

No. 10-3745

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

KEVIN ROBERTS,
Plaintiff-Appellee,

– v. –

CSX TRANSPORTATION, INC.,
Defendant-Appellant.

On Appeal from a Final Judgment of
the United States District Court for the Southern District of Indiana

Honorable Larry J. McKinney, District Judge
Case No. 1:09-cv-162

**OPENING BRIEF
OF CSX TRANSPORTATION, INC.**

Harold Abrahamson
ABRAHAMSON, REED & BILSE
200 Russell Street
Hammond, Indiana 46320
Telephone: (219) 937-1500

Evan M. Tager
Michael B. Kimberly
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
Telephone: (202) 263-3000

Counsel for Defendant-Appellant CSX Transportation, Inc.

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-3745

Short Caption: Roberts v. CSX Transportation, Inc.

- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

CSX Transportation, Inc.

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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- (3) If the party or amicus is a corporation:

- (i) identify all its parent corporations, if any:

CSX Corporation is the parent company of CSX Transportation, Inc.

- (ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

AXA Financial Inc. (greater than 10% interest in CSX Corporation)

Attorney's Signature: _____ Date: 02/28/2011

Printed Name: Michael B. Kimberly, counsel of record

Email: mkimberly@mayerbrown.com

Attorney's Signature: _____ Date: 02/28/2011

Attorney's Printed Name: Evan M. Tager

Email: etager@mayerbrown.com

1999 K Street NW
Washington, D.C. 20006
Phone: (202) 263-3000, Fax: (202) 263-3300

Attorney's Signature: _____ Date: 02/28/2011

Attorney's Printed Name: Harold Abrahamson

Email: aralawfirm@aol.com

200 Russell Street
Hammond, Indiana 46320
Phone: (219) 937-1500, Fax: (219) 937-3174

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JURISDICTION

On December 8, 2008, plaintiff-appellee Kevin Roberts filed an action in federal district court against defendant-appellant CSX Transportation, Inc. (“CSXT”) under the Federal Employers’ Liability Act (“FELA”), 45 U.S.C. §§ 51-60. Dkt. 1. On August 30, 2010, the district court entered final judgment on a jury verdict in Robert’s favor. Dkt. 156. On September 24, 2010, CSXT filed a motion for judgment as a matter of law, or in the alternative, for a new trial or remittitur. Dkt. 162. The district court denied CSXT’s motion on November 2, 2010. Dkt. 171. On November 29, 2010, CSXT filed a timely notice of appeal. Dkt. 172. This Court’s jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to Circuit Rule 34(f), CSXT respectfully requests oral argument. This appeal involves a general verdict following a four-day jury trial, and the parties’ familiarity with the record will aid the Court in resolving any questions it may have about the evidence presented to the jury. What is more, this appeal raises an important question of federal law that this Court has not previously addressed: whether a violation of a state statute may constitute negligence per se under FELA. Oral argument will assist the Court in resolving this issue.

STATEMENT OF THE ISSUES

The issues presented for review are (1) whether there was sufficient evidence to find that CSXT was negligent; and (2) whether it was plain error to instruct the jury that a violation of state traffic laws is negligence per se under FELA.

STATEMENT OF THE CASE

Roberts filed this FELA action against CSXT and Professional Transportation, Inc. in the United States District Court for the Northern District of Indiana. SA1-6. The case thereafter was transferred to the Southern District of Indiana. Dkt. 12. That court granted Professional Transportation, Inc.'s unopposed motion for summary judgment (Dkt. 46), and the claims against CSXT proceeded to trial.

A four-day jury trial was held from August 24, 2010 through August 27, 2010. Dkts. 135, 136, 144, 145. At the close of Robert's evidence, CSXT moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50. SA76-79. The district court denied the motion. SA82. The jury returned a verdict in favor of Roberts, awarding \$3,979,686 in damages. Dtk. 150. On August 30, 2010, the district court entered a final judgment on the verdict. A6.

On September 24, 2010, CSXT moved for judgment as a matter of law, and in the alternative, for a new trial or remittitur. SA90-108. The district court denied the motion on November 2, 2010. A8-9.

STATEMENT OF FACTS

A. Statutory Background

FELA provides that “common carrier[s] by railroad,” such as CSXT, “shall be liable in damages to any person suffering injury while he is employed by such carrier” for injuries “resulting in whole or in part from the negligence” of the carrier or its employees. 45 U.S.C. § 51. Thus, FELA “provide[s] a federal remedy for railroad workers who suffer personal injuries as a result of the negligence of their employer or their fellow employees.” *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 561 (1987).

As a comprehensive federal statute, “FELA preempts state law within its domain, so that a railroad worker who has a cause of action under the FELA cannot sue under state tort law instead.” *Lancaster v. Norfolk & W. Ry.*, 773 F.2d 807, 812 (7th Cir. 1985). Accordingly, although “[t]he vast majority of courts examining lawsuits arising out of automobile[] collisions do so under state law,” accidents covered by FELA must be examined under federal law. *Waymire v. Norfolk & W. Ry.*, 218 F.3d 773, 775 (7th Cir. 2000).

FELA’s preemption of state-law causes of action follows from Congress’s judgment that a “uniform application [of the statute] throughout the country” is “essential to effectuate its purposes.” *Scha-*

del v. Iowa Interstate R.R., Ltd., 381 F.3d 671, 676 (7th Cir. 2004) (quoting *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361 (1952)). For the same reason, the Supreme Court has recognized that “[w]hat constitutes negligence” under FELA is strictly “a federal question” that does “not vary[] in accordance with the differing conceptions of negligence * * * under state and local laws.” *Robinson v. Burlington N. R.R.*, 131 F.3d 648, 652 (7th Cir. 1997) (quoting *Urie v. Thompson*, 337 U.S. 163, 174 (1949)).

Consistent with the federal character of FELA’s negligence standard, violations of certain federal laws are negligence per se under FELA. *See, e.g., Coffey v. METRA*, 479 F.3d 472, 477 (7th Cir. 2007) (“[T]he failure to comply with [the federal Locomotive Inspection Act] is negligence per se under the FELA.”) (citing *Urie*, 337 U.S. at 188-189 & n.30). By contrast, it has long been settled that violations of state laws do not “constitute[] negligence per se * * * under the Federal Employers’ Liability Act,” and, indeed, “ha[ve] no bearing on the civil liability of a railway to its employees.” *Chesapeake & O. Ry. Co. v. Stapleton*, 279 U.S. 587, 593 (1927).

B. Factual Background

The accident giving rise to this action occurred early in the morning, around 5:15 am, at the intersection of Raceway Road and Rockville

Road near Avon, Indiana. It was dark out, and the roads were icy. SA53, 55, 112-114. Fallen snow was blowing across the road, and fresh snow may also have been falling.¹ Vernon Perry – a machinist working for CSXT – was driving a Ford pickup truck. SA21. He had recently departed CSXT’s Avon Yard, just west of Indianapolis, and was headed for the Hawthorn Yard, east of the city – about a 30-minute drive. SA20, 25.

Only a few minutes into his trip, Perry came to a stop at a red light at the intersection of Raceway Road and Rockville Road. SA37. He was headed northbound on Raceway, and made a right turn, eastbound onto Rockville. SA37.² Approximately 100 feet beyond the intersection, Perry hit a patch of ice and lost control of his vehicle. SA22-24, 40-41, 53. The truck went into a spin, crossed the center line of the road, and collided nearly head on with an oncoming van. SA27-28, 31, 40-41, 54,

¹ Perry testified that there was “snow flying across the road,” but that it was not actively snowing. SA24. The first page of the accident report suggests the same – that snow was “blowing,” but not that snow was falling (SA109) – while the fourth page suggests that it was snowing (SA112); *see also* SA58 (testimony of investigating office that the fact that “it was snowing out” was “consistent” with an “observation that there was blowing snow on the road”).

² There is some inconsistency in the record with respect to whether Perry was turning right onto Rockville Road from Raceway or from a gas station parking lot. *See, e.g.*, SA26-27, 33, 57, 112. This discrepancy is not relevant to the issues presented in this appeal.

112, 115-116. The police report detailing the circumstances of the accident attributed the collision to “roadway surface condition[s]” and stated that “ice caus[ed]” Perry’s truck to “slide into westbound traffic.” SA109, 112 (initial caps omitted).

The evidence indicated that, immediately prior to the impact, the oncoming van had been traveling at 20 to 30 miles per hour (SA14), while Perry had been traveling at about 20 miles per hour (SA31, 34, 37, 113). The speed limit was 40 or 45 miles per hour. SA28-29, 38, 64. Immediately after the collision, the police were summoned to the scene; Officer Nathan Challis responded to Perry’s call, conducted an on-site investigation, and prepared an accident report. SA25-26, 109-112.

The van, which was operated by Professional Transportation, Inc., was transporting two CSXT employees to the Avon Yard for the end of their daily shifts. One of the passengers, plaintiff Kevin Roberts – a 34-year-old CSXT engineer – was injured in the accident and taken to the hospital. SA20, 55.³

Roberts presented at the emergency room complaining of pain in his left knee and right shoulder. Dkt. 181, at 19. Following his initial examination, Roberts began experiencing headaches; pain in his neck,

³ Neither the second passenger nor the van driver testified at trial, and there is no evidence that either one of them was injured.

left knee, and right shoulder; and tingling and tremors in his right arm and fingers. *Id.* at 25, 27-28. He has since undergone surgeries on his knee, elbow, and shoulder. *Id.* at 29, 40, 46. Roberts ultimately was unable to return to work as an engineer and has been adjudged permanently disabled. *Id.* at 55; Dkt. 138, at 53-54.

C. Procedural Background

Roberts sued CSXT, alleging that Perry negligently caused the car accident. He claimed specifically that Perry had “fail[ed] to use ordinary care”; had been driving his vehicle “in an unsafe manner”; “violated certain safety standards,” including “the Indiana Vehicle Code”; was driving “at an excessive rate of speed”; “failed to keep a proper lookout”; and was “otherwise careless and negligent.” SA3. Roberts further claimed that the accident caused him lost earning potential, medical expenses, and pain and suffering. SA4.

From the outset, Roberts’s theory of the case was negligence per se. His lawyer argued during opening statements that the jury “ha[d] to look at the Indiana statutes” and should keep certain Indiana traffic laws “in mind when you hear the evidence in this case.” SA8-9. He asserted specifically that the evidence would show that “not only did [Perry] lose control, * * * but he crossed over the center lane[,] [a]nd you can’t drive to the left of center.” SA10. According to Roberts’s law-

yer, “the law says” also that “[w]hen it is icy and snowing out, you have to slow down.” SA9. He argued to the jury that “[t]hese are the rules that CSX violated when it caused the collision between the CSX truck and the CSX van that Mr. Roberts was a passenger in.” SA10.

Apart from Officer Challis’s police report (SA109-112) and a couple of pictures of the vehicles after the accident (SA115-116), Roberts’s evidence concerning liability was limited exclusively to testimony from Perry, Challis, and himself.

Proceeding on his theory of negligence per se, Roberts attempted to adduce testimony that Perry had been driving on the wrong side of the road and too fast for the conditions. In his direct examination of Officer Challis, for example, he leadingly asked whether the accident report indicated that Perry was “[d]riving left of center” when his truck slid into oncoming traffic; Challis answered that it did. SA54.⁴ And in his examination of Perry, he pressed the notion that Perry had failed to slow down to accommodate the weather conditions, eliciting an admission that Perry did not believe there was any ice on the road, “so [he

⁴ As we explain below (at 24-25), Challis evidently construed the question simply as asking whether Perry’s vehicle was on the left side of the road at the time it collided with the vehicle in which Roberts was riding. The accident report never indicated that Perry was *driving* on the wrong side of the road and instead consistently stated that Perry’s vehicle slid out of control over a patch of ice, into oncoming traffic. See SA109-112; see also SA23-25, 40-41, 54, 113-114.

was] operating the vehicle as [he] would operate it on any day when there are good weather conditions.” SA24.

At the close of Roberts’s case, CSXT moved for judgment as a matter of law under Federal Rule of Civil Procedure 50. SA76. CSXT argued that “[t]he undisputed evidence is that the truck which Mr. Perry was operating was traveling 20 miles per hour” and that there was “a total lack of evidence that the speed at which Mr. Perry was operating his vehicle was in any way negligent” or that “the railroad in any [other] way violated its duty to exercise reasonable care to provide the plaintiff with a safe place to work.” SA77, 79.

Roberts contended that there was evidence that Perry “drove his vehicle as if the weather conditions were clear and the streets were dry” and that, “as a result of [Perry] not appreciating the weather conditions and the conditions of the road, he lost control of his vehicle, crossed the center line, and had a head-on collision with the vehicle that Mr. Roberts was a passenger in.” SA80-81.

The district court denied the motion, stating simply that “I think there is evidence from which a jury could conclude with a finding in favor of the plaintiff in this case.” SA82.

After CSXT put on its case, the parties’ attorneys gave closing arguments. With respect to liability, Roberts’s attorney again focused ex-

clusively on negligence per se. He argued that “there’s no defense to the statutory violations here” and that “[t]he statutory violations are not taking account of the roadway conditions, driving to the left side of the center line.” SA72. He explained specifically:

We all know that when we drive a vehicle, we have to stay on the right side of the road. There’s no contest, no question of fact that the CSX vehicle crossed the center line and had a head-on collision. There’s no defense to that.

I mean, the defense that was purportedly raised in the opening statement was “Well, we were driving carefully.” That is not a defense to a statutory violation, and we all know that.

* * *

They have violated the statute about taking care of the account of roadway conditions when the weather conditions make driving hazardous and adjust your driving for them so you don’t lose control.

They drove to the left of the center. He didn’t keep control of his vehicle, and he wasn’t exercising care for other people on the highway, did not make a proper turn. There is no defense to those violations, and those violations are negligence, which is a violation of the FELA.

Id. He repeated this theme during his rebuttal:

[T]he railroad claims that their vehicle did not drive to the left of center, and therefore, they should not be held responsible. There’s a statute that says your vehicle cannot be to the left side of the road.

Everyone knows that vehicle was on the left side of the road, and a police officer in his report said that the CSX – that the contributing cause of this accident was the vehicle driving to the left side of the road.

So I think you look at the jury instructions, you look at the facts of this accident and you will see that CSX undoubtedly violated those rules, those laws.

SA74-75.

Consistent with Roberts's negligence per se theory, the district court instructed the jury that Indiana traffic laws require that drivers must (i) not "drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions"; (ii) "drive at an appropriate reduced speed" when a "special hazard exists by reason of * * * weather or highway conditions"; (iii) "drive[] upon the right half of the roadway"; and (iv) execute "right turn[s] as close as practical to the right-hand curb or edge of the roadway." SA88-89. Following Indiana Pattern Jury Instruction 17.01 (*see* Dkt. 83, at 36), the charge directed the jury that a "violat[ion] [of] any of these statutes" was "fault" per se under FELA. SA89.

CSXT objected to the negligence per se instruction for lack of evidentiary foundation; it did not object on the ground that violations of state traffic statutes are not negligence per se under FELA. SA83-85 (objecting to instruction appearing on page 24 of the court's Draft Jury Instructions (dkt. 125-2)). The district court overruled the objection, noting only that the statutory violations were "the only guidance [the jury has] got" on the issue of liability. SA85-86.

The jury returned a verdict for Roberts. A1. It awarded him \$1,479,686 for the loss of past and future earnings, and \$2,500,000 for pain and suffering. A1, 3. The district court entered a final judgment on the verdict, awarding a total of \$3,979,686 in damages. A6.

CSXT moved for judgment as a matter of law, and in the alternative, for a new trial or remittitur, arguing that (i) Roberts had failed to produce sufficient evidence of negligence (SA90-96), (ii) the district court erred in giving the negligence per se instruction because there was no evidence to support it (SA96-100), and (iii) the damages were excessive (SA100-106). The district court denied the motion, explaining only that it “disagree[d]” with each of CSXT’s contentions. A8-9.

SUMMARY OF ARGUMENT

The relevant facts are undisputed: CSXT employee Vernon Perry was traveling at approximately 20 miles per hour eastbound on Rockville Road when he encountered ice on the road and lost control of his truck. The truck went into a spin, crossed the center line, and collided with an oncoming van. Another CSXT employee, Kevin Roberts, who was a passenger in the van, was injured in the accident. A jury ultimately found that CSXT had negligently caused the accident and awarded Roberts almost \$4 million in damages.

For two separate and independent reasons, the judgment below must be reversed:

First, the evidence was not sufficient to support the verdict. In determining whether a rational jury could have rendered a verdict in Roberts’s favor, this Court must apply the proper legal standard for determining liability, regardless of whether the jury was instructed on that standard. *Geldermann, Inc. v. Fin. Mgmt. Consultants, Inc.*, 27 F.3d 307, 312-313 (7th Cir. 1994). As relevant here, it is settled that “[w]hat constitutes negligence” under FELA is exclusively “a federal question” (*Robinson*, 131 F.3d at 652) and that “[s]tate laws [therefore] are not controlling in determining” when “damages [are] negligently inflicted” under the statute. *Dice*, 342 U.S. at 361. FELA thus required Roberts to prove “the traditional common law elements of negligence.” *Stevens v. Bangor & Aroostook R.R.*, 97 F.3d 594, 598 (1st Cir. 1996).

Though courts consistently have recognized that violations of certain federal statutes *may* constitute negligence per se (*e.g.*, *Coffey v. METRA*, 479 F.3d 472 (7th Cir. 2007)), they have equally consistently held that violations of state laws may *not* (*e.g.*, *Chesapeake & O. Ry. Co. v. Stapleton*, 279 U.S. 587 (1927); *Davee v. So. Pac. Co.*, 375 P.2d 293, 294 (Cal. 1962); *Smith v. Thompson*, 182 S.W.2d 63 (Mo. 1944); *Moore v. So. Ry. Co.*, 161 S.E. 525, 526 (S.C. 1931), *reversed on unrelated*

grounds, 284 U.S. 581 (1931) (per curiam)). Accordingly, Roberts could not meet his burden merely by introducing evidence that CSXT violated one or more Indiana traffic laws.

Yet that is all that Roberts offered at trial. Relying exclusively on purported violations of Indiana traffic laws, Roberts made no effort to prove that Perry failed to “exercise reasonable care under all the circumstances” (*Restatement (Third) of Torts: Liability for Physical & Emotional Harm* § 3 (2005) (hereinafter “*Restatement*”)) and thereby “caused or contributed to” Roberts’s injury (*McBride v. CSX Transp., Inc.*, 598 F.3d 388, 406 (7th Cir. 2010), *cert. granted*, 131 S.Ct. 644 (2010)). For example, he adduced no evidence regarding the precautions a reasonably careful person would have taken under the circumstances; no evidence that Perry failed to take such precautions himself; and no evidence that any such precautions would have prevented the accident.

Instead, the evidence showed only that Perry lost control of his vehicle after encountering a patch of ice while traveling at just 20 miles per hour in a 40- or 45-mile-per-hour speed zone. Without any proof that a reasonably careful person would have done anything differently, or that anything such a person might have done would have averted the accident, no rational jury could have found that Perry was driving negligently.

Second, the district court committed plain error in instructing the jury that a violation of a state traffic law is negligence per se under FELA. The plain-error standard requires a showing that the error was “clear” or “obvious” (*United States v. Sykes*, 614 F.3d 303, 312 (7th Cir. 2010)) and that it “probably changed the outcome of the trial” (*United States v. Courtright*, No. 09-2880, 2011 WL 102591, at *6 (7th Cir. Jan. 13, 2011) (internal quotation marks omitted)).

Both conditions are satisfied here. As noted above, it is well settled that, because a “uniform application [of FELA] throughout the country” is “essential to effectuate its purposes” (*Dice*, 342 U.S. at 361), the question of “[w]hat constitutes negligence” under FELA is strictly “a federal question” that takes no account of “state and local laws.” *Robinson*, 131 F.3d at 652 (quoting *Urie*, 337 U.S. at 174). Permitting juries to find negligence per se under FELA based on violations of state traffic laws is in clear and obvious conflict with the long-recognized rule that violations of state laws “ha[ve] no bearing on the civil liability of a railway to its employees.” *Chesapeake & O. Ry. Co. v. Stapleton*, 279 U.S. 587, 593 (1927). And because Roberts’s *only* theory of liability was negligence per se, the district court’s erroneous instruction not only probably, but doubtlessly, changed the outcome of the trial. Thus, even if the Court concludes that there is sufficient evidence to support a

finding of negligence (thereby precluding entry of judgment for CSXT), it still should reverse and remand with instructions to hold a new trial before a properly instructed jury.

STANDARDS OF REVIEW

This court “review[s] sufficiency-of-the-evidence challenges de novo, viewing the evidence in the light most favorable to the prevailing party and drawing all inferences in its favor.” *Wis. Alumni Research Found. v. Xenon Pharm., Inc.*, 591 F.3d 876, 885-886 (7th Cir. 2010). It applies plain-error review to objections to jury instructions that have not been preserved. *Lewis v. City of Chicago Police Dep’t*, 590 F.3d 427, 433 (7th Cir. 2009); Fed. R. Civ. P. 51(d)(2).

ARGUMENT

I. THE EVIDENCE WAS NOT SUFFICIENT TO SUPPORT THE VERDICT.

“While it is true that it is difficult to set aside a jury verdict” on the basis of insufficient evidence, this Court’s “review of the evidence is not a rubber stamp of a jury’s decision.” *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1183 (7th Cir. 2002). Instead, the Court must undertake an independent evaluation of the entire record to determine whether a “rational jury could have rendered the verdict.” *Staub v. Proctor Hosp.*, 560 F.3d 647, 658 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 2089 (2010).

Notwithstanding the deference owed to a jury's determination of the facts, this Court has overturned or affirmed the overturning of civil jury verdicts with some frequency. *See, e.g., Clifford v. Crop Prod. Servs., Inc.*, 627 F.3d 268 (7th Cir. 2010); *Staub, supra*; *Sarkes Tarzian, Inc. v. U.S. Trust Co. of Fla. Sav. Bank*, 397 F.3d 577 (7th Cir. 2005); *Mid Am. Title Co. v. Transnation Title Ins. Co.*, 332 F.3d 494 (7th Cir. 2003); *Zelinski v. Columbia 300, Inc.*, 335 F.3d 633 (7th Cir. 2003); *Millbrook, supra*; *Mack v. Great Dane Trailers*, 308 F.3d 776 (7th Cir. 2002); *Worth v. Tyer*, 276 F.3d 249 (7th Cir. 2001); *Massey v. Blue Cross-Blue Shield of Illinois*, 226 F.3d 922 (7th Cir. 2000). It should do so in this case as well, for no rational jury could have found that Roberts had proven each of the elements of his negligence claim.

A. Roberts was not permitted to rely on violations of state traffic laws to establish negligence per se.

The Supreme Court repeatedly has “insisted that FELA ‘does not make the employer the insurer of the safety of his employees while they are on duty.’” *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543-544 (1994) (quoting *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947)). Instead, “[t]he basis of” a railroad’s liability under FELA is “negligence, [and] not the fact that injuries occur.” *Id.* “That, of course, means an employee must prove that the railroad was negligent and that the railroad’s negligence caused the injury at issue.” *Myers v. Ill. Cent. R.R.*,

629 F.3d 639, 642 (7th Cir. 2010); *see also Stapleton*, 279 U.S. at 590 (“proof of * * * negligence is essential to recovery” under FELA).

In determining whether Roberts met his burden to prove negligence under FELA, this Court must look to the “properly formulated legal standard” for liability, without regard for the theories presented by the parties or the instructions given to the jury. *Geldermann*, 27 F.3d at 313 (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 513-514 (1988)). In the proceedings below, Roberts took the position that CSXT was negligent per se under FELA because Perry allegedly violated certain state traffic laws on the morning of the accident, and the district court instructed the jury accordingly. But that theory of the case was squarely contrary to well-established law forbidding the consideration of violations of state laws in determining whether a railroad was negligent under FELA; it accordingly provides no basis for upholding the verdict.

Legislating against the backdrop of harsh and inconsistent state common law rules (Thomas E. Baker, *Why Congress Should Repeal the Federal Employers’ Liability Act of 1908*, 29 Harv. J. Legis. 79, 82 (1992)), Congress determined in passing FELA that there should be a single, “federally declared standard” of negligence to govern injuries to railroad employees. *Dice*, 342 U.S. at 361; *see also* 49 U.S.C. § 20106-

(a)(1) (providing that the standards under FELA “shall be nationally uniform to the extent practicable”). As this Court and the Supreme Court both have said, a “uniform application” of FELA’s negligence standard “throughout the country” is “essential to effectuate its purposes.” *Schadel*, 381 F.3d at 676 (quoting *Dice*, 342 U.S. at 361).

In keeping with the uniform nature of FELA’s negligence standard, the Supreme Court has recognized that violations of certain federal laws, which themselves apply consistently throughout the nation, are negligence per se under the statute. *Urie*, 337 U.S. at 189; *Coffey*, 479 F.3d at 477. Thus, proving a violation of “the Safety Appliance Acts” or “the Boiler Inspection Act” will “dispense * * * with the necessity of proving” the individual elements of negligence because a violation of either statute, standing alone, “is effective to show negligence as a matter of law.” *Urie*, 337 U.S. at 189; *see also, e.g., Schmitz v. Canadian Pac. Ry. Co.*, 454 F.3d 678 (7th Cir. 2006) (holding that a violation of 49 C.F.R. § 213.37(c) is negligence per se under FELA).

By contrast, it has long been settled that “the violation of a statute of a state” does *not* “constitute[] negligence per se * * * under the Federal Employers’ Liability Act.” *Stapleton*, 279 U.S. at 593. That is so because negligence under FELA presents “a federal question” that “is to be decided exclusively as such.” *Id.* “The kind or amount of evidence

required to establish it” accordingly “is not subject to the control of the several states,” and violations of state laws “ha[ve] no bearing on the civil liability of a railway to its employees.” *Id.* at 593, 597.

Every other court to have considered the question has followed *Stapleton*’s lead. The Missouri Supreme Court, for example, has concluded that “the test and measure of [a railroad’s] liability [under FE- LA] is not whether [it has] complied with a state statute but is whether [it was] guilty of negligence under the act.” *Smith*, 182 S.W.2d at 66 (citing *Stapleton*). The Supreme Court of California likewise has held that “provisions of the local law” may not be “consider[ed] * * * in decid- ing whether or not the employer was negligent” under FELA. *Davee*, 375 P.2d at 294. And the Supreme Court of South Carolina has ex- plained succinctly that “no presumption of negligence arises in a case tried under the Federal Employers’ Liability Act from the violation of a state statute.” *Moore*, 161 S.E. at 526.

This common-sense conclusion – that violations of state law can- not be negligence per se under FELA – recognizes that the “federally declared standard [w]ould be defeated if states were permitted to have the final say as to what” conduct constitutes negligence in “suits under the Act.” *Dice*, 342 U.S. at 361. As this Court acknowledged in the course of interpreting 45 U.S.C. § 54a, if state-law “vehicular safety

regulation[s]” defined the railroads’ obligations under FELA with respect to motor vehicle accidents, there would be “irrational disparities in the enforcement” of the statute: “FELA would mean one thing in Illinois and another thing in Indiana even with regard to identical accidents,” directly undermining FELA’s central purpose of creating a single, uniform standard. *Fletcher v. Chicago Rail Link, L.L.C.*, 568 F.3d 638, 640 (7th Cir. 2009).⁵

There is accordingly no disputing that Roberts was required to offer evidence sufficient to demonstrate not that Perry violated certain Indiana traffic laws, but that Perry failed to “exercise reasonable care

⁵ The prospect of irrational disparity in the application of FELA, if state traffic law violations were negligence per se under the Act, is neither fanciful nor speculative. Laws concerning moving violations as common as exceeding a posted speed limit vary wildly from state to state. In many states, such as Indiana, Oklahoma, and Wisconsin, for example, driving at a speed in excess of the posted limit is a per se violation of state traffic laws. *See* Ind. Code § 9-21-5-2; Okla. Stat. tit. 47, § 11-801; Wis. Stat. § 346.57(5). In Texas, however, driving above a posted speed limit is only prima facie evidence of a traffic violation; a defendant may rebut the presumption with evidence that his or her speed was safe. *See* Tex. Transp. Code Ann. §§ 545.352(a), (b)(1). Many other states, such as Michigan, Minnesota, and Ohio, split the difference. In these states, speeding is sometimes a per se violation and sometimes not. *See* Mich. Comp. Laws §§ 257.627, 257.628; Minn. Stat. § 169.14(2)(a); Ohio Rev. Code Ann. § 4511.21. Thus, according to Roberts’ theory in the case, the same accident occurring at 27 miles per hour in a 25 mile-per-hour speed zone would be negligence as a matter of law under FELA in Indiana, but not Ohio; in Wisconsin, but not Minnesota; and in Oklahoma, but not Texas.

under all the circumstances” (*Restatement* § 3) and thereby “caused or contributed to” Roberts’s injury (*McBride*, 598 F.3d at 406). *See Martin v. Harris*, 560 F.3d 210, 216 (4th Cir. 2009) (FELA plaintiffs must prove “duty, breach, and injury”); *Stevens*, 97 F.3d at 598 (“A FELA plaintiff must prove the traditional common law elements of negligence.”).⁶ As we now demonstrate, Roberts fell far short of doing so.

B. The evidence was not sufficient to establish that Perry was negligent.

Roberts failed to carry his burden of proving each indispensable element of negligence. To start, there was no evidence to establish the precautions that a reasonably careful person would have taken under the conditions prevailing that morning or that Perry failed to take such precautions. *See Clifford*, 627 F.3d at 272 (“to prove negligence, [a plaintiff is] required to produce evidence identifying the precaution that [the defendant] failed to take”).

Evidence sufficient to this task might have included proof concerning the precautions that drivers ordinarily adopt when driving in

⁶ It is irrelevant that CSXT did not object to the negligence-per-se instruction on this ground. “If the evidence presented” at trial does “not suffice, as a matter of law, to support a jury verdict under the properly formulated” legal standard, then the verdict must be overturned “even though [the party who lost the verdict] failed to object to jury instructions that expressed” an incorrectly formulated legal standard “that would support a verdict.” *Boyle*, 487 U.S. at 513-514.

icy, snowing conditions (such as driving at a particular speed), and evidence that Perry failed to adopt those precautions. *See* W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 33, at 193 (5th ed. 1984) (“evidence of the usual and customary conduct of others under similar circumstances” is relevant to prove “the risks of the situation and the precautions required to meet them”). Alternatively, Roberts could have called an expert witness to opine on whether Perry’s speed of 20 miles per hour was excessive under the circumstances. *See, e.g.*, *Wilkerson v. Harvey*, 814 N.E.2d 686, 690-691 (Ind. Ct. App. 2004) (expert opining on reasonable speed); *Williams v. Garmane*, 590 N.E.2d 121, 125 (Ill. App. Ct. 1992) (to support a finding that a driver “failed to exercise reasonable care in reducing his speed,” there must be not only evidence of the driver’s speed, but also testimony that the speed was “too fast for conditions”). But Roberts offered no such evidence.

Even if Roberts had adduced evidence that Perry was driving unreasonably, the record is devoid of evidence that the accident could have been avoided if he had not been. Accidents happen, after all, even to drivers driving reasonably. Indeed, it is a “general rule” that some injuries “could not have [been] avoided by exercising reasonable care” and that actors are “not liable for harm” under such circumstances, regardless of whether they exercised such care themselves. *Restatement*

§ 6(g). Here, again, Roberts could have offered expert testimony to establish that driving at an objectively reasonable speed would have averted the collision. *See, e.g., Wilkerson*, 814 N.E.2d at 690-691. And here, again, he did not.

Rather than offering evidence concerning the basic elements of negligence, Roberts focused instead on two, isolated snippets of testimony that are wholly insufficient to sustain the verdict.

The first of these was Officer Challis's affirmative response to Roberts's leading question as to whether the police report demonstrated that Perry was "[d]riving left of center" at the time of the accident. SA54. No rational trier of fact could have taken Challis's one-word response to mean that Perry actually was driving on the wrong side of the road, akin to driving into the opposing lane to make an illegal pass. To begin with, there was not an iota of corroborating evidence to support Roberts's leading question. Of particular note, not one of the actual eye witnesses to the accident testified that Perry was driving on the wrong side of the road.

Perhaps more importantly, however, Challis's answer was elicited in response to an inquiry concerning the contents of the accident report, and not any independent account of the collision. (Challis did not witness the accident himself.) Even the most cursory review of the

accident report confirms that it does *not* suggest that Perry was “driving” left of center; instead, it says in plain terms that “ice caus[ed]” Perry’s truck to lose traction and “*slide* into westbound traffic.” SA112 (emphasis added). The diagram of the accident that Challis drew in his report is consistent with this understanding. *Id.* And Challis himself later testified that his report said only that “ice caused [Perry] to slide into the westbound lane of traffic and strike Vehicle 2.” SA58. In short, no reasonable jury could find merely on the basis of Challis’s acquiescence in Roberts’s leading question that Perry had been actively driving on the wrong side of the road before colliding with the vehicle in which Roberts was riding.⁷

Yet without such a finding, there can be no liability. While reasonably prudent people generally may be expected not to drive on the wrong side of the road into oncoming traffic, they hardly can be expected to prevent a car that is sliding out-of-control on ice from crossing a road’s center line. *See Berger v. Peterson*, 498 N.E.2d 1257, 1259 (Ind.

⁷ Even if Challis’s uncorroborated acquiescence in Roberts’s question constituted “some” evidence that Perry was driving negligently, however, it is settled that there must be “more than a ‘mere scintilla’ of evidence to support the verdict.” *Minn. Mining & Mfg. Co. v. Pribyl*, 259 F.3d 587, 605 (7th Cir. 2001); *see also Millbrook*, 280 F.3d at 1173 (“a mere scintilla of supporting evidence will not suffice”). Without even a hint of support from any other evidence in the record, Challis’s one-word answer to a leading question is nothing more than that.

Ct. App. 1986) (upholding a verdict for the defendant on the basis that “skid[ding] into [the opposing] lane” over ice and snow is not negligent absent “evidence of excessive speed or * * * specific driver error”).

The second snippet of testimony that Roberts relied on was Perry’s admission that he was unaware that the roads were icy that morning and that he accordingly was “operating the vehicle as [he] would operate it on any day when there are good weather conditions.” SA24.

That statement also is insufficient to support a finding that Perry failed to exercise reasonable care, for at least two reasons. *First*, there was no evidence that the roads were conspicuously icy and that a reasonably cautious person necessarily would have been aware of the ice and adjusted his or her driving accordingly. *Second*, the record does not establish that a reasonably prudent person aware of ice on the road would have been driving any differently than Perry was driving immediately before the accident. Again, the evidence was that Perry was traveling just 20 miles per hour in a 40- or 45-mile-per-hour speed zone. Given the complete lack of evidence bearing on what an appropriate speed would have been, only speculation could have supported a conclusion that 20 miles per hour was too fast for the conditions – and it is well settled that “speculation cannot be the basis of a jury verdict.” *Garrett v. Barnes*, 961 F.2d 629, 634 (7th Cir. 1992).

In sum – applying the “properly formulated legal standard” for liability in this case (*Geldermann*, 27 F.3d at 312) – there was insufficient evidence to find that Perry was negligent. The Court accordingly should reverse the judgment below and order entry of judgment in favor of CSXT.⁸

II. INSTRUCTING THE JURY ON NEGLIGENCE PER SE WAS PLAIN ERROR.

If the Court nonetheless concludes that there was sufficient evidence of negligence to preclude entry of judgment for CSXT, it should order a new trial because the district court committed plain error by instructing the jury that violations of Indiana traffic laws constitute negligence per se under FELA.

For this court to overturn a jury verdict on the basis of an unpreserved instructional error, the error must be “plain” and “affect[] sub-

⁸ It bears brief mention that this is not the kind of case in which a jury could have inferred negligence from the mere fact that the accident occurred. This Court has recognized that a plaintiff may prevail in a FELA action upon a *res ipsa loquitur* theory only in very limited circumstances. The doctrine “was designed for the situation in which * * * the occurrence, absent the possible negligence of the plaintiff, was extraordinary in nature, [and] not a usual happening.” *Robinson*, 131 F.3d at 654 (citing *Herdman v. Pa. R.R.*, 352 U.S. 518, 520 (1957)). Put another way, “[t]he rule deals only with permissible inferences from [otherwise] unexplained events.” *Id.* (quoting *Johnson v. United States*, 333 U.S. 46, 49 (1948)). A car sliding across ice into oncoming traffic is hardly an “extraordinary” and “[un]usual” event, inexplicable absent negligence.

stantial rights.” Fed. R. Civ. P. 51(d)(2).⁹ “An error is ‘plain’ when it is ‘clear’ or, equivalently, ‘obvious.’” *Sykes*, 614 F.3d at 312 (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)). “An error affects substantial rights when it ‘affected the outcome of the district court proceedings.’” *Id.* (quoting same). Reversal for plain error also requires that “the error seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Id.* (alterations and internal quotation marks omitted) (quoting *Olano*, 507 U.S. at 732). This Court has accordingly said that unpreserved instructional errors generally require reversal when the error “probably changed the outcome of the trial.” *Courtright*, 2011 WL 102591, at *6 (quoting *United States v. Moore*, 115 F.3d 1348, 1362 (7th Cir. 1997)). Each of these conditions is satisfied here.

As an initial matter, the district court’s error in giving the state-law negligence-per-se instruction was “clear” and “obvious.” *Sykes*, 614 F.3d at 312. As we have explained (*supra*, at 18-21), it is well settled that “the violation of a statute of a state” does not “constitute[] negligence per se * * * under the Federal Employers’ Liability Act.” *Staple-*

⁹ Although CSXT objected to the negligence per se instruction, it did so only on the basis that there was insufficient evidence to give it. SA83-85, 96-100. We acknowledge that that objection did not preserve the independent argument that the instruction was erroneous because violations of state law are not negligence per se under FELA. See *Schobert v. Ill. Dep’t of Transp.*, 304 F.3d 725, 730 (7th Cir. 2002).

ton, 279 U.S. at 593. To the contrary, the issue of negligence under FE-
LA presents “a federal question” that “is to be decided exclusively as
such,” and violations of state laws “ha[ve] no bearing on the civil liabili-
ty of a railway to its employees.” *Id.* at 593, 597. The district court’s
negligence per se instruction clearly and obviously violated this long-
established rule.

What is more, the district court’s error also “probably” – indeed,
almost *certainly* – “changed the outcome of the trial.” *Moore*, 115 F.3d
at 1362 (internal quotation marks omitted). On this point, there is little
room for doubt: Roberts’s only theory of the case was negligence per se.

Roberts’s attorney opened the trial by arguing that Perry had vi-
olated Indiana traffic laws providing that drivers must “drive to the left
of center,” and “[w]hen it is icy and snowing out, you have to slow
down.” SA9-10. He contended that, because Perry “violated” these
“rules” “when [he] caused the collision between the CSX truck and the
CSX van,” the jury should find that he was at fault, without regard for
the basic elements of negligence. SA10.

During summations Roberts similarly argued: “There’s a statute
that says your vehicle cannot be to the left side of the road. Everyone
knows that vehicle was on the left side of the road, * * * [that] the ve-
hicle [was] driving to the left side of the road.” SA74. He also argued

that Perry “violated the statute about taking * * * account of roadway conditions when the weather conditions make driving hazardous and adjust your driving for them so you don’t lose control.” SA72. According to Roberts, “[t]here is no defense to those violations, and those violations are negligence, which is a violation of the FELA.” *Id.* These arguments were central in framing the jury’s consideration of the case. *See Lewis*, 590 F.3d at 440 (lawyers’ arguments “can be accounted for when determining if there was plain error”).

There is thus no doubting that the jury found CSXT liable solely by reason of the negligence per se instruction. Roberts offered no other basis for finding in his favor. The erroneous instruction charging the jury to find CSXT negligent per se if it found that Perry violated any Indiana traffic law thus “probably changed the outcome of the trial.” *Courtright*, 2011 WL 102591, at *6 (quoting *Moore*, 115 F.3d at 1362). In short, the giving of that instruction was plain error.

CONCLUSION

The judgment should be reversed and the case remanded with instructions either to enter judgment for CSXT (if the Court finds the evidence insufficient to support the verdict), or to hold a new trial before a properly instructed jury (if it does not).

Respectfully submitted,

Evan M. Tager
Michael B. Kimberly
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

Harold Abrahamson
ABRAHAMSON,
REED & BILSE
200 Russell Street
Hammond, IN 46320
(219) 937-1500

*Counsel for Defendant-Appellant
CSXT Transportation, Inc.*

Dated: February 25, 2011

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the rules concerning format and length contained in Circuit Rule 32(b) and Federal Rule of Appellate Procedure 32(a)(7). This brief was produced with a proportionally spaced font, 12 points or larger; and the length of this brief, including footnotes, is 7,199 words.

Dated: February 25, 2011

Michael B. Kimberly
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

CERTIFICATE OF SERVICE

I hereby certify that that on February 25, 2011, two copies of the Opening Brief of CSX Transportation, Inc. and Required Short Appendix, together with one copy of the Separate Appendix of CSX Transportation, Inc., were served by overnight courier upon counsel of record for Plaintiff-Appellee, Kevin Roberts. Digital versions of the same were served electronically via the Court's CM/ECF system.

Dated: February 25, 2011

Michael B. Kimberly
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), I hereby certify that all materials required by Circuit Rule 30(a) and (b) are included in the Attached Required Short Appendix and the Supplemental Appendix.

Dated: February 25, 2011

Michael B. Kimberly
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

REQUIRED SHORT APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KEVIN ROBERTS,)	
Plaintiff,)	
)	
vs.)	1:09-cv-00162-LJM-TAB
)	
CSX TRANSPORTATION, INC.,)	
Defendant.)	
)	

SPECIAL VERDICT FORM

- Do you find that defendant, CSX Transportation, Inc., by and through its employee, Vernon Perry, was negligent and that CSX Transportation's negligence caused or contributed to plaintiff's, Kevin Roberts, injuries?

YES X NO _____

If you answered yes, mark the appropriate box on Verdict Form A and proceed to the next question. If you answered no, sign and date this Special Verdict Form and Verdict Form B and inform the Bailiff that you have reached a verdict.

- What sum of money has the plaintiff, Kevin Roberts, proven that he would have received as wages if he had not been injured due to the negligence of defendant, CSX Transportation?

If appropriate, enter the amount of Roberts' lost wages \$ 1,479,686

If you entered an amount, proceed to the next question. If you did not, proceed to question 6.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KEVIN ROBERTS,)	
Plaintiff,)	
)	
vs.)	1:09-cv-0162-LJM-TAB
)	
CSX TRANSPORTATION, INC.,)	
Defendant.)	
)	
)	

SPECIAL VERDICT FORM (continued)

3. Did the plaintiff, Kevin Roberts, fail to take reasonable actions to secure other employment following the accident at issue, and would Roberts reasonably have found employment if he had taken such action?

YES _____ NO X _____

If you answered yes, proceed to the next question. If you answered no, proceed to question 6.

4. What sum of money do you all agree that plaintiff, Kevin Roberts, reasonably would have earned during the period for which you are awarding lost wages, if he had sought and reasonably have obtained employment?

If appropriate, enter amount \$ N/A

5. If appropriate, subtract the amount you entered for question 4 from the amount you entered for question 2, and enter the difference as Roberts' "lost wages."

\$ N/A - \$ N/A = \$ N/A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KEVIN ROBERTS,)
Plaintiff,)
)
vs.) 1:09-cv-0162-LJM-TAB
)
CSX TRANSPORTATION, INC.,)
Defendant.)
)
)

SPECIAL VERDICT FORM (continued)

6. In addition to lost wages, what sum of money do you all agree will compensate plaintiff, Kevin Roberts, for any losses which he has proven that he suffered as a result of defendant's, CSX Transportation, negligence?

If appropriate, enter amount \$ 2,500,000



FOREPERSON

Dated: Aug. 27, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KEVIN ROBERTS,)	
Plaintiff,)	
)	
vs.)	1:09-cv-0162-LJM-TAB
)	
CSX TRANSPORTATION, INC.,)	
Defendant.)	
)	
)	

VERDICT FORM A

We, the Jury in the above-entitled action, unanimously find the following:

 X Plaintiff, Kevin Roberts, has proven by a preponderance of the evidence that the defendant, CSX Transportation, Inc., by and through its employee, Vernon Perry, was negligent and that CSX Transportation's negligence caused or contributed to plaintiff's, Kevin Roberts, injuries.

If appropriate, add the amounts that you all agree represents Roberts' lost wages (either the amount entered for question 2 or question 5) to the amount you entered for question 6. Plaintiff, Kevin Roberts, is entitled to compensatory damages in the amount of

\$ 3,979,686.



FOREPERSON

Dated: August 27, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KEVIN ROBERTS,)	
Plaintiff,)	
)	
vs.)	1:09-cv-0162-LJM-TAB
)	
CSX TRANSPORTATION, INC.,)	
Defendant.)	
)	

VERDICT FORM B

We, the Jury in the above-entitled action, unanimously find in favor of the defendant, CSX Transportation, Inc., and against the plaintiff, Kevin Roberts, on his FELA claim.

FOREPERSON

DATED: _____

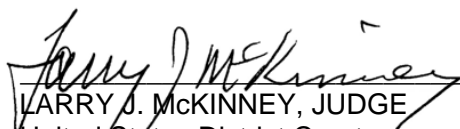
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KEVIN ROBERTS,)	
Plaintiff,)	
)	
vs.)	1:09-cv-00162-LJM-TAB
)	
CSX TRANSPORTATION, INC.,)	
Defendant.)	

ENTRY OF JUDGMENT

On August 27, 2010, a jury returned a verdict in favor of plaintiff, Kevin Roberts, and against defendant, CSX Transportation, Inc., in the amount of \$3,979,686.00, on plaintiff's claim for damages. Judgment is hereby **ENTERED** accordingly.

DATED this 08/30/2010


 LARRY J. MCKINNEY, JUDGE
 United States District Court
 Southern District of Indiana

LAURA A. BRIGGS, CLERK
United States District Court
Southern District of Indiana

By: _____
Deputy Clerk

Distribution attached.

Distribution to:

Harold Abrahamson
ABRAHAMSON REED & BILSE
aralawfirm@aol.com

George T. Brugess
HOEY & FARINA P.C.
gbrugess@hoeyfarina.com

Frank Van Bree
HOEY FARINA
fvanbree@hoeyfarina.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KEVIN ROBERTS,)	
Plaintiff,)	
)	
vs.)	1:09-cv-00162-LJM-TAB
)	
CSX TRANSPORTATION, INC.,)	
Defendant.)	

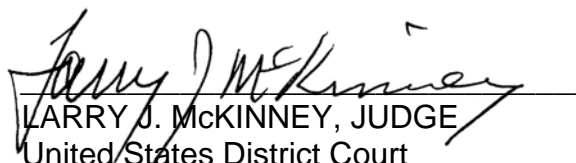
**ORDER ON DEFENDANT’S MOTION FOR JUDGMENT OR, IN THE ALTERNATIVE,
FOR NEW TRIAL OR REMITTITUR**

This matter comes before the Court on defendant’s, CSX Transportation, Inc. (“CSX”), Motion for Judgment or, in the Alternative, for New Trial or Remittitur, pursuant to Federal Rule of Civil Procedure 59 (Dkt. No. 162). In support of its Motion, CSX argues that there was no evidence at trial that its driver, Vernon Perry (“Perry”), negligently operated the CSX truck that collided with the van in which plaintiff, Kevin Roberts, was a passenger. In addition, CSX argues that the Court erred when instructing the jury pursuant to Instruction 21 and, as a result, CSX was prejudiced. Lastly, CSX argues that the compensatory damages awarded by the jury were both excessive and unsupported by sufficient evidence.

The Court disagrees with CSX that there was no evidence that Perry negligently operated the CSX truck in question. The Court also disagrees that it erred in giving Instruction 21 to the jury or that CSX was prejudiced by that Instruction. Lastly, the Court

disagrees that the verdict was excessive or unsupported by the evidence. Accordingly, CSX's Motion for Judgment or, in the Alternative, for New Trial or Remmittitur is **DENIED**.¹

IT IS SO ORDERED this 2nd day of November, 2010.


LARRY J. MCKINNEY, JUDGE
United States District Court
Southern District of Indiana

Distribution to:

Harold Abrahamson
ABRAHAMSON REED & BILSE
aralawfirm@aol.com

George T. Brugess
HOEY & FARINA P.C.
gbrugess@hoeyfarina.com

Frank Van Bree
HOEY FARINA
fvanbree@hoeyfarina.com

¹ In addition, after an examination of the arguments contained in the parties' briefs, the Court concludes that oral argument is unnecessary. Therefore, CSX's Motion for Oral Argument (Dkt. No. 164) is **DENIED**.