Nos. 13-2235(L), 13-2252, and 13-2325

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CSX TRANSPORTATION, INCORPORATED,

Plaintiff-Appellee/Cross-Appellant,

v.

ROBERT N. PEIRCE, JR.; LOUIS A. RAIMOND; RAY A. HARRON, Dr.,

Defendants-Appellants/Cross-Appellees,

[Caption Continued on Inside Cover]

Appeals from the United States District Court
for the Northern District of West Virginia
in Case No. 5:05-cv-00202-FPS-JES (Stamp, J.)

REPLY BRIEF FOR CROSS-APPELLANT

Marc E. Williams
Robert L. Massie
NELSON MULLINS RILEY & SCARBOROUGH LLP
949 Third Avenue
Suite 300
Huntington, WV 25701
(304) 526-3501

Samuel L. Tarry, Jr.
Mitchell K. Morris
MCGUIREWOODS LLP
One James Center
901 E. Cary Street
Richmond, VA 23219
(804) 775-1000

Dan Himmelfarb
Scott M. Noveck
Jason R. LaFond
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Attorneys for Plaintiff-Appellee/Cross-Appellant
CSX Transportation, Incorporated

[Caption Continued from Front Cover]

ROBERT V. GILKISON; PEIRCE, RAIMOND & COULTER, PC, a/k/a Robert Peirce & Associates, P.C., a Pennsylvania Professional Corporation; JOHN DOE(S); MARK T. COULTER,

Defendants,

RICHARD CASSOFF, M.D.,

Party-in-Interest,

LUMBERMENS MUTUAL CASUALTY COMPANY,

Intervenor.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
INTRODUCTION 1
ARGUMENT 1
A. There Is Overwhelming Evidence Of Gross Fraud 1
B. Cross-Appellees' Alternative Argument—That Punitive Damages Are Unavailable Because CSXT's Common-Law Claims Are Supposedly Based On A Rule 11 Violation—Should Be Rejected 6
1. Cross-appellees' alternative argument is foreclosed by this Court's decision in the prior appeal 7
2. Cross-appellees' alternative argument was not raised below 13
3. Cross-appellees' alternative argument is meritless 18
CONCLUSION 30
CERTIFICATE OF COMPLIANCE 31
CERTIFICATE OF SERVICE 32

TABLE OF AUTHORITIES

Cases **Page(s)**

AUSA Life Ins. Co. v. Ernst & Young,
206 F.3d 202 (2d Cir. 2000) 21

Beverati v. Smith,
120 F.3d 500 (4th Cir. 1997) 13

Bus. Guides, Inc. v. Chromatic Commc'ns Enters.,
498 U.S. 533 (1991) 22, 23

Chambers v. NASCO, Inc.,
501 U.S. 32 (1991) 27

City of Roseville Emps.' Ret. Sys. v. Horizon Lines, Inc.,
686 F. Supp. 2d 404 (D. Del. 2009) 20

Clark v. Druckman,
624 S.E.2d 864 (W. Va. 2005) 23, 24, 25, 27

Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.,
203 F.3d 291 (4th Cir. 2000) 9

Crocker v. Piedmont Aviation, Inc.,
49 F.3d 735 (D.C. Cir. 1995) 10

CSX Transp., Inc. v. Gilkison,
406 F. App'x 723 (4th Cir. 2010) 8

Eichorn v. AT&T Corp.,
484 F.3d 644 (3d Cir. 2007) 10

Essroc Cement Corp. v. CTI/D.C., Inc.,
740 F. Supp. 2d 131 (D.D.C. 2010) 6

Fogel v. Chestnutt,
668 F.2d 100 (2d Cir. 1981) 11, 12

Garnes v. Fleming Landfill, Inc.,
413 S.E.2d 897 (W. Va. 1991) 4, 29

TABLE OF AUTHORITIES
(continued)

Page(s)

Haeger v. Goodyear Tire & Rubber Co.,
906 F. Supp. 2d 938 (D. Ariz. 2012) 28

Harrison v. Westinghouse Savannah River Co.,
176 F.3d 776 (4th Cir. 1999) 21

Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc.,
573 F.3d 947 (10th Cir. 2009) 11, 12

Heathcoat v. Potts,
905 F.2d 367 (11th Cir. 1990) (per curiam) 11

Ill. Cent. R.R. v. Harried,
2010 WL 4553640 (S.D. Miss. 2010), *aff'd*, 682 F.3d 381
(5th Cir. 2012) 4

In re Intelligroup Sec. Litig.,
527 F. Supp. 2d 262 (D.N.J. 2007) 20

In re Stone & Webster, Inc., Sec. Litig.,
414 F.3d 187 (1st Cir. 2005) 21

In re Under Seal,
749 F.3d 276 (4th Cir. 2014) 14

Int'l Bus. Machs. Corp. v. Bajorek,
191 F.3d 1033 (9th Cir. 1999) 22

Kessler v. Nat'l Enters.,
203 F.3d 1058 (8th Cir. 2000) 11, 12

Laitram Corp. v. NEC Corp.,
115 F.3d 947 (Fed. Cir. 1997) 10

Louzon v. Ford Motor Co.,
718 F.3d 556 (6th Cir. 2013) 15

TABLE OF AUTHORITIES
(continued)

Page(s)

Luce v. United States,
469 U.S. 38 (1984) 15

Pavelic & LeFlore v. Marvel Entm't Grp.,
493 U.S. 120 (1989) 29

Perrine v. E.I. du Pont de Nemours & Co.,
694 S.E.2d 815 (W. Va. 2010) 28

Quicken Loans, Inc. v. Brown,
737 S.E.2d 640 (W. Va. 2012) 19

R.R. ex rel. R. v. Fairfax Cnty. Sch. Bd.,
338 F.3d 325 (4th Cir. 2003) 14

Roboserve, Inc. v. Kato Kagaku Co.,
78 F.3d 266 (7th Cir. 1996) 6

Schering Corp. v. Ill. Antibiotics Co.,
89 F.3d 357 (7th Cir. 1996) 11, 13

Sorich v. United States,
709 F.3d 670 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 952 (2014) 21

United States v. Moss,
963 F.2d 673 (4th Cir. 1992) 14

Van Alstyne v. Elec. Scriptorium, Ltd.,
560 F.3d 199 (4th Cir. 2009) 15

Statutes, Regulations, and Rules

18 U.S.C. § 1341 2

18 U.S.C. § 1343 2

18 U.S.C. § 1350 20

TABLE OF AUTHORITIES
(continued)

Page(s)

18 U.S.C. § 1962 2

18 U.S.C. § 1963 2

17 C.F.R. § 210.2-02(b)(1) 21

Fed. R. Civ. P. 50 .....14, 18

Fed. R. Civ. P. 50(a) 15, 17

Fed. R. Civ. P. 50(b) 14, 16

W. Va. R. Civ. P. 11 .....*passim*

Other Authorities

Restatement (Second) of Torts (1977) 19

INTRODUCTION

As the stage-two brief demonstrates (at 83-85), a reasonable jury could find not only fraud but "gross fraud," under any possible definition of that term, and thus the punitive-damages claim should be submitted to the jury in the event that this Court orders a new trial on the common-law counts. In defending the judgment as a matter of law on punitive damages, cross-appellees principally contend that there can be no gross fraud because there can be no fraud. They advance two of the same arguments that they make in challenging the jury's finding of fraud: that CSXT is seeking to enforce Rule 11 through a private cause of action; and that cross-appellees' representations were not false. Stage Three Br. 48-51. These arguments fare no better in this context than in the other. Together with cross-appellees' other arguments on punitive damages, they should be rejected for the reasons below.

ARGUMENT

A. There Is Overwhelming Evidence Of Gross Fraud

Cross-appellees argue that "there is no evidence that [they] engaged in anything close to the kind of conduct that warrants an award of punitive damages under West Virginia law"—namely, "gross fraud" as opposed to "simple fraud." Stage Three Br. 49-51. In fact

there is overwhelming evidence of gross fraud under any possible standard.

Cross-appellees claim, for example, that gross fraud requires "conduct similar to that usually found in a crime." Stage Three Br. 49 (internal quotation marks omitted). Even if that is true, the conduct here was not merely "similar" to criminal conduct; it *was* criminal conduct. On the basis of the same evidence that proved CSXT's common-law claims, the jury could and *did* find that cross-appellees conducted (or conspired to conduct) the affairs of an enterprise through a pattern of mail and wire fraud. Both racketeering and mail and wire fraud are crimes. *See* 18 U.S.C. §§ 1341, 1343, 1962-1963.

Cross-appellees also contend that the "existence of more than one misrepresentation" is not sufficient for a finding of gross fraud. Stage Three Br. 49. Even if *that* is true, a jury could find far more than just a series of misrepresentations here, since CSXT proved that the lawyer defendants both manufactured *and* filed fraudulent asbestos claims. Thus:

- The lawyer defendants solicited thousands of railroad workers, who they had no reason to believe were sick, to sit

for unprescribed, low-quality x-rays taken by an unlicensed technician.

- They conspired with a since-discredited doctor who claimed to find evidence of asbestosis at an impossibly high rate.
- They suggested and even fabricated answers on "asbestos questionnaires" as evidence of asbestos exposure.
- They inundated CSXT with thousands of claims in mass lawsuits, making it prohibitively expensive for CSXT to contest any individual claim or uncover their fraud.
- They falsely certified that they had conducted a reasonable investigation into each plaintiff's claim before filing suit when in fact they had not even bothered to search their own files.
- Despite knowing that the claims were manufactured, they falsely represented that the claims in each mass lawsuit had a good-faith basis in fact.
- Even after Harron was discredited, they pressed to settle as many claims as possible before his fraud became widely

known and sought out other unreliable doctors to rubber-stamp his fraudulent B-reads.

If all of this does not amount to the sort of "substantial misconduct" that would allow a jury to find "gross" rather than "simple" fraud, Stage Three Br. 49, then one has to wonder what would.

Nor is this evidence of "gross fraud" the only aggravating conduct that would justify an award of punitive damages. For one thing, the lawyer defendants abused their positions as "attorneys and officers of the Court," a breach of trust that is "wanton and aggressive enough" to support punitive damages. *Ill. Cent. R.R. v. Harried*, 2010 WL 4553640, at *4 (S.D. Miss. 2010), *aff'd*, 682 F.3d 381 (5th Cir. 2012). For another, one of the "factors to be considered in awarding punitive damages" is whether the defendants "attempted to conceal or cover up [their] actions," *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 899, 909 (W. Va. 1991), and cross-appellees took a number of steps (described above) to do just that.

Apart from their general assertion that the standard for gross fraud is hard to satisfy, cross-appellees advance only one argument that is tied to the specific facts of this case. They contend that no rational

jury could find gross fraud because Dr. Parker's blinded study supposedly constitutes "strong[] *** evidence" that the lawyer defendants had a good-faith basis for the lawsuits that rested on Harron's B-reads. Stage Three Br. 50. This is essentially the same argument that cross-appellees made in their stage-one brief (at 45-46) in challenging the sufficiency of the evidence supporting CSXT's RICO and common-law claims. As we explained in our stage-two brief (at 67-69), the argument ignores the fact that the panel consensus *rejected every one of Harron's positive reads* and that, even if an individual x-ray might be read as positive, the jury could find from Harron's systematic pattern of overreading that, as a whole, Harron's B-reads were intentionally inaccurate and unreliable.

Cross-appellees offer no real response to these points in their stage-three brief—either in addressing the punitive-damages claim (at 48-51) or in addressing the RICO and common-law claims (at 34-36). The blinded study thus no more precludes a finding of gross fraud than it precludes a finding of fraud and racketeering. On the contrary, as Dr. Parker testified, the study powerfully *supports* the jury's fraud verdict, and it would support a finding of gross fraud as well.

For all these reasons, this case could not be more different from the two punitive-damages cases on which cross-appellees rely (at 49). In one, the court "f[ou]nd in the record little more than simple deceit and obfuscation." *Roboserve, Inc. v. Kato Kagaku Co.*, 78 F.3d 266, 276 (7th Cir. 1996). In the other, the court rejected what amounted to a contention that punitive damages should be awarded "solely on a finding that Defendant made an intentional misrepresentation to Plaintiff." *Essroc Cement Corp. v. CTI/D.C., Inc.*, 740 F. Supp. 2d 131, 147 (D.D.C. 2010). As explained above, a rational jury could easily find much more than such "simple fraud" here.

B. Cross-Appellees' Alternative Argument—That Punitive Damages Are Unavailable Because CSXT's Common-Law Claims Are Supposedly Based On A Rule 11 Violation—Should Be Rejected

In addition to arguing that there is insufficient evidence of gross fraud, cross-appellees defend the judgment as a matter of law on punitive damages on a ground on which the district court did not rely. They contend that CSXT cannot recover punitive damages because its common-law claims "are predicated on an alleged violation of West Virginia Rule [of Civil Procedure] 11," which "cannot support [even] an award of compensatory damages" (or for that matter a finding of

liability). Stage Three Br. 48. Cross-appellees' alternative argument on punitive damages is thus derivative of one of their legal challenges to the RICO and common-law claims. Indeed, cross-appellees expressly cross-reference the portions of their stage-one and stage-three briefs that raise that challenge. *Id.* Like cross-appellees' claim directed to CSXT's RICO and common-law claims, *see* Stage Two Br. 37-46, this claim fails for three independent reasons: it is foreclosed by this Court's decision in the prior appeal; it was not raised below; and it is meritless. Nothing in cross-appellees' stage-three brief shows differently.

1. Cross-appellees' alternative argument is foreclosed by this Court's decision in the prior appeal

a. Cross-appellees' challenge to CSXT's theory of liability is foreclosed by the law-of-the-case doctrine, because this Court necessarily determined that CSXT's legal theory was viable in the prior appeal. *See* Stage Two Br. 37-39. In arguing otherwise, cross-appellees contend that this Court "in no way endorsed" CSXT's legal theory and that CSXT "cannot point to any part" of the Court's decision that addressed "the validity" of its theory. Stage Three Br. 20-21. That is simply incorrect. As cross-appellees acknowledge, CSXT's theory of

fraud is that the lawyer defendants falsely represented that "there was a good-faith basis" for their asbestosis claims. Stage Three Br. 4 (internal quotation marks omitted). In reversing summary judgment for the defendants in the prior appeal, this Court held that, if the jury were to "find that the lawyer defendants *** *lacked* a good faith basis to file an asbestos injury claim," the jury "could find that the lawyer defendants committed fraud by filing the lawsuit." *CSX Transp., Inc. v. Gilkison*, 406 F. App'x 723, 734 (4th Cir. 2010) (emphasis added). That holding necessarily endorsed CSXT's legal theory.

Cross-appellees also argue that the law-of-the-case doctrine does not apply because "the case that gave rise to this appeal is materially different from the case previously before this Court." Stage Three Br. 21. That is also incorrect. As the lawyer defendants acknowledged in the district court, the complaint on the basis of which the case was tried (the third amended complaint)

> specifically alleged [as] the basis of the[] *** fraud claims[] *** that *there was no good faith basis in fact* for the [l]awyer [d]efendants to file the claims at issue because they allegedly must have known that the claimants at issue did not in fact show any indications of having asbestos-related disease.

JA1304 (emphasis added). As the lawyer defendants elsewhere conceded, "the substance" of CSXT's operative complaint is therefore "the same" as the complaint that was previously before this Court (the first amended complaint). JA811. *Compare* JA161-66 (first amended complaint) *with* JA305-07 (third amended complaint).

Finally, cross-appellees argue that law of the case is "a discretionary doctrine" that "does not mandate acceptance" of CSXT's legal theory. Stage Three Br. 18. That law of the case is "discretionary," however, simply means that the doctrine is "not a jurisdictional requirement" and that there are certain "exceptions" that can "allow a panel of the court to change a prior ruling in the same case." *Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 203 F.3d 291, 304 (4th Cir. 2000). But no such exception applies here. Neither the law nor the facts have changed since the prior appeal, *see id.*, and cross-appellees cannot show that "the prior decision was clearly erroneous and would work a manifest injustice," *id.* (internal quotation marks omitted). If anything would work an injustice, it would be allowing cross-appellees to argue now that CSXT's basic legal theory—which CSXT has consistently asserted from the time it filed its first amended

complaint seven years ago, which this Court accepted in the prior appeal, and which was tried to the jury that returned a verdict in CSXT's favor—was never a viable theory to begin with.

b. Cross-appellees' challenge to CSXT's theory of liability is also foreclosed by the law-of-the-case doctrine for an independent reason: they failed to raise it in the prior appeal. *See* Stage Two Br. 39-40. Cross-appellees argue that this law-of-the-case waiver principle "does not apply to parties who were *appellees* in a previous appeal." Stage Three Br. 16. But the three cases on which they rely, *id.*, do not say that. What the cases say is that "a degree of leniency" is justified "in applying the waiver rule to issues that could have been raised by appellees on previous appeals." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 741 (D.C. Cir. 1995); *accord Eichorn v. AT&T Corp.*, 484 F.3d 644, 657-58 (3d Cir. 2007) (quoting this language); *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 954 (Fed. Cir. 1997) (same).

While there are some cases in which such "leniency" is warranted, there are many cases in which it is not, and in which the rule therefore has been applied to a party that was an appellee in the first appeal. Sometimes courts applying the rule in this circumstance have expressly

noted and discussed the status of the party. *See, e.g., Schering Corp. v. Ill. Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996) (Posner, J.) ("in the interest of judicial economy [the rule] should have a limited applicability even where, as in this case, the initial challenge to the trial court's ruling would have been by the appellee"); *Kessler v. Nat'l Enters.*, 203 F.3d 1058, 1059 (8th Cir. 2000) (while "appellate courts should not enforce the rule punitively against appellees," there is "strong reason to invoke the general rule" in this case); *Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc.*, 573 F.3d 947, 963 (10th Cir. 2009) ("the rule has properly been applied to appellees in some cases" and "[t]his is such a case"). Sometimes courts applying the rule in this circumstance have not expressly noted the party's status. *See, e.g., Fogel v. Chestnutt*, 668 F.2d 100, 108-12 (2d Cir. 1981) (Friendly, J.); *Heathcoat v. Potts*, 905 F.2d 367, 370-71 (11th Cir. 1990) (per curiam); *see also* Stage Three Br. 17-18. But courts have unquestionably applied the law-of-the-case waiver principle to parties that were appellees in the prior appeal.

Like those cases, this case is a singularly appropriate one for application of the waiver rule. Whether the plaintiff has a viable legal

claim is one of the most fundamental questions in any case. *Cf. Fogel*, 668 F.2d at 108 ("Defendants are *** precluded from now litigating the existence of an implied cause of action *** because of the principle of the law of the case."). For seven years, from the time the case began, all parties had assumed that CSXT had a viable legal claim in this case. *Cf. Haynes Trane Serv. Agency*, 573 F.3d at 964 ("We think the better course is to leave the posture of the case as both parties accepted it for six years—with [the plaintiff's] complaint *** arising as a fraud claim, not a contract claim."). Only now, in this appeal from a jury verdict against it, have cross-appellees taken the position that CSXT does *not* have a viable legal claim. *Cf. Kessler*, 203 F.3d at 1060 (defendant "presents no reason why justice requires that we overlook its long silence").

Cross-appellees argue that "judicial economy is not promoted" by requiring the appellee in the initial appeal "to assert every conceivable alternative ground for affirmance." Stage Three Br. 16. But no one takes the position that an appellee should be required to assert "every conceivable" claim. Like Judge Posner, we "agree that the failure of an appellee to have raised all possible alternative grounds for affirming the

district court's original decision *** should not operate as a waiver." *Schering Corp.*, 89 F.3d at 358. What we *do* say is that defendants should not be permitted to wait seven years—until after they have filed multiple rounds of dispositive motions, an appeal has been taken, they have filed multiple *additional* rounds of dispositive motions, and a jury has returned a verdict against them—to challenge the very foundation of the plaintiff's case. Cross-appellees' complaint about the burden that would be imposed on appellees rings especially hollow given that they *did* raise several alternative grounds for affirmance in the prior appeal, *see* Defs.-Appellees' Br. at 42-46, 60-64, *CSX Transp., Inc. v. Gilkison*, No. 09-2135 (4th Cir. 2010), and thus could easily have raised the much more fundamental one that they are raising for the first time in *this* appeal.

2. Cross-appellees' alternative argument was not raised below

Even if cross-appellees' challenge to CSXT's theory of liability was still available after this Court's decision in the prior appeal, it is not available now, because it was not raised below. An appellee defending a judgment on alternative grounds may rely only on "*properly preserved* alternative bases for affirmance." *Beverati v. Smith*, 120 F.3d 500, 503

(4th Cir. 1997) (emphasis added); *accord, e.g.*, *R.R. ex rel. R. v. Fairfax Cnty. Sch. Bd.*, 338 F.3d 325, 332 (4th Cir. 2003); *see United States v. Moss*, 963 F.2d 673, 676 (4th Cir. 1992) ("declin[ing] to consider" an alternative ground for affirmance that was "a theory newly raised" on appeal). Issues not raised in the district court are not properly preserved, and when a case proceeds through trial, even legal challenges must be raised in a motion under Fed. R. Civ. P. 50 to preserve them. *See* Stage Two Br. 40-41. "[T]o preserve an argument for appeal," moreover, a party "must press and not merely intimate the argument during the proceedings before the district court." *In re Under Seal*, 749 F.3d 276, 287 (4th Cir. 2014) (internal quotation marks omitted). Cross-appellees did not even "intimate" their alternative argument in the district court, much less "press" it in a Rule 50 motion. *See* Stage Two Br. 40-41. They are therefore precluded from relying on it.

Cross-appellees argue that "the filing of a Rule 50(b) motion"—*i.e.*, a renewed motion for judgment as a matter of law after the verdict—"is not a prerequisite to this Court's review of an otherwise-preserved *legal* challenge." Stage Three Br. 25. But a legal challenge at the very least

must be raised in a Rule 50(a) motion *before* the verdict, *Van Alstyne v. Elec. Scriptorium, Ltd.*, 560 F.3d 199, 203 n.3 (4th Cir. 2009), and cross-appellees did not do that. In any event, their challenge is not "otherwise-preserved."

Cross-appellees claim to have challenged CSXT's theory of fraud in two motions *in limine*, Stage Three Br. 22-24, but that would be inadequate even if they had. Unlike a motion to dismiss, for summary judgment, or for judgment as a matter of law, a motion *in limine* asks a court "to exclude anticipated prejudicial evidence before the evidence is actually offered," *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984), not to dismiss a case, or some part of it, on the basis of an asserted flaw in the plaintiff's legal theory. Courts have "consistently disallow[ed] litigants to raise non-evidentiary matters [in motions] in limine." *Louzon v. Ford Motor Co.*, 718 F.3d 556, 562 (6th Cir. 2013).

In any event, cross-appellees did not in fact claim in those motions *in limine*—as they do now—that CSXT's theory of fraud was impermissibly predicated upon a violation of Rule 11. On the contrary, cross-appellees acknowledged without protest that, "from the beginning, it has been CSX[T]'s position that the fraud fundamentally involved a

lack of factual basis for the claims that claimants at issue suffered from an asbestos-related disease." JA1306. They also recognized that "[t]his is a fraud case" and thus "very different" from an attempt to enforce Rule 11. JA769, 771. Far from *challenging* CSXT's theory of fraud, cross-appellees' motions *accepted* that theory and argued merely that certain evidence and arguments could not be placed before the jury to prove it. *See* JA769-82 (arguing that expert evidence should be excluded); JA1301-11 (arguing that CSXT could not deviate from the theory cross-appellees now challenge and present a *different* theory of fraud).

For the same reasons, cross-appellees' incorporation of one of those motions in their post-verdict Rule 50(b) motion, *see* Stage Three Br. 23, is insufficient to preserve the claim they raise here. Indeed, the Rule 50(b) motion, like the motion it incorporated, acknowledged that, "[f]rom this case's inception ***, CSX's theory *** ha[s] always and consistently been that the claims at issue were fraudulent because there was no factual basis to believe that the claimants at issue had an asbestos-related disease." JA1779-80. Like the motion *in limine*, the Rule 50(b) motion did not challenge that theory but instead argued that

CSXT had attempted to inject into the case a "*new* theory of fraud." JA1781 (emphasis added).

Nor was cross-appellees' legal challenge raised in their pre-verdict motion under Rule 50(a), *see* Stage Three Br. 23, as this Court requires. The portion of the trial transcript cited by cross-appellees, JA1355, contains no argument for judgment as a matter of law on the basis of the challenge asserted here—and indeed no reference to either of the motions *in limine* on which cross-appellees now rely. On the contrary, the transcript reflects that the lawyer defendants in fact *distinguished* CSXT's fraud claim from a Rule 11 violation:

> [W]e're not talking about whether someone would have won the underlying FELA case or whether there was a Rule 11 motion in the underlying FELA case. I think it's even a lesser standard than that. We've just got to show that we thought these were legitimate claims.

Id.

Likewise, in "object[ing] to CSX's attempt to inject 'ethical violations' into the case" during trial, Stage Three Br. 23, the lawyer defendants argued, consistent with CSXT's position, that "this is a case of alleged fraud, *** not *** a case about ethical violations," JA1274. The same is true of their argument "at the charge conference," Stage

Three Br. 23, where the lawyer defendants acknowledged that the jury was "being instructed on *fraud*," JA1578 (emphasis added). In any event, like the motions *in limine* and the Rule 50 motions, neither argument included a request that the case or any part of it be dismissed on the basis of a flawed legal theory.

In the end, the most conclusive evidence that cross-appellees did not properly challenge CSXT's legal theory in the district court is that the court *never made a ruling* on this foundational question. Because cross-appellees failed to provide the district court an opportunity to evaluate this challenge in the first instance, they may not ask this Court to do so now.

3. Cross-appellees' alternative argument is meritless

Cross-appellees' challenge to CSXT's legal theory not only is foreclosed by the prior appeal and by their failure to raise it below, it is fundamentally wrong on the merits. *See* Stage Two Br. 42-46. Cross-appellees' arguments to the contrary are baseless.

a. CSXT alleged and proved that the lawyer defendants intentionally caused materially false statements to be made to the court and CSXT, and that CSXT justifiably relied on these statements and

suffered damages as a result. Thus, as cross-appellees acknowledged in the district court, "[t]his is a fraud case," JA769; *see Quicken Loans, Inc. v. Brown*, 737 S.E.2d 640, 652-53 (W. Va. 2012) (setting forth elements of fraud).

Although cross-appellees now seek to portray the case as one in which CSXT asserted a private right of action for a Rule 11 violation, Stage Three Br. 3-9, what they really seem to object to is CSXT's use of a Rule 11 certification to fulfill the representation element of common-law fraud, *see id.* at 1 (asserting that "Rule 11 cannot be used to *** establish an element of a civil cause of action"). But cross-appellees provide no persuasive reason for this Court to create categorical exceptions to liability for common-law fraud in West Virginia. *See* Restatement (Second) of Torts § 525 (1977) (stating, without qualification, that "[o]ne who fraudulently makes a misrepresentation of fact, *** for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other *** for pecuniary loss caused to him"). In particular, cross-appellees offer no principled justification for treating a false representation occasioned by

Rule 11 differently from any other misrepresentation in deciding whether that element of common-law fraud has been satisfied.

Other certifications occasioned or required by rule or statute are routinely treated as representations in fraud claims brought under the common law and similar statutory schemes. Thus:

- Under the Sarbanes-Oxley Act, corporate executives must certify the accuracy of their companies' financial statements. 18 U.S.C. § 1350. This provision has "not specifically created a separate private right of action *** and none can be implied." *City of Roseville Emps.' Ret. Sys. v. Horizon Lines, Inc.*, 686 F. Supp. 2d 404, 417 (D. Del. 2009). But "where 'the complaint asserts facts indicating that, at the time of the certification, defendants knew or consciously avoided any meaningful exposure to the information that was rendering their [Sarbanes-Oxley] certification erroneous,' a false or misleading certification may form the basis" of a securities-fraud claim. *Id.* at 417-18 (quoting *In re Intelligroup Sec. Litig.*, 527 F. Supp. 2d 262, 290 (D.N.J. 2007)).

- Under 17 C.F.R. § 210.2-02(b)(1), accountants auditing a public company's financial statements are required to "state whether the audit was made in accordance with generally accepted auditing standards." Accountants who *falsely* certify compliance with those standards face liability—not through a private right of action under the regulation, but through common-law-fraud and securities-fraud claims. *See, e.g.*, *In re Stone & Webster, Inc., Sec. Litig.*, 414 F.3d 187, 214 (1st Cir. 2005); *AUSA Life Ins. Co. v. Ernst & Young*, 206 F.3d 202, 207 (2d Cir. 2000).
- "A number of courts in a variety of contexts have found violations of the False Claims Act" based upon the falsity of certifications required under other federal regimes. *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 786 (4th Cir. 1999).
- There are other examples as well. *See, e.g., Sorich v. United States*, 709 F.3d 670, 672 (7th Cir. 2013) (upholding mail-fraud convictions of defendants who "falsely signed *** certifications" required by a federal consent decree "attesting

that political patronage had not affected hiring decisions" (internal quotation marks omitted)), *cert. denied*, 134 S. Ct. 952 (2014); *Int'l Bus. Machs. Corp. v. Bajorek*, 191 F.3d 1033, 1042-43 (9th Cir. 1999) (allowing a common-law fraud claim to proceed based on the allegation that the defendant, in exercising stock options, falsely certified that he would comply with a contractual non-compete clause).

As these examples demonstrate, a fraud action based on a false certification is distinct from the statutory and regulatory regime that imposes the obligation to make the certification. That a representation was occasioned by Rule 11 thus does not convert a common-law fraud claim into a private right of action seeking to enforce that rule.

b. Although nothing in West Virginia law *explicitly* precludes a common-law fraud claim simply because the false representation was made in a certification under West Virginia Rule of Civil Procedure 11, cross-appellees take the position that CSXT's common-law fraud claim is somehow *implicitly* precluded. There is no basis for that view. Common-law fraud and Rule 11 serve different purposes, have different elements, and provide different remedies. *See Bus. Guides, Inc. v.*

Chromatic Commc'ns Enters., 498 U.S. 533, 553-54 (1991). Indeed, cross-appellees themselves acknowledged in the district court that "West Virginia Rule of Civil Procedure 11 *** set[s] forth very different standards of conduct than specific intent to commit fraud." JA771. These two independent legal obligations can and do coexist.

Cross-appellees ultimately acknowledge, as they must, that "Rule 11 is not a substitute for tort damages." Stage Three Br. 8 (internal quotation marks omitted). But they nonetheless argue that a court's authority to regulate "the conduct of lawyers in the cases before them" precludes a private remedy for fraud related to litigation in this case. *Id.* at 9. That argument is contrary to West Virginia law.

In *Clark v. Druckman*, 624 S.E.2d 864 (W. Va. 2005), the West Virginia Supreme Court of Appeals considered "whether the so-called 'litigation privilege' *** provides immunity for civil damages for claims arising from conduct occurring during a civil action." *Id.* at 869. The court concluded that, although the state's litigation privilege immunizes lawyers from civil damages arising from *some* litigation conduct, it does not "bar liability of an attorney in *all* circumstances." *Id.* at 870. The court then held that the privilege does not protect against claims

arising from "fraud or malicious conduct by [an] attorney." *Id.* (internal quotation marks omitted). "[S]uch exceptions to an absolute litigation privilege arising from conduct occurring during the litigation process," the court explained, "are reasonable accommodations which preserve an attorney's duty of zealous advocacy *while providing a deterrent to intentional conduct which is unrelated to legitimate litigation tactics* and which harms an opposing party." *Id.* (emphasis added).

The West Virginia Supreme Court of Appeals, whose rulings are authoritative on matters of state law, has thus determined that civil liability for fraud in the conduct of litigation is an appropriate supplement to the "safeguards *** against abusive and frivolous litigation tactics" provided by West Virginia's "Rules of Civil Procedure, *** Rules of Professional Conduct, and the court's inherent authority." *Clark*, 624 S.E.2d at 871 (italics omitted). According to West Virginia's highest court, in other words, the state's adoption of Rule 11 does not preclude common-law claims seeking redress for litigation fraud.

In a passage that speaks directly to the facts here, the court also said this: "A fraud claim against a lawyer is no different from a fraud claim against anyone else. If an attorney commits actual fraud in his

dealings with a third party, the fact he did so in the capacity of attorney for a client does not relieve him of liability." *Clark*, 624 S.E.2d at 870 (internal quotation marks omitted). It is clear from *Clark*, therefore, that the West Virginia courts are not the exclusive regulators of lawyers' litigation-related conduct. Instead, West Virginia allows—indeed embraces—the use of the common law when, as here, lawyers' conduct crosses the line that separates legitimate litigation conduct from intentional fraud.

In light of *Clark*'s clear pronouncements, cross-appellees' insistence that that decision somehow supports *their* position, Stage Three Br. 6-7, 9, is fanciful. In particular, cross-appellees' assertion that *Clark* permits a "malicious prosecution claim," but not a claim for "fraud," when a lawyer files a suit that lacks a good-faith basis, *id.* at 6-7, is irreconcilable with *Clark*'s express holding that the litigation privilege "generally operates to preclude actions for civil damages arising from an attorney's conduct in the litigation process" but "does not apply to claims of malicious prosecution *and fraud*." *Clark*, 624 S.E.2d at 872 (emphasis added).

c. Cross-appellees complain that CSXT's theory of liability "threatens to interfere" with state courts' ability to control attorney conduct and remedy attorney *mis*conduct. Stage Three Br. 9. The facts of this case belie that claim. After cross-appellees' misconduct was exposed, the state court stayed all cases against CSXT that had been brought by the lawyer defendants' firm. JA334. The court required each plaintiff represented by the lawyer defendants to affirm that he or she was "aware of his or her lawsuit" and "believe[d] that his or her claims and the assertions contained within the complaint are well grounded in fact." *Id.* In response to this order, the lawyer defendants voluntarily dismissed with prejudice all claims against CSXT. JA339-395. Nothing in CSXT's fraud claim has interfered or will in the future interfere with any remedy fashioned by the state court.

This case likewise demonstrates the fallacy of cross-appellees' related assertion that allowing "fraud liability for [litigation] conduct" will "force[] the federal courts, in separately filed civil cases, into a supervisory role over state courts." Stage Three Br. 9. This case concerns the conduct of the lawyer defendants (in conspiracy with Harron), not the conduct of the state court in the underlying asbestosis

actions. At no point was the federal district court or jury asked to pass judgment on the state court's handling of those cases. In any event, a fraud case could just as easily—indeed more easily—be filed in *state* court, where the concern identified by cross-appellees could not arise.

There is, however, an even more fundamental flaw in cross-appellees' position. They concede, as they must, that they "are not arguing" (and could not argue) that "'litigation misconduct' can *never* give rise to" a fraud-based cause of action. Stage Three Br. 7 (emphasis added). It is, they say, only one particular type of litigation misconduct—filing a lawsuit without a good-faith basis—that cannot give rise to a claim of fraud. The reason for *that*, according to cross-appellees, is that the filing of such a suit can subject an attorney to court-imposed sanctions and that no other remedy is necessary or proper. *Id.* at 7, 9. But this asserted rationale for the distinction cross-appellees seek to draw overlooks the obvious fact that courts possess authority to sanction counsel for *all* litigation misconduct, not just the filing of fraudulent claims. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991); *Clark*, 624 S.E.2d at 871-72. If "litigation misconduct" *generally* can subject a party to both sanctions by the court

and a fraud-based action by the opposing party—and it certainly can, *see* Stage Two Br. 44n.4, 55n.7; *see also Haeger v. Goodyear Tire & Rubber Co.*, 906 F. Supp. 2d 938, 974 (D. Ariz. 2012) (sanctioning the defendant for misconduct and encouraging the other parties to file a fraud action)—then there is no possible justification for treating litigation misconduct that takes the form of fraudulent lawsuits any differently.

d. Cross-appellees claim that, in *Perrine v. E.I. du Pont de Nemours & Co.*, 694 S.E.2d 815, 881 (W. Va. 2010), the West Virginia Supreme Court of Appeals "explicitly declined to allow punitive damages" in situations where their availability would "incentivize" what cross-appellees characterize as "suspect lawsuits." Stage Three Br. 49. As we have just explained, this is not a "suspect lawsuit. And, in any event, that is not what the court did in *Perrine*. It simply held that punitive damages are inappropriate in medical-monitoring cases because plaintiffs need not prove actual injury to succeed on such a claim. *Perrine*, 694 S.E.2d 880-81. That obviously is not true in fraud actions.

Cross-appellees also argue that awarding punitive damages for fraud involving misrepresentations occasioned by Rule 11 would amount to "duplicative punishment" for "already-sanctionable Rule 11 violations." Stage Three Br. 49. Whatever relevance this argument might have in the abstract, it has none here. The state court had no occasion to consider or assess Rule 11 sanctions, so there is no risk of duplicative punishment. The lawyer defendants evaded Rule 11 by having a subordinate sign the fraudulent complaints instead of signing the documents themselves. JA904-05, 907-08, 1440-42; *see Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 123-27 (1989) (only the signatory of the pleading may be sanctioned under analogous Federal Rule of Civil Procedure 11).

To the extent that an award of punitive damages might overlap with Rule 11 sanctions in a case in which they *were* imposed, that could be a reason to reduce the *size* of the award. *See Garnes*, 413 S.E.2d at 909 (other civil damages and criminal sanctions "based on the same conduct" should "mitigate the punitive damages award"). Indeed, West Virginia requires "meaningful and adequate review" of punitive-damages awards by both the trial court and the appellate court, *id.* at

907-08, which provides safeguards against excessive awards. But that is not a reason to preclude the award of *any* punitive damages, and it certainly is not a reason to preclude an award in *this* case.

CONCLUSION

If this Court orders a new trial on CSXT's common-law claims, it should direct that CSXT's punitive-damages claim be submitted to the jury.

Dated: June 30, 2014

Respectfully submitted,

/s/ *Dan Himmelfarb*

Marc E. Williams
Robert L. Massie
NELSON MULLINS RILEY & SCARBOROUGH LLP
949 Third Avenue
Suite 300
Huntington, WV 25701
(304) 526-3501

Samuel L. Tarry, Jr.
Mitchell K. Morris
MCGUIREWOODS LLP
One James Center
901 E. Cary Street
Richmond, VA 23219
(804) 775-1000

Dan Himmelfarb
Scott M. Noveck
Jason R. LaFond
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Attorneys for Plaintiff-Appellee/Cross-Appellant CSX Transportation, Incorporated

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13-2235(L), 13-2252, 13-2325 Caption: CSX Transportation, Inc. v. Peirce *et al.*

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)

Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

   This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because:

   ☒ this brief contains 5,765 [*state number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   ☐ this brief uses a monospaced typeface and contains _____ [*state number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. **Typeface and Type Style Requirements:** A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch).

   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:

   ☒ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 [*identify word processing program*] in 14-point Century Schoolbook [*identify font size and type style*]; **or**

   ☐ this brief has been prepared in a monospaced spaced typeface using _____ [*identify word processing program*] in _____ [*identify font size and type style*].

(s) Dan Himmelfarb

Attorney for CSX Transportation, Inc.

Dated: June 30, 2014

CERTIFICATE OF SERVICE

I certify that, on this 30th day of June, 2014, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ *Dan Himmelfarb*
Dan Himmelfarb
Counsel for Appellee/Cross-Appellant
CSX Transportation, Incorporated