No. 12-14587-CC

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JIMMY CLEMENTS, Plaintiff-Appellant, v. CSX TRANSPORTATION, INC., Defendant-Appellee.	)	On Appeal from the U.S. District Court for the Northern District of Georgia No. 3:09-cv-122-TCB

BRIEF FOR DEFENDANT-APPELLEE
CSX TRANSPORTATION, INC.

James E. Gilson
jgilson@caseygilson.com
Robert S. McEvoy
rsm@caseygilson.com
CASEY GILSON P.C.
Six Concourse Parkway
Suite 2200
Atlanta, GA 30328
(770) 512-0070

Evan M. Tager
etager@mayerbrown.com
Brian D. Netter
bnetter@mayerbrown.com
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Attorneys for Defendant-Appellee CSX Transportation, Inc.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Clements v. CSX Transportation, Inc., No. 12-14587-CC

Set forth below is a list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of a party's stock, and other identifiable legal entities related to a party, to the best of my knowledge:

Batten, Sr., Timothy C. (trial judge)

Camp, Jack T. (trial judge)

Casey Gilson P.C. (counsel for defendant)

Clements, Jimmy (plaintiff)

Cook, Edward (counsel for plaintiff)

Cook, Hall & Lampros, LLP (counsel for plaintiff)

CSX Corporation (NYSE: CSX) (parent company of defendant)

CSX Transportation, Inc. (defendant)

Gilson, James E. (counsel for defendant)

Hall, Christopher (counsel for plaintiff)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Clements v. CSX Transportation, Inc., No. 12-14587-CC

Hannon, Patrick J. (counsel for plaintiff)

Hunt, Willis B. (trial judge)

Jones, David R. (counsel for plaintiff)

Lampros, Andrew (counsel for plaintiff)

McEvoy, R. Sean (counsel for defendant)

Netter, Brian D. (counsel for defendant)

Tager, Evan M. (counsel for defendant)

Thrash, Thomas W. (trial judge)

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CITATIONS

CASES **Page(s)**

TABLE OF CITATIONS
(continued)

Page(s)

TABLE OF CITATIONS
(continued)

Page(s)

STATUTES, RULES AND REGULATIONS

OTHER AUTHORITIES

TABLE OF RECORD REFERENCES IN THE BRIEF

TABLE OF RECORD REFERENCES IN THE BRIEF (continued)

Plaintiff's Exhibit #	Description	Page(s)
11	Report of Red Signal Violation	6, 7, 12, 28
25	Video of Collision	12
Defendant's Exhibit #	**Description**	**Page(s)**
26	Signal Log	5, 6, 7
31	CSXT Rule 55	3
34	CSXT Rule 50	5
44	Approach Signals	4
82	Letter dated Aug. 12, 2009	9
83	Letter dated Aug. 18, 2009	9
84	Letter dated Oct. 2, 2009	9
85	Letter dated Oct. 9, 2009	9
90	Job Description	3

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary. The "issue of first impression" for which Plaintiff-appellant Jimmy Clements ("Clements") seeks oral argument (Clements Br. iii) was rendered moot by the jury's verdict.

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

Clements filed his complaint in the U.S. District Court for the Northern District of Georgia on November 24, 2009. (R.1.) Because the complaint alleged a cause of action under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.*, the district court exercised federal-question jurisdiction pursuant to 28 U.S.C. § 1331 and 45 U.S.C. § 56.

The district court entered judgment in favor of CSXT on January 25, 2012. (R.102.) After Clements' post-trial motion was denied on July 31, 2012 (R.109), Clements timely filed a notice of appeal on August 30, 2012 (R.110). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. In light of the evidence that plaintiff's alleged damages arose from circumstances other than defendant's negligence, did

the district court abuse its discretion in declining to set aside the jury's finding that plaintiff's damages were not caused by defendant's negligence?

2. Is plaintiff's challenge to the jury instruction on contributory negligence moot given that the jury did not reach the question of contributory negligence? In the alternative, did the district court correctly determine that any liability to plaintiff could be offset by plaintiff's own negligence?

3. Did the district court properly exclude evidence designed to challenge the validity of the recertification of the train's engineer, given plaintiff's failure to assert any causal connection between his damages and the alleged technical shortcomings with the engineer's recertification?

STATEMENT OF THE CASE

This case is about a head-on collision between two trains. Plaintiff Jimmy Clements was the conductor of the train at fault but was asleep on the job when his train barreled through an approach signal and an absolute stop signal and struck another train. Despite his egregious dereliction of duty, Clements filed suit against CSXT, his employer, alleging damages from the incident.

A. Statement of Facts

1. Two crewmembers are essential to the operation of a freight train: the conductor and the engineer. Their job responsibilities are dictated by CSXT rules.

The conductor is "the boss" of the train (Tr. 80[1]), responsible for "the operation of the train," "the administration of the train," and "the safety of the train" (Tr. 32; *see also* R.106-3 (Defendant's Exhibit ("DX") 31) (CSXT General Rule 55.2) ("The conductor supervises the operation and administration of the train")). The engineer is responsible for "safely and efficiently operating the engine" and "must comply . . . with instructions of the conductor concerning the movement of their train." (R.106-3 (CSXT General Rule 55.1, 60); *see also* R. 106-7 (DX 90) (conductor must "[e]nsure all train orders, signals, and railroad rules and regulations are complied with").)

When a train is in motion, the crew is required to abide by train signals along the tracks. Much like automobile stoplights, train signals feature red, yellow, and green lights that direct the

---

[1] The consecutively paginated trial transcript ("Tr.") appears in the record at R.115 (Jan. 23, 2012), R.116 (Jan. 24, 2012), and R.118 (Jan. 25, 2012).

crew to stop, to prepare to stop, or to proceed. (Tr. 92-93, 170.) In addition, train signals provide track indications that might instruct the crew, for example, not to exceed a certain speed. Of particular importance here, an "approach" signal directs the crew to immediately reduce the train's speed and to stop at the next signal. (Tr. 92-94; DX 44.) Moreover, when the train approaches grade crossings, the crew is required to sound the horn according to a prescribed pattern—two long blasts followed by a short blast and another long blast. *See* 49 C.F.R. § 222.21(a). (Tr. 147, 298.)

The conductor and the engineer are required to work together to obey signals. (Tr. 87-88.) The conductor has primary responsibility for identifying the signals. (*Id.*) After the conductor announces the signal to the engineer, the engineer confirms the signal orally, whereupon the conductor records the signal indication in a log book and announces the signal over the radio. (Tr. 87-88, 170-71, 270-71, 300-01.)

The conductor is the "fail-safe to make sure that th[e] train is under control." (Tr. 303.) Pursuant to CSXT Operating Rule 50.1:

> If the engineer fails to control the train in accordance with a signal indication or

> restriction imposed upon his train, other members of the crew must:
>
> a. Caution the engineer and, if necessary,
>
> b. Take action to ensure the safety of the train (including stopping the movement).

(R.106-5 (DX 34).) In case of such an emergency, the conductor must activate the emergency brake valve at his control stand. (Tr. 139, 171, 173, 300, 303.)

If a train proceeds through a red stop signal without permission, both the engineer and the conductor are subject to automatic removal from service. (Tr. 312.)

2. On August 7, 2009, Train Q60206 was scheduled to haul a load of freight from Manchester, Georgia, to Waycross, Georgia. (Tr. 79.) Clements was the conductor and Reginald Bridges was his engineer.

There was nothing exceptional about the journey from Manchester to Ambrose, Georgia. The crew obeyed each of the signals it passed, Clements recorded the signal indications in his log, and Clements announced the signal indications over the radio. (R.106-2 (DX 26) at 1-2; Tr. 99-101.) But after the train passed through Ambrose, something changed. Clements did not record

any of the next 10 signals in his log, as the train covered 25 miles of track. (Tr. 103-06; R.106-2 at 3; Plaintiff's Exhibit ("PX") 11 at 56-58.) Clements later told a doctor that he "blanked out." (Tr. 122.)

Because Clements was asleep, he did not take any action when his engineer's performance deteriorated. He did nothing when his engineer failed to sound the whistle in the long-long-short-long pattern at *nine consecutive crossings* (Tr. 148, 151; PX 11 at 14)—violations that he could have noticed even if he was filling out paperwork at the time, as he later claimed (Tr. 105). And he failed to reprimand his engineer when the engineer failed entirely to blow the whistle at two crossings (Tr. 149, 152, 177)—egregious and dangerous oversights for which Clements "should have been all over" his engineer and which should have caused Clements to activate the train's emergency brake (Tr. 178, 300).

The situation escalated when the train passed through Nicholls, Georgia, at milepost 616.3. (PX 11 at 4.) The signal in Nicholls was a yellow light over a yellow light—an "advance approach" signal indicating that the train would need to stop at the signal after the next, 3.6 miles away. (Tr. 112-13; PX 11 at 3-4.) Clements, who was still asleep, failed to apprise his engineer of the

signal and failed to record the signal in his log book. (R.106-2 (DX 26) at 3.) The next signal, at the North end of Sessoms, Georgia, at milepost 614.1, was an approach signal—requiring the train immediately to slow down to 30 mph and to prepare to stop at the next signal. (Tr. 124; PX 11 at 3-4.) But the train did not slow—rather, it continued along, in excess of 40 mph. By this point, Clements (who had a speedometer on the console directly in front of him) should have thrown the train into emergency if he could not get his engineer to slow the train. (Tr. 158-59, 173-74.) But he did nothing, because he was asleep. (*See* Tr. 160.)

And that was how Train Q60206 approached the red light at Sessoms, Georgia, 1.4 miles from the approach signal, at 43 miles per hour. (Tr. 124; PX 11 at 3, 5.) The light was red for a reason: Another train was proceeding in the opposite direction on the same track, and the dispatcher had determined that Train Q60206 should yield. The conductor and the engineer aboard the other train could tell that something was horribly wrong—they knew that a train heading toward them "was just too quick" and was "'not going to stop.'" (Tr. 275.) The two-member crew of that train jumped out when they realized a collision was imminent. (Tr. 276.)

Clements and Bridges were still aboard their train. When Bridges recognized the impending collision, he threw his mile-long train into emergency and braced for impact. (Tr. 163-64.) But it was too late, and the trains collided. Because Train Q60206 weighed 8,159 tons and the other train (which consisted of two engines without any freight cars) weighed only 823 tons, Train Q60206 pushed the other train 1,192 feet past the point of impact before both trains came to a stop. (PX 11 at 7, 53.)

3. After the collision, Clements was taken to the hospital in Alma, Georgia. (Tr. 119.) He reported that his leg and hands were sore but made no complaints about his back. (Tr. 120-21.) After he was discharged, he feared that something else was wrong, so he checked into Warm Springs Medical Center, hoping to get a set of x-rays. (Tr. 122.) He told the doctors at Warm Springs that he "blanked out and ran into another engine," but they refused to take x-rays. (Tr. 122-23.) Clements next went to see his family doctor, Dr. Allen Thompson. He told Dr. Thompson that he was "out" at the time of the accident. (Tr. 123.)

4. When a CSXT employee is suspected of committing a serious violation of the rules, he is immediately removed from

service without pay. (Tr. 308.) An investigation is then conducted to determine whether the employee will be dismissed or permitted to return to active service. (*Id.*)

After the collision involving Train Q60206, Clements was removed from service. (R.106-6 (DX 82) at 1; Tr. 124.) He was suspended without pay on the charge that he "failed to reduce to medium speed when [he] reached the approach signal [in Sessoms] and . . . passed an absolute signal displaying a stop indication without permission, resulting in personal injuries and extensive damage to equipment." (*Id.*) At the request of Clements' union representatives, the investigation was postponed until Clements was "medically qualified to attend." (R.106-6 at 2-4 (DX 83-85); Tr. 124-26.)

Clements never made himself available for the investigation—which, in light of his misconduct, surely would have resulted in his dismissal—and he never returned to service. (Tr. 127.)

B. Proceedings Below

1. Pretrial proceedings

On November 24, 2009, Clements filed suit against CSXT. (R.1.) He alleged that he sustained injuries to his back and lost

wages "as a result of the negligence of Defendant CSXT, its agents, and/or employees." (*Id.* at 4.)

CSXT moved for summary judgment on the theory that Clements' own actions were the sole cause of any injuries that he sustained. (R.42.) The district court denied the motion. (R.55.)

As the case proceeded to trial, the parties filed motions in limine. (R.75; R.76.) Two of CSXT's motions are relevant here.

First, CSXT sought an order prohibiting Clements from asserting that CSXT violated 49 C.F.R. § 240.305, which provides that "[i]t shall be unlawful to . . . [o]perate a locomotive or train past a signal indication . . . that requires a complete stop before passing it." (R.76 at 2, 6.) CSXT contended that Clements had waived any such argument by omitting it from his complaint and failing to mention it during discovery. In the alternative, CSXT sought to prevent Clements from arguing that a violation of § 240.305 was a basis for strict liability because strict liability attaches only to "'statute[s] enacted for the safety of employees.'" (*Id.* at 5 (quoting 45 U.S.C. § 53).) Moreover, even if a violation of § 240.305 would result in strict liability, CSXT contended that it was entitled to present the defense that Clements' conduct—and not CSXT's—was

the sole cause of any injuries that Clements sustained. (*Id.* at 10-11.)

Second, CSXT sought to preclude Clements from introducing evidence of alleged defects in the process by which Bridges' engineering certification was renewed. (R.76 at 11-23.) Bridges was an experienced engineer who had been operating locomotives since 1978. (Tr. 138.) On the date of the collision, he was carrying a current certification card. (R.76-2.) But Clements sought to argue that the Road Foreman of Engines who recertified Bridges in 2008 had failed to observe Bridges operating an engine, which is a technical requirement for recertification. (R.76 at 11.) The testimony, however, was that the Road Foreman *had* conducted a ride-along with Bridges. (*Id.*) Among other arguments, CSXT contended that evidence relating to whether the Road Foreman had or had not observed Bridges operating an engine before recertifying him was irrelevant because Clements had never contended that the alleged failure to conduct a ride-along had caused him injury. (*Id.* at 12-14.)

At the pretrial hearing, the district court ruled that Clements was entitled to assert that CSXT had violated 49 C.F.R. § 240.305

but that the regulation was not "enacted for the safety of employees" and that it therefore "does not ultimately result in the imposition of strict liability." (R.117 at 7.) After giving "careful consideration" to the issue of Bridges' certification, the court excluded evidence relating to that issue "for the reasons stated in CSX's brief." (*Id.* at 7-8.)

2. Trial

The case was tried to a jury in January 2012. Clements, Bridges, and other CSXT personnel testified as to the responsibilities of conductors and engineers, the events of August 7, 2009, and the ensuing disciplinary proceedings, as described above. *See supra* pp. 3-9. The jury had access to CSXT's investigation report, which was introduced into evidence by Clements. (Tr. 27 (admitting PX 11).) And the jury was shown video footage of Train Q60206 from the 15 minutes preceding the collision, which had been captured by a video camera mounted on the locomotive engine. (Tr. 8, 24, 37, 106, 144-46, 166; PX 25.[2])

[2] The video footage was admitted into evidence, but this Court is unlikely to have access to the proprietary software required to replay the recordings. If the Court believes that viewing the footage

That footage showed the series of lapses by Clements and his engineer.

Clements also put on a case for damages. He called an expert economist, Dr. Richard Thompson, who testified as to the net present value of wages and benefits that Clements would have earned had he remained in active service from the date of collision until a hypothetical retirement at age 65. (Tr. 212-13.) But Dr. Thompson conceded that he had not accounted for the fact that Clements was "unable to earn income due to a rules violation." (Tr. 242.)

Clements also called several doctors to testify to back injuries that he allegedly sustained as a result of the collision: Dr. Frank Allen Thompson, a gastroenterologist; Dr. James H. Wood, a neurosurgeon; and Dr. Ernest L. Howard, a rehabilitation specialist.

Dr. Wood testified that he had diagnosed Clements with a series of degenerative back problems—osteophytic changes, disc degeneration, lateral recess stenosis, and neural foraminal stenosis—and performed back surgery on Clements in 2010. (Tr.

---

would assist in resolving the appeal, CSXT will facilitate such a viewing.

204-05; R.121 at 17.) But Dr. Wood testified that degenerative conditions are not necessarily caused by traumatic events (R.121 at 33-34) and stated his opinion that Clements' conditions "were all present prior to the injury" on August 7, 2009 (*id.* at 52). Dr. Thompson testified that he would have no reason to disagree with that assessment (Tr. 182; R.93 at 20:11-20:46), and Dr. Howard agreed that the symptoms he treated could be part of a degenerative, non-acute disease that was not related to a traumatic event (Tr. 206; R.122 at 15, 31).

At the close of the evidence, the case was submitted to the jury with a special verdict form containing five interrogatories. The first interrogatory asked the jury whether CSXT's negligence was "a legal cause of damage to [Clements]." (R.101 at 1.) The second interrogatory asked the jury more specifically whether the "operation of CSX train Q60206 past a control point signal, when that signal indicated a complete stop was required before passing it," was "a legal cause of damage to [Clements]." (*Id.*) The third and fourth interrogatories asked whether Clements was contributorily negligent and the extent of his contributory negligence. (*Id.* at 1-2.)

The fifth interrogatory asked the jury to determine the total amount of Clements' damages. (*Id.* at 2.)

In response to the first interrogatory, the jury unanimously found that CSXT's negligence was not "a legal cause of damage to [Clements]." (R.101 at 1.) As such, the jury did not answer the remaining interrogatories, which were moot, and judgment was entered for CSXT. (R.102.)

3. Post-trial proceedings

Clements timely filed a post-trial motion seeking judgment as a matter of law or a new trial. (R.104.) Clements contended that (1) the evidence at trial established CSXT's negligence; (2) CSXT committed negligence per se by violating 49 C.F.R. § 240.305(a), which requires a train to stop at a stop signal; and (3) Clements should have been permitted to introduce evidence that Bridges' recertification as an engineer was improper.

The district court denied Clements' motion. (R.109.) The court found that Clements had waived any claim for judgment as a matter of law because his pre-verdict motion for judgment as a matter of law did not articulate any of the claims that he sought to raise after the verdict. (*Id.* at 8-9.)

As to Clements' motion for a new trial, the court found all of Clements' arguments to be meritless.

The court found that the jury's verdict "was not contrary to the great weight of the evidence," because the jury could reasonably have inferred that Clements' back injuries were the result of preexisting disc degeneration and his loss of income was caused by Clements' own actions—*i.e.*, rules violations. (R.109 at 12-14.)

The court found that even though Bridges' misconduct in failing to stop the train established that CSXT had breached a duty, "CSX was entitled to argue that despite its own negligence in causing the collision, Clements' injuries were due to another cause, such as a pre-existing condition." (R.109 at 10-11.) In any event, Clements had failed to object at trial to CSXT's theory of defense. (*Id.* at 11.)

Finally, the court rejected Clements' claim that he should have been able to introduce evidence contesting Bridges' recertification because "evidence of his lack of certification would not prove that CSX's negligence was the legal cause of Clements's injuries." (R.109 at 14.)

C. Standard of Review

This Court "review[s] the denial of a motion for a new trial only for an abuse of discretion." *Walter Int'l Prods., Inc. v. Salinas*, 650 F.3d 1402, 1407 (11th Cir. 2011). In the course of that review, deference "is particularly appropriate where a new trial is denied and the jury's verdict is left undisturbed." *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson,* 573 F.3d 1186, 1200 n.16 (11th Cir. 2009) (internal quotation marks omitted).

SUMMARY OF THE ARGUMENT

The judgment of the district court upholding the jury's verdict should be affirmed.

1. An employee's claim for relief under FELA requires proof that the railroad breached a duty of care and that the breach caused the employee to sustain damages. In this case, CSXT acknowledged that it was vicariously responsible for Bridges' negligence in failing to avert the collision. But the jury nevertheless concluded that the collision did not cause Clements to sustain damages.

The district court did not abuse its discretion by failing to order a new trial because there was evidence in the record to

support the jury's verdict. Clements asserted that he was damaged because he lost wages and injured his back. But the jury heard testimony that Clements' lost wages were attributable to his own misconduct, which resulted in an automatic removal from service without pay. And the jury heard testimony that Clements' back problems were the result of preexisting degenerative conditions and not the collision itself. That testimony is more than enough to preserve the jury's verdict.

2. Clements asserts that the district court erred by permitting the jury to consider whether he was contributorily negligent. But even though interrogatories concerning contributory negligence were posed to the jury, the jury never reached those questions because it found that CSXT was not liable in the first place. Thus, the availability of a contributory-negligence defense was mooted by the jury's verdict and any error on that score would be harmless.

In any event, the district court did not err. The defense of contributory negligence is available in FELA cases unless the plaintiff proves a violation of a statute or regulation enacted for the safety of employees. As the majority of courts to consider this

question have correctly concluded, the regulation invoked by plaintiff does not fall within that category.

3. Finally, Clements asserts that he should have been able to introduce evidence to prove that there were defects in Bridges' recertification. The district court correctly found that Bridges' recertification was irrelevant. The question in this case is whether the collision caused Clements to sustain damages. Clements has advanced no theory under which Bridges' certification status bears on that question.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING CLEMENTS' MOTION FOR A NEW TRIAL.

A losing party faces a steep hurdle when moving to set aside the jury's verdict after trial. "Because it is critical that a judge does not merely substitute his judgment for that of the jury, new trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great—not merely the greater—weight of the evidence." *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir. 2001) (internal

quotation marks omitted). That standard is even greater in a FELA action:

> The Congress when adopting the law was particularly concerned that the issues whether there was employer fault and whether that fault played any part in the injury or death of the employee should be decided by the jury whenever fair-minded men could reach these conclusions on the evidence.

Rogers v. Mo. Pac. R.R., 352 U.S. 500, 508, 77 S. Ct. 443, 449 (1957). And a losing party's burden is greater yet on appeal. This Court grants more discretion when the judge who presided over the trial has *denied* a motion for a new trial on evidentiary grounds. *Williams v. City of Valdosta*, 689 F.2d 964, 974 (11th Cir. 1982).[3]

To prevail on a claim under FELA, a plaintiff must prove that (1) the railroad engaged in negligence or violated a statute designed to protect the safety of railroad employees; and (2) the negligence or

---

[3] Although Clements appears to be challenging only the denial of his motion for a new trial, his brief twice asserts that the district court erred in not entering "JNOV." (Clements Br. 22.) The district court found that Clements had forfeited any claim to judgment as a matter of law by failing to make any of his post-verdict arguments in a pre-verdict Rule 50 motion. (R.109 at 9.) Clements nowhere disputes that finding of forfeiture, which precludes any claim for judgment as a matter of law. *See* Fed. R. Civ. P. 50; *Blasland, Bouck & Lee, Inc. v. City of N. Miami*, 283 F.3d 1286, 1300 (11th Cir. 2002).

safety violation caused the plaintiff's injury. *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 169, 127 S. Ct. 799, 807 (2007); *Coray v. S. Pac. Co.*, 335 U.S. 520, 524, 69 S. Ct. 275, 277 (1949).

Here, the evidence supported the jury's finding that any negligence or safety violation on the part of CSXT was not the cause of Clements' alleged injuries. Clements asserted two injuries—(1) lost wages and benefits, and (2) medical problems with his back—but there was substantial evidence that neither injury was caused by CSXT's negligence. In particular, the jury heard testimony that Clements' lost wages were caused by his *own* violation of the red-light rule, which results in automatic removal from service without pay. (Tr. 308.) And the jury heard testimony that Clements' back issues were consistent with the natural progression of degenerative conditions that existed before the collision. (R.93 at 20:11-20:46; R.121 at 33-34, 52; R.122 at 15, 31.) The district court cited that evidence in denying Clements' motion. (R.109 at 12-13.) Moreover, the district court noted that Clements "did not dispute CSX's arguments that the jury could have found that CSX was not a legal cause of Clements's injuries on these bases." (*Id.* at 13.)

Although Clements argues that the district court abused its discretion in denying his motion for a new trial, he does not contest the district court's finding that he had forfeited any objection to CSXT's "arguments that the jury could have found that CSX was not a legal cause of Clements's injuries." (R.109 at 13.) Nor does Clements explain why, in light of the evidence identified by the district court, the jury was *not* permitted to find for CSXT. Those omissions from Clements' argument are fatal to his appeal. *See, e.g.*, *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1306 (11th Cir. 2012) ("By failing to challenge in their opening brief the district court's ruling that they did not establish the predominance of common issues because of variations in damages, the plaintiffs have abandoned any contention that the court erred in denying class certification on that ground."); *Holland v. Gee*, 677 F.3d 1047, 1066 (11th Cir. 2012) ("The law is by now well settled in this Circuit that a legal claim or argument that has not been briefed before the court is deemed abandoned and its merits will not be addressed." (alteration and internal quotation marks omitted)).

Instead of addressing the district court's reasoning, Clements makes two inapposite arguments

First, Clements contends that CSXT was not permitted to present "the defense of sole proximate cause." (Clements Br. 19-20.) When he made that argument to the district court, the court determined that Clements had waived any objection to CSXT's theory of defense by failing to make an appropriate objection at trial. (R.109 at 11.) Because Clements has not challenged the court's finding of waiver, that finding is conclusive. *Little*, 691 F.3d at 1306.

In any event, binding precedent rejects Clements' theory: "'Of course the substantive law recognizes that if the negligence of the Employee is the sole cause of the injury or death, there is no liability.'" *Almendarez v. Atchison, Topeka & Santa Fe Ry.*, 426 F.2d 1095, 1097 (5th Cir. 1970) (quoting *Page v. St. Louis Sw. Ry.*, 349 F.2d 820, 827 (5th Cir. 1965)); *see also Toth v. Grand Trunk R.R.*, 306 F.3d 335, 351 (6th Cir. 2002) ("If the employee's own negligence was the sole cause of the accident, then it is proper to conclude that employer negligence played no role in causing the injury."); *Hurley v. Patapsco & Back Rivers R.R.*, 888 F.2d 327, 330 (4th Cir. 1989) (per curiam) ("When an employee's own negligence is the sole proximate cause of his injuries, the employer cannot be found liable

pursuant to FELA."); *Beimert v. Burlington N., Inc.*, 726 F.2d 412, 414 (8th Cir. 1984) (per curiam) ("If the plaintiff's negligence was the *sole* cause, then the violation of the Safety Appliance Act could not have contributed in whole or in part to the injury.").

And that rule must be correct. There is nothing magical about a theory of sole cause: It "means exactly that—there is no other cause." *Gonzales v. Mo. Pac. R.R.*, 511 F.2d 629, 632 (5th Cir. 1975). Given that Clements was required to prove causation to make out his claim, a defense that he could *not* prove causation (because he was the cause of his own injuries) is plainly within bounds.

Second, Clements asserts that "the evidence at trial overwhelming establishes that CSX's negligence played some role in causing the collision and, therefore, Clements's injuries and damages." (Clements Br. 24.) We acknowledge that CSXT is responsible for Bridges' conduct. But the issue in this trial was whether the collision *caused* "Clements' injuries and damages." Clements tried to convince the jury that his damages were caused by the collision, but the jury found otherwise. Clements cannot

overcome the jury's verdict simply by asserting that the jury was wrong.

II. THE DISTRICT JUDGE'S DECISION TO INSTRUCT THE JURY ON CONTRIBUTORY NEGLIGENCE HAS BEEN MOOTED BY THE JURY'S VERDICT AND WAS, IN ANY EVENT, CORRECT.

Clements devotes much of his brief to arguing that the district court should not have instructed the jury on contributory negligence. According to Clements, the defense of contributory negligence was unavailable because CSXT allegedly violated a rule "enacted for the safety of employees." 45 U.S.C. § 53.

That argument is moot, however, because the jury did not consider contributory negligence. After it found that any negligence by CSXT was not a legal cause of Clements' alleged damages, it had no need to determine whether Clements was contributorily negligent. In any event, the district court was correct to determine that the contributory negligence instruction was proper notwithstanding the violation of 49 C.F.R. § 240.305(a).

A. Clements' Argument Is Barred By Fed. R. Civ. P. 61.

A party is not entitled to seek a new trial on the basis of an alleged "error[] . . . that do[es] not affect any party's substantial

rights." Fed. R. Civ. P. 61. Because the district court's instruction on contributory negligence turned out to be irrelevant to the outcome, Rule 61 compels rejection of Clements' challenge to that instruction.

Although defendants in FELA actions ordinarily are entitled to pursue a defense of contributory negligence, that defense is unavailable "in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 45 U.S.C. § 53. Thus, when a plaintiff proves a violation of a statute enacted for the safety of employees, he or she may recover the full amount of damages caused by that violation. *Coray*, 335 U.S. at 524, 69 S. Ct. at 277; *Duty v. E. Coast Tender Serv., Inc.*, 660 F.2d 933, 947 n.* (4th Cir. 1981) (en banc) (per curiam) (upon a finding of negligence per se, "the jury still would be required to determine whether the defendant's negligence in the use of an unlicensed operator caused or contributed to plaintiff's injury").

Accordingly, if § 240.305(a) was "enacted for the safety of employees" and CSXT's violation of that provision played a role in causing Clements' alleged injuries, then Clements could not be

found contributorily negligent for his injuries. The district court held that § 240.305(a) was *not* "enacted for the safety of employees," however, and therefore included two questions on the special verdict form:

> 3. Was the Plaintiff, Jimmy Clements, also negligent in the manner claimed by the Defendant and that such negligence was a legal cause of the Plaintiff's own damage?
>
> ___ Yes or ___ No
>
> * * *
>
> 4. What percentage of fault do you attribute to Defendant CSX and what percentage fault do you attribute to Plaintiff Jimmy Clements[?]
>
> ___% fault attributable to Defendant CSX
> ___% fault attributable to Plaintiff Jimmy Clements
> note: percentage of fault attributable to Defendant CSX and Plaintiff Jimmy Clements must total 100%.

(R.101 at 1-2.) But those questions went unanswered because the jury determined that CSXT's negligence did not cause damage to Clements. *Id.* at 1. So even if Clements were correct that the jury should not have been asked about contributory negligence, the error has been mooted by the jury's finding that CSXT's violation of the regulation did not cause Clements' injuries. *See, e.g.*, *Kermarec*

v. Compagnie Generale Transatlantique, 358 U.S. 625, 629, 79 S. Ct. 406, 409 (1959) (plaintiff was not prejudiced by error in contributory-negligence instruction because jury's verdict did not turn on that instruction).

Clements' suggestion that the district court's ruling resulted in the admission of evidence that would otherwise have been inadmissible (Clements Br. 12) is mistaken. Whether or not the jury was entitled to apportion damages, CSXT was entitled to present evidence of Clements' negligence because that evidence disproved Clements' assertion that he sustained an injury—lost wages—as a result of CSXT's negligence. In any event, it was *Clements*—and not CSXT—who elicited testimony that he had been faulted for "[f]ailing to properly comply with the CSX Operating Rules," and it was *Clements* who introduced into evidence the report identifying his violations as a crewmember of Train Q60206. (Tr. 27-29; PX 11.) Moreover, as the district court recognized, Clements neither objected to the introduction of this evidence nor requested a jury instruction ruling out the contributory-negligence defense. (R.109 at 11.) Consequently, Clements is not entitled to complain now. *Heath v. Suzuki Motor Corp.*, 126 F.3d 1391, 1394

(11th Cir. 1997); *see* Fed. R. Civ. P. 51. Finally, even if evidence bearing on Clements' fault was erroneously admitted, Clements would have to demonstrate that he suffered prejudice. Clements has not offered any explanation as to how the evidence of his negligence impelled the jury to conclude that CSXT's negligence did not cause his injuries.

Thus, the question whether the district court erred in permitting the jury to consider the defense of contributory negligence is irrelevant and cannot provide Clements a basis for relief.

B. Section 240.305(a) Was Not Enacted For The Safety Of Railroad Employees.

Even if the question of contributory negligence were relevant to the judgment below, Clements would not be entitled to relief because the district court correctly determined that 49 C.F.R. § 240.305(a) was not a statute "enacted for the safety of employees."[4]

[4] Although 49 C.F.R. § 240.305(a) is a regulation and not a statute, 45 U.S.C. § 54a provides that regulations prescribed by the Secretary of Transportation are considered to be statutes for these purposes.

Clements asserts that "[t]he great weight of the case law holds that § 240.305 was enacted for the safety of employees." (Clements Br. 15.) To the contrary, we are aware of four trial courts that have addressed whether § 240.305 is an employee-safety statute for purposes of 45 U.S.C. § 53—and three have found that it is not.

In addition to the court below, the district courts in *Koger v. Norfolk Southern Railway*, 2009 WL 3242068 (S.D. W. Va. Oct. 2, 2009), and *Bowie v. New Orleans Public Belt Railroad*, 2012 WL 4344548 (E.D. La. Sept. 21, 2012), ruled that a defendant may present a defense of contributory negligence in spite of its violation of § 240.305. The *Koger* court found that "the legislative history does not support plaintiff's argument in this regard" (2009 WL 3242068, at *3), and the *Bowie* court noted that whereas the "Secretary of Transportation has on occasion explicitly designated when a particular railroad regulation was enacted in order to protect employees," § 240.305 carries no such designation (2012 WL 4344548, at *4; *see, e.g.*, 49 C.F.R. § 214.1(a) ("The purpose of this part is to prevent accidents and casualties *to employees* involved in certain railroad inspection, maintenance and construction activities.") (emphasis added)). A single district court

has reached the opposite conclusion, finding—without analysis—that § 240.305(a)(1) triggers § 53. *See Fresquez v. Nat'l R.R. Passenger Corp.*, 2004 WL 724459, at *3 (D. Utah Feb. 25, 2004).[5]

Clements invokes the floor statement of a single senator regarding the statute pursuant to which § 240.305 was promulgated. (*See* Clements Br. 13-14.) But even if a single senator could speak for all of Congress (*but see Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs*, 506 U.S. 153, 166, 113 S. Ct. 692, 700 (1993) (giving "no weight to a single reference by a single Senator during floor debate in the Senate")), that assertion surely proves too much, because other regulations promulgated pursuant to the same act cannot credibly be considered safety statutes. *See, e.g.*, 49 C.F.R. § 240.409(e) (providing that locomotive engineer qualification petitions must be signed).

---

[5] In his brief (at 15-16), Clements identifies two additional cases in which a district court found that a violation of § 240.305 was negligence per se. *See Waggoner v. Ohio Cent. R.R.*, 2007 WL 4224217 (S.D. Ohio Nov. 27, 2007), *modified*, 2007 WL 4615788 (S.D. Ohio Dec. 31, 2007); *Correll v. Consol. Rail Corp.*, 266 F. Supp. 2d 711 (N.D. Ohio 2003). But neither *Waggoner* nor *Correll* addressed the separate question whether a railroad's violation of § 240.305 immunizes a plaintiff from his own contributory negligence.

The pertinent legislative history is the preamble to the applicable regulations. That preamble indicates that these regulations were promulgated in response to a train collision between Amtrak and Conrail trains in Chase, Maryland (56 Fed. Reg. 28228, 28228 (June 19, 1991)), which "resulted in 16 deaths and over 170 injuries," and shined a light on "the safety of *railroad passenger traffic*" (S. Rep. No. 100-153, at 2 (1987), *reprinted in* 1988 U.S.C.C.A.N. 695, 696 (emphasis added)). In light of this directly on-point regulatory history, the district court correctly declined to find that this rule was "enacted for the safety of employees."

Clements nevertheless asserts that § 240.305(a) was "enacted for the safety of employees" because it is an "enforcement regulation." (Clements Br. 14.) But that is a *non sequitur*, for there are many reasons to enforce a rule other than to protect employee safety.

For all of these reasons, the district court did not err in holding that CSXT was entitled to present a contributory-negligence defense.

III. CLEMENTS WAS NOT ENTITLED TO INTRODUCE EVIDENCE CHALLENGING THE ENGINEER'S RECERTIFICATION.

Clements contends that the district court abused its discretion in excluding evidence relating to Bridges' recertification as an engineer. (Clements Br. 24-26.) Far from abusing its discretion, the district court was manifestly correct.

The district court excluded this evidence because it was not relevant to any issue in dispute between the parties. (R.109 at 14; R.117 at 7-8.) Specifically, it was undisputed that Bridges had failed to stop at an absolute stop signal and that his failure to stop constituted negligence. Indeed, even if CSXT had contested negligence, the evidence about whether Bridges had been properly recertified would have been irrelevant (and undoubtedly would have been substantially more prejudicial than probative). But with CSXT's negligence not in dispute, the evidence could have served only to prejudice and/or confuse the jury.

In equivalent contexts, courts routinely find that "evidence that a plaintiff or defendant driver in an automobile personal injury case had no valid license is inadmissible unless a causal connection exists between the accident and the absence of a license." *Xpress*

Cargo Sys., Inc. v. McMath, 481 S.E.2d 885, 886 (Ga. Ct. App. 1997); *accord, e.g.*, *Henning v. Union Pac. R.R.*, 530 F.3d 1206, 1218 (10th Cir. 2008); *Rentschler v. Lewis*, 33 S.W.3d 518, 519 (Ky. 2000); *Nesvig v. Town of Porter*, 668 N.E.2d 1276, 1285 (Ind. Ct. App. 1996); *Dewitz ex rel. Nuestel v. Emery*, 508 N.W.2d 334, 337-38 (N.D. 1993); *Amdahl v. Sarges*, 405 N.W.2d 638, 639 (S.D. 1987).

Clements does not distinguish that line of cases. Nor does he identify any theory under which his injuries might be attributable to alleged defects in Bridges' recertification. That, of course, is because there is no connection. Bridges' recertification did not affect whether Clements had preexisting back conditions. Nor did it affect whether Clements fell asleep on duty and thereby violated the cardinal rule that a train must not disobey an absolute stop signal.

Instead, Clements makes three arguments. *First*, he asserts that defects in Bridges' recertification constitute "evidence that Bridges's poor operation of the train was a result of CSX's negligence." (Clements Br. 25.) But, as indicated above, CSXT's negligence was not in dispute. Moreover, it is rank speculation that the alleged defects in Bridges' recertification had any causal

relationship to Bridges' failure to heed the most basic signals in railroading. *Second*, Clements asserts that evidence about Bridges' recertification would have "allow[ed] the jury to determine whether that additional act by CSX caused or contributed to cause, either in whole or in part, the collision and Clements's injuries." (*Id.* at 26.) But if Clements cannot say how this so-called "additional act" could legitimately have altered the jury's resolution of the causation issue, he is not entitled to a new trial just by asserting that it could have. *Third*, Clements contends that the jury should have heard evidence that CSXT violated the engineer certification regulations "[b]ecause the certification regulations are safety regulations." (*Id.*) But Clements does not explain why safety violations will always be relevant, and to the extent he intends to invoke 45 U.S.C. § 53, that statute applies only when a safety violation "contributed to the injury or death" of a railroad employee. Again, Clements cannot say how any alleged defects in Bridges' recertification caused Bridges to run through the red signal, much less cause Clements' alleged injuries.

Thus, the district court did not abuse its discretion in declining to order a new trial.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: April 3, 2013

Respectfully submitted,
s/ Brian D. Netter

James E. Gilson
jgilson@caseygilson.com
Robert S. McEvoy
rsm@caseygilson.com
CASEY GILSON P.C.
Six Concourse Parkway
Suite 2200
Atlanta, GA 30328
(770) 512-0070

Evan M. Tager
etager@mayerbrown.com
Brian D. Netter
bnetter@mayerbrown.com
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 6,797 words.

s/ Brian D. Netter

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system.

The following counsel is a registered CM/ECF user for whom service will be accomplished by the CM/ECF system:

Patrick Hannon
COOK HALL & LAMPROS, LLP
1230 Peachtree St NE Ste 3700
Atlanta, GA 30328-5353

The following counsel are not registered CM/ECF users. They have been served by sending a copy of the foregoing to their address via first-class U.S. mail:

David R. Jones
Law Offices of David R. Jones
23 Country Club View
P.O. Box 738
Edwardsville, IL 62025

Peter Lampros
COOK HALL & LAMPROS, LLP
1230 Peachtree St NE Ste 3700
Atlanta, GA 30328-5353

s/ Brian D. Netter