No. 12-3689

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

James D. Szekeres,

Plaintiff-Appellant,

v.

CSX Transportation, Inc.,

Defendant-Appellee.

On Appeal from the United States District Court for the
Northern District of Ohio, Eastern Division at Cleveland
No. 1:08-cv-01153-JRA
The Honorable John R. Adams

BRIEF OF DEFENDANT-APPELLEE CSX TRANSPORTATION, INC.

Joseph J. Santoro
Stephen M. Beaudry
GALLAGHER SHARP
Sixth Floor, Bulkley Building
1501 Euclid Ave.
Cleveland, Ohio 44115
Telephone: (216) 241-5310
Facsimile: (216) 241-1608
jsantoro@gallaghersharp.com
sbeaudry@gallaghersharp.com

Dan Himmelfarb
Scott M. Noveck
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
Telephone: (202) 263-3000
Facsimile: (202) 263-3300
dhimmelfarb@mayerbrown.com
snoveck@mayerbrown.com

Attorneys for Appellee CSX Transportation, Inc.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 12-3689 Case Name: Szekeres v. CSX Transportation, Inc.

Name of counsel: Dan Himmelfarb

Pursuant to 6th Cir. R. 26.1, CSX Transportation, Inc.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

CSX Transportation, Inc. is a subsidiary of a publicly owned corporation, CSX Corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on December 7, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Dan Himmelfarb
Mayer Brown LLP
1999 K St., NW Washington, DC 20006

Th s statement s f ed tw ce: when the appea s n t a y opened and ater, n the pr nc pa br efs, mmed ate y preced ng the tab e of contents. See 6th C r. R. 26.1 on page 2 of th s form.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes and Rules

STATEMENT REGARDING ORAL ARGUMENT

Defendant-appellee CSX Transportation, Inc. ("CSXT") believes that the Court's decisional process would be aided by oral argument. *See* Fed. R. App. P. 34(a)(2)(C).

INTRODUCTION

While traveling on a freight train operated by his employer, defendant-appellee CSXT, plaintiff-appellant James D. Szekeres had to go to the bathroom. He did not use the bathroom on the train, however, because he deemed it unclean. After the train arrived at its destination, Szekeres got out and performed his duties as a brakeman, throwing a switch on the track several times. Szekeres claims that the area behind the switch was muddy. Right before the train was to depart, Szekeres tried to climb an incline to relieve himself. The incline was also muddy. He slipped on the incline and injured his knee.

Szekeres sued CSXT under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.*, and the Locomotive Inspection Act ("LIA"), 49 U.S.C. §§ 20701 *et seq.* He sought to recover under two theories. The first—the LIA claim—was that CSXT was negligent *per se* in failing to provide a sanitary bathroom on the train and that this negligence caused Szekeres's injury because he would not have been on the incline where he slipped if he had been able to use a bathroom on the train. Szekeres's second theory—the FELA claim—was that CSXT was negligent in failing to place ballast behind the switch on the track where he was working and that this negligence caused his injury because the lack of ballast caused mud to accumulate on his boots and the accumulated mud, in combination with the muddy condition of the incline, caused him to slip when he

tried to climb the incline. At trial, however, Szekeres could say only that mud from behind the switch "might" have accumulated on his boots, and he admitted that he could only "speculate" that it had.

Last year, in *CSX Transportation, Inc. v. McBride*, 131 S. Ct. 2640, 2643 (2011), the Supreme Court made clear that a trial court in a FELA case has "no warrant to submit *** to the jury" a "'but for' scenario[]" in which the "alleged negligence was [the] failure to provide [a] lavatory" to an employee and the "employee was injured *** while looking for a lavatory." That is precisely the theory of causation for Szekeres's first claim. Sixty years before *McBride*, in *Moore v. Chesapeake & Ohio Railway*, 340 U.S. 573, 578 (1951), the Supreme Court established another principle—that "[s]peculation cannot supply the place of proof" in a FELA case. The theory of causation for Szekeres's second claim depends entirely on speculation rather than proof.

The district judge who presided over the trial, and heard the evidence, granted judgment as a matter of law to CSXT on these grounds, concluding that Szekeres had failed to prove the essential element of causation on both claims. That decision is unassailable and should be affirmed.

STATEMENT OF THE ISSUES

1. Whether the district court correctly granted judgment as a matter of law to CSXT on Szekeres's LIA claim.

2. Whether the district court correctly granted judgment as a matter of law to CSXT on Szekeres's FELA claim.

3. Whether, in the event that this Court reverses the district court's grant of judgment as a matter of law, it should allow the district court to rule on CSXT's alternative motion for a new trial.

STATEMENT OF THE CASE

This case was commenced in the Northern District of Ohio on May 8, 2008, Complaint, RE1, PageID# 1-4, and assigned to Judge Ann Aldrich. On July 30, 2008, Szekeres filed a second amended complaint, alleging that CSXT violated FELA and the LIA. Second Amended Complaint, RE10, PageID# 41-44. On February 27 and March 3, 2009, CSXT moved for summary judgment on the two claims. Motion for Partial S.J. on LIA Claim, RE17, PageID# 161-247; Motion for S.J. on All Claims, RE18, PageID# 248-282. On July 2, 2009, Judge Aldrich granted CSXT's motions for summary judgment and dismissed the case. Memorandum and Order, RE31, PageID# 605-613; Order of Dismissal, RE32, PageID# 614.

Szekeres appealed. Notice of Appeal, RE33, PageID# 615-616. On August 16, 2010, this Court reversed the grant of summary judgment on both claims. *Szekeres v. CSX Transp., Inc.*, 617 F.3d 424 (6th Cir. 2010) ("*Szekeres I*").

On remand, the case was reassigned to Judge John R. Adams. The case was tried to a jury on August 15 and August 16, 2011. Transcript, RE126, PageID# 1790-2052; Transcript, RE127, PageID# 2053-2197. On August 17, 2011, the jury returned a verdict for Szekeres on both the FELA and the LIA claim, finding CSXT 60% responsible and Szekeres 40% responsible, and awarding $49,000 in damages. Jury Verdict, RE116, PageID# 1718-1726. On September 15, 2011, CSXT filed a renewed motion for judgment as a matter of law or, in the alternative, a new trial. Renewed Motion for J.M.O.L. or New Trial, RE130, PageID# 2232-2235. On June 5, 2012, Judge Adams granted CSXT's motion for judgment as a matter of law on both claims. Order, RE139, PageID# 2363-2370.

This appeal followed. Notice of Appeal, RE140, PageID# 2371-2372.

STATEMENT OF FACTS

A. Legal Background

FELA establishes the compensation scheme for injuries sustained by railroad employees in the workplace. The statute provides that a railroad is liable to its employee for an "injury *** resulting in whole or in part from the negligence" of the railroad, 45 U.S.C. § 51, and the basic elements of a FELA cause of action are thus "breach of a duty of care (that is, conduct unreasonable in the face of a foreseeable risk of harm), injury, and causation," *Consol. Rail Corp. v. Gotshall*, 512 U.S. 532, 538 (1994).

An action for violation of the LIA, a separate statute, "is prosecuted as an action under the FELA." *Green v. River Terminal Ry.*, 763 F.2d 805, 810 (6th Cir. 1985). The LIA provides that a locomotive and its "parts and appurtenances" must be "in proper condition and safe to operate without unnecessary danger of personal injury," must have been "inspected as required" under the statute and applicable regulations, and must be able to "withstand every test prescribed" by the Secretary of Transportation. 49 U.S.C. § 20701. A violation of the LIA "is negligence *per se* under FELA," *Mickler v. Nimishillen & Tuscarawas Ry.*, 13 F.3d 184, 188 (6th Cir. 1993), and a plaintiff asserting an LIA claim must therefore prove that there was a violation of the statute, that the plaintiff was injured, and that the violation caused the injury. "[T]he FELA causation standard applies." *Green*, 763 F.2d at 810.

"[T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery" under FELA. 45 U.S.C. § 53. Instead, the damages in a case in which the employee is contributorily negligent are diminished "in proportion to the amount of negligence attributable to such employee." *Id.* An employee's contributory negligence will not result in *any* diminution of damages, however, if the claim is premised upon a violation of the LIA. *Id.*

B. Factual Background

Viewed in a light most favorable to Szekeres, *see Andler v. Clear Channel Broad., Inc.,* 670 F.3d 717, 723 (6th Cir. 2012), the trial evidence in general, and Szekeres's testimony in particular, established the following facts:

CSXT is a freight railroad, for which Szekeres worked as a brakeman—someone who, in Szekeres's words, "switches cars" and "throws switches." Transcript, RE126, PageID# 1826. A railroad switch moves a track "from one direction to another" and enables cars to be moved "from one track to another." *Id.*, PageID# 1826-1827.

On January 4, 2006, Szekeres was the brakeman on the D-753, a local train that services customers between Cleveland and Valley City, Ohio. Transcript, RE126, PageID# 1827-1928. Its crew also included a conductor (Larry Ashby) and an engineer (Matthew Ashby). *Id.*, PageID# 1828-1829. On that day it was about 40 degrees and "misty." *Id.*, PageID# 1828, 1850.

The D-753 left Clark Avenue, in Cleveland, at approximately 12:45 p.m., and traveled to Parma, where it dropped off a locomotive. Transcript, RE126, PageID# 1828-1831, 1852-1853. The train then continued on to Valley City. *Id.*, PageID# 1831-1832, 1853-1854. When it arrived there, Szekeres operated the switch on the main track, so that the train could enter the Valley City "industry," Liverpool Coil. *Id.*, PageID# 1832-1833, 1854-1855. After leaving five cars on

the main track, the train proceeded into the industry, where it delivered loaded cars and picked up empty ones. *Id.*, PageID# 1833-1834, 1856.

The D-753 then left the industry to return to the main track. Transcript, RE126, PageID# 1834. When the train was still "at least a half mile up into" the industry, Szekeres had to go to the bathroom. *Id.*, PageID# 1836, 1867-1878. He did not use the bathroom in the train's locomotive, however, because it was dirty. *Id.*, PageID# 1836.

After the D-753 arrived at the main track, the crew picked up the five cars it had left there. Transcript, RE126, PageID# 1834. During the course of this operation, Szekeres threw the switch "at least ten to fifteen times." *Id.* According to Szekeres, the area behind the switch was muddy. *Id.*, PageID# 1835. When he "was getting ready to leave," at around 3:00 p.m., Szekeres tried to go up an incline to relieve himself. *Id.*, PageID# 1835, 1849. The incline was muddy too. *Id.*, PageID# 1838-1839, 1872. Szekeres slipped on the incline and injured his knee. *Id.*, PageID# 1835-1836, 1849-1850.

C. Prior Proceedings

1. Szekeres's lawsuit

Szekeres sued CSXT under FELA and the LIA, seeking to recover on two different theories. First, Szekeres alleged that the bathroom on the locomotive was unsanitary and therefore unusable, in violation of the LIA and applicable

regulations; that, because there was no usable bathroom, he was forced to relieve himself somewhere else; and that, while climbing the incline to do so, he slipped and injured his knee. Second Amended Complaint, RE10, PageID# 42-43; *see Szekeres I*, 617 F.3d at 428. Second, Szekeres alleged that CSXT was negligent in failing to place ballast on the ground behind the main track where he was operating the switch; that, because there was no ballast there, mud accumulated on his boots; and that the accumulation of mud on his boots at that location, in combination with the muddy condition of the incline, caused him to slip and injure his knee when he started to climb the incline. Second Amended Complaint, RE10, PageID# 42-43; *see Szekeres I*, 617 F.3d at 430. The allegation that the injury was a result of CSXT's failure to provide a usable bathroom on the train is Szekeres's LIA claim; the allegation that it was a result of CSXT's failure to place ballast behind the switch is his FELA claim.[1]

2. The district court's grant of summary judgment to CSXT

CSXT moved for summary judgment on both claims. Judge Aldrich granted the motions, ruling that Szekeres could not prove the negligence *per se* element of his LIA claim (*i.e.*, the statutory violation) or the negligence element of his FELA

[1] Although technically both are FELA claims (inasmuch as the LIA is privately enforced through FELA), we refer to the FELA claim that is premised on the alleged LIA violation as the "LIA" claim, both to distinguish it from the FELA claim that is *not* premised on the alleged LIA violation and because that is the convention that has been used throughout this litigation by the parties and the courts.

claim. In particular, the district court held that Szekeres "failed to establish any objective evidence proving that the condition of the restroom on the date of the incident was improper or unsafe" and "did not demonstrate that CSX was on actual or constructive notice of the muddy walkway." Memorandum and Order, RE31, PageID# 610, 613.

3. This Court's decision in *Szekeres I*

Szekeres appealed the grant of summary judgment. This Court reversed, holding that there was sufficient evidence in the summary judgment record both of an LIA violation and of FELA negligence. In particular, the Court concluded that Szekeres "provided sufficient evidence to survive summary judgment on the issue whether the toilet facility was sanitary" and "presented sufficient evidence of CSX's constructive notice of the muddy conditions surrounding the switch to survive summary judgment." *Szekeres I*, 617 F.3d at 429, 432.

The Court also briefly considered an alternative argument for affirming summary judgment on the LIA claim—namely, that, "even if Szekeres had established a defect with the toilet facility, the causal connection between the alleged defect and injury is 'too tenuous to impose absolute liability upon CSX.'" *Szekeres I*, 617 F.3d at 429-30. The Court viewed the sufficiency of the evidence of causation as "a close question," but ultimately determined that there was "a sufficient factual basis for a reasonable jury to conclude" that "the defective

appliance played *any* part, even the slightest, in bringing about the plaintiff's injury." *Id.* at 430 (internal quotation marks omitted).

In finding sufficient evidence of LIA causation, the Court appears to have understood the summary judgment record to show that, "[a]fter visually inspecting the locomotive's restroom, Szekeres exited the locomotive and walked to the switch," that he then "threw the switch and turned to walk up an inclined embankment to privately relieve himself among trees at the top," and that he "slipped while ascending the embankment and twisted his knee." *Szekeres I*, 617 F.3d at 426. Szekeres's subsequent testimony at trial established that there were many more steps in the sequence of events that began with his inability to use the bathroom on the train and ended with his accident on the incline. *See supra* pp. 7-8.

4. The Supreme Court's decision in *McBride*

Ten months after this Court reversed summary judgment, and two months before the case was tried, the Supreme Court decided *CSX Transportation, Inc. v. McBride*, 131 S. Ct. 2630 (2011), which addressed whether FELA requires a plaintiff to prove proximate causation. The Court concluded that the statute eliminates the requirement of *common-law* proximate causation, but not the requirement of *any* proximate causation. "Under FELA," the Court held, "injury 'is proximately caused' by the railroad's negligence if that negligence 'played any

part ... in ... causing the injury.'" *Id.* at 2641 (quoting *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 506 (1957); ellipses added by Court).

While *McBride* rejected the view that common-law proximate causation is necessary to establish liability under FELA, it also rejected the view that "but for" causation is sufficient. The Court explained that juries "have no warrant to award damages in far out 'but for' scenarios" and that judges "have no warrant to submit such cases to the jury." *McBride*, 131 S. Ct. at 2643. The Court then provided examples of FELA cases in which there was only "but for" causation and the lower court correctly held that the plaintiff could not recover. One such case was *Nicholson v. Erie Railroad*, 253 F.2d 939 (2d Cir. 1958), which the Court described as follows: "alleged negligence was failure to provide lavatory for female employee; employee was injured by a suitcase while looking for a lavatory in a passenger car; applying *Rogers*, appellate court affirmed lower court's dismissal for lack of causation." *McBride*, 131 S. Ct. at 2643.

D. Proceedings Below

1. The trial

a. Szekeres's case

In his testimony at trial, Szekeres acknowledged that his LIA claim was that, "had [he] been provided with a sanitary restroom in the lead locomotive when [he] w[as] in Valley City," he "wouldn't have had to attempt to urinate outside and

eventually slip on the incline and injure [his] right knee." Transcript, RE126, PageID# 1849. Szekeres also testified that his FELA claim was that "there should have been ballast or walking stone in the area right behind the switch where [he] w[as] standing when [he] w[as] operating the switch" on the main track and that, because there was no such ballast, "mud from behind the switch" "accumulated on [his] boots" and, in "combination" with the muddy condition of the incline, "caused [him] to slip on the incline." *Id.*, PageID# 1839, 1867, 1872. Szekeres agreed that he was *not* claiming that there should have been ballast on the incline. *Id.*, PageID# 1866-1867, 1871.

Szekeres then had the following exchange with CSXT's counsel:

> Q. Let's talk about the mud that you say accumulated on your boots.
>
> ****
>
> Q. Isn't it true that when your own attorney asked you in the deposition of November 2008 if you had an opportunity to see the mud that had accumulated on your shoes, you said, "It was on the bottom of my shoe. It might have been there."
>
> ****
>
> A. Not in those words. I just know that they were on my shoes. The mud was on my shoes because there was mud everywhere.
>
> ****
>
> Q. Okay. Would you agree with me that you testified back in November 2008, that you said with regard to the mud on your

shoes, "It was on the bottom of my shoe. It might have been there?"

A. Yes.

Q. Sir, you never checked the bottom of your boots before the incident; isn't that right?

****

A. Correct.

Q. In fact, you admitted—you already admitted in your deposition that you said the mud might have been there, correct?

A. Correct.

Q. Okay. Because you never looked at the bottom of your boots before your incident, you can only speculate as to whether there was mud on the bottom of your boots, correct?

A. Good speculation, yes.

Q. In that regard then, you would also be speculating that it was mud on the bottom of your boots that caused you to slip and twist your knee; isn't that correct?

A. Yes.

Transcript, RE126, PageID# 1874-1875.

Szekeres also called an expert witness, James Arton, who testified that the "industry practice" is to place walking ballast "adjacent to the main track"—i.e., "adjacent to the actual road ballast where the employees are required to walk and to dismount from locomotives and cars." Transcript, RE126, PageID# 1921; *see also id.*, PageID# 1920-1921, 1959-1961. When asked how he became familiar

with this industry practice, Arton answered that he did so through his "association" with "civil engineers who are responsible for those standards." *Id.*, PageID# 1939; *see also id.*, PageID# 1927-1928, 1944. Arton admitted that he is not an engineer himself and that he is not "an expert in railroad engineering or maintenance of way issues." *Id.*, PageID# 1934, 1963-1964.

During Arton's testimony, Judge Adams expressed "grave concerns about whether or not to allow th[is] witness to testify as to th[is] matter," because it appeared that his testimony was based, not "on any personal knowledge," but "upon the expertise of other[s]." Transcript, RE126, PageID# 1954-1955. "[I]n an abundance of caution," however, the district court "allow[ed] him to complete his testimony," while observing that it may ultimately "determine to instruct the jury to disregard it." *Id.*, PageID# 1955.

At the close of Szekeres's case, CSXT moved to exclude Arton's testimony. Transcript, RE126, PageID# 2037. Judge Adams denied the motion "for the time being," subject to "potentially reconsidering" it. *Id.*, PageID# 2038-2039. In so doing, the district court reiterated its "grave doubts" about Arton's "qualifications to render the opinions that he rendered." *Id.*

CSXT then moved for judgment as a matter of law. It argued (1) that Szekeres had failed to prove his LIA claim because any connection between the unsanitary bathroom and his injury on the incline was too remote and (2) that

Szekeres had failed to prove his FELA claim because any connection between the mud near the track and his injury on the incline was purely speculative. Motion for J.M.O.L., RE114, Page ID#1703-1716. Judge Adams viewed both questions as "close," but ultimately decided to deny the motion and allow the case to go forward, "subject to motion practice at the conclusion of all the evidence." Transcript, RE127, PageID# 2056.

b. The verdict

At the conclusion of the case, the jury returned a verdict for Szekeres on both claims. Jury Verdict, RE116, PageID# 1718-1726; Transcript, RE128, PageID# 2201-2206. It found (1) that CSXT was negligent and that its negligence caused Szekeres's injury; (2) that CSXT violated the LIA and that the violation caused Szekeres's injury; and (3) that Szekeres was contributorily negligent and that his negligence caused his injury. The jury determined that CSXT was 60 percent at fault and that Szekeres was 40 percent at fault. Without any adjustment for his contributory negligence, the jury awarded Szekeres $49,000 in damages.

Judge Adams entered judgment on the verdict in the full amount. Judgment, RE120, PageID# 1741. He did so despite the finding of contributory negligence, because the jury also found that CSXT had violated the LIA. *See* 45 U.S.C. § 53.

2. The district court's grant of judgment as a matter of law to CSXT

After judgment was entered on the verdict, CSXT filed a renewed motion for judgment as a matter of law or, in the alternative, a new trial. CSXT first argued that it was entitled to judgment as a matter of law on Szekeres's LIA claim because the Supreme Court made clear in *McBride*, by endorsing the result in *Nicholson*, that the causal relationship between the violation and the injury here is legally insufficient. Memorandum in Support of Renewed Motion for J.M.O.L. or New Trial, RE135, PageID# 2251-2259. CSXT next argued that it was entitled to judgment as a matter of law on Szekeres's FELA claim for two independent reasons. The first was that Szekeres's expert, Arton, was not qualified to opine that industry standards required ballast at the location at issue, that his testimony therefore should have been excluded under Federal Rules of Evidence 702 and 703, and that Szekeres could not prove negligence without it; the second was that Szekeres relied entirely on speculation to establish causation. *Id.*, PageID# 2259-2269. Finally, CSXT argued that, if the district court did not grant judgment as a matter of law, it should order a new trial because the jury's verdict was against the weight of the evidence, the court should not have admitted Arton's testimony, and the court should have instructed the jury that its verdict may not be based on speculation. *Id.*, PageID# 2269-2272. Judge Adams granted the motion for judgment as a matter of law on both the LIA claim and the FELA claim.

With respect to the LIA claim, Judge Adams quoted *McBride*'s statement that judges "have no warrant" to submit "far out 'but for' scenarios" to the jury; noted that *McBride* had cited *Nicholson* as a case involving such a scenario; and quoted *Nicholson*'s statement that the plaintiff's theory there was that "'because of defendant's failure to afford her toilet facilities she was forced to and did use for that purpose [a] lavatory in [a passenger] car in which she was injured.'" Order, RE139, PageID# 2366-2367 (quoting *McBride*, 131 S. Ct. at 2643, and *Nicholson*, 253 F.2d at 940). The district court then explained that it could "find no meaningful distinction between the facts at issue in *Nicholson* and the facts presented by Szekeres." *Id.*, PageID# 2367. "[L]ike the plaintiff in *Nicholson*," Judge Adams said, "'[i]f defendant [CSX] had supplied indoor toilet facilities plaintiff [Szekeres] would not have been where *** [the injury took place].'" *Id.*, PageID# 2368 (quoting *Nicholson*, 253 F.2d at 941; brackets added by court). Rejecting Szekeres's argument that *Szekeres I* controls on the issue of LIA causation, the district court observed that, when it decided *Szekeres I*, this Court "did not have the express guidance offered by the United States Supreme Court in *McBride*, in which *Nicholson* was highlighted as a case that should not be submitted to a jury." *Id.*

As for the FELA claim, Judge Adams first "agree[d] that Arton's testimony should have been excluded." Order, RE139, PageID# 2368. But he did not reach

the question whether the exclusion of that testimony precluded Szekeres from proving negligence and thus whether CSXT was entitled to judgment as a matter of law on that basis. *Id.* Instead, Judge Adams granted CSXT judgment as a matter of law because "the sole evidence of causation on [the FELA] claim is speculation." *Id.* The district court explained that a plaintiff "may not establish causation through conjecture or speculation"; that Szekeres "admitted that he had no factual basis" for his "statements that he accumulated mud on his boots *** behind the switch"; that Szekeres "does not in fact know when and where he accumulated mud on his boots"; that Szekeres also "could not say" that "it was not simply the muddy condition on the incline that caused him to twist his knee"; and that there is thus a lack of "sufficient evidence for a jury" to find that Szekeres "accumulated mud on his boots at the switch that ultimately contributed to his injury." *Id.*, PageID# 2369.

In a footnote at the end of his order, Judge Adams stated that, "[b]ecause of [his] resolution of the motion for judgment as a matter of law," he was "not address[ing] the argument for a new trial," but would do so "[i]n the event this matter is remanded." Order, RE139, PageID# 2370 n.1. Szekeres filed his notice of appeal on the day the order was issued. Notice of Appeal, RE140.

SUMMARY OF ARGUMENT

I. Szekeres's LIA claim is that he would not have been on the incline, which he was climbing to find a place to relieve himself, if there had been a sanitary bathroom on the train. The district court correctly granted CSXT judgment as a matter of law on this claim.

In *CSX Transportation, Inc. v. McBride*, 131 S. Ct. 2630 (2011), the Supreme Court made clear that trial courts "have no warrant to submit [FELA] cases to the jury" on a theory of "but for" causation, *id.* at 2643, and provided examples of such cases. One was *Nicholson v. Erie Railroad*, 253 F.2d 939 (2d Cir. 1958), which the Supreme Court described as follows: the "alleged negligence was [a] failure to provide [a] lavatory for [a] female employee"; the "employee was injured by a suitcase while looking for a lavatory in a passenger car"; and the case was properly "dismiss[ed] for lack of causation." *McBride*, 131 S. Ct. at 2643.

This case is materially indistinguishable from *Nicholson*, and the same result is therefore required. As in *Nicholson*, Szekeres's theory of negligence was that CSXT "fail[ed] to supply [suitable] toilet facilities" and his theory of causation was that, but for this "failure," he would not have been "forced to *** use for that purpose [a] lavatory [at a different location at] which []he was injured."

Nicholson, 253 F.2d at 940. As in *Nicholson*, such "but for" causation is not enough.

Szekeres contends that this case is governed, not by *Nicholson*, which found *insufficient* evidence of causation (a result that *McBride* endorsed), but by *Richards v. Consolidated Rail Corp.*, 330 F.3d 428 (6th Cir. 2003), and *Szekeres I*, both of which found *sufficient* evidence of causation. That is not correct.

Richards does not control because this case is much more like *Nicholson* (in which the "alleged negligence was [a] failure to provide [a] lavatory" and the "employee was injured *** while looking for a lavatory," *McBride*, 131 S. Ct. at 2643) than like *Richards* (in which "a defective brake malfunctioned en route" and "the employee was injured while inspecting underneath the train to locate the problem," *id.* at 2641 n.9). *Szekeres I* does not control both (a) because the record on which this Court relied in reversing summary judgment is not the same as the record on which the district court relied in granting judgment as a matter of law and (b) because, even if the records were identical, the Supreme Court's intervening decision in *McBride*, which reached a different result on materially indistinguishable facts, would control over this Court's decision in *Szekeres I*. Finally, *Nicholson* is not distinguishable from this case. Some of the supposed distinctions that Szekeres seeks to draw are distinctions without a difference, and

the rest are not distinctions at all. If anything, the causal relationship here is even *more* attenuated than in *Nicholson*.

II. Szekeres's FELA claim is that CSXT violated the industry standard of care by failing to place ballast behind the switch; that, because there was no ballast there, mud accumulated on Szekeres's boots when he was operating the switch; and that the mud on his boots, in combination with the muddy condition of the incline, caused him to slip when he later tried to walk up the incline to relieve himself. The district court correctly granted CSXT judgment as a matter of law on this claim, both because there was insufficient evidence of causation and because there was insufficient evidence of negligence.

As to causation: Szekeres was able to testify only that mud from behind the switch "might" have accumulated on his boots, and he conceded that he was merely "speculating" that it had. Transcript, RE126, PageID# 1875. The testimony from other witnesses was no less speculative. As in another case in which this Court found insufficient evidence of causation, therefore, Szekeres "does not know" what caused him to slip; he "has not presented evidence" that he slipped because of CSXT's negligence (as opposed, for example, to mud on the incline, or to mud that accumulated on his boots at another location); and he seeks to "rely on speculation to take the place of proof." *Przybylinski v. CSX Transp.,*

Inc., 292 F. App'x 485, 489 (6th Cir. 2008). But "[s]peculation cannot supply the place of proof." *Moore v. Chesapeake & Ohio Ry.*, 340 U.S. 573, 578 (1951).

As to negligence: CSXT argued in its post-trial motion that Szekeres's expert, James Arton, was not qualified to opine that industry standards required ballast behind the switch and that his testimony therefore should have been excluded under Federal Rules of Evidence 702 and 703. The district court agreed. Szekeres does not challenge that ruling on appeal, and in any event the court acted well within its discretion in ruling that Arton—who by his own admission is not an expert in railroad engineering or maintenance-of-way issues—should not have been permitted to testify about the standard of care. "Because the business of operating a railroad entails technical and logistical problems with which the ordinary layman has had little or no experience[,] the failure to provide expert testimony regarding the applicable standard of care is fatal to [the FELA] claim[]." *Caniff v. CSX Transp., Inc.*, ___ S.W.3d ___, 2012 WL 5038812, at *4 (Ky. Ct. App. Oct. 19, 2012) (internal quotation marks omitted; first set of brackets added by court). Even if expert evidence were *not* required on this issue, the exclusion of Arton's testimony still would render the evidence of negligence legally insufficient, because there was no other evidence that the industry standard of care required ballast behind the switch.

III. For the above reasons, the grant of judgment as a matter of law should be affirmed. If it is not, however, the district court should be allowed to rule on CSXT's alternative motion for a new trial. Szekeres contends that *this* Court should rule on the new trial motion, and deny it, but he cites no decision in which this Court has done so. The ordinary practice is to allow the district court to rule on a new trial motion first when judgment as a matter of law is reversed and the district court did not conditionally rule on the new trial motion before the appeal, and there are good reasons to follow that procedure here if the decision below is not affirmed.

To begin with, the principal basis for CSXT's alternative new trial motion was that the verdict was against the weight of the evidence, an issue that particularly "calls for the judgment in the first instance by the district court, wh[ich] saw and heard the witnesses and has the feel of the case which no appellate transcript can impart." *Hubbard v. Detroit Pub. Sch.*, 372 F. App'x 631, 634 (6th Cir. 2010) (internal quotation marks omitted). The district court, moreover, has already decided that Arton's testimony should have been excluded (a second basis for the new trial motion), and that court should be the first one to decide whether the erroneous admission of the evidence warrants a new trial. Finally, CSXT cannot be faulted for not seeking a conditional ruling on its new trial motion after the district court granted judgment as a matter of law, since

Szekeres filed his notice of appeal on the same day that the court issued its order, thereby divesting it of jurisdiction and depriving CSXT of any meaningful opportunity to make such a request.

STANDARD OF REVIEW

This Court reviews a grant of judgment as a matter of law *de novo*, *Griffin v. Finkbeiner*, 689 F.3d 584, 592 (6th Cir. 2012), employing the same standard as the district court, *Sykes v. Anderson*, 625 F.3d 294, 305 (6th Cir. 2010). Under that standard, judgment as a matter of law is required if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the [nonmoving] party." Fed. R. Civ. P. 50(a)(1). A defendant is thus entitled to judgment as a matter of law if the plaintiff has "fail[ed] to establish all elements of his claim." *Gray v. Gen. Motors Corp.*, 312 F.3d 240, 242 (6th Cir. 2002).

Szekeres quotes a Third Circuit decision for the proposition that "[a] trial court is justified in withdrawing FELA issues from the jury's consideration only in those *extremely rare instances where there is a zero probability* either of employer negligence or that any such negligence contributed to the injury of an employee." Br. 23 (quoting *Pehowic v. Erie Lackawanna R.R.*, 430 F.2d 697, 699-700 (3d Cir. 1970); emphasis added by Szekeres). Stated differently, Szekeres's position, as the same Third Circuit decision elsewhere puts it, is that judgment as a matter of law may be granted to the railroad in a FELA case only when there is "no evidence

from which the jury could infer" negligence or causation. *Pehowic*, 430 F.2d at 700.

This Court has already rejected that argument. It "is not correct," this Court has held, that "judgment as a matter of law can be directed" in a FELA case "only in the complete absence of any probative facts." *Aparicio v. Norfolk & W. Ry.*, 84 F.3d 803, 808 (6th Cir. 1996). And, indeed, this Court has routinely—not "*rare[ly]*," Br. 23—affirmed decisions holding that FELA claims fail as a matter of law, thus confirming that judgment as a matter of law is "frequently proper," *Green v. River Terminal Ry.*, 763 F.2d 805, 807 (6th Cir. 1985).[2]

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED CSXT JUDGMENT AS A MATTER OF LAW ON SZEKERES'S LIA CLAIM

Szekeres's LIA claim fails as a matter of law because a FELA plaintiff must prove more than mere "but for" causation and Szekeres did not. His arguments to the contrary lack merit.

[2] *See, e.g., Sapp v. CSX Transp., Inc.*, 478 F. App'x 961 (6th Cir. 2012); *Williams v. Grand Trunk W. R.R.*, 352 F. App'x 13 (6th Cir. 2009); *Borger v. CSX Transp., Inc.*, 571 F.3d 559 (6th Cir. 2009); *Przybylinski v. CSX Transp., Inc.*, 292 F. App'x 485 (6th Cir. 2008); *Van Gorder v. Grand Trunk W. R.R.*, 509 F.3d 265 (6th Cir. 2007).

A. A FELA Plaintiff Must Prove More Than "But For" Causation

A violation of the LIA constitutes negligence *per se* under FELA, *Mickler v. Nimishillen & Tuscarawas Ry.*, 13 F.3d 184, 188 (6th Cir. 1993), but as in any FELA case a plaintiff must still establish that the negligence was a cause of the injury, *Green v. River Terminal Ry.*, 763 F.2d 805, 810 (6th Cir. 1985). In *CSX Transportation, Inc. v. McBride*, 131 S. Ct. 2630 (2011), the Supreme Court addressed whether FELA requires a plaintiff to prove *proximate* causation. As the Court explained, "'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability." *Id.* at 2637. "[B]ecause of convenience, of public policy, of a rough sense of justice," the Court said, the law "declines to trace a series of events beyond a certain point." *Id.* (internal quotation marks omitted).

McBride held that FELA eliminates the requirement of *common-law* proximate causation. 131 S. Ct. at 2634. But it did not hold that FELA eliminates the requirement of *any* proximate causation. On the contrary, *McBride*'s holding is that FELA requires proof of the type of proximate causation reflected in the statutory language—"in whole or in part"—as interpreted in *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500 (1957). "While some courts have said that *Rogers* eliminated the *concept* of proximate cause in FELA cases," the Court explained in *McBride*, it is "more accurate ... to recognize that *Rogers* describes the test for

proximate causation applicable in FELA suits." 131 S. Ct. at 2641 (internal quotation marks omitted; ellipsis added by Court). "Under FELA," *McBride* held, "injury 'is proximately caused' by the railroad's negligence if that negligence 'played any part ... in ... causing the injury.'" *Id.* (quoting *Rogers*, 352 U.S. at 506; ellipses added by Court).

The Court in *McBride* noted the dissent's concern that an "any part" standard of proximate causation could "open[] the door to unlimited liability" by "inviting juries to impose liability on the basis of 'but for' causation." 131 S. Ct. at 2641; *see id.* at 2647 (Roberts, C.J., dissenting). The Court found that concern unjustified. Under FELA's "any part" standard of proximate causation, *McBride* made clear, mere "but for" causation is not sufficient. In that connection, the Court said the following: "Properly instructed on negligence and causation, and told, as is standard practice in FELA cases, to use their 'common sense' in reviewing the evidence, juries would have no warrant to award damages in far out 'but for' scenarios." *Id.* at 2643 (citation omitted). "Indeed," the Court added, "judges would have no warrant to submit such cases to the jury." *Id.*

The Court then provided two examples of FELA cases in which there was only "but for" causation and the lower court correctly concluded that the plaintiff could not recover. One of those cases was *Nicholson v. Erie Railroad*, 253 F.2d 939 (2d Cir. 1958), which the Supreme Court described as follows: "alleged

negligence was failure to provide lavatory for female employee; employee was injured by a suitcase while looking for a lavatory in a passenger car; applying *Rogers*, appellate court affirmed lower court's dismissal for lack of causation." *McBride*, 131 S. Ct. at 2643. The Court also discussed two cases in which recovery *was* properly allowed because "the evidence did *not* show mere 'but for' causation." *Id.* at 2641 n.9 (emphasis added). One of those cases was this Court's decision in *Richards v. Consolidated Rail Corp.*, 330 F.3d 428 (6th Cir. 2003), which the Supreme Court described as follows: "a defective brake malfunctioned en route, and the employee was injured while inspecting underneath the train to locate the problem; the Sixth Circuit sent the case to a jury." *McBride*, 131 S. Ct. at 2641 n.9.

While *McBride* rejected the railroad's position that proof of common-law proximate causation is necessary to establish liability under FELA, therefore, it also rejected the position adopted by many lower courts that "but for" causation is sufficient.[3] Under those decisions, a FELA plaintiff could recover for an injury even when the railroad's negligence "merely creates an incidental condition or

[3] *See, e.g., Wilson v. Union Pac. R.R.*, 56 F.3d 1226, 1230 (10th Cir. 1995) (rejecting argument that "'but for' relationship did not suffice to establish legal causation" under FELA); *Newton v. Norfolk S. Corp.*, 2008 WL 55997, at *7 (W.D. Pa. Jan. 3, 2008) ("The FELA's standard for causation differs from the common law of negligence in that it *** merely asks if there is 'but for' causation present."); *Richardson v. Nat'l R.R. Passenger Corp.*, 1992 WL 52558, at *1 (D.D.C. Feb. 25, 1992) ("Under the FELA, where the defendant's negligence is a 'but for' cause for a plaintiff's injury, defendant can be held liable.").

situation in which the accident *** results in such injury." *Davis v. Wolfe*, 263 U.S. 239, 243 (1923). *McBride* disagreed with this view, as other courts have recognized.[4] Instead, *McBride* endorsed the reasoning in the *Nicholson* case, where the Second Circuit said that, while "[s]peaking literally it cannot be denied that *** failure to supply toilet facilities 'played a part' in producing plaintiff's injury," the "cause and effect here were too far removed from one another *** to satisfy the requirements of the F.E.L.A." *Nicholson*, 253 F.2d at 941.

B. Szekeres Proved Only "But For" Causation

As the court below correctly held, there is "no meaningful distinction between the facts at issue in *Nicholson* and the facts presented by Szekeres." Order, RE139, PageID# 2367. By virtue of its endorsement of *Nicholson*, *McBride* thus compels the conclusion that the evidence of causation is insufficient here and that CSXT was entitled to judgment as a matter of law on Szekeres's LIA claim.

1. The plaintiff in *Nicholson*, a "woman employee" of the defendant railroad, worked in car shops in which "there was no women's toilet." *Nicholson*, 253 F.2d at 940. On the day of the accident, she "wanted to use the toilet and so

[4] *See, e.g., Murphy v. CSX Transp., Inc.*, 2011 WL 3881021, at *4 (E.D. Tenn. Sept. 2, 2011) (under *McBride* plaintiff must show "something more than 'but for' causation" (emphasis omitted)); *Omega Protein, Inc. v. Forrest*, 732 S.E.2d 708, 712 (Va. 2012) (under *McBride* causation standard "does not extend to 'but for' causation"); *Niederhofer v. Ill. Cent. R.R.*, 2011 Ill. App. Unpub. LEXIS 2644, at *10 (Ill. Ct. App. Nov. 1, 2011) ("*McBride* *** makes clear that more than mere 'but for' causation is required under the FELA.").

went into the yard where she knew there were trains, *** got into one of the cars, left her pocketbook and bag on a seat opposite the lavatory and went in." *Id.* When Nicholson came out of the lavatory, she "reached across for her pocketbook and bag and was then struck by something carried by one of the passengers." *Id.* "She fell and was injured." *Id.*

In her FELA action, Nicholson's theory of negligence was that the railroad had "fail[ed] to supply women's toilet facilities in the shop." *Nicholson*, 253 F.2d at 940. Her theory of causation was that "because of defendant's failure to afford her toilet facilities she was forced to and did use for that purpose the lavatory in the car in which she was injured." *Id.*

The Second Circuit held that the district court "was correct in dismissing [the case] at the close of the evidence," because "[t]he causation requisite for recovery under the F.E.L.A. is lacking." *Nicholson*, 253 F.2d at 940. It was true, the court of appeals explained, that "[i]f [the] defendant had supplied indoor toilet facilities [the] plaintiff would not have been where the passenger's baggage struck her," and thus that "the injury would not have happened 'but for' the negligence." *Id.* at 941. But such "but for" causation, the Second Circuit held, is "not enough" under FELA. *Id.* The Supreme Court explicitly endorsed this reasoning in *McBride*.

2. In all relevant respects, this case is indistinguishable from *Nicholson*. If anything, the causal relationship between negligence and injury is even *more* attenuated here.

Viewed in a light most favorable to Szekeres, the evidence at trial showed that he was traveling on a train from the Valley City industry when he felt the need to urinate; that there was no suitable toilet on the train for him to use; that "at least a half mile" later the train arrived at the main track; that Szekeres then got off the train and operated a switch "at least ten to fifteen times" to enable the crew to pick up "five cars on the main [track]"; that, when he "was getting ready to leave," he attempted to walk up an incline to urinate; and that he slipped on the incline and injured himself. Transcript, RE126, PageID# 1831-1836, 1854-1856, 1867-1868. As in *Nicholson*, Szekeres's theory of negligence was that CSXT "fail[ed] to supply [suitable] toilet facilities" and his theory of causation was that, because of this "failure," he "was forced to [attempt to] use for that purpose [another location at] which []he was injured." *Nicholson*, 253 F.2d at 940. As in *Nicholson*, this is a "but for" theory of causation. "[I]f [CSXT] had supplied [suitable] toilet facilities," Szekeres claimed, he "would not have been where" he was injured. *Id.* at 941. And as in *Nicholson*, such "but for" causation is not enough.

Szekeres has repeatedly acknowledged that this is the theory of causation for his LIA claim. In his trial brief, for example, Szekeres characterized his theory as

follows: "Plaintiff contends that had the railroad provided a sanitary toilet facility, he would have used it, thus eliminating the need to urinate in the field, which led him to slip on the incline and injure his knee." Plaintiff's Trial Brief, RE93, PageID# 1290. And in his testimony at trial, Szekeres conceded that his allegation was that, "had [he] been provided with a sanitary restroom," he "wouldn't have had to attempt to urinate outside and eventually slip on the incline and injure [himself]." Transcript, RE126, PageID# 1849.

Szekeres's own characterization of his theory of causation is indistinguishable from *McBride*'s characterization of the plaintiff's theory in *Nicholson*: the "alleged negligence was [a] failure to provide [a] lavatory for [an] employee," who "was injured *** while looking for a[nother] lavatory." *McBride*, 131 S. Ct. at 2643. And if the theory of causation in *Nicholson* was insufficient as a matter of law, as the Supreme Court made clear in *McBride*, then so too is Szekeres's. *Cf. Niederhofer v. Ill. Cent. R.R.*, 2011 Ill. App. Unpub. LEXIS 2644, at *12, *14 (Ill. Ct. App. Nov. 1, 2011) (affirming summary judgment for railroad because "[t]his case" is "like *Nicholson*" in that theory of causation was that plaintiff "w[as] in [a] location[] and doing [an] activit[y] that [he] would not have been doing if it were not for the defendant['s] alleged negligence").

C. Szekeres's Arguments Lack Merit

Szekeres contends that this case is governed, not by *Nicholson* (which *McBride* endorsed), but by *Richards* and *Szekeres I*. Br. 24-39. He is wrong. Neither *Richards* nor *Szekeres I* controls, and *Nicholson* is not distinguishable.

1. *Richards* does not control

This Court's 2003 decision in *Richards* does not govern here because this case is far more analogous to *Nicholson* than to *Richards*. *McBride*'s description of the two cases establishes this beyond any serious doubt.

In *Nicholson* the "alleged negligence was [a] failure to provide [a] lavatory" and the "employee was injured *** while looking for a lavatory," *McBride*, 131 S. Ct. at 2643, whereas in *Richards* "a defective brake malfunctioned en route" and "the employee was injured while inspecting underneath the train to locate the problem," *id.* at 2641 n.9. Thus, in *Nicholson* but not in *Richards* the employee sustained an injury at a location where the employee had gone to use the bathroom because there was no suitable bathroom where the employee was initially. And *McBride* found that there was sufficient evidence of causation in *Richards* but not in *Nicholson*. In *Richards* "the causal link *** [wa]s hardly farfetched" and "the evidence did not show mere 'but for' causation," *id.*, whereas *Nicholson* involved a "far out 'but for' scenario[]" and the trial judge "ha[d] no warrant to submit [the] case[] to the jury," *id.* at 2643. That there was sufficient evidence of causation in

Richards, in short, does not mean that there was sufficient evidence of causation here, because this case is much more like *Nicholson* than like *Richards*.

Beyond its very different facts, the specific holding of *Richards* does not apply in this case. The reason this Court found sufficient evidence of causation in *Richards* was that "a jury might reasonably have concluded that Richards only was injured because the braking system failed to function properly, it was his duty to identify and remedy the defect, and the proper method for fulfilling his responsibilities was walking the train"—*i.e.*, "getting off the train, walking its length, and inspecting for visible causes." *Richards*, 330 F.3d at 431, 437. That reasoning has no relevance to a case, like this, that does not involve a plaintiff who was injured while attempting to identify or remedy a defect.

2. *Szekeres I* does not control

In *Szekeres I* this Court found sufficient evidence of causation based on the summary judgment record in this case. 617 F.3d at 429-30. Szekeres argues that the "same facts" were before the jury on remand and thus that "[n]othing has changed to alter th[e] result" in *Szekeres I*. Br. 35, 37. That is wrong for two independent reasons.

First, "[o]nce [a] case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion," *Ortiz v. Jordan*, 131 S. Ct. 884, 889 (2011), and the trial record here is not identical to

the summary judgment record. "Law of the case [thus] does not apply in this situation because Judge [Adams] based his post-trial order on a different record than did [this Court] when addressing summary judgment." *Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1237 n.1 (11th Cir. 2001).

At trial, for example, Szekeres testified that, between the time that he "started to have to use the bathroom" on the train (but could not because of the claimed LIA violation) and the time that he tried to climb an incline outside to relieve himself (where he sustained the injury), his train had traveled "at least half a mile" back to the main track, where the crew had then picked up five cars, with Szekeres throwing a switch back and forth "at least ten to fifteen times" during the operation. Transcript, RE126, PageID# 1831-1836, 1854-1856, 1867-1868. The evidence in the summary judgment record did not have this level of detail. *See* Exhibit 1 to Memorandum in Opposition to Motion for S.J., RE24-1, PageID# 448-466 (Szekeres deposition). In finding sufficient evidence of causation in *Szekeres I*, therefore, *see* 617 F.3d at 429-30, this Court could not have considered it. If anything, the Court seems to have believed that Szekeres's injury occurred right after he determined that he could not use the bathroom on the train. *See id.* at 426 ("After visually inspecting the locomotive's restroom, Szekeres exited the locomotive and walked to the switch. *** He threw the switch and turned to walk up an inclined embankment to privately relieve himself ***.)."

This difference in the evidence of how "far removed" the negligence and injury were from one another, *Nicholson*, 253 F.2d at 941, is certainly relevant to whether Szekeres failed to establish anything more than "but for" causation *at trial*, even if he was able to do so at the summary judgment stage. It is particularly relevant because this Court viewed the question whether there was sufficient evidence of causation in the summary judgment record as "close," *Szekeres I*, 617 F.3d at 430, and that evidence was more favorable to Szekeres than the evidence in the trial record.

Second, even if the summary judgment record *is* identical to the trial record, as Szekeres contends, there is still something fundamental that has changed since *Szekeres I*—namely, the issuance of the Supreme Court's decision in *McBride*, which found that there was *in*sufficient evidence of causation in a case (*Nicholson*) that is just like this one. 131 S. Ct. at 2643. As the district court pointed out, when *Szekeres I* was decided this Court "did not have the express guidance offered by the United States Supreme Court in *McBride*, in which *Nicholson* was highlighted as a case that should not be submitted to a jury." Order, RE139, PageID# 2368.

A "prior decision" of this Court does not remain "controlling authority" on an issue when "an inconsistent decision of the United States Supreme Court requires modification of the decision." *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985). This Court has applied that principle time and

time again, including when the prior decision was issued in the same case and thus might otherwise be not only *stare decisis* but also law of the case on a particular issue. *See United States v. Anglin*, 601 F.3d 523, 529 (6th Cir. 2010) (holding that, in light of *Chambers v. United States*, 555 U.S. 122 (2009), this Court's 2006 decision in *Anglin I* "is no longer good law").[5] The district court was right to apply the principle here.

Szekeres cannot and does not dispute that an intervening decision of the Supreme Court controls over a conflicting prior decision of this Court. His position, instead, is that *Szekeres I* is not inconsistent with *McBride*. Br. 32-33. That position is mistaken, because the decisions reached different conclusions on materially indistinguishable facts. *See supra* pp. 30-33; *see also infra* pp. 40-44.

[5] *See also Emswiler v. CSX Transp., Inc.*, 691 F.3d 782, 788-90 & n.1 (6th Cir. 2012) (following *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), rather than *Stephens v. Ret. Income Plan for Pilots of U.S. Air, Inc.*, 464 F.3d 606 (6th Cir. 2006)); *United States v. Lucido*, 612 F.3d 871, 876 (6th Cir. 2010) (following *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994), rather than *United States v. Doe*, 556 F.2d 391 (6th Cir. 1977)); *United States v. Bowers*, 594 F.3d 522, 529-30 & n.4 (6th Cir. 2010) (following *Gonzales v. Raich*, 545 U.S. 1 (2005), rather than *United States v. Corp*, 236 F.3d 325 (6th Cir. 2001)); *Michael v. Ghee*, 498 F.3d 372, 380-82 & n.4 (6th Cir. 2007) (following *Garner v. Jones*, 529 U.S. 244 (2000), rather than *Ruip v. United States*, 555 F.2d 1331 (6th Cir. 1977)); *Caswell v. City of Detroit Hous. Comm'n*, 418 F.3d 615, 618-19 & n.1 (6th Cir. 2005) (following *Alexander v. Sandoval*, 532 U.S. 275 (2001), and *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), rather than *Loschiavo v. City of Dearborn*, 33 F.3d 548 (6th Cir. 1994)); *Maples v. Stegall*, 340 F.3d 433, 437 (6th Cir. 2003) (following *Wiggins v. Smith*, 539 U.S. 510 (2003), rather than *Doan v. Brigano*, 237 F.3d 722 (6th Cir. 2001), and *Clifford v. Chandler*, 333 F.3d 724 (6th Cir. 2003)); *Goad v. Mitchell*, 297 F.3d 497, 502-03 (6th Cir. 2002) (following *Crawford-El v. Britton*, 523 U.S. 574 (1998), rather than *Veney v. Hogan*, 70 F.3d 917 (6th Cir. 1995)).

Even more lacking in merit is Szekeres's fanciful suggestion that *McBride* affirmatively *endorsed Szekeres I*. Br. 31-32. Far from having endorsed it, *McBride* did not even *mention* the decision. It is true, as Szekeres points out, *id.*, that an *amicus curiae* brief filed in the case cited *Szekeres I*, Br. of Academy of Rail Labor Attorneys as *Amicus Curiae* in Supp. of Resp't 23, *McBride*, 131 S. Ct. 2630 (2011) (No. 10-235), 2011 WL 757407, and that the Supreme Court's opinion cited the *amicus* brief, *McBride*, 131 S. Ct. at 2640 n.6. But the *amicus* brief cited *Szekeres I* for the proposition that FELA does not require proof of common-law proximate causation (something that no one here disputes), and the Court cited the *amicus* brief for the proposition that pattern FELA jury instructions do not employ the language of common-law proximate causation (something that no one here disputes either). Neither the brief nor the opinion stated or even suggested that there was sufficient evidence of causation in *Szekeres I*.

It again bears emphasis that, even without the benefit of *McBride*, *Szekeres I* viewed the question whether there was sufficient evidence of causation on the LIA claim as "close." 617 F.3d at 430. *McBride*'s subsequent endorsement of *Nicholson* makes clear that the district court was correct in concluding that that close question must now be resolved differently.

3. *Nicholson* is not distinguishable

Szekeres's third argument is that *Nicholson* is distinguishable from this case. Br. 24-31. This argument is as meritless as his first two. Try as he might, Szekeres cannot refute the district court's conclusion that there is "no meaningful distinction between the facts at issue in *Nicholson* and the facts presented by Szekeres." Order, RE139, PageID# 2367. Still less can he show that the facts are "vastly different." Br. 27.

Szekeres points out, for example, that the jury here "found that the railroad had violated [its] duty" to make "a sanitary toilet *** available *** for use by employees." Br. 28. But the same was true in *Nicholson*. The "violation of duty" that was "claimed to exist" there, and that the court assumed had a sufficient evidentiary basis to go to the jury, was "the failure to supply women's toilet facilities in the shop." *Nicholson*, 253 F.2d at 940.

Szekeres also makes the related argument that *Nicholson* is distinguishable because, unlike in this case, "there was no evidence of a *statutory* defect" in that case. Br. 30 (emphasis added). That is a distinction without a difference, because the standard of causation is the same whether negligence is established by a breach of the railroad's general duty of care (as in *Nicholson*) or by a violation of a railroad safety statute (as here). *See Green*, 763 F.2d at 810. Indeed, in this very case the jury received identical causation instructions on the FELA and LIA

claims. *Compare* Transcript, RE127, PageID# 2148 (FELA) ("plaintiff must show that the injury resulted in whole or in part from the defendant's negligence") *with id.*, PageID# 2152 (LIA) ("plaintiff[] must prove *** that the failure *** to comply with the requirements of the Code of Federal Regulations resulted in whole or in part in injury to the plaintiff").

Szekeres also places heavy emphasis on the fact that Nicholson "had completed her work for the day" and "was on her way home when the injury occurred," whereas Szekeres "was on duty and in the midst of his work shift." Br. 24-25, 27. But Szekeres does not explain why this distinction makes any difference either. It does not. The same series of events could have occurred in *Nicholson* if the plaintiff had been on her way to another worksite rather than her home, and the result would have been the same.

Szekeres also seeks to distinguish *Nicholson* on the ground that the "direct cause" of the plaintiff's injury there was the "intervening act" of her being "hit" by a "passenger," whereas here it was "the railroad's failure to provide a sanitary toilet" that was "directly tied" to Szekeres's "decision to relieve himself in the field." Br. 25, 27, 33. But if the "direct cause" of Nicholson's injury was the "intervening act" of a collision with a passenger, then this case is no different, because the "direct cause" of Szekeres's injury was, according to his own version of events, the "intervening act" of Szekeres's accumulating mud on his boots and

then slipping on the incline. Szekeres essentially concedes as much when he says that it was the "mud" that "resulted in him slipping and twisting his knee." Br. 12; *see also* Transcript, RE126, PageID# 1838-1839, 1872. If, instead, it was "the railroad's failure to provide a sanitary toilet" that was "directly tied" to "Szekeres's decision to relieve himself in the field," then that was no less true in *Nicholson*, where the fact that there was "no women's toilet" was directly tied to Nicholson's decision to use "the lavatory" in "one of the cars" on "[t]he train." *Nicholson*, 253 F.2d at 940.

Szekeres also contends that his injury was a "natural, foreseeable and probable" consequence of a "dirty and unuseable bathroom," and was "within the risk" created by it, because there was evidence that CSXT employees sometimes relieved themselves "in the field" and that CSXT knew this. Br. 28 (internal quotation marks and emphasis omitted). In fact there was no such evidence. The testimony at the 2011 trial that this "does occur," Transcript, RE126, PageID# 1909, is not proof that employees relieved themselves in that location before Szekeres's 2006 accident—much less that CSXT knew that they did. Even if there *were* such evidence, Szekeres's injury would be no more a natural, foreseeable, and probable consequence of the allegedly negligent conduct than Nicholson's, and it would be no more within the risk created by the negligence. For Nicholson "was accustomed to use the lavatory in any one of the cars standing

on tracks adjoining the shop awaiting use," or, if there were no cars in that location, to "go to Eleventh Street" and "use the toilet facilities *** there." *Nicholson*, 253 F.2d at 940 (internal quotation marks omitted). The railroad knew all about this, inasmuch as Nicholson "had protested against this state of affairs," which "had obtained all of the twenty-nine years while she had been employed there." *Id.* The railroad thus was well aware that Nicholson would use a bathroom wherever she could find one, that she sometimes traveled long distances to do so, and that she routinely used bathrooms on trains.

Finally, Szekeres claims that *Nicholson* is distinguishable because, unlike in that case, the events at issue here were "all close in time and space." Br. 28. In fact the events at issue here were no closer in time and space than those in *Nicholson*—and were likely *less* close. Szekeres testified that he "started to have to use the bathroom" when his train was "coming down" from the Valley City industries; that at that point he was still "at least a half mile up into" the industries; that he "would have used the locomotive restroom" at that time if it had been useable; but that he "wouldn't use it" because it was "dirty" and "smelly" (the alleged LIA violation). Transcript, RE126, PageID# 1836, 1867-1868. The train eventually arrived at the main track, where the crew picked up "five cars *** that [it] previously left there." *Id.* at 1834. During this operation Szekeres was "handling th[e] switch," which he threw "at least ten to fifteen times." *Id.* It was

only when he was "getting ready to leave" that Szekeres tried to ascend the incline to relieve himself and sustained the injury for which he sued. *Id.* at 1835-1836. If in *Nicholson* "the cause and effect *** were too far removed from one another in space and time to satisfy the requirements of the F.E.L.A.," 253 F.2d at 941, then surely the same is true here.

II. THE DISTRICT COURT CORRECTLY GRANTED CSXT JUDGMENT AS A MATTER OF LAW ON SZEKERES'S FELA CLAIM

Szekeres's FELA claim fails as a matter of law for two independent reasons. First, Szekeres did not prove causation, because his claim that he slipped as a result of mud that had accumulated on his boots behind the switch is purely speculative. Second, Judge Adams ruled that the testimony of Szekeres's expert on the industry standard of care, James Arton, should have been excluded, and Szekeres could not prove negligence without it.

A. There Was Insufficient Evidence Of Causation

In a FELA case as in any other, "[s]peculation cannot supply the place of proof." *Moore v. Chesapeake & Ohio Ry.*, 340 U.S. 573, 578 (1951); *accord Green*, 763 F.2d at 807 (quoting *Moore*). This Court has repeatedly applied that principle in FELA cases holding that the railroad was entitled to judgment as a

matter of law on the element of causation.[6] In this case, too, Judge Adams correctly concluded that "the sole evidence of causation on [the FELA] claim is speculation." Order, RE139, PageID# 2368.

1. If CSXT was negligent in failing to place ballast behind the switch, as Szekeres claimed, then that negligence could have caused his injury only if he slipped on the incline as a result of the muddy condition behind the switch that allegedly resulted from the lack of ballast, since Szekeres did not and could not claim that CSXT was negligent in failing to place ballast on the incline itself, Transcript, RE126, PageID# 1866-1867, 1871, 1973. As Szekeres concedes, CSXT "would not be liable" under FELA "if mud from behind the switch played no role" in causing "his slip on the incline." Br. 38. Szekeres's theory is that the mud behind the switch caused his injury because it accumulated on his boots while he was operating the switch and the accumulation, in combination with the muddy condition of the incline, caused him to slip when he later started up the incline. Transcript, RE126, PageID# 1872. But Szekeres offered only speculation, not

[6] *See, e.g., Przybylinski v. CSX Transp., Inc.*, 292 F. App'x 485, 489 (6th Cir. 2008) ("Przybylinski cannot put before the jury any actual evidence—beyond the mere speculation offered to us—as to what caused her injury ***."); *Dent v. Consol. Rail Corp.*, 187 F.3d 635 (table), 1999 WL 551402, at *2 (6th Cir. July 20, 1999) ("Evidence of causation must be composed of something beyond raw speculation."); *Basinger v. CSX Transp., Inc.*, 91 F.3d 143 (table), 1996 WL 400182, at *6 (6th Cir. July 16, 1996) ("Assuming that the switches and spray gun were defective, Basinger provided no evidence, other than his own speculation, that the defects caused his carpal tunnel syndrome.").

evidence, that mud did in fact accumulate on his boots; that that mud came from behind the switch rather than one of the multiple other outdoor locations at which he had been working that day; and that it was that mud, rather than just the mud on the incline, that caused him to slip.

As Judge Adams rightly observed, Szekeres "admitted that he had no factual basis" for his claim that "he accumulated mud on his boots from [the area] behind the switch." Order, RE139, PageID# 2369. On the contrary, his own testimony "makes clear" that he "does not in fact know when and where he accumulated mud on his boots." *Id.* Szekeres testified only that mud from behind the switch—or, for that matter, from anywhere else—"might" have accumulated on his boots, and he forthrightly acknowledged that he was "speculating" about whether it had. Transcript, RE126, PageID# 1875. Szekeres also "could not say" that "it was not simply the muddy condition of the incline that caused him to twist his knee." Order, RE139, PageID# 2369.

Szekeres's testimony thus amounts to no more than a "guess[]" that mud that accumulated on his boots behind the switch caused the accident, "without any underlying evidence to support his speculation." Order, RE139, PageID# 2369-2370. As in another FELA case in which this Court found insufficient evidence of causation, Szekeres "does not know" what caused him to slip, he "has not presented evidence" that he slipped because of CSXT's negligence, and he seeks to

"rely on speculation to take the place of proof." *Przybylinski v. CSX Transp., Inc.*, 292 F. App'x 485, 489 (6th Cir. 2008). He has therefore failed to establish the element of causation.

2. Szekeres argues that he presented evidence of causation beyond mere speculation, but that is not correct. Szekeres points, for example, to photographs admitted into evidence that "showed mud *** behind the switch." Br. 42. That there was mud in that location, however, is not proof that mud accumulated on Szekeres's boots; it is not proof that *that* mud did; and it is not proof that that mud caused him to slip on the incline.

Szekeres also claims that trainmaster John Whittenberger and conductor Larry Ashby testified that "the ground conditions" behind the switch "were such that they also got mud on their shoes" there. Br. 41. As Szekeres ultimately acknowledges, however, *id.*, Whittenberger in fact gave the same testimony that Szekeres did—*i.e.*, that he "would have to speculate" that he had gotten some mud on his shoes at that location. Transcript, RE126, PageID# 1897. And Ashby conceded that he "could have accumulated that mud on [his] boots from anywhere." *Id.*, PageID# 1891.

Finally, Szekeres relies on his own testimony that, "'in order to slip in the mud'" on the incline, "'there had to be mud in the bottom of my boot.'" Br. 40-41 (quoting Transcript, RE126, PageID# 1877; emphasis omitted). That is pure

speculation too. It could have been "simply the muddy condition of the incline that caused him to twist his knee." Order, RE139, PageID# 2369; *cf. Mettle v. CSX Transp., Inc.*, 221 F. App'x 262, 264 (4th Cir. 2007) (per curiam) ("absent speculation, a jury could not conclude that [Mettle] slipped because of the mud and not because of the rain" (internal quotation marks omitted; brackets added by court)). And even if Szekeres *did* have mud on the bottom of his boots (and that mud was a cause of the accident), it could have accumulated at some location other than behind the switch. Szekeres himself conceded that "there was mud everywhere." Transcript, RE126, PageID# 1874; *accord id.*, PageID# 1873.

3. Szekeres next argues that "juries are allowed in FELA cases to consider circumstantial evidence to decide contested issues." Br. 42. Of course they are. That is because, as the term suggests, circumstantial evidence is *evidence*, not speculation. That the "circumstantial evidence" in *Gallick v. Baltimore & Ohio Railroad*, 372 U.S. 108 (1963), was deemed "sufficient to allow the issue of causation to be determined by the jury" in that case, Br. 44, therefore, does not mean that the *speculation* in this case was sufficient to allow the jury to decide causation here.

Szekeres also quotes the Supreme Court's statement in *Lavender v. Kurn*, 327 U.S. 645, 653 (1946), that, "[w]henever *** the evidence is such that fair-minded men may draw different inferences, a measure of speculation and

conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference." Br. 43. In the same vein, Szekeres quotes *Pehowic v. Erie Lackawanna Railroad*, 430 F.2d 697, 700 n.6 (3d Cir. 1970), which cites *Lavender* for the proposition that the fact that "some measure of speculation would be required does not affect the integrity of the jury's function." Br. 46.

That a *jury* may be permitted to engage in a "measure of speculation" in choosing the most reasonable inference from the evidence, however, does not mean that a *witness* is permitted to do so in testifying. On the contrary, the *Lavender* decision itself "made it abundantly clear that there must be proved facts to support the conclusion reached" by the jury, *Pa. R.R. v. Pomeroy*, 239 F.2d 435, 442 (D.C. Cir. 1956), when it twice said, in the same paragraph in which the sentence quoted by Szekeres appears, that a jury's verdict should be upheld as long as there is an "evidentiary basis" for it, *Lavender*, 327 U.S. at 653. If a verdict could be based on speculation rather than evidence, both the Supreme Court's subsequent decision in *Moore* and numerous more recent decisions of this Court would be wrong. The *Lavender* decision obviously "was not intended *** to carry so far." *Woods v. N.Y. Cent. R.R.*, 222 F.2d 551, 552 (6th Cir. 1955) (per curiam).[7]

[7] Szekeres also testified that he "might" have accumulated mud on his boots at his deposition. Transcript, RE126, PageID# 1874. He points out that this testimony was therefore "before this Court" in *Szekeres I*, which reversed the grant of

B. There Was Insufficient Evidence Of Negligence

In its post-trial motion, CSXT argued that Szekeres's expert, Arton, was not qualified to opine that industry standards required ballast behind the switch; that he therefore should have been precluded from testifying under Federal Rules of Evidence 702 and 703; and that Szekeres could not prove a breach of the duty of care without Arton's testimony. Memorandum in Support of Renewed Motion for J.M.O.L. or New Trial, RE135, PageID# 2259-2265. Judge Adams "agree[d] that Arton's testimony should have been excluded." Order, RE139, PageID# 2368. In light of its ruling that CSXT was entitled to judgment as a matter of law on the FELA claim because Szekeres had not proved causation, however, the district court did not decide whether judgment as a matter of law was warranted for the independent reason that Szekeres could not prove negligence without Arton's testimony. *Id.* Judgment as a matter of law on the FELA claim *is* warranted for this independent reason.[8]

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summary judgment to CSXT. Br. 39 n.4. As the district court explained, however, the sufficiency of the evidence of causation on the FELA claim "was not addressed" in *Szekeres I*, "nor was the summary judgment record as clear that Szekeres was engaged in pure speculation." Order, RE139, PageID# 2370.

[8] This argument is not foreclosed by *Szekeres I* either, both because that decision addressed whether there was sufficient evidence of foreseeability, not whether there was sufficient evidence of a breach of a duty of care, and because it assumed that Arton's testimony was admissible. *Szekeres I*, 617 F.3d at 430-32.

1. Other than the entirely conclusory assertion that "Arton was qualified to make *** an opinion" that "ballast rock should have been placed behind the Valley City switch," Br. 50, Szekeres has not challenged in this Court the district court's ruling that Arton's testimony should have been excluded. He therefore has abandoned any such claim. "[I]t is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *United States v. Johnson*, 440 F.3d 832, 846 (6th Cir. 2006) (internal quotation marks omitted).

In any event, this Court would review only for an abuse of discretion whether the district court properly excluded expert testimony, *United States v. Amawi*, 695 F.3d 457, 478 (6th Cir. 2012), and Judge Adams did not come close to an abuse of discretion in ruling that Arton's testimony should have been excluded. Arton admitted that he is not an engineer or otherwise an expert in railroad engineering or maintenance-of-way issues, and he testified that he had become familiar with industry standards on the placement of ballast through his "association" with unidentified civil engineers who supposedly were responsible for them. Transcript, RE126, PageID# 1934, 1939, 1963-1964; *see also id.*, PageID# 1927-1928, 1944. "[A] district court err[s] by admitting expert testimony that [is] based upon the opinion of others who were not even qualified as experts, nor present at the trial." *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398,

409 (6th Cir. 2006) (internal quotation marks omitted). *A fortiori*, a district court does *not* err by *excluding* such testimony.

2. Without the testimony of Szekeres's expert, the evidence that CSXT breached a duty of care is legally insufficient. "FELA claims *** must be supported by expert testimony where they involve issues *** beyond the common experience and understanding of the average jury." *In re Amtrak "Sunset Limited" Train Crash*, 188 F. Supp. 2d 1341, 1349 (S.D. Ala. 1999). That principle applies with particular force to the industry standard of care. Courts have required expert testimony to establish the standard of care in FELA cases in which the plaintiff claimed that the railroad used improper ballast in rail yards, *Adkins v. CSX Transp., Inc.*, 2011 WL 2935399, at *4 (Ky. Ct. App. July 22, 2011), provided inadequate lighting in a rail yard, *Rawson v. Midsouth Rail Corp.*, 738 So. 2d 280, 292 (Miss. Ct. App. 1999), required an employee to carry equipment that was too heavy, *Caniff v. CSX Transp., Inc.*, ___ S.W.3d ___, 2012 WL 5038812, at *4 (Ky. Ct. App. Oct. 19, 2012), failed to evaluate an employee's physical capacity to perform her job, *Jones v. Nat'l R.R. Passenger Corp.*, 942 A.2d 1103, 1108 (D.C. 2008), or allowed a train to travel too fast, *In re Amtrak "Sunset Limited" Train Crash*, 188 F. Supp. 2d at 1349. This case, in which the plaintiff claimed that the railroad should have placed ballast in a particular location, is no different. "Because the 'business of operating a railroad entails technical and logistical problems with

which the ordinary layman has had little or no experience[,]' the failure to provide expert testimony regarding the applicable standard of care is fatal to [Szekeres's FELA] claim[]," *Caniff*, ___ S.W.3d ___, 2012 WL 5038812, at *4 (quoting *Bridger v. Union Ry.*, 355 F.2d 382, 389 (6th Cir. 1966); first set of brackets added by court), and "entitles [CSXT] to judgment as a matter of law," *Jones*, 942 A.2d at 1108.

Even if expert testimony were *not* required, Judge Adams' ruling that Arton's testimony should have been excluded still would render legally insufficient the evidence that CSXT breached a duty of care, because Szekeres's other witnesses "fail[ed] to point to any standard of care to which [CSXT] failed to conform." *Van Gorder v. Grand Trunk W. R.R.*, 509 F.3d 265, 270 (6th Cir. 2007). In arguing otherwise, Szekeres notes that conductor Larry Ashby testified that "ballast rock was needed behind the switch" and that "he complained to the railroad about the same at a safety meeting." Br. 50. Unlike Arton, however, Ashby gave "no testimony" that ballast in that location is "common in the railroad industry" or required under the "applicable standard of care." *Rawson*, 738 So. 2d at 292. Szekeres also points out that "the jury had before it photographs taken on the date of the incident that showed ballast rock along the track at various other areas." Br. 50. But that does not establish the industry standard either; it could simply mean that CSXT *exceeded* the standard in those areas. *Cf. Rawson*, 738

So. 2d at 292 (photographs of different lights at different location did not show that those lights "were standard in the industry").

III. THE DISTRICT COURT SHOULD BE ALLOWED TO RULE ON CSXT'S ALTERNATIVE MOTION FOR A NEW TRIAL IN THE EVENT THAT THE GRANT OF JUDGMENT AS A MATTER OF LAW IS REVERSED

Judge Adams granted CSXT's motion for judgment as a matter of law but did not conditionally rule on its alternative motion for a new trial. Instead he stated that he would "address the argument for a new trial" if "this matter is remanded." Order, RE139, PageID# 2370 n.1. As Szekeres points out, the district court should have made a conditional ruling on the new trial motion when it granted judgment as a matter of law. Br. 48; *see* Fed. R. Civ. P. 50(c)(1).

Szekeres argues that, if this Court reverses the grant of judgment as a matter of law, it should rule on the motion for a new trial itself and deny it. Br. 48-51. The Court need not reach this issue, because Judge Adams correctly granted CSXT judgment as a matter of law. If the Court concludes otherwise, however, the district court should be allowed to decide CSXT's new trial motion in the first instance. That is so for at least three reasons.

First, while it may sometimes be appropriate for a court of appeals to be the first court to rule on a new trial motion when the motion is addressed solely to rulings that the district court made before or during trial, *see, e.g.*, *Acosta v. City & Cnty. Of San Francisco*, 83 F.3d 1143, 1149 (9th Cir. 1996) (district court's refusal

to submit special interrogatories to the jury), the principal basis for CSXT's alternative new trial motion was that the jury's verdict, even if supported by legally sufficient evidence, was against the weight of the evidence. Memorandum in Support of Motion for J.M.O.L. or New Trial, RE135, PageID# 2269-2272. That is an issue that was not addressed by the district court *at all*. This Court should not be the first one to consider it, because this is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). There is particular reason to allow the district court to rule on CSXT's new trial motion first, if this Court reverses the grant of judgment as a matter of law, because "[w]hether a verdict is sufficiently against the weight of the evidence as to require a new trial *** 'calls for the judgment in the first instance' by the district court, 'who saw and heard the witnesses and has the feel of the case which no appellate transcript can impart.'" *Hubbard v. Detroit Pub. Sch.*, 372 F. App'x 631, 634 (6th Cir. 2010) (quoting *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 216 (1947)).

Second, CSXT's new trial motion also challenged the admission of Arton's testimony, Memorandum in Support of Motion for J.M.O.L. or New Trial, RE135, PageID# 2272, and the district court has already decided, in its order granting judgment as a matter of law, that "Arton's testimony should have been excluded," Order, RE139, PageID# 2368. While that ruling did not factor into the court's decision to grant CSXT judgment as a matter of law, it would certainly factor into

any decision whether to order a new trial if such a decision became necessary. Since Judge Adams was the one who determined, in the exercise of his discretion, that Arton's testimony should not have been admitted at trial, he should also be the one who decides, in the exercise of his discretion, whether the erroneous admission of the evidence warrants a *new* trial.

Third, CSXT can hardly be faulted for "not petition[ing] the district court for a ruling on the motion" for a new trial after the court granted CSXT's motion for judgment as a matter of law without ruling on its new trial motion. Br. 48. Szekeres filed his notice of appeal *on the same day* that the district court issued its order, Notice of Appeal, RE140, and "once a notice of appeal was filed, the district court was divested of jurisdiction," *Taylor v. KeyCorp*, 680 F.3d 609, 616 (6th Cir. 2012). As a consequence of Szekeres's own actions, therefore, CSXT had no realistic opportunity to request reconsideration of the district court's decision not to rule on its alternative new trial motion.

Szekeres cites two decisions in which this Court addressed a new trial motion after reversing a grant of judgment as a matter of law, Br. 48-49, but in both cases, unlike in this one, the district court had ruled on the new trial motion prior to the appeal, *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1523-25 (6th Cir. 1990); *Ross v. Chesapeake & Ohio Ry.*, 421 F.2d 328, 330 (6th Cir. 1970). In a decision that Szekeres does *not* cite, in which, as in this case, the

district court had granted judgment as a matter of law but had *not* ruled on new trial motions, this Court reversed the grant of judgment as a matter of law and then "remanded" the case for "resolution by the district court" of "[t]he motions for a new trial." *Hanna v. Cnty. of Wood*, 895 F.2d 1413 (table), 1990 WL 8721, at *6 (6th Cir. Feb. 6, 1990) (per curiam). If the Court reverses the grant of judgment as a matter of law here, it should follow the same procedure.

Szekeres does cite a decision of the Fourth Circuit in which, after reversing the grant of judgment as a matter of law, the court of appeals itself ruled upon (and denied) a new trial motion that had not been decided by the district court. Br. 49 (citing *Mays v. Pioneer Lumber Corp.*, 502 F.2d 106, 109-10 (4th Cir. 1974)). It appears, however, that this Court has never done so. And for the reasons explained above, in this case "prudence militates in favor of a remand so that the district court may consider *** [the] motion for a new trial" in the first instance. *Rhone Poulenc Rorer Pharm. Inc. v. Newman Glass Works*, 112 F.3d 695, 699 (3d Cir. 1997); *see also Isaksen v. Vt. Castings, Inc.*, 825 F.2d 1158, 1165 (7th Cir. 1987) (Posner, J.) (likewise remanding for decision on previously unaddressed new trial motion after reversing grant of judgment as a matter of law). Even the Fourth Circuit decision on which Szekeres relies recognized that "remand[ing]" is "ordinarily" the appropriate course in this circumstance. *Mays*, 502 F.2d at 110.

CONCLUSION

The judgment of the district court should be affirmed.

December 7, 2012

Respectfully submitted,

s/ *Dan Himmelfarb*

Joseph J. Santoro
Stephen M. Beaudry
GALLAGHER SHARP
Sixth Floor, Bulkley Building
1501 Euclid Ave.
Cleveland, Ohio 44115
Telephone: (216) 241-5310
Facsimile: (216) 241-1608
jsantoro@gallaghersharp.com
sbeaudry@gallaghersharp.com

Dan Himmelfarb
Scott M. Noveck
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
Telephone: (202) 263-3000
Facsimile: (202) 263-3300
dhimmelfarb@mayerbrown.com
snoveck@mayerbrown.com

Attorneys for Appellee CSX Transportation, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 6th Cir. R. 32(a), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,993 words, including footnotes, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 6th Cir. R. 32(b)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. 32(a)(6) because it has been prepared in Word using 14-point Times New Roman.

Dated: December 7, 2012

s/ *Dan Himmelfarb*
Dan Himmelfarb

CERTIFICATE OF SERVICE

I hereby certify that, on this the 7th day of December, 2012, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I further certify that, pursuant to 6th Cir. R. 25(f)(1), service will be accomplished by filing via the CM/ECF system, which will generate and transmit a Notice of Docket Activity to all registered attorneys participating in the case.

s/ *Dan Himmelfarb*
Dan Himmelfarb

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

District Court Record Entry	Description	Page ID Range
1	Complaint	1-4
10	Second Amended Complaint	41-44
17	Motion for Partial Summary Judgment on LIA Claim	161-247
18	Motion for Summary Judgment on All Claims	248-282
24-1	Exhibit 1 to Memorandum in Opposition to Motion for Summary Judgment (Szekeres Deposition)	448-466
31	Memorandum and Order Granting Summary Judgment	605-613
32	Order of Dismissal	614
33	Notice of Appeal	615-616
93	Plaintiff's Trial Brief	1277-1297
114	Motion for Judgment as a Matter of Law	1703-1716
116	Jury Verdict	1718-1726
120	Judgment	1741
126	Trial Transcript (Volume One)	1790-2052
127	Trial Transcript (Volume Two)	2053-2197
128	Trial Transcript (Volume Three)	2198-2206
130	Renewed Motion for Judgment as a Matter of Law or New Trial	2232-2235
135	Memorandum in Support of Renewed Motion for Judgment as a Matter of Law or New Trial	2246-2273

District Court Record Entry	Description	Page ID Range
139	Order Granting Judgment as a Matter of Law	2363-2370
140	Notice of Appeal	2371-2372