other things) the justification for tightening the straps, the parties responsible for securing the vehicles, the tools given to stevedores to release the straps, and the feasibility of instituting such policies and procedures. Instead, CSXT was led to believe that no such claim was at issue, given Lyman's answer to the interrogatory request that he "[s]et forth any specific rule, regulation, order, instruction or practice which you claim defendant should have had in effect but did not," which identified only an alleged failure "to warn its employees of the dangerous condition created by the existence of license plate brackets on autorack rail cars." JA 156.

Similarly, despite a specific request to "[s]et forth specifically any condition of ground, object, structure or place which you claim helped to bring about each of your injuries," Lyman never mentioned the alleged darkness of the railcar. JA 157. Given his interrogatory response, his deposition testimony, and the fact that he did not check the box for "im-

proper lighting” on the incident report he filled out after his injury, JA 162, CSXT was not on notice that it needed to develop the record regarding the lighting in the railcar at the time of the accident.

Raising such claims for the first time after discovery had closed prevented CSXT from adequately responding to Lyman’s new allegations. *See Coleman*, 232 F.3d at 1292-94. Although the district court could perhaps have re-opened discovery to mitigate some of this prejudice, Lyman never requested that it do so, and the court declined to re-open discovery *sua sponte*—a decision well within its discretion. *See, e.g., Zurich Am. Ins. Co. v. ABM Indus., Inc.*, 397 F.3d 158, 172-73 (2d Cir. 2005) (“Because discovery was closed and trial was approaching, the district court could reasonably conclude that Zurich would be substantially prejudiced by the introduction of the new claim and did not abuse its discretion in refusing to consider it.”). The district court thus permissibly concluded that Lyman’s new claims of negligence had been forfeited.

c. Lyman’s sole response to the district court’s forfeiture ruling appears in a footnote in his brief. Relying on *Claudio v. Scully*, 982 F.2d 798, 802 n.3 (2d Cir. 1992), Lyman seeks to distinguish between

new “claims,” which he concedes may not be raised in opposition to summary judgment, and new “arguments to support a claim already raised,” which he contends are permissible even after the close of discovery. Br. 22 n.1 (emphasis omitted). But *Claudio* provides no support for the proposition that plaintiffs may assert new theories of liability for the first time in opposition to summary judgment.

Claudio involved the question whether a court of appeals may refuse to consider an issue raised for the first time on appeal, not the question whether a district court may refuse to consider a theory of liability raised for the first time in opposition to summary judgment. As we have already explained, this Court has elsewhere answered the latter question yes. *See Greenidge*, 446 F.3d at 361. Even in the situation presented in *Claudio*, moreover, this Court has held that a new theory of negligence constitutes a new “issue or argument” that will not be considered for the first time on appeal. *Tufariello*, 458 F.3d at 85 (internal quotation marks omitted); *see also Cook v. CSX Transp. Inc.*, 557 F. Supp. 2d 1367, 1372 (M.D. Fla. 2008) (“[a]llegations raise a new ‘claim’ when they create a different theory of relief”). This Court’s decisions thus fully support the conclusion that the district court acted

within its discretion in finding that Lyman's new claims of negligence had been forfeited.

2. Lyman's Other Claims do not Present any Triable Issue

The district court was also correct in its alternative ruling that summary judgment must be granted on Lyman's other claims even if they were properly before the court. As with his duty-to-warn claim, Lyman cannot prove either negligence or causation.

a. Lyman cannot prove negligence

As we explain below, Lyman cannot establish that CSXT was negligent either (1) in failing to prevent the vehicles from being over-restrained or (2) in failing to provide more lighting.

(1) *Lyman cannot prove that CSXT was negligent in failing to prevent the vehicles from being over-restrained*

Even apart from the forfeiture, summary judgment was proper on Lyman's first new claim of negligence—the alleged over-restraining of Nissan vehicles—for at least three reasons.

First, there is no evidence that CSXT knew or should have known that such over-restraining could lead to injury. Although Lyman asserted during his deposition that (unspecified) employees had com-

plained that “whoever was loading [the Nissan vehicles] had been cranking them down we believe more than it was necessary,” thereby making it difficult to release the tension in the strap, JA 69-70, the record does not suggest that employees had complained that this alleged over-tightening was reducing their available work space. Lyman has offered no evidence that a reasonable inspection would have uncovered this problem, and he does not argue that CSXT should otherwise have been aware of it. As explained above, moreover, CSXT did not require its employees to walk between the vehicles, and Lyman has offered no evidence that CSXT knew or should have known that its employees would attempt to traverse the narrow space between the vehicles rather than cross in the open space at either end of the railcar. *See Inman v. Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959) (absence of similar accidents in past and lack of complaints about allegedly dangerous conditions required judgment as a matter of law for railroad).

Second, there is no evidence that the alleged over-restraining of vehicles reflected a failure of due care. Lyman testified that employees had been working with tightly secured Nissan vehicles for years without incident and that CSXT had addressed the only issue about which

its employees complained by providing them with special equipment to unshackle particularly well-secured automobiles. JA 72-73.

Third, insofar as Lyman's theory is that CSXT was negligent because of the alleged over-restraint *in combination with* the failure to warn about the license-plate holder, the theory fails for the same reason that Lyman's initial failure-to-warn theory fails: the presence of the license-plate holder on a new Nissan vehicle was unforeseeable and there was no duty to warn employees about it.

(2) *Lyman cannot prove that CSXT was negligent in failing to provide more lighting*

Inasmuch as Lyman's second new claim of negligence—the allegedly inadequate lighting—was not advanced until he filed his opposition to summary judgment, the record evidence regarding the lighting conditions in the railcar is extremely sparse. In fact, Lyman offers nothing in support of this theory of liability but an assertion in his deposition that “darkness” may have been obstructing his view of the front bumper of the vehicle because “[i]t's very dark in the 'A' deck in January at 7:00 in the morning.” JA 93, *cited in* Br. 24. This offhand remark is insufficient to create an issue of fact as to whether CSXT negligently provided inadequate lighting in the railcars.

First, Lyman himself immediately backed away from this testimony when confronted with his own incident report, which stated that the accident had occurred during daylight hours, at 9:00 a.m. rather than 7:00 a.m. *See* JA 93-99. Second, Lyman did not offer any expert testimony, testimony from other witnesses, photographs, or other evidence regarding the level of visibility in the railcar. A plaintiff's "own conclusory assertions that the lighting was inadequate are not sufficient to survive a motion for [summary judgment]." *Hurley v. Patapsco & Back Rivers R.R.*, 888 F.2d 327, 329 (4th Cir. 1989) (per curiam); *accord Briggs v. Washington Metro. Area Transit Auth.*, 481 F.3d 839, 846 (D.C. Cir. 2007) (plaintiff's mere assertion of inadequate workplace lighting, without expert testimony on what constitutes adequate lighting, did not create issue of fact sufficient to survive motion for summary judgment).

For the first time on appeal, Lyman asserts that his visibility may have been impaired because the incident report shows that it was snowing on the day of the accident. Br. 24. But Lyman has offered no evidence that it was snowing inside the railcar or that the snow had somehow affected his ability to view the space between the vehicles in the

railcar. To the contrary, the same incident report contained a box for “improper lighting,” which Lyman did not check. JA 162.

b. Lyman cannot prove causation

Even if the alleged over-tightening of the straps or the allegedly inadequate lighting (or a combination of the two) could be considered negligent, there is no evidence that this negligence was the cause of Lyman’s injury. Although Lyman appears to have been well aware that unstrapping the Nissans sometimes caused them to roll forward about an inch, he offers no explanation for why he nevertheless chose to attempt to walk through the narrowed space. Rather than simply walk around to the open area at the front or back of the railcar, Lyman looked at the space between the vehicles, judged that it was sufficient for safe passage, and walked through. This judgment call by the employee, which ultimately caused his injury, simply cannot be attributed to CSXT. *See supra* Point A.2. The district court thus correctly ruled that, “[i]n view of plaintiff’s testimony that he knew of the situation, and he had space to get through,” any negligence on CSXT’s part could not be a “cause of plaintiff’s injuries.” JA 277.

C. The District Court Did Not Rely On Any Principle Of Assumption Of Risk Or Contributory Negligence

Lyman contends (Br. 30-34) that the judgment below must be reversed because it is based on two common-law defenses that have been abrogated by FELA: assumption of risk and contributory negligence, *see* 45 U.S.C. §§ 53, 54. Lyman is mistaken. CSXT did not rely on either doctrine in its arguments, and the district court did not rely on either one in its decision.

1. While acknowledging that CSXT never used the terms “assumption of risk” or “contributory negligence,” Lyman asserts that it nevertheless “introduced” those concepts by “infer[ence]” in the district court. Br. 32-33. That is simply untrue.

a. As Lyman himself recognizes (Br. 31), this Court has defined assumption of risk as “the knowledgeable acceptance by an employee of a dangerous condition when and if such acceptance was necessary for the performance of his duties.” *Rivera v. Farrell Lines, Inc.*, 474 F.2d 255, 257 (2d Cir. 1973). Attempting to squeeze through the space in front of the A5 unit was *not* “necessary for the performance of [Lyman’s] duties” as a stevedore. The evidence established that there was plenty of room to cross elsewhere in the railcar and that CSXT could not have

foreseen that Lyman would nevertheless attempt to pass through the narrow space between the vehicles. Both in the district court and here, CSXT relied on that evidence to argue that Lyman could not prove that it was negligent, not to argue that Lyman had assumed the risk of his employment. *See* JA 190-91; *supra* Point A.1.a.

The evidence also established that CSXT had no duty to warn Lyman about the presence of a non-defective license-plate holder—a common car part in plain view at the front of the vehicle. Both in the district court and here, CSXT relied on *that* evidence to argue that Lyman could not prove that it was negligent, not to argue that Lyman had assumed the risk of his employment. *See* JA 188-89; *supra* Point A.1.b.

As Judge Posner has explained,

if a danger is so obvious that a reasonable person would not think a warning required—would think that anyone who might be endangered could and would protect himself—then liability is barred, *irrespective of assumption of risk*, by the principle that requires potential injurers to take precautions only where appropriate for the protection of normally careful and observant people, unless the injurer knows or should know that the plaintiff is not in that class.

Pomer, 875 F.2d at 1269 (emphasis added); *see also Puthé*, 2 F.3d at 483.

b. The common-law defense of contributory negligence “operated as an absolute bar to relief,” *Sorrell*, 549 U.S. at 166; it precluded recovery if the plaintiff’s own negligence played any part in bringing about his injury. FELA adopts a regime of *comparative* negligence; the employee’s negligence “shall not bar a recovery, but the damages shall be diminished * * * in proportion to the amount of negligence attributable to such employee,” 45 U.S.C. § 53. Still, in order to recover, a FELA plaintiff must demonstrate that his injury resulted at least “in part” from the railroad’s negligence. 45 U.S.C. § 51.

The evidence established that Lyman’s injury resulted entirely from his own negligence—his attempt to squeeze through a narrow space rather than walk in the open space available to him. Both in the district court and here, CSXT relied on that evidence to argue that Lyman’s action is barred because any negligence on the part of CSXT did not cause his injury even “in part,” not to argue that the action is barred because Lyman was contributorily negligent. *See* JA 189; *supra* Point A.2.

2. Lyman also asserts that the reasoning of the district court itself “is based, almost entirely, on improper assumption of the risk and contributory negligence principles.” Br. 34. That is also untrue.

In granting summary judgment to CSXT on the failure-to-warn claim, the court explained that Lyman had “failed to establish that there was any duty to warn about license plate holders” and that this “alleged failure to warn the plaintiff[] could not be considered a proximate cause of this accident.” JA 277-78. In granting summary judgment on the remaining claims, the court explained that they “need not be considered” because they “were first brought up in response to the summary judgment motion” and that, even if considered, “there is no evidence of how the defendant might have changed the light conditions” and no evidence that either “over-tightening the chock straps” or “the light conditions” were “a proximate cause of plaintiff’s injury.” JA 277. The court thus concluded that Lyman “cannot establish a prima facie case” and that the action must therefore be dismissed because “the plaintiff has failed to adduce facts that create a question of fact that [CSXT] was negligent.” JA 278.

This language confirms that the district court granted summary judgment to CSXT because it determined—correctly—that Lyman could not establish the elements of a cause of action required by FELA (and because two of his claims were forfeited), not because it believed that CSXT had established two affirmative defenses abolished by the Act.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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Dated: November 10, 2009

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a), counsel for Defendant-Appellee CSX Transportation, Inc., hereby certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,937 words, excluding the parts of the brief exempted by Fed. R. App. R. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Century Schoolbook.

Dated: November 10, 2009

/s/ Dan Himmelfarb

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**CERTIFICATE OF COMPLIANCE WITH
INTERIM LOCAL RULE 25.1(a)(6)**

Pursuant to Interim Local Rule 25.1(a)(6), counsel for Defendant-Appellee CSX Transportation, Inc. hereby certifies that the PDF version of this document has been scanned for viruses using Symantec Antivirus v. 10.1.4.4000, with virus definitions version 6/25/2009 rev. 7, and that no virus has been detected.

Dated: November 10, 2009

/s/ Dan Himmelfarb

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CERTIFICATE OF SERVICE

Counsel for Defendant-Appellee CSX Transportation, Inc. hereby certifies, pursuant to Fed. R. App. P. 25(c) and Interim Circuit Rule 25.1(a)(8), that, on November 10, 2009, I caused two copies of this brief to be served by email PDF and overnight delivery upon the following:

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