Case No. 1D13-4775

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
FIRST DISTRICT

CRYSTAL SELLS, AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF LARRY SELLS, DECEASED,

Plaintiff/Appellant,

v.

CSX TRANSPORTATION, INC.,

Defendant/Appellee.

Appeal from the Circuit Court in and for Duval County, Florida,
Case No. 16-2009-CA-2330

Hon. Waddell A. Wallace III, Circuit Judge

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INTRODUCTION

Larry Sells, a conductor for defendant CSX Transportation, Inc. ("CSXT"), suffered a fatal cardiac arrest at work. Plaintiff Crystal Sells filed this action under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.*, alleging that CSXT's negligence caused Sells' death. Plaintiff has never argued that the conditions under which Sells worked caused his cardiac arrest. Rather, she alleges that CSXT should have taken steps—such as providing automated external defibrillators ("AEDs") or training in cardiopulmonary resuscitation ("CPR")—in anticipation of the possibility that an employee would suffer cardiac arrest and that CSXT contributed to a delay in the arrival of emergency medical technicians ("EMTs") on the day of Sells' death.

The jury returned a verdict in favor of Plaintiff (while also finding that Sells was 45% contributorily negligent). In response to post-judgment motions, however, the circuit court granted judgment to CSXT, holding that it had no duty to take the anticipatory measures Plaintiff proposed and that any delay in summoning EMTs could not have contributed to Sells' death. To facilitate appellate review, the court also held that Sells' failure to disclose his cardiac history to CSXT allowed the jury to find Sells contributorily negligent.

On appeal, Plaintiff contends that the circuit court's duty-based holding impermissibly intruded on the role of the jury, but that the comparative-negligence

issue should have been decided by the trial court. That is backwards: Duty is an issue of law for the court, while the jury typically decides issues of comparative negligence. Plaintiff has also not provided any other reason to believe that the circuit court erred. The judgment for CSXT accordingly should be affirmed.

STATEMENT OF FACTS AND OF THE CASE

A. Statement Of Facts

During a "checkup" performed while Larry Sells was "awaiting [a] move" to Florida in 2005, Sells' physician performed an electrocardiogram ("EKG"). R17:91.[1] The EKG "indicat[ed] a possible abnormality." *Id.* The physician "referred [Sells] to a cardiologist" to rule out "heart disease." R17:92, 94.

Sells told the cardiologist that he "had intermittent chest pain that comes and goes without any clear precipitants." R17:95; *see also* R19:9-10. The cardiologist performed a second EKG, which revealed the "same area of abnormality." R17:97; *see also* R19:10. She also performed an echocardiogram, which was "normal," and a stress test, which was at least potentially "abnormal." R19:70; *see also* R19:10-11. She recommended that Sells visit a cardiologist in Florida for further testing. R17:98, 100; R19:12-13. Sells did not do so. R17:101, 168; R18:297-98.

After his move, Sells applied to work at CSXT. R18:269, 305-06. As part of the hiring process, Sells completed a questionnaire concerning his health history.

[1] Citations using "R" refer to the record, with a colon separating the volume and page numbers. Citations using "OB" refer to Plaintiff's opening brief.

R6:1099-1100; R20:180. The questionnaire asked whether Sells had experienced either "heart, vein or artery trouble" or "chest pains." R20:181; *see also* R6:1099. Sells "answered no to" both questions. R20:182; *see also* R6:1099. Unaware of Sells' cardiac history, CSXT hired him as a conductor. R18:307-08; R20:183.

On August 14, 2006, Sells was working with Richard Wells, a CSXT engineer, on a "road switch[ing]" job in rural Clay County, Florida. R18:210-12; *see also* R15:56-57. After stopping the locomotive, Sells dismounted to operate a switch. R18:215-16. Wells heard the switch make the usual "clunk[ing]" noise, but heard nothing else from Sells. *Id.* Wells initially "didn't think too much about it" and "got ... a bottle of water" and "took a couple of sips." R18:216. He then "got worried" because of their tight schedule and "looked out the back window," from which he saw Sells "laying on the ground face up." R18:216-17. Sells had gone into cardiac arrest. *E.g.*, R17:184-85.

Wells immediately radioed CSXT's dispatcher on the "emergency channel." R18:217. Wells said that Sells was "down" and that, as the only person in the vicinity, Wells would "try to help" him. R16:198; R18:217. When Wells reached Sells, two or three minutes had elapsed since they had last spoken. R18:219-20.[2] Sells was not breathing and had no pulse. R18:217. Wells did not know how to

[2] Contrary to Plaintiff's suggestion (OB12), Wells did not testify that using the radio "delayed him from helping ... Sells for a couple minutes." He said that two to three minutes *in total* passed from the time he "last heard from" Sells to the time he reached Sells. R18:255.

perform CPR but "attempted" to apply "chest compressions." *Id.* He was unsuccessful in reviving Sells. *Id.*

After some confusion concerning Sells' location, CSXT's dispatcher called 911 to report Sells' collapse, and EMTs were dispatched to the scene. *See, e.g.*, R15:98-110; R18:224. Even absent a delay, "15 minutes was as quick as" EMTs could have reached Sells. R17:78. Sells was declared dead at the scene. R17:67-68.

B. Statement Of The Case

1. Pre-trial proceedings

Plaintiff filed this suit against CSXT, alleging that Sells' death resulted from violations of FELA. Plaintiff did not allege, and has not argued, that Sells' work for CSXT caused his cardiac arrest. *See, e.g.*, R4:650-55; R9:1591-92. Instead, Plaintiff alleged "that [CSXT] contributed to Mr. Sells' death by failing to furnish him with prompt … medical attention." R9:1592; *see also* R4:652. Plaintiff theorized that CSXT "should have trained its employees in [CPR,] ... provided [AEDs]," or taken other steps "in anticipation of the possibility that an employee might suffer severe cardiac problems." R9:1592. She "also argued that [CSXT] negligently delayed the arrival of emergency medical personnel." *Id.*

CSXT moved for summary judgment (R1:15-36), and the circuit court granted the motion in part. The court held that the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20106(a)(2), precluded Plaintiff's theory that CSXT should

have trained Wells in CPR. R14:3-4. Plaintiff also conceded, and the court held, that the Locomotive Inspection Act ("LIA"), 49 U.S.C. § 20701, precluded "any claim [that] the locomotive didn't have a[n AED]." R14:4. The court allowed Plaintiff's other theories to proceed. *E.g.*, R14:6, 12-14.

The circuit court also partially granted Plaintiff's motion (R5:801-11) to exclude evidence that Sells' own negligence contributed to his death. The court held that CSXT could not argue that Sells' failure to "take[] care of himself" constituted negligence. R14:24. It did, however, permit a comparative-negligence defense based on Sells' failure to "disclose[]" his cardiac history to CSXT. R14:19.

2. Trial proceedings

At trial, Plaintiff maintained that CSXT should have taken measures in anticipation of a possible cardiac arrest (*e.g.*, R15:41-43) and that it negligently delayed the arrival of the EMTs (*e.g.*, R15:38-41). CSXT presented a comparative-negligence defense based on Sells' concealment of his cardiac condition. *E.g.*, R15:70-76.

Plaintiff's case rested largely on the testimony of Michelle Copeland, an industrial hygienist who criticized CSXT's "emergency response" procedures (R16:121) and said that the immediate use of AEDs or CPR can improve survival rates (*e.g.*, R16:145). *See also* OB7-10. Copeland, however, conceded that it would not "be reasonable" to require CSXT to place AEDs next to its tracks in all rural

areas. R16:183-84. She also conceded that, absent earlier treatment, Sells' chances of surviving "15 minutes" after cardiac arrest were "nonexistent." R16:197-98.

Both sides also presented experts who spoke to cardiac arrest generally and to Sells' medical history in particular. Both Michael Fifer, Plaintiff's expert cardiologist, and Orlando Bautista, Sells' treating physician from New York, testified that "[b]rain death begins to occur after four or five minutes" following cardiac arrest (R17:186) and that a person will be irrevocably "brain dead" after ten minutes (R17:116; *see also* R17:120, 123). Fifer thus concluded that, absent prior treatment with an AED or CPR, it did not "matter if the EMTs got there 15 minutes or 35 minutes" after Sells went into cardiac arrest, because "he would not be able to be resuscitated" at either time. R17:185, 191; *see also, e.g.*, R17:135.

Fifer and CSXT's expert cardiologist, Michael Zile, both suggested that Sells "had coronary artery disease," which—in Fifer's words—can lead "to an arrhythmia" that in turn could cause "sudden death." R17:165-66; *see also* R17:107-09, 134; R19:41-44. Fifer elaborated that Sells had three "significant[ly] block[ed]" arteries at the time of his death. R17:179-80. According to Zile, Sells also had high cholesterol, diabetes, and a family history of "premature coronary disease." R19:68. Fifer and Zile agreed that additional "testing" could have disclosed the "condition in [Sells'] heart that was going to lead to his death." R17:172; *see also* R19:75. Zile added that, had Sells been diagnosed, "treatments

would have reduced the likelihood that [he] would have suffered from sudden cardiac death." R19:79.

The jury found that both negligence on the part of CSXT and Sells' own negligence contributed to Sells' death. R7:1275-76. It awarded Plaintiff $1.98 million in damages but held Sells to be 45% responsible for those damages. *Id.*

3. Post-trial proceedings

CSXT filed a motion to set aside the verdict and enter judgment in accordance with the directed verdict or, in the alternative, for a new trial. R7:1322-29; R8:1427-77. Plaintiff, meanwhile, filed a motion to set aside the jury's comparative-negligence finding. R8:1379-90. The circuit court granted CSXT's motion for judgment. R9:1591-99. It held that CSXT "did not have a duty to make AEDs available to its employees, to train its employees to use AEDs" or "CPR," or to take "other steps in anticipation of the possibility that Mr. Sells would suffer cardiac arrest." R9:1593. It also "conclude[d] that [CSXT] had no duty to provide its employees with AEDs" because doing so would be "unreasonably burdensome," meaning that any harm from failing to have AEDs was unforeseeable as a matter of law. R9:1595-96. And the court rejected Plaintiff's theory that CSXT "breached its duty to provide timely medical care" on the ground that "plaintiff presented no evidence that" any delay in summoning EMTs "caused [Sells'] death." R9:1597.

"To facilitate complete appellate review," the circuit court summarily ad-

dressed, and denied, CSXT's motion for new trial. R9:1598. It also denied Plaintiff's motion to set aside the comparative-negligence finding, holding that Sells' "nondisclosure of his cardiac … history provides a basis for [that] finding." *Id.*

On appeal, Plaintiff challenges the circuit court's holding that CSXT had no duty to anticipate Sells' cardiac arrest. *See* OB19-34. Plaintiff argues that CSXT should have been required to "have … Mr. Wells … call 911 directly," train its "workers in CPR," or "provide AEDs" to its employees. OB23. Plaintiff does not challenge the circuit court's holding that the delayed arrival of the EMTs did not contribute to Sells' death. She does, however, repeat her contention that the comparative-negligence issue should have been taken from the jury. *See* OB34-42.

SUMMARY OF ARGUMENT

I. A. CSXT has no duty to provide its employees with AEDs or CPR training or to take any other steps in anticipation of possible medical emergencies. The cases delineating employers' duties under FELA make clear that, although railroads must ensure that employees who suffer medical emergencies receive care, that duty arises only once the emergency strikes—meaning that there is no duty to act before the incident occurs. The analogous common-law rules, which FELA did not alter, confirm that result. Any duty to anticipate medical emergencies, even when those emergencies are not alleged to have been caused by workplace hazards, would also both impermissibly impose liability on railroads simply because the

emergency occurred at work and turn railroads into healthcare providers.

Furthermore, contrary to Plaintiff's contentions, whether railroads must anticipate medical emergencies entails a question of duty and thus presents an issue of law for the court. Although Plaintiff cites cases holding railroads liable for failing to anticipate workplace conditions that might cause injuries in violation of FELA's directive to provide a reasonably safe workplace, those cases are inapplicable when, as here, the injury was not caused by the conditions of the workplace.

B. Any requirement that railroads provide AEDs either throughout a rail system or to every team of employees working in the field would also be unreasonably burdensome. FELA requires railroads only to guard against foreseeable harms, and a harm is not foreseeable if the burden of taking additional precautionary measures significantly outweighs the benefit of those measures. Applying that rule, numerous courts have held that that it would be unduly burdensome for railroads to install fences or other system-wide precautions and thus that any harm from failing to take such precautions is unforeseeable as a matter of law.

As the circuit court held, the same is true here: The installation, maintenance, training, and other costs associated with system-wide AEDs would be astronomical, and those costs would generate only marginal benefits. Despite Plaintiff's protestations, neither the case law nor the trial testimony is to the contrary.

C. CSXT is also entitled to a judgment on Plaintiff's AED- and CPR-based

theories on the alternate ground that those theories are precluded by federal law. The LIA precludes any FELA suit that would regulate the equipment on locomotives. Plaintiff's theory that CSXT should have provided either Sells or Wells with an AED would do exactly that, because Sells and Wells were working from a locomotive. It does not matter that Plaintiff does not seek to directly require CSXT to install AEDs on locomotives, because the U.S. Supreme Court has held that the LIA also precludes indirect attempts to require specific equipment on locomotives.

The FRSA, meanwhile, precludes any claim concerning subject matter covered by federal railroad-safety regulations—such as the training of railroad engineers. The FRSA thus precludes any theory that CSXT should have trained Wells in CPR, either in the regular course of his employment or over the radio after Sells collapsed. It also bars any theory that CSXT should have provided Wells with an AED, because any such theory would require CSXT to train Wells in AED use.

D. Plaintiff's opening brief does not directly challenge the circuit court's holding that there was no evidence that CSXT's supposed delay in summoning EMTs to the scene could not have contributed to Sells' death. She has therefore waived any such challenge. In any event, the circuit court was correct. The uncontradicted testimony at trial demonstrated that, even absent any delays, the EMTs could not have reached Sells for 15 minutes—but that he could not have survived for more than 10 minutes following the onset of cardiac arrest. And Plain-

tiff's theory that Wells should have been instructed to dial 911 to receive impromptu CPR instruction fails for the same reason: By the time Wells could have done so, it would have been too late to save Sells' life.

II. A. Assuming *arguendo* that the Court needs to reach the issue, the jury's comparative-negligence verdict was proper. Under *Johnson v. Cenac Towing, Inc.*, 544 F.3d 296 (5th Cir. 2008) ("*Johnson I*"), an employer in a FELA case may show comparative negligence by demonstrating that the employee failed to disclose a health condition to his employer, exposed himself to a risk of aggravating the condition, and then suffered an aggravating incident. CSXT presented evidence to satisfy every element of that test and to show, as required by *Johnson v. Cenac Towing, Inc.*, 599 F. Supp. 2d 721 (E.D. La. 2009) ("*Johnson II*"), that Sells should have known of the risk of a serious cardiac incident.

B. Plaintiff has provided no plausible reason why the *Johnson* test should not apply to this case. That test cannot logically be confined to cases involving allegedly work-related injuries. Moreover, CSXT did not rely on mere but-for causation, and its nondisclosure theory did not conflate the concepts of comparative negligence and proximate causation.

STANDARD OF REVIEW

The issues on appeal concern the circuit court's ruling on the parties' cross-motions for judgment in accordance with a prior motion for directed verdict. This

Court reviews that ruling "*de novo*." *Specialty Marine & Indus. Supplies, Inc. v. Venus*, 66 So. 3d 306, 309 (Fla. 1st DCA 2011). The entry of judgment is proper if, "'view[ing] all the evidence in a light most favorable to the non-movant,'" there is no "competent substantial evidence" to support the jury's verdict. *Id*.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DETERMINED THAT CSXT WAS ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT.

FELA establishes the compensation scheme for injuries sustained by railroad employees in the workplace. Unlike workers' compensation laws, which typically provide relief without regard to fault, FELA "is not a strict liability statute" (*Fulk v. Ill. Cent. R.R.*, 22 F.3d 120, 124 (7th Cir. 1994)) and "'does not make the employer the insurer of the safety of his employees'" (*Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994)). FELA instead provides that a railroad is liable to employees only for "injur[ies] . . . resulting in whole or in part from the negligence" of the railroad. 45 U.S.C. § 51. The elements of a FELA cause of action are "breach of a duty of care (that is, conduct unreasonable in the face of a foreseeable risk of harm), injury, and causation." *Gottshall*, 512 U.S. at 538.

As we discuss herein, the circuit court correctly held that Plaintiff's theories of liability each rest either on actions that CSXT had no duty to perform or on al-

leged negligence that lacks any causal connection to Sells' injuries. In addition, those theories are precluded by federal law.

A. Railroads Have No Duty To Anticipate Potential Medical Emergencies Not Caused By Workplace Hazards.

1. A railroad's duty is limited to responding to medical emergencies *after* they arise.

a. The case law compels the circuit court's conclusion that CSXT had no duty to "take preventive actions in anticipation of the possibility" that a cardiac arrest would occur. R9:1593. Railroads are "not subject to a duty, except in special circumstances, to give [medical treatment] to sick or disabled employees." *Cortes v. Baltimore Insular Lines, Inc.*, 287 U.S. 367, 376 (1932), *superseded in part on other grounds as stated in Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990). As Plaintiff implicitly concedes (OB20), such circumstances exist only when the employee "is helpless ... unless relief is given on the spot." *Cortes*, 287 U.S. at 376.

Thus, "[i]n FELA cases, an employer must render medical assistance 'when an employee, to the employer's knowledge, becomes so seriously ill while at work as to render him helpless to obtain medical aid or assistance for himself.'" *Bell v. Norfolk S. Ry.*, 476 S.E.2d 3, 5 (Ga. Ct. App. 1996) (quoting *Handy v. Union Pac. R.R.*, 841 P.2d 1210, 1221 (Utah Ct. App. 1992)).[3] In other words, the duty to pro-

[3] *Accord, e.g.*, *Pulley v. Norfolk S. Ry.*, 821 So. 2d 1008, 1014-15 (Ala. Civ. App. 2001); *Bridgeman v. Terminal R.R. Ass'n*, 552 N.E.2d 1146, 1148 (Ill. App. Ct. 1990); *Rival v. Atchison, Topeka & Santa Fe Ry.*, 306 P.2d 648, 651 (N.M.

vide medical care under FELA "arises with the [medical] emergency." *Szabo v. Pa. R.R.*, 40 A.2d 562, 563 (N.J. 1945).[4] It also "expires" once the emergency ends. *Id.*; *accord, e.g.*, *S. Pac. Co. v. Hendricks*, 339 P.2d 731, 733 (Ariz. 1959). When a railroad employee suffers a "heart attack," for example, the railroad's only duty is to "give [the employee] medical assistance at [the] time" of the incident. *Shelton v. Chesapeake & Ohio Ry.*, 1987 WL 24090, at *3 (6th Cir. Dec. 10, 1987) (per curiam).

These temporal limitations bar Plaintiff's theories, because they require the conclusion that railroads do *not* have a duty to "anticipat[e] that the physical health and ability of [an employee] to care for himself while doing ordinary work will suddenly cease." *Wilke v. Chicago Great W. Ry.*, 251 N.W. 11, 13 (Minn. 1933). The reason is straightforward: Such anticipatory steps would, by definition, require action *before* an emergency arose, at a time when the relevant duty under FELA does not exist.

Plaintiff asserts that "the issue in *most* of these cases was whether the worker was suffering from" a "medical emergency that gave rise to a duty to provide aid." OB28 (emphasis added). She cannot deny, however, that several of the cases *also* reject, among other things, a proposed "duty under the FELA ... to provide [em-

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1957).

[4] *Accord, e.g.*, *Randall v. Reading Co.*, 344 F. Supp. 879, 884 (M.D. Pa. 1972); *S. Pac. Co. v. Hendricks*, 339 P.2d 731, 736 (Ariz. 1959); *Haggard v. Lowden*, 134 P.2d 676, 679-81 (Kan. 1943); *see also* R9:1593.

ployees] with ... medical services before [a] heart attack" (*Shelton*, 1987 WL 24090, at *2) and a broader proposed duty to "anticipate" medical issues "likely to happen to [the] employee" (*Wilke*, 251 N.W. at 13). Furthermore, the cases that do consider only whether an emergency existed remain highly relevant, because—as the circuit court recognized (R9:1594)—that inquiry necessarily implies that there is no duty to act when an emergency is not in progress.

b. Contrary to Plaintiff's assertion (OB29-30), the Jones Act cases cited by the circuit court strongly support the result here. Those cases uniformly state that although vessel owners must take "reasonable measures to get" seriously ill employees to a doctor, they need not "carry a physician" on the ship. *De Zon v. Am. President Lines, Ltd.*, 318 U.S. 660, 668 (1943).[5] That rule means that vessel owners do *not* need to have anticipatory medical services on board; rather, their "duty to ... provide aid" to ill or injured employees (OB29) is purely reactive. And if vessel owners whose seriously ill employees might be *days* away from the nearest port and doctor have no duty to take steps in anticipation of such emergencies, *a fortiori* railroads whose employees are *minutes* away from medical care have no such duty either.

The statement in *De Zon* that the duty to provide aid might necessitate

[5] *Accord Olsen v. Am. S.S. Co.*, 176 F.3d 891, 895 (6th Cir. 1999); *Carleno v. Marine Transp. Lines, Inc.*, 317 F.2d 662, 665 (4th Cir. 1963); *Billiot v. Two C's Marine, L.L.C.*, 2011 WL 2937237, at *3 (E.D. La. July 19, 2011); *see also Stowe v. Moran Towing Corp.*, 2014 WL 247544, at *3 (E.D. La. Jan. 22, 2014).

"'measures of considerable cost in time and money'" (OB30 (quoting 318 U.S. at 668)) does not help Plaintiff. That statement refers to the possibility that finding appropriate care might require "turning back, putting in to the nearest port …, hailing a passing ship, or taking" similar steps. *De Zon*, 318 U.S. at 668. But as the rule above makes clear, such steps are required only *after* an emergency arises.[6]

c. The analogous common-law rules dispel any residual doubt that the duty to provide emergency medical care does not include a duty to anticipate medical emergencies. Under the common law, employers have a duty to provide medical care *only* "when an employee becomes ill on the job" and "is rendered helpless to provide for his own care." *Dudley v. Victor Lynn Lines, Inc.*, 161 A.2d 479, 485 (N.J. 1960).[7] That is the same reactive duty imposed on railroads by FELA.

In the absence of "express [statutory] language to the contrary, the elements of a FELA claim are determined by reference to the common law." *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 165-66 (2007). Here there is no such "language to the contrary." FELA "abolished the fellow servant rule, rejected contributory negli-

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[6] That *De Zon* "affirmed the judgment for the defendant because there was no evidence the ship's doctor acted unreasonably" (OB30) also does not change matters. If there were a duty to anticipate medical emergencies, the question would have been whether the employer had taken sufficient steps in advance, not whether the doctor it chose performed adequately after the fact.

[7] *Accord, e.g.*, *Szabo*, 40 A.2d at 563; *Gypsy Oil Co. v. McNair*, 64 P.2d 885, 891-92 (Okla. 1936) (per curiam); *Carey v. Davis*, 180 N.W. 889, 891 (Iowa 1921) (per curiam).

gence ..., prohibited employers from contracting around the Act, and abolished the assumption of risk defense." *Id*. at 168. It also "parted from traditional common-law formulations of causation." *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2639 (2011).[8] But as the circuit court recognized, these alterations do not displace general "common law principles relating to the existence or formation of a duty" (R9:1595), much less principles concerning the scope of the duty to provide medical care. CSXT's duty to provide aid under FELA was thus necessarily limited in the same way as employers' duty to provide aid under the common law.[9]

The rule that railroads have no duty to anticipate medical emergencies is also "consistent with," and supported by, the limited common-law "duty that business owners ... owe to persons" who suffer medical emergencies "on their premises." R9:1594. A business that invites customers onto its premises has a duty "to take reasonable action to give ... first aid" to customers the business "knows ... are ill or injured." *Personal Rep. of Starling's Estate v. Fisherman's Pier, Inc.*, 401 So. 2d 1136, 1137 (Fla. 4th DCA 1981) (citing Restatement (Second) of Torts § 314A

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[8] The Supreme Court's dictum in *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500 (1957) that FELA imposed a far "'more drastic duty'" (OB30 (quoting *Rogers*, 352 U.S. at 507)) refers not the scope of the legal duties that railroads owe to their employees but to the so-called "duty" of "paying damages for injury or death at work due in whole or in part to the employer's negligence" (*Rogers*, 352 U.S. at 507). That, of course, is just another way of saying that FELA relaxed common-law standards of causation.

[9] The common-law duty has since been superseded by workers' compensation statutes. FELA, however, is *not* such a statute. *See, e.g.*, *Gottshall*, 512 U.S. at 543.

(1965)). But a "business owner satisfies" that duty simply "by summoning medical assistance within a reasonable time." *L.A. Fitness Int'l, LLC v. Mayer*, 980 So. 2d 550, 558 (Fla. 4th DCA 2008). The duty thus does not encompass the provision of "medical care or medical rescue services" beyond minimal first aid. *Id.*

More specifically, every appellate court to consider the issue has held that the duty to attend to ill customers does not require businesses either to "have an AED" or to "perform CPR." *Id.* at 559, 561.[10] That rule applies even to health clubs, at which customers routinely engage in activities that entail a heightened risk of cardiac incidents. *See, e.g., id.*

d. In short, the cases uniformly make clear that CSXT "had no duty to take preemptive measures in anticipation" that its employees "would suffer cardiac ar-

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[10] *Accord Abramson v. Ritz Carlton Hotel Co.*, 480 F. App'x 158, 161 (3d Cir. 2012); *De La Flor v. Ritz-Carlton Hotel Co.*, 930 F. Supp. 2d 1325, 1329-30 (S.D. Fla. 2013); *Verdugo v. Target Corp.*, 2014 WL 2808965, at *12-18 (Cal. June 23, 2014); *O'Gwin v. Isle of Capri Natchez, Inc.*, 2014 WL 2462989, at *3 (Miss. Ct. App. June 3, 2014); *Miglino v. Bally Total Fitness of Greater N.Y., Inc.*, 20 N.Y.3d 342, 349 (2013); *Boller v. Robert W. Woodruff Arts Ctr., Inc.*, 716 S.E.2d 713, 715-16 (Ga. Ct. App. 2011); *Pacello v. Wyndham Int'l, Inc.*, 2006 WL 1102737, at *9 (Conn. Super. Ct. Apr. 7, 2006); *Salte v. YMCA of Metro. Chicago Found.*, 814 N.E.2d 610, 615 (Ill. App. Ct. 2004); *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218, 1224 (Pa. 2002); *see also, e.g., Limones v. Sch. Dist. of Lee Cnty.*, 111 So. 3d 901, 904-05 (Fla. 2d DCA 2013), *review granted*, 2014 WL 622977 (Fla. Feb. 6, 2014) (schools have "no common law duty to make [AEDs] available" to their students). The only case that Plaintiff can muster in response—*Smith v. Jung*, 241 So. 2d 874 (Fla. 3d DCA 1970) (per curiam) (cited at OB31)—held only that a landowner who invites others onto his land must make the land "reasonably safe for use," including by "provid[ing] ... adequate measures ... for rescue" from a swimming pool on the property. *Id.* at 876-77.

rest" or any other medical emergency. R9:1594. The circuit court recognized, and Plaintiff does not dispute, that this conclusion precludes Plaintiff from relying on any theory that CSXT should have "provide[d] its employees with AEDs[or] train[ed] its employees in CPR." R9:1595. It also precludes any theory that CSXT should have preemptively enacted "a policy requiring [the engineer] to call 911 directly" (OB23) or "take[n] other preemptive measures in case its employees suffered severe heart problems" (R9:1595).

2. A duty to anticipate medical emergencies would violate FELA and transform railroads into healthcare providers.

The rule that railroads have no duty to anticipate medical emergencies rests on a sound theoretical basis. In fact, any other result would stretch FELA beyond recognition and require railroads to serve as providers of medical care.

The U.S. Supreme Court has made clear that although "FELA is to be liberally construed," it is not "a workers' compensation statute," and it "'does not make the employer the insurer of the safety of his employees while they are on duty.'" *Gottshall*, 512 U.S. at 543 (quoting *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947)). As a result, liability under FELA may not be "base[d]" solely on the "'fact that [an] injur[y] occur[ed]'" at the workplace as opposed to somewhere else. *Id.*

Plaintiff's proposed duty to acquire AEDs or provide CPR training would violate that rule. Under any such duty, railroads could be held liable for the result of an employee's cardiac incident even when, as here, the plaintiff does not allege

that a workplace hazard caused the incident. In such circumstances, the fact that a cardiac arrest occurred at work constitutes the *only* link between the incident and the victim's employer. *Gottshall* precludes that result.

Furthermore, the duty Plaintiff proposes cannot logically be confined to the context of cardiac arrest, AEDs, and CPR. A wide range of serious medical conditions—including diabetes, severe allergies, and epilepsy—can strike employees at work. Imposing a duty on railroads to provide AEDs or CPR training would inexorably require railroads to provide the equipment and training best-suited to deal with any such condition, even when the condition is not caused by work or the workplace.[11] It would also open railroads to lawsuits alleging that the employees or doctors who provided treatment were insufficiently skillful.[12] In short, Plaintiff's proposed duty would force railroads to act as healthcare and emergency medical

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[11] Plaintiffs across the country have already attempted to sue employers and other businesses for—among other things—allowing a diabetic "to drive in [a] hypoglycemic condition" (*Stockberger v. United States*, 332 F.3d 479, 480 (7th Cir. 2003)), failing "to take steps to avert" an epileptic seizure (*Newman v. Redstone*, 237 N.E.2d 666, 669 (Mass. 1968)), "fail[ing] to have on-site the equipment and skilled personnel necessary to perform an intubation" (*Lundy v. Adamar of N.J., Inc.*, 34 F.3d 1173, 1178 (3d Cir. 1994)), and calling for emergency help rather than performing the Heimlich maneuver on a choking victim (*Breaux v. Gino's Inc.*, 200 Cal. Rptr. 260, 261 (Ct. App. 1984)).

[12] *See, e.g.*, *Fulk*, 22 F.3d at 124 ("liability attaches under the FELA ... if, having undertaken to give [medical] examinations, the employer performs them negligently"); *Moody v. Boston & Me. Corp.*, 921 F.2d 1, 3 (1st Cir. 1990); *Atchison, Topeka & Santa Fe Ry. v. Hix*, 291 S.W. 281, 284 (Tex. Civ. App. 1926); *see also, e.g.*, *Vasquez v. Gloucester Cnty.*, 2014 WL 1599499, at *1 (D.N.J. Apr. 21, 2014) (suit against entity that acquired AED after the device "malfunctioned").

service providers. That result would violate the principle that FELA does *not* make railroads "insurer[s] of the safety of [their] employees." *Gottshall*, 512 U.S. at 543.

3. Plaintiff's contrary arguments are unpersuasive.

a. Plaintiff attempts to avoid the dispositive case law and the impermissible consequences of her theory of liability by arguing that the jury should have decided whether CSXT was required to provide AEDs or CPR training. *E.g.*, OB20. That argument should be rejected. There can be no doubt that, as the circuit court held and Plaintiff concedes, "[t]he existence of a duty is an issue of law for the court to decide." R9:1593; OB22; *see also*, *e.g.*, *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 502-04 (Fla. 1992). It is also well settled that the "scope of [railroads'] duty" under FELA represents a "matter of law" for the court. *Glass v. Birmingham S. R.R.*, 982 So. 2d 504, 505 (Ala. 2007); *accord, e.g.*, *Atchison, Topeka & Santa Fe Ry. v. Standard*, 696 S.W.2d 476, 479 (Tex. Ct. App. 1985).

Plaintiff nevertheless suggests that the question whether CSXT can be required to take steps in anticipation of a medical emergency was for the jury because it represents an issue of breach or causation rather than duty. *See* OB22-23, 25-26. That is incorrect. The question here implicates the "'standard of conduct'" used to "'gaug[e]'" the railroad's "'factual conduct'" in a particular case. *Dorsey v. Reider*, 2014 WL 1239898, at *2 (Fla. Mar. 27, 2014) (quoting *McCain*, 593 So. 2d at 503). Put another way, the question goes to "'whether the law imposed upon

the defendant the obligation to protect the plaintiff against the consequences which occurred.'" *Fulk*, 22 F.3d at 125. It is thus a "question of duty" that "is not for the jury." *Id.* (internal quotation marks omitted); *accord Dorsey*, 2014 WL 1239898, at *2; *Everett v. Norfolk S. Ry.*, 734 S.E.2d 388, 390 (Ga. 2012).[13]

b. Because the relevant question is one of duty, Plaintiff's factual assertions concerning Sells' cardiac arrest and CSXT's response (*see* OB23-25) are irrelevant. As Plaintiff emphasized in the circuit court, the "'details of [the defendant's] conduct bear upon the issue of whether the defendant who does have a duty has breached the applicable standard of care ..., not whether such a standard of care exists in the first instance.'" R9:1608 (emphasis omitted) (quoting *Markowitz v. Az. Parks Bd.*, 706 P.2d 364, 367 (Ariz. 1985) (en banc)); *accord, e.g.*, *Dorsey*, 2014 WL 1239898, at *2-3. Considering the specific facts of this particular case when determining whether a duty exists would thus "'inadvisabl[y] ... conflate ... duty'" with breach and causation. R9:1609 (quoting *Marshall v. Burger King Corp.*, 856 N.E.2d 1048, 1061 (Ill. 2006)).

c. Plaintiff also argues that the circuit court's ruling is "contrary to" decisions of the U.S. Supreme Court and the lower federal courts. OB26; *see also* OB21, 28, 30. She is wrong. Almost all of the Supreme Court cases on which

[13] The cases on which Plaintiff relies suggest that the jury generally decides issues of breach or causation and therefore do not show that "the issues here were for the jury, not the court." OB29; *see also Cortes*, 287 U.S. at 377; *Randall*, 344 F. Supp. at 884; *Szabo*, 40 A.2d at 563-64.

Plaintiff relies hold only that a railroad must anticipate hazardous conditions at its own work sites that "'would or might result in a mishap and injury.'" *McBride*, 131 S. Ct. at 2643 (quoting *Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108, 118 n.7 (1963)); *accord Urie v. Thompson*, 337 U.S. 163, 187 (1949).[14] Here, however, Plaintiff has never argued that Sells' work or workplace caused his cardiac arrest. That distinction is critical, because railroads' core duty under FELA is "'to use reasonable care in furnishing … employees with a safe place to work.'" *Gottshall*, 512 U.S. at 550. That duty requires railroads to guard against known hazards posed by "the conditions of [the plaintiff's] employment" (*Urie*, 337 U.S. at 166), but it cannot be read to require railroads to anticipate and guard against *non*-work-related hazards. As discussed above, the duty FELA imposes concerning those hazards is simply to respond to medical emergencies that render employees helpless.

The cases Plaintiff cites from other courts do not, as Plaintiff argues, "establish that railroads have a duty to reasonably anticipate" all medical "emergencies." OB28; *see also* OB21. Rather, they stand at most for the proposition that railroads must anticipate workplace dangers—such as a fatal train crash (*Monheim v. Union R.R.*, 788 F. Supp. 2d 394, 397 (W.D. Pa. 2011)), a river adjacent to the worksite (*Powers v. N.Y. Cent. R.R.*, 251 F.2d 813, 817 (2d Cir. 1958), *superseded in part*

[14] The exception simply and correctly notes the existence of a duty to attempt to "save" an employee "from ... probable peril" once an emergency arises. *Anderson v. Atchison, Topeka & Santa Fe Ry.*, 333 U.S. 821, 823 (1948) (per curiam).

as stated in Smith v. Nat'l R.R. Passenger Corp., 856 F.2d 467, 472-73 (2d Cir. 1988)), and a contagiously ill co-worker (*Patterson v. Norfolk & W. Ry.*, 489 F.2d 303, 305 (6th Cir. 1973)). Nothing in these cases suggests that railroads must guard against injuries *not* alleged to be caused by the workplace.

B. Any Requirement That CSXT Provide Employees With AEDs Would Be Unduly Burdensome.

The circuit court's holding that CSXT "had no duty to provide its employees with AEDs" because any such duty "would be unreasonably burdensome" (R9:1595-96) was also correct.

1. Foreseeability was an issue for the court.

As the circuit court recognized, "[t]he [U.S.] Supreme Court has held that 'reasonable foreseeability of harm is an essential ingredient of [FELA] negligence.'" R9:1595 (quoting *Gallick*, 372 U.S. at 117). More specifically, a FELA "defendant's dut[ies are] measured by what a reasonably prudent person would anticipate" (*Gallick*, 372 U.S. at 118), which is to say that foreseeability is "relevant ... to the element of duty." *McCain* , 593 So. 2d at 502; *accord, e.g., Ackley v. Chicago & Nw. Transp. Co.*, 820 F.2d 263, 267 (8th Cir. 1987); *Standard*, 696 S.W.2d at 479.[15] As it relates to that element, foreseeability presents a question of law for the court. *See, e.g., McCain*, 593 So. 2d at 502; *supra* p. 21.

[15] In common-law actions, foreseeability is also relevant to "the element of proximate causation," which—unlike the question of duty—typically presents "a question of fact" for the jury. *McCain*, 593 So. 2d at 502.

Despite these well-settled rules, Plaintiff argues that "it is particularly within the jury's province to evaluate … the 'reasonable foreseeability of harm.'" OB22 (quoting *McBride*, 131 S. Ct. at 2643); *see also* OB32. Plaintiff, however, provides no rationale for that argument. And the cases she cites do not support her view: *Gallick* held that the plaintiff presented sufficient evidence of foreseeability to support a jury verdict—not that the issue is never one for the court. *See* 372 U.S. 117-18. The remaining cases suggest that breach and causation, not duty, are issues for the jury (*e.g.*, *McBride*, 131 S. Ct. at 2643), often without even addressing foreseeability (*see Powers*, 251 F.3d at 817; *Rival v. Atchison, Topeka & Santa Fe Ry.*, 306 P.2d 648, 654 (N.M. 1957); *Bridgeman v. Terminal R.R. Ass'n*, 552 N.E.2d 1146, 1149 (Ill. App. Ct. 1990)).[16]

2. The circuit court correctly applied the foreseeability inquiry.

a. Foreseeability implicates, among other things, the "balanc[e]" between "the foreseeability of harm" and "the burden to be imposed." *Biglen v. Fla. Power & Light Co.*, 910 So. 2d 405, 409 (Fla. 4th DCA 2005) (internal quotation marks omitted); *see also, e.g.*, *Whitt v. Silverman*, 788 So. 2d 210, 222 (Fla. 2001) (con-

[16] Plaintiff's argument that the circuit court "found that [CSXT] committed no negligence"—which is to say, did not breach an existing duty—misreads the court's opinion. OB33. As Plaintiff concedes (*id.*), the circuit court "couched its order in terms of duty." Given that the court was enunciating a general "'standard'" by which to evaluate CSXT's "'factual conduct'" (*Dorsey*, 2014 WL 1239898, at *2), the court was correct in resolving the case under the duty rubric.

sidering whether a proposed duty would be "unduly burdensome"); *Pate v. Threlkel*, 661 So. 2d 278, 282 (Fla. 1995) (same). Thus, "'to say that an injury is not "foreseeable" is simply to say that the probability of loss is low' and that the 'burden of [taking additional] precautions would substantially exceed the loss such precautions could prevent.'" R9:1596 (quoting *Reardon v. Peoria & Pekin Union Ry.*, 26 F.3d 52, 53-54 (7th Cir. 1994)).[17] And when the burden substantially exceeds the potential loss, the harm is unforeseeable as a matter of law and "recovery" is "foreclose[d]." *Reardon*, 26 F.3d at 54; *accord, e.g.*, R9:1596 (citing further cases). The rationale for this rule is straightforward: Any other result would raise "the specter of unlimited and unpredictable liability" by allowing plaintiffs to impose duties without any regard for the realistic costs and benefits those duties would entail. *Gottshall*, 512 U.S. at 557.[18]

As the circuit court recognized, courts across the country have held that it would be unreasonably burdensome to require railroads "to implement [a] solution," such as fencing or security patrols, "'innumerable places along … many miles of tracks.'" R9:1596 (quoting *Choate v. Ind. Harbor Belt R.R.*, 980 N.E.2d

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[17] Plaintiff contends that *Reardon* is "distinguishable" as "involving a lack of evidence of breach or causation." OB31 n.4. *Reardon*, however, *also* advanced the foreseeability analysis discussed by the circuit court. *See* 26 F.3d at 53-54.

[18] Plaintiff notes that *Gottshall* "involved a … claim for emotional distress" (OB31 n.4), but she provides no reason to believe that the *Gottshall* Court's concern about unlimited liability is inapplicable here.

58, 69 (Ill. 2012)).[19] The court below applied the same logic here. It concluded that "requir[ing]" CSXT either to "place AEDs at fixed points alongside its tracks" or "to equip its engineers or conductors with hand-held AEDs" would, no less than requiring fencing or security guards aimed at keeping out trespassers, "unreasonably burden [CSXT] with significant costs for a minimal benefit." R9:1597.

b. That conclusion is compelled by the record. Plaintiff's own evidence "showed that AEDs … cost up to $3,000 each." R9:1597; *see also* R5:878; R16:138. But the $3,000 cost of acquiring a device would represent only the beginning of CSXT's burden. It is undisputed that, as the circuit court held, each AED would also require ongoing expenditures for maintenance. R9:1597. CSXT would also incur the costs of securing the devices from theft and vandalism and of replacing nonfunctioning or outdated AEDs. *See Verdugo v. Target Corp.*, 2014 WL 2808965, at *15 & n. 21(Cal. June 23, 2014).

Furthermore, if CSXT had equipped each team working in the field with an AED, it would have to train its employees to use the devices properly. Company policy would require that step (*see* R20:205-06), and for good reason. As noted above (at 20), CSXT would face liability under the negligent undertaking doctrine if it failed to do so. Moreover, the testimony at trial uniformly suggested that train-

[19] *Accord, e.g.*, *Union Ry. v. Williams*, 187 F.2d 489, 493 (6th Cir. 1951); *Frazee v. St. Louis-San Francisco Ry.*, 549 P.2d 561, 565 (Kan. 1976); *Kline v. N.Y., New Haven & Hartford R.R.*, 276 A.2d 890, 892 (Conn. 1970); *Dugan v. Pa. R.R.*, 127 A.2d 343, 349 (Pa. 1956).

ing is important: Plaintiff's Occupational Safety and Health Administration brochures expressly recommend AED training. R5:878, 898. Michelle Copeland, who insisted that an AED "can be administered by anybody even without training," also conceded that "training [in AED use] is a good idea." R16:140, 156, 187. And she also testified that properly using an AED involves applying CPR (R16:140), which unquestionably requires training (R16:156). Each AED would thus entail training, security, and maintenance costs in addition to the cost of acquiring the device.

Plaintiff's proposed duty, moreover, would require thousands of devices. Plaintiff argues that CSXT should have had its "'employees carry ... AED[s]'" into the field. OB8 (quoting R16:187). As the circuit court noted, however, CSXT has over 30,000 employees, including many conductors and engineers who function as two-person teams in rural areas. *See, e.g.*, R9:1597; R16:155; R20:163. Equipping each of those teams with an AED would be prohibitively expensive.

The testimony also made clear that the probability of injury resulting from failing to provide AEDs is low. CSXT's medical director testified without contradiction that very few employees have experienced serious cardiac events on the job. R20:201; *see also* R9:1597. That is unsurprising, because CSXT takes extensive steps to ensure that employees with disclosed heart conditions can "do [their jobs] safely." R20:173-74; *see also infra* p. 47. Any requirement that CSXT pro-

vide an AED to each team of employees would thus be unduly burdensome.[20]

c. Plaintiff provides no plausible reason to doubt the propriety of the circuit court's analysis. Plaintiff attempts to distinguish the cases on which the court relied on the ground that they involved injuries "to trespassing children, [to] whom the railroad does not even owe a duty of care." OB31 n.4 (emphasis omitted). But that argument assumes the conclusion Plaintiff seeks to prove; it would have force only if CSXT had a duty to make AEDs available. Plaintiff's reliance on the statement in *De Zon* that "furnishing aid may involve taking 'measures of considerable cost in time and money'" (OB32 (quoting *De Zon*, 318 U.S. at 668)) should be rejected on the same basis, because the Court in *De Zon* was describing the measures that might be necessary in "circumstances" where a duty *does* exist. 318 U.S. at 668.[21]

Plaintiff next suggests that the trial testimony undermines the circuit court's analysis. *See* OB32-33. That is not so. Although CSXT "has installed AEDs" in

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[20] Plaintiff does not dispute the circuit court's holding that requiring trackside AEDs would be unreasonably burdensome. R9:1597. Even Copeland conceded that point (R16:183-84**)**—for the good reasons that CSXT's rail system includes "many rural areas" spread "across twenty-three states [and] two Canadian provinces" and that "the devices would need to be placed" so "close … together" that "an employee could reach an AED on foot in a matter of seconds or minutes" (R9:1597). Plaintiff's cursory suggestion that CSXT should place AEDs in some other unspecified but "accessible location" (OB23) fails for the same reason.

[21] The *ipse dixit* that CSXT "had a duty to reasonably render aid" (OB33), meanwhile, assumes that such a duty requires railroads to anticipate non-work-related medical emergencies. It does not. *See supra* pp. 22-24. Even if it did, the circuit court's analysis would provide an independent basis for concluding that the duty does not require the provision of countless AEDs.

roughly "200 ... locations" (OB32), that action does not imply that CSXT has a duty to install thousands more. In fact, CSXT's medical director testified that the railroad chose to install AEDs in locations that would maximize the potential benefit of the devices—in "fitness facilities" that pose a special risk of cardiac arrest because employees use them to obtain "maximum exercise" and "push[] themselves to the limits" and in facilities with a high "concentration of employees." R20:190. That it might be reasonable for CSXT to *elect to* install AEDs in these limited locations does not mean that CSXT should be *required* to provide every two-person team with its own device.

Copeland's testimony that unspecified "medical emergencies in remote locations were foreseeable to" CSXT (OB32), meanwhile, does not speak to the issue of whether cardiac arrests not alleged to be caused by work are unforeseeable as a matter of law, much less whether a requirement that railroads provide AEDs would be unreasonably burdensome. And Plaintiff's assertion "that the benefit [of AEDs is] great given the significant increase in survival rates" (OB32-33)[22] ignores the undisputed evidence that CSXT employees very rarely suffer serious cardiac prob-

[22] This assertion, which rests on a document suggesting that "immediate defibrillation" is effective when the victim suffers one particular type of cardiac arrest (R5:880), cannot be squared with the statistical evidence that "only 22.4 percent" of individuals who suffer cardiac arrest in a hospital "survive[] to hospital discharge[,] and only 18.9 percent survive[] and [are] able to go home" (R17:163) and that at most 6% of cardiac-arrest victims stricken outside the hospital survive the incident. R19:55.

lems while on the job. R20:201; *see also* R16:164-66. It follows from that undisputed evidence that, whether or not AEDs would have a significant benefit in some locations, distributing them to every railroad crew would produce no such benefit.

Finally, testimony to the effect that "the costs for providing [an AED] in close proximity to *this* remote location"—the location where Sells suffered cardiac arrest—would not be "overly burdensome" (OB32 (emphasis added)) is irrelevant. There is no way that CSXT could have known that *this* employee would suffer cardiac arrest on *this* day at *this* location, especially given that Sells failed to disclose his cardiac history to CSXT. Any requirement that CSXT place an AED in "this remote location" would thus be tantamount to imposing the unreasonably burdensome requirement that it place AEDs in all remote locations. For this reason, the testimony Plaintiff invokes fully supports the circuit court's conclusion that Sells' cardiac arrest was unforeseeable to CSXT as a matter of law.

Plaintiff's last argument is that the circuit court "ignore[d] significant evidence" concerning CPR and 911 calls. OB31-32. The circuit court did so for the very good reason that its foreseeability holding applied only to Plaintiff's AED-based theories. *See* R9:1596-98. But Plaintiff's reliance on other potential anticipatory actions is also unavailing for a second, more fundamental reason: Numerous courts applying FELA have concluded that "when an employee suffers a heart attack in the ordinary course of his employment where neither he nor the railroad

[has] any notice of heart trouble and the employee has not complained of discomfort or pain prior to the heart attack," the "injury is not reasonably foreseeable as a matter of law." *Albert v. S. Pac. Transp. Co.*, 35 Cal. Rptr. 2d 777, 781 (Ct. App. 1994).[23] There is simply no basis to conclude that a railroad should know that an employee is at a heightened risk of a cardiac incident unless the employee "inform[s]" the railroad that he suffers from a medical condition associated with such a heightened risk.[24] *Moody v. Boston & Me. Corp.*, 921 F.2d 1, 3 (1st Cir. 1990).

C. Plaintiff's Suggestion That CSXT Was Required To Provide AEDs Or CPR Training Is Precluded By Federal Law.

CSXT was also entitled to judgment on Plaintiff's AED- and CPR-based theories on the ground that those theories are precluded by the LIA and the FRSA. This Court should accordingly "affirm[]" the circuit court's judgment on "an alternative theory" even if it believes that court employed "erroneous reasoning." *Applegate v. Barnett Bank*, 377 So. 2d 1150, 1152 (Fla. 1979); *accord, e.g.*, *Muina v. Canning*, 717 So. 2d 550, 553 n.3 (Fla. 1st DCA 1998) (per curiam).

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[23] *Accord Moody*, 921 F.2d at 3; *Robert v. Consol. Rail Corp.*, 832 F.2d 3, 5-7 (1st Cir. 1987); *Morrison v. Ill. Cent. Gulf R.R.*, 387 So. 2d 754, 756 (Miss. 1980); *Thompson v. Tippit*, 300 S.W.2d 351, 355-57 (Tex. Civ. App. 1957); *Creamer v. Ogden Union Ry. & Depot Co.*, 242 P.2d 575, 577 (Utah 1952).

[24] If heart attacks—one of the leading causes of death in the United States—from conditions not known to the employer are unforeseeable as a matter of law, so too are cardiac arrests from conditions not disclosed to the employer. *See Robert*, 832 F.2d at 6 ("We would have a much different case if [the railroad], knowing of appellant's heart condition, acted negligently toward [him].").

1. The LIA precludes imposition of a duty requiring employees who work on locomotives to bring AEDs to the workplace.

The LIA "manifest[s] the intention [of Congress] to occupy the entire field of regulating locomotive equipment." *Napier v. Atl. Coast Line R.R.*, 272 U.S. 605, 611 (1926). As a result, the statute preempts any state or local regulation of "the equipment of locomotives." *Id.* at 612; *accord, e.g.*, *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1266 (2012). And although Plaintiff brought this case under FELA rather than under state law, the LIA precludes FELA actions to the same extent that it preempts state-law tort claims.[25] Otherwise, a "'railroad could at one time be in compliance with federal railroad safety standards with respect to certain classes of plaintiffs yet be found negligent under the FELA with respect to other classes of plaintiffs for the very same conduct.'" *Lane v. R.A. Sims, Jr., Inc.*, 241 F.3d 439, 443 (5th Cir. 2001) (discussing the FRSA). That result would "destroy ... uniformity" and "make[] little sense." *Parise v. Union Pac. R.R.*, 2014 WL 2002281, at *7 (E.D. Cal. May 14, 2014).

Before trial, Plaintiff conceded, and the circuit court held, that the LIA precludes any claim that CSXT should have equipped its locomotives with AEDs.[26]

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[25] *See, e.g.*, *Parise v. Union Pac. R.R.*, 2014 WL 2002281, at *6-7 (E.D. Cal. May 14, 2014); *Monheim*, 788 F. Supp. 2d at 401; *Munns v. CSX Transp., Inc.*, 2009 WL 1514603, at *1-2 (N.D. Ohio May 29, 2009).

[26] The pre-trial statement by CSXT's counsel that the LIA would not preclude claims that AEDs should be at "switches" or "other locations" (R14:10; *see also*

See R2:347; R14:8. Plaintiff nevertheless argued that Sells and Wells should have been given a portable AED at the beginning of their workday. *E.g.*, R15:42.

The LIA precludes that argument every bit as much, however. It is beyond dispute that, on the day of Sells' cardiac arrest, Sells and Wells were working from a locomotive (*see, e.g.*, R16:198[27]) and that Sells had simply stepped outside the "stopped" locomotive to perform a task when he became incapacitated (R18:215). Any duty to provide Sells or Wells with an AED would thus necessarily require them to carry the AED *onto the locomotive* and keep it there for the entire day. Copeland conceded as much. R16:183.

That result is precluded by the LIA, because it would effectively regulate "the equipment of locomotives." *Kurns*, 132 S. Ct. at 1266 (internal quotation marks omitted). It makes no difference that Plaintiff seeks to do so indirectly by forcing railroad employees to carry AEDs onto locomotives, rather than by directly arguing that locomotives should come with AEDs pre-installed. In *Kurns*, the Supreme Court held that the LIA preempted a products-liability claim against a *manufacturer* of locomotive equipment, because that claim attempted to dictate how

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OB5), is consistent with, and did not waive, the argument that requiring Wells or Sells to "have had an AED with him" would represent an impermissible "end run" around the statute (R14:9; *see also* R17:26-27).

[27] These circumstances are not unusual. It is the job of locomotive engineers to drive a locomotive. *See, e.g.*, *Major v. CSX Transp., Inc.*, 278 F. Supp. 2d 597, 614 (D. Md. 2003). And engineers work with conductors as a team. R16:155.

railroads "equip [their] fleet[s] of locomotives" even though the claim was not filed against a railroad itself. *Id.* at 1269. *Kurns* thus makes clear that the LIA bars plaintiffs from attempting to regulate locomotive equipment either directly or indirectly. *See also id.* at 1274 (Sotomayor, J., dissenting in part) (contending that the Court's opinion "elides the distinction between indirect and direct regulation").

2. The FRSA precludes any requirement that CSXT train its engineers in CPR or AED use at any time.

Just as the LIA precludes Plaintiff's theory that Sells or Wells should have been provided with an AED to carry onto the locomotive, the FRSA precludes any contention that CSXT should have trained Wells in either CPR or AED use.

The FRSA expressly preempts any state-law claims "covering the [same] subject matter" as federal railroad safety regulations. 49 U.S.C. § 20106(a)(2); *accord, e.g.*, *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Like the LIA, the FRSA precludes FELA claims that "would have been preempted if brought by a non-employee under state law." *Nickels v. Grand Trunk W. R.R.*, 560 F.3d 426, 430 (6th Cir. 2009).[28]

Federal railroad-safety regulations provide "minimum Federal safety standards" governing "the eligibility, training, testing, certification and monitoring of … locomotive engineers." 49 C.F.R. § 240.1(b); *see also id.* §§ 240.101–.411. It is

[28] *Accord, e.g.*, *Lane*, 241 F.3d at 443; *Waymire v. Norfolk & W. Ry.*, 218 F.3d 773, 776 (7th Cir. 2000); *Booth v. CSX Transp., Inc.*, 334 S.W.3d 897, 900 (Ky. Ct. App. 2011).

settled that those standards "cover" the subject of engineer training and preclude any attempt to impose additional training requirements.[29] The federal regulations, however, do not require—and never have required—engineers to be trained either in CPR or in AED use. R2:321. The circuit court was therefore correct to hold—in a ruling Plaintiff does not challenge on appeal—that the FRSA bars "the claim that [CSXT] should have trained its engineer in CPR." OB5 (citing R14:3-6).[30]

The FRSA similarly precludes Plaintiff's theory that CSXT's "dispatcher … could have coached Mr. Wells on CPR until the EMTs arrived." OB23; *see also* OB4. That theory necessarily would require CSXT, acting through its dispatchers, to *train* Wells in CPR. *See, e.g.*, Webster's New Collegiate Dictionary 211 (1981) (defining "coach" as "to instruct, direct, or prompt" or "to train intensively by instruction, demonstration, and practice"). That Plaintiff's theory would require CSXT to provide that training during a medical emergency rather than in advance makes no difference, because the FRSA bars the imposition of additional training requirements at *any* time after the "Secretary of Transportation … prescribe[d]" the

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[29] *See, e.g.*, *Union Pac. R.R. v. Cal. Pub. Utils. Comm'n*, 346 F.3d 851, 868 (9th Cir. 2003); *Burlington N. & Santa Fe Ry. v. Doyle*, 186 F.3d 790, 796-97 (7th Cir. 1999); *Peters v. Union Pac. R.R.*, 80 F.3d 257, 262 (8th Cir. 1996); *Brenner v. Consol. Rail Corp.*, 806 F. Supp. 2d 786, 795 (E.D. Pa. 2011); *Thompson v. Ne. Ill. Reg'l Commuter R.R.*, 854 N.E.2d 744, 746-47 (Ill. App. Ct. 2006).

[30] Plaintiff's contentions that Wells "was not formally train[ed] in CPR" (OB12) and that CSXT had not "trained" him "in CPR" (OB25) are therefore irrelevant.

engineer training "regulation[s]." 49 U.S.C. § 20106(a)(2); *accord Easterwood*, 507 U.S. at 664.

Finally, the FRSA also precludes Plaintiff's AED theories. As discussed above (at 27-28), any requirement that CSXT acquire and provide AEDs would be tantamount to a requirement that it train its employees in their use. *See also*, *e.g.*, *O'Gwin v. Isle of Capri Natchez, Inc.*, 2014 WL 2462989, at *4 (Miss. Ct. App. June 3, 2014) ("using a defibrillator[] ... requires medical training to know, first, that an AED is needed and, second, how to properly use it") (citing *Salte v. YMCA of Metro. Chicago Found.*, 814 N.E.2d 610, 614-15 (Ill. App. Ct. 2004)). In this case, that means that CSXT would have had to train Wells, the engineer, to use the device: The record demonstrates that an AED is effective only if, among other things, the device is applied almost immediately after the onset of cardiac arrest. *See* R17:136; R20:203. And by his own account, Wells was the only person near Sells when he collapsed, and thus the only person who could have timely applied an AED. R16:198.[31]

D. Plaintiff Presented No Evidence That Either Delay In Summoning EMTs Or Wells' Decision To Radio For Help Contributed To Sells' Death.

At trial, Plaintiff also relied on the theory that CSXT violated FELA by contributing to "delays" that led "emergency medical workers [to] reach[] Mr. Sells"

[31] Plaintiffs' contention that CSXT should have trained other "workers in CPR" (OB23) is likewise unavailing for this reason.

only "35 minutes after he went into cardiac arrest." R9:1597. The circuit court held that this theory, standing alone, could not provide a basis for holding CSXT liable, because "no reasonable jury could" conclude that the asserted delays had a causal link to Sells' death. R9:1598. The testimony, the court reasoned, showed "that even absent any delays by [CSXT], emergency medical personnel could not have arrived on the scene until 15 minutes after Mr. Sells went into cardiac arrest"—and that "emergency medical treatment administered" at that time "could not have forestalled Mr. Sells' death." R9:1597-98.

1. Plaintiff does not directly challenge that conclusion in her brief. She does suggest in passing that her medical witnesses "testified that" the supposed "delay in providing [emergency medical] treatment ... contributed to [Sells'] death." OB25; *see also* OB10. But such "isolated references," unaccompanied by any argument that the circuit court erred, are "insufficient to present an argument for appellate review." *Caldwell v. Fla. Dep't of Elder Affairs*, 121 So. 3d 1062, 1064 (Fla. 1st DCA 2013) (per curiam). Plaintiff has therefore "waived the right to have this Court consider [the] matter in this appeal." *Hogan v. State*, 123 So. 3d 110, 111 n.1 (Fla. 1st DCA 2013) (per curiam).

2. In any event, Plaintiff's suggestion is wrong. Fifer and Copeland—Plaintiff's own experts—testified that "[i]n the absence of resuscitation," brain death "begins to occur after four to five minutes" following cardiac arrest

(R17:186) and that "[t]en minutes is considered to be ... the outside that a person can survive sudden cardiac arrest without any kind of [medical] response" (R15:95; *accord, e.g.*, R17:116, 120, 123). Even Plaintiff's counsel expressly conceded during opening statements that brain death is, "in all likelihood, ... permanent" after "14 or 15 minutes of no oxygen." R15:44. Sells' "chances of survival" 15 minutes after cardiac arrest—the earliest the EMTs could have arrived (R17:78)—were thus "nonexistent" (R16:197), and any further delay would, as Zile testified, not have "changed" Sells' chance of survival (R19:64).

Fifer did not, as Plaintiff asserts, contradict this testimony by stating that Sells "had a 'good chance' of surviving" either if "CPR or an AED [had] been used, or if EMTs arrived as quickly as possible." OB25. Fifer instead told the jury that Sells "could have survived the event" if "he had had effective [CPR], if there were an [AED] present, *and* if emergency personnel arrived as quickly as possible." R17:135 (emphasis added). In other words, Fifer said that EMTs who arrived after 15 minutes could have saved Sells' life *only if* CPR or an AED had been immediately administered. An earlier arrival, without more, would not have helped.

The remaining testimony that Plaintiff cites establishes only that "proper CPR" administered immediately after the onset of cardiac arrest could "have extended the window of survivability" (R17:140; *see also* R17:148, 195), that an AED could also have "increased" the odds of survival (R17:148; *see also* R17:123-

24, 195), and that the EMTs arrived too late to help Sells (R17:114-15). None of that testimony even begins to support the view that the arrival of EMTs 15 minutes rather than 35 minutes after the onset of cardiac arrest could have saved Sells' life.

3. Plaintiff's theory that CSXT should have instructed Wells to dial 911 in order to receive on-the-spot CPR training instead of radioing for help also fails on causation grounds.[32] Wells did not immediately notice Sells' distress. *See* R18:216. Once he did, under Plaintiff's theory Wells would have had to (1) retrieve his "cell phone" from his equipment bag (R18:233); (2) turn the phone on, because CSXT policy sensibly required him to have the "phone turned off" while operating the locomotive (R18:231);[33] (3) wait for a signal, which Wells testified would take "longer" than "a couple of minutes" given the remote area (R18:233); (4) dial 911; (5) explain the situation and his location to an operator unfamiliar with the railroad's property; (6) dismount from the locomotive and return to Sells, hoping that the call did not drop; and (7) listen to the operator's instructions. Only then could Wells have attempted to perform CPR.

By that time, more than 10 minutes would have elapsed. The result is that Sells could no longer have been saved even if Wells correctly performed the pro-

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[32] So, too, does Plaintiff's suggestion that the "[r]ailroad managers" who "arrived about fifteen minutes" after Sells entered cardiac arrest should have been "trained in CPR" or provided with an AED. OB3.

[33] Federal regulations promulgated in 2010 now impose the same requirement. *See* 49 C.F.R. § 220.305(b)(1).

cedure—and there was no evidence that he would have done so.[34] Plaintiff thus presented no evidence to suggest that CSXT's failure to instruct Wells to undertake this complicated series of actions, rather than to immediately pick up the radio and contact the emergency dispatcher, contributed to Sells' death.[35]

II. THE ISSUE OF COMPARATIVE NEGLIGENCE WAS FOR THE JURY TO DECIDE.

FELA is a "comparative negligence" statute. *Gottshall*, 512 U.S. at 542-43. The statute thus "allow[s] a jury to apportion fault as it sees fit between negligent parties whose negligence was part of the legal and proximate cause of ... [an] injury." *Birge v. Charron*, 107 So. 3d 350, 357 (Fla. 2012) (quoting *Hoffman v. Jones*, 280 So. 2d 431, 439 (Fla. 1973)). To show comparative negligence under FELA, "an employer must prove" that the employee was "negligen[t]." *Johnson I*, 544 F.3d at 302. The employer must also show "causation" under the "same" standard used to show "railroad negligence" (*Sorrell*, 549 U.S. at 171)—namely, that the negligence played "'any part, even the slightest, in producing the injury or death'" (*McBride*, 131 S. Ct. at 2636 (quoting *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 506

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[34] Copeland testified that "911 dispatchers are prepared to coach an untrained person" in "CPR using chest compressions" and that chest compressions are "effective," but not that on-the-spot training of laypeople is effective. R16:154.

[35] Plaintiff's theory would also place CSXT in violation of federal regulations. Under 49 C.F.R. § 220.13(a), employees must report all "conditions which could result in death or injury" using "the quickest means available." There can be no dispute on this record that the locomotive radio provided a more expeditious means of reporting Sells' collapse than a cell phone that was inaccessible and turned off.

(1957))).[36]

The issue of comparative negligence—unlike the question whether a duty exists—is "ordinarily a matter for a jury's determination." *Petroleum Carrier Corp. v. Gates*, 330 So. 2d 751, 752 (Fla. 1st DCA 1976) (citing cases). Thus, "[w]here there is evidence which supports an inference of comparative fault on the part of the plaintiff, the issue of comparative negligence should be submitted to the jury." *Howell v. Winkle*, 866 So. 2d 192, 195 (Fla. 1st DCA 2004).

Here, the circuit court allowed CSXT to present the comparative-negligence defense enunciated in the Fifth Circuit's opinion in *Johnson I* and the subsequent district-court opinion in *Johnson II*. *See, e.g.*, R15:5-6. Under *Johnson I*, an employer may show comparative negligence under FELA by providing evidence that the employee "concealed material information about a pre-existing injury or physical condition from his employer; expose[d] his body to a risk of reinjury or aggravation of the condition; and then suffer[ed] reinjury or aggravation injury." 544 F.3d at 303-04. *Johnson II*, meanwhile, suggests that there must also be evidence that the plaintiff "kn[ew], or should have [had] reason to know, that certain working conditions posed an unreasonable risk of reinjury." 599 F. Supp. 2d at 732.

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[36] *Norfolk Southern Railway v. Schumpert*, 608 S.E.2d 236 (Ga. Ct. App. 2004), did not hold that comparative negligence provides a defense only if the worker's negligence "can be seen as the sole proximate cause of the accident." OB42 (internal quotation marks omitted). Rather, it makes clear that a negligent railroad cannot escape liability entirely unless the plaintiff's actions are the sole cause of his injury. *See Norfolk S. Ry.*, 608 S.E.2d at 238-39.

The circuit court held that Sells' "nondisclosure of his cardiac medical history provides a basis for the jury's finding of comparative fault" under this test. R9:1598. Plaintiff has provided no persuasive reason to conclude that the court erred.

A. CSXT Presented Evidence That Sells' Negligence Contributed To His Death.

1. CSXT presented evidence to support each element of the test in *Johnson I*. There was ample evidence that Sells had a "pre-existing ... physical condition" that he "concealed" from the railroad. *Johnson I*, 544 F.3d at 303-04. Sells' former treating physician testified that, in 2005, shortly before he moved to Florida, Sells had a "possibl[y] abnormal[]" EKG. R17:91. He therefore "referred [Sells] to a cardiologist." R17:92. Sells told the cardiologist that, in addition to the "abnormal electrocardiogram," he "had intermittent chest pain that comes and goes without any clear precipitants (R17:95), and the cardiologist performed a second EKG, which showed "the same area of abnormality" (R17:97; *accord* R19:12).

The cardiologist instructed Sells to "'follow up with a cardiologist'" in Florida for further testing to determine whether a serious "problem" existed. R17:101; R19:13. Sells "complained of ... shortness of breath" to a new treating physician in Florida (R17:173), who performed another EKG and, like Sells' previous doctors, marked it "abnormal" (R17:175). Nevertheless, Sells did not follow up with a Florida cardiologist, and no additional tests were performed on his heart. R17:168.

When Sells applied for work as a conductor at CSXT, he completed a "post-offer health questionnaire" that asked whether he "ever had" either "heart, vein or artery trouble" or "chest pains." R20:181; *see also* R6:1099-1100. Sells untruthfully answered no to both questions (R6:1099; R20:182), and he never disclosed a "positive EKG or incomplete cardiac evaluation[] or chest pain ... or shortness of breath" to CSXT (R20:183).

CSXT also presented evidence that satisfies the remaining two elements of *Johnson I*. The jury heard that, despite knowing about his potential cardiac problem, Sells sought and accepted a job in which he worked in rural areas, far from public roads or medical assistance. *See, e.g.*, R16:195-96. By doing so without disclosing his cardiac history to CSXT, Sells unquestionably "expose[d] his body to a risk of" death from cardiac incident in a remote location. *Johnson I*, 544 F.3d at 304. And Sells then "suffer[ed]" precisely that injury. *Id.*; *see also* R17:184-85.

2. Plaintiff disputes none of this. Instead, she argues that CSXT "offered no evidence" to satisfy the element added by *Johnson II*—"that Mr. Sells knew or should have known that working as a conductor was unreasonably dangerous." OB39-40; *see also* OB41. Plaintiff is mistaken. The jury heard that Sells had three "significant[ly] block[ed]" arteries at the time of his death. R17:179-80. Sells also had high cholesterol, diabetes, and a family history of "premature coronary disease." R19:68. In fact, both Fifer and Zile further testified that Sells "had coronary

artery disease," which can lead "to an arrhythmia that [can lead] to sudden death." R17:165-66; *see also* R17:107-09, 134; R19:41-44. And Zile told the jury that "sudden cardiac death" can "occur at any time, anyplace, without any warning whatsoever" and leaves the victim "without a heartbeat, without breathing, [and] without brain activity." R19:39.

The jury was thus entitled to infer that Sells was at an unusual risk of cardiac failure—which would mean that his decision to voluntarily go into remote areas placed him at an unreasonable risk of death. Moreover, because Sells knew that he had chest pains, shortness of breath, and an abnormal EKG and that he was under instructions to visit a cardiologist for further testing, the jury was further entitled to conclude that Sells should have known about this risk.[37]

3. Plaintiff further argues that CSXT "failed to present evidence as to how Mr. Sells' ... negligence in failing to disclose his history caused his death." OB41. That argument comprises two separate assertions: that CSXT "presented no evidence that the cardiac arrest was caused by the same problem" Sells failed to disclose, and that CSXT presented no evidence that it would have "changed its emergency procedures ... had it known of Mr. Sells' history." *Id.*; *see also* OB37. Nei-

[37] Plaintiff's contention that "no work-related activity contributed to the cardiac arrest" (OB40) is irrelevant. The issue is not whether Sells' work caused his cardiac arrest but whether Sells should have known that he had a potential heart condition that "made him vulnerable" (R12:31) to serious, sudden cardiac events wherever he might be, including in remote areas.

ther type of evidence is necessary: As shown above (at 43-44), the jury heard that Sells knew that he had a potential heart condition, chose to work in remote areas, and then suffered a cardiac arrest in a remote area. That evidence provides a sufficient basis to uphold the jury's finding that Sells' negligence contributed to his death. *See Johnson I*, 544 F.3d at 303-04.

Moreover, Plaintiff's assertion that there was no evidence that Sells' 2005 heart condition caused his 2006 cardiac arrest cannot be reconciled with the record. Fifer testified that Sells had "coronary artery disease" in 2005 (R17:166)—and that the same disease caused an "arrhythmia" that resulted in Sells' death (R17:165-66). Both Fifer and Zile also testified that additional "testing" could have disclosed the "condition in [Sells'] heart that was going to lead to his death." R17:172; *see also* R19:75-76. And Zile stated that, had Sells been diagnosed, "treatments would have reduced the likelihood that [he] would have suffered sudden cardiac death." R19:79-80. There was thus evidence directly tying Sells' "cardiac arrest" both to the "problem" demonstrated by Sells' 2005 cardiac tests (OB41) and to his failure to follow his cardiologist's instructions to seek further testing.

Plaintiff's assertion concerning CSXT's emergency-response procedures, meanwhile, is irrelevant, because evidence concerning those procedures would not show whether Sells' own negligence contributed to his death. It would at most show whether Sells could have been saved from the consequences of his own neg-

ligence.

In any event, the jury heard that, had Sells disclosed his cardiac history, CSXT *would* have taken steps that might have saved his life by ensuring that he could "safely" perform the "job" of a conductor before allowing him to work in that position. R20:175. Specifically, as Plaintiff concedes (OB37), CSXT would have asked Sells to obtain the relevant medical and testing "records" and to "complete" any additional necessary tests. R20:171-73. CSXT would also have instructed Sells to "review the job duties" of conductor "with [his] own treating doctor" (R20:173)—and, if necessary, it would have referred Sells to its "in-house vocational rehabilitation" department for placement in a position consistent with his health limitations (R20:173-75). As discussed above (at 46), those steps might well have led to a diagnosis of coronary artery disease and to treatment that could have reduced the risk of cardiac arrest.[38]

B. CSXT Was Entitled To Present A Comparative-Negligence Defense.

In an effort to circumvent the extensive testimony showing that Sells' failure to disclose his heart condition contributed to his cardiac arrest and death, Plaintiff argues that *Johnson*'s test for comparative negligence does not apply to this case.

[38] Contrary to Plaintiff's contention, the jury was entitled to conclude that Sells would not simply have been "cleared by his doctor" to work as a conductor. OB37. Although Sells' general practitioner in Florida "imposed no work restrictions" (*id.*), CSXT's medical director said that he would have insisted on learning the opinion of a "cardiologist." R20:208-09.

That argument is not plausible.

1. Plaintiff contends that *Johnson* does not apply because her claim is "for an injury caused by" the alleged "failure to timely render medical care," not "for a work-related injury." OB36. That contention cannot be squared with the test in *Johnson*, which applies on its face to *all* types of alleged negligence. *See Johnson I*, 544 F.3d at 303-04; *Johnson II*, 599 F. Supp. 2d at 731-32.

Moreover, Plaintiff's contention would render the availability of a comparative-negligence defense dependent on the type of negligence allegedly committed by the employer—a result that would conflict with the principle that comparative negligence depends on the actions of the employee. *See, e.g.*, *Johnson I*, 544 F.3d at 303; *Birge*, 107 So. 3d at 355-56. Worse still, under Plaintiff's theory, railroads would always have to bear full liability for the results of medical emergencies they did not cause—but not for medical emergencies that were caused by workplace hazards. That result would be absurd.

2. Plaintiff also argues that "[w]hat Mr. Sells may have done ... that gave rise to the need for medical care is distinct from anything he may have done that contributed to" the alleged "failure to render aid." OB36. But the factors that gave rise to Sells' underlying condition played no role in CSXT's comparative-negligence defense at trial. The causal question is instead whether Sells' failure to disclose his condition represents a cause of his death under the "relaxed standard of

causation" that "applies under FELA."[39] *Gottshall*, 512 U.S. at 543. As demonstrated above (at 43-46), it does. *See also Smith v. Tidewater Inc.*, 918 So. 2d 1, 17 (La. Ct. App. 2005) (holding that "plaintiff ha[d] comparative fault for allowing himself to fall into the sea" even though the defendant "violat[ed] its duty to search and rescue" after his fall).

3. Plaintiff's remaining contentions are similarly meritless. Although it is true that "FELA ... does not permit recovery in far[-]out 'but for' situations" (OB35 (quoting *McBride*, 131 S. Ct. at 2643-44)), this is not such a situation. A causal tie is sufficient under FELA if the injury falls "'within the risk created by'" the negligent conduct. *Szekeres v. CSX Transp., Inc.*, 731 F.3d 592, 601 (6th Cir. 2013). The courts have held, for example, that injuries suffered from a fall in muddy conditions that occurred because the employee chose to use a "private outdoor location" instead of a "'dirty and unusable'" toilet were sufficiently tied to condition of the toilet. *Id.* at 596. Here, Sells' injury—death from cardiac arrest in a rural area—fell well "within the risk created by" his failure to disclose a potential cardiac condition when applying for a job that required work in rural areas.

To be sure, Plaintiff is right that "'[p]roximate cause is not the same as contributory negligence,'" which requires both negligence and causation. OB35 (quot-

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[39] *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676 (10th Cir. 1981) (cited at OB36) stands only for the propositions that injured employees may assert separate claims for an initial injury and a subsequent aggravating injury and that "the extent of each party's comparative fault may differ under each claim." 651 F.2d at 685.

ing *Mullett v. Wheeling & Lake Erie Ry.*, 2003 WL 21469150, at *7 (Ohio Ct. App. June 26, 2003). In view of the substantial evidence demonstrating both of the required elements (*see supra* pp. 43-46), however, that truism does not help her.

Neither does the opinion in *Mullett*. In that case, the railroad argued that the plaintiff's hearing loss and tinnitus had been caused not, as Mullett claimed, by "a practical joke" played by co-workers involving the placement of an explosive packet "on a turntable track," but by Mullett's failure to "wear ear protection" when firing shotguns. 2003 WL 21469150, at *1, *7. The court explained that, because Mullett was not firing shotguns at the alleged time of his injury, the proper defense was not comparative negligence but "that the [practical joke] was not the proximate cause of" the injury. *Id.* at *7.[40] The same is not true here. As the circuit court recognized, unlike Mullett's potentially negligent use of shotguns, Sells' negligence in the form of "nondisclosure" was ongoing and "continued right up until he fell." R20:227. CSXT could thus appropriately rely on a comparative-negligence defense in this case.

CONCLUSION

The judgment of the circuit court should be affirmed.

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[40] *Mullett* also provides no support for Plaintiff's contention that Sells was "blameless" as a matter of law. OB36. Sells was not "the unintended victim of a practical joke" (2003 WL 21469150, at *1, *7); he was an employee who knew of a cardiac condition that he failed to disclose to his employer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that that, on June 27, 2014, I served the foregoing Appellee's Answer Brief by email on the following counsel for Appellant:

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the typeface and type-style requirements of Florida Rule of Appellate Procedure 9.210(a)(2) because it has been prepared using Microsoft Office Word 2007 and is set in Times New Roman font in a size equivalent to 14 points or larger.

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