No. 11-1578

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

GEOFFREY CROWTHER,
Plaintiff-Appellant

v.

CONSOLIDATED RAIL CORPORATION
AND CSX TRANSPORTATION, INC.,
Defendants-Appellees

On Appeal from Judgment of the
United States District Court for the District of Massachusetts
Docket Nos. 09-cv-10334, 09-cv-11467

The Honorable Michael Ponsor

BRIEF OF DEFENDANTS-APPELLEES

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October 18, 2011

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Appellee CSX Transportation, Inc., states that it is 100% owned by CSX Corporation. Defendant-Appellee Consolidated Rail Corporation states that it is jointly owned by CSX Corporation and Norfolk Southern Corporation, both of which are publicly traded and, indirectly, hold more than 10 percent of Conrail's stock.

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MISCELLANEOUS

INTRODUCTION

Plaintiff Geoffrey Crowther sued CSX Transportation, Inc. ("CSXT") and Consolidated Rail Corp. ("Conrail"), alleging claims under the Federal Employers Liability Act ("FELA") for various injuries he suffered over a decades-long career. The case proceeded to trial. At the close of Crowther's evidence, the court granted defendants judgment as a matter of law on several claims. The claims that remained went to the jury, which returned a special verdict in favor of defendants. The jury concluded that Crowther failed to prove that either railroad had acted negligently.

Crowther's efforts to overturn the results of the trial are insubstantial. The district court admitted evidence regarding Crowther's receipt of Railroad Retirement Board ("RRB") disability benefits because it showed that he had opportunity and incentive to malinger, and was therefore relevant to defendants' contention that Crowther failed to mitigate his damages. Crowther appeals the jury verdict on the ground that this evidence was improperly admitted, but binding circuit precedent – *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838, 841 (1st Cir. 1998) – squarely forecloses his argument. And even if it did not,

the facts of this case render Crowther's argument moot: evidence of RRB disability benefits speaks to *malingering*, but Crowther lost on the separate question of *negligence*; he invited any error; and any use of the evidence was harmless.

Crowther also seeks to overturn the trial court's grant of judgment as a matter of law. After closely reviewing the record, the court concluded that certain of Crowther's injuries are barred by the statute of limitations. It also found that Crowther offered insufficient evidence on two of his theories of negligence. The court explained that Crowther simply had not shown what defendants could have done differently that would have precluded his asserted injuries. Because Crowther cannot cobble together enough evidence on these issues to create triable questions of fact, the decision below must be affirmed.

ISSUES PRESENTED FOR REVIEW

1. Whether Crowther's appeal from the district court admission of RRB-benefits evidence is moot or has been waived, and, if neither, whether the district court properly applied *McGrath*, 136 F.3d at 841, which recognizes that trial courts have broad discretion when deciding whether to admit such evidence.

2. Whether the district court properly granted judgment as a matter of law with respect to certain claims based on the statute of limitations.

3. Whether the district court properly granted judgment as a matter of law with respect to certain other claims for failure to prove negligence.

STATEMENT OF FACTS

A. Factual Background.

Crowther began working for Conrail in 1976. A432.[1] In 1999, due to changes in corporate ownership, Crowther was transferred to CSXT. A472. He worked through 2006. A540. During his tenure on the railroad, Crowther held several different jobs, including trackman (A432), driver (A435), assistant foreman (A457), foreman (A461), welding foreman (A464), track inspector (A485-A486), and pilot/flagman (A681).

Crowther alleges that he experienced pain in different parts of his body over the course of his career as the result of cumulative and traumatic injuries. He injured his knees in the 1970s and 1980s. A685-A687; Def. Ex. O-9, SA15-SA17. A 1986 knee x-ray revealed an "ex-

[1] "A" refers to the Appellant's Appendix. "SA" refers to Appellees' Supplemental Appendix. "Add." refers to Appellant's Addendum.

tremely severe degree of osteoarthritis." Def. Ex. YY, SA19. He reported knee and other problems to Conrail in 1992, and again in 1998. Def. Exs. N-1, N-2, SA3-SA4. In 2002, he went to his doctor complaining of, among other things, neck pain. A944. As a result, his doctor ordered an x-ray, which revealed that Crowther had "degenerative disc disease" in his neck. A946.

Crowther claims that he was injured on September 8, 2005, while working in New Bedford after a spike he attempted to drive bounced back and cut his left arm, requiring eleven stitches. A498-A499, A502. Crowther did not miss any work as a result of the injury. A503-A504; A891.

Crowther contends that in late 2006 he experienced increased pain in his neck. A507-A509. He had a fusion surgery in January 2007. A512. Subsequently, Crowther also had surgery on his left thumb in February 2007 (A514); on his knees in April 2007 (A517); and, on his left elbow in 2009 (A530).

Because of the fusion surgery, the RRB deemed Crowther disabled. A537-A538. Crowther has not returned to work since 2006. A540.

Since going on disability, Crowther has engaged in a substantial amount of physical activity, including swimming five times a week (A545, A664), walking four miles a day (A533; A665-A666), and bicycling multiple days each week (A533; A665-A666). Crowther, who declined to participate in CSXT's vocational rehabilitation program (A862-A863), admits that he has not even looked for other work (A857-A858) because he "would lose [his] disability from the Railroad Retirement Board" if he accepted alternative employment (A894).

B. Proceedings Below.

1. Crowther initially filed suit in the Philadelphia County Court of Common Pleas. His first action, filed on September 21, 2007, alleged cumulative injuries to several parts of his body as a result of his work on the railroads. Dkt. No. 39, Ex. A. The state court ultimately dismissed the action, without prejudice to refile in Massachusetts. A41; Dkt. No. 39, Ex. B. Separately, Crowther filed a different action, also in the Philadelphia County Court of Common Pleas, asserting an injury to his left arm resulting from the September 8, 2005, incident. That case, too, was dismissed without prejudice to refile in Massachusetts. A45.

On March 5, 2009, Crowther filed his first federal complaint against CSXT and Conrail. A36-A41. Crowther again alleged cumulative injuries to several different parts of his body, including his back, shoulder, neck, knees, left elbow, and left thumb. A36-A42. But, unlike the earlier state action, Crowther's federal complaint also included separate claims for aggravation injuries. A38, ¶ 11. The complaint did not specify any particular incident or event that caused his alleged injuries, but instead asserted that they resulted from "exposure to excessive and harmful cumulative trauma, repetitive stress, repetitive motion, force, awkward postures, and/or vibration." *Id.* Crowther asserted a wide variety of possible liability theories. A38-A41.

On September 3, 2009, Crowther filed a second federal complaint against CSXT in connection with the September 8, 2005, injury to his left arm. A43-A46.[2]

2. The court granted defendants partial summary judgment. Dkt. No. 45. Crowther conceded there was insufficient evidence to support his back and shoulder claims (*id.* at 2), and the court found that Crowther's claim for aggravation to his neck was barred by the statute

[2] Crowther filed both federal complaints in the Boston Division, but they were transferred to the Springfield Division.

of limitations period (*id.* at 9).[3] Following entry of partial summary judgment, Crowther's remaining claims were for the September 8, 2005, injury to his arm; for injuries to his neck, knees, left elbow, and left thumb; and for aggravation injuries to his knees, left elbow, and left thumb. *Id.* at 11.

3. On November 8, 2010, defendants filed a motion in limine for leave to introduce evidence of Crowther's receipt of RRB disability benefits. Dkt. No. 75 & 76. In support of their motion, defendants identified evidence that suggested Crowther was malingering, including evidence of Crowter's failure to seek work and failure to participate in vocational rehabilitation. Citing *McGrath*, 136 F.3d at 840, defendants noted that RRB-benefits evidence "is admissible on the issue of Plaintiff's credibility, malingering and failure to mitigate damages." Dkt. No. 76, at 1. Defendants further explained that the evidence in this case showed that Crowther "lacked any motivation to return to work because he was receiving disability payments near or equal to his net salary." *Id.* at 4-5.

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[3] Crowther does not challenge this ruling in his opening brief and has thus waived any argument in connection therewith. *See Ondine Shipping Corp. v. Cataldo*, 24 F.3d 353, 356 (1st Cir. 1994) ("it is settled law that an appellant waives arguments which should have been, but were not, raised in its opening brief").

On December 23, 2010, the court issued a docket order granting defendant's motion and advising that the court would "give a limiting instruction" at an appropriate time. Add. ii.

4. Trial on Crowther's consolidated complaints began on January 3, 2011. Crowther testified (A428-A552, A657-A742, A758-A899), as did his wife, Sally Crowther (A909-A928). Plaintiff also offered the testimony of: Michael Shinnick, who testified as to ergonomics (A168-A310); Everett Cooley (A328-A388) and Charles Mead (A571-610), railroad employees; and various doctors, including Robert Cowan (A403), Andrew Lehman (A617), Steven Wenner (A620, A647), Martin Luber (A933), and Allan Baustin (A942-A971). Defendants called a single witness, Roy Squires, a CSXT employee. A1058, A1113.

Crowther pursued several theories. He contended that the September 8, 2005, injury to his arm was the result of CSXT having negligently failed to provide him a safe workplace. With respect to his allegations of cumulative injury to his neck, knees, left elbow, and left thumb and cumulative aggravation injuries to his knees, left elbow, and left thumb, Crowther asserted three distinct theories of negligence:

- Lack of sufficient ergonomics program;

- Inadequate tools; and
- Lack of manpower.

A1038-A1041.

5. At trial, it was Crowther himself who, on direct examination, first introduced evidence that he was receiving RRB disability benefits. *See* A541-A543. Crowther answered "yes" to his counsel's question, "since you've left the railroad, you're on a disability, correct?" A542. And, likewise, it was Crowther himself who first introduced evidence of how much he was receiving in RRB disability benefits, answering "2,700 and something dollars" when asked by his counsel, "What do you get monthly from the disability?" *Id.*

Recognizing that malingering was "a huge issue * * * in the case" given Crowther's "admi[ssion] on the stand that he could very well go out and be earning wages right now" (A800-A801), the trial court reaffirmed its pretrial ruling allowing the defendants to cross-examine Crowther on his receipt of RRB disability benefits (A805-A810). Consistent with that ruling, the trial court issued a lengthy limiting instruction, which informed the jury of the limited purpose for which the evidence could be considered:

I want to just stop for a minute to give an instruction to the jury so that you'll know why I'm permitting this line of questioning, because ordinarily I wouldn't but there are special reasons for why I'm doing it here.

There's been some reference obliquely or on a couple of occasions during the trial to the fact that the plaintiff, Mr. Crowther, may be receiving some benefits from the railroad.

He worked for those benefits and he's entitled to those benefits. The fact that he's receiving benefits should not play a part in your consideration of any award of damages in this case, if you reach the issue of an award of damages.

In other words, if a person is receiving benefits that they earned during their work life and they bring an action for damages, it is not appropriate for the jury to subtract those benefits from any damage award.

By saying that, I'm not suggesting that you should impose damages and I'm not suggesting that you should find for the plaintiff or not find for the plaintiff. That's something that's up to you.

It's important for you to have in mind, as you listen to any evidence with regard to any benefits that Mr. Flynn may question the witness about, that in considering damages, if you reach that issue, you should not deduct from any damage award the amount of benefits that the plaintiff is earning because he's earned those benefits through the work that he did while he was a railroad worker.

I'm allowing the attorney for the defendant here, Mr. Flynn, to question Mr. Crowther about the issue of benefits for one very limited reason and that is that an individual who is claiming some wage loss, either full or partial wage loss, has an obligation, if he's asking for compensation or damages to replace lost wages, to engage in whatever work he is capable of engaging in.

> In other words, he has an obligation if he's going to ask a third party to replace his wages to do whatever work he can to get the wages himself before asking someone else to pay them.
>
> Mr. Flynn is permitted to ask questions about the benefits that the plaintiff here has been receiving if he wishes to argue to you later that the reason that the plaintiff is not working is not because he's unable to work but because he has an income stream which allows him to pay for the expenses of ordinary living, and that's an argument that the defendant is permitted to make based upon the fact that the plaintiff may have a certain income stream.
>
> But keep in mind that I'm only allowing that questioning on the topic of benefits for that reason and you should have firmly in mind that if you do reach the issue of damages, that will be up to you, if you do reach the issue of damages, you should not deduct from any damage award the amount of benefits that the plaintiff may be receiving as a result of some entitlement he earned during his work life.

A850-A852.

Notwithstanding this detailed and legally correct limiting instruction, Crowther repeatedly argued to the jury that his (alleged) damages *should* be offset by the disability benefits he received. *See*, *e.g.*, A542, A801, A803, A894, A1182. It was, the trial court said, "ironic" that Crowther had asked the jury to offset his disability benefits given the court's instruction on the collateral source rule and the defendants' agreement that an offset would indeed be improper. A1190-A1191.

Crowther's counsel explained that he was attempting to "negotiate" with the jury. A1191.

6. At the close of plaintiff's evidence, defendants moved for judgment as a matter of law. After hearing argument (A972-A1038), the court granted the motion in part. Add. iii. The court first pronounced an oral judgment, and later elaborated its reasoning in a written opinion. A1038-A1042; Add. iv-xi.

The court concluded that some of Crowther's claims were barred by the statute of limitations. As for Crowther's claim of injury to his neck, the court – citing evidence from Crowther and his doctors – found that "the jury could not reasonably have found that Plaintiff reasonably should not have known of the relationship between his work and his neck pain in 2002." Add. vi-vii; *see also* A1040.[4] As for Crowther's claim of injury to his knees, the court – again citing evidence from Crowther and his doctors – found that "the only reasonable conclusion the jury could draw was that Plaintiff should have known, prior to Sep-

[4] In addition to finding plaintiff's neck claim barred by the statute of limitations, the court also found that defendants were entitled to judgment on the claim because plaintiff "failed to meet his burden in showing a causal medical connection between his neck injury and his work." Add. vii n.1. Crowther does not challenge that determination on appeal.

tember 21, 2004, of his knee injuries and their potential relationship to his work." Add. vii; *see also* A1040. Noting that "[i]t is undisputed * * * that the limitations period for Plaintiff's claim of aggravation of injury to his knees, left elbow, and left thumb began on March 5, 2006," the court also determined that "all of [Crowther's] claims of aggravation of injury are time-barred" given his "testi[mony] on redirect examination that in 2005 he became aware that his injuries were work-related." Add. vi; *see also* A1040.

Additionally, the court rejected Crowther's liability theory regarding an ergonomics program because it was "way too vague to demonstrate the sort of specific negligence that is needed to sustain the plaintiff's burden." A1038-A1039; *see also* Add. x. The court likewise found that "there was not enough evidence" for Crowther's claim of inadequate tools. A1039; *see also* Add. ix. Although the court found that "the evidence is razor thin with regard to the sufficiency to support a claim for the kind of injuries that the plaintiff has suffered here based upon inadequacy of manpower," the court permitted the manpower theory to reach the jury. A1039.

The combined effect of these rulings was to limit the case to Crowther's claim for the September 8, 2005, arm injury and to his claims for injuries to his left thumb and left elbow resulting from an alleged lack of manpower. A1041.

The jury was instructed on January 20, 2011, and provided a special verdict form. A47-A53. It reached a verdict that same day.

7. With respect to each of the remaining claims, the jury concluded that Crowther had failed to prove that the defendants had acted negligently. As for Crowther's claims for injury to his left thumb and left elbow, the jury found that he had not "proved by a preponderance of the evidence" that either CSXT or Conrail "was negligent by failing to provide Plaintiff with sufficient manpower to perform his work safely." A48, A49. As for plaintiff's claim for injury to his arm, the jury answered "no" as to whether Crowther "proved by a preponderance of the evidence that Defendant CSX Transportation was negligent by failing to provide Plaintiff with a reasonably safe workplace on September 8, 2005." A51.

8. The court entered judgment in the two consolidated matters on January 21, 2011. A54-A55. On February 18, 2011, Crowther moved to

alter the judgment or for a new trial (Dkt. No. 131), which the court denied on April 19, 2011. Crowther noticed his appeal on May 19, 2011. A56.

STANDARD OF REVIEW

The Court "review[s] the trial court's admission of collateral source evidence for abuse of discretion." *McGrath*, 136 F.3d at 841. In admitting such evidence, a court employs a balancing approach pursuant to Fed. R. Evid. 403. *Id.* Because a trial court's fact-intensive and context-specific balancing "is entitled to considerable deference," "[o]nly rarely – and in extraordinarily compelling circumstances – will [this Court], from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect." *Fitzgerald v. Expressway Sewerage Constr., Inc.*, 177 F.3d 71, 75 (1st Cir. 1999) (quotation omitted).

The Court "review[s] the grant of judgment as a matter of law de novo." *Cruz-Vargas v. R.J. Reynolds Tobacco Co.*, 348 F.3d 271, 275 (1st Cir. 2003).

SUMMARY OF ARGUMENT

The district court held a nine-day trial. Crowther entered the testimony of ten witnesses. Yet, at bottom, Crowther was unable to prove his claims. The record revealed that several of his claims were untimely. With respect to the claims that were timely, the trial court properly rejected two of Crowther's liability theories (lack of ergonomic programs and lack of adequate tools) for insufficient evidence, explaining that "it isn't a close call." A1037. And the jury concluded that Crowther's third theory of negligence (lack of manpower), similarly failed, as did Crowther's claim stemming from the September 8, 2005 incident. Crowther's arguments in favor of overturning the jury verdict and the court's order entering judgment as a matter of law are unpersuasive.

A. Crowther seeks reversal of the jury verdict solely because he believes the trial court improperly admitted evidence of his receipt of RRB disability benefits. The district court allowed defendants to question Crowther about his benefits, as it was probative of his opportunity and incentive to malinger. Crowther argues that such evidence is *per se* inadmissible, but this Court rejected precisely that argument in *McGrath*, 136 F.3d at 841. *McGrath* concluded that trial courts *may*

admit RRB benefits evidence pursuant to Federal Rule of Evidence 403 balancing, particularly where a limiting instruction safeguards against improper use of the evidence. *Id.* That is exactly what the court did here.

Although *McGrath* in any event disposes of Crowther's contention that admission of the RRB-benefits evidence was erroneous, there are several reasons why this Court need not even reach Crowther's contention. The RRB evidence was irrelevant to the verdict actually rendered because it relates only to *malingering*, but Crowther lost the verdict because he failed to prove *negligence*. Moreover, even if the jury had found liability, it was *Crowther*, not defendants, who argued that the jury should offset his damages by the amount of his disability benefits. Thus, had the jury had occasion to consider the RRB payments as satisfaction for his asserted injuries, it would have been error Crowther invited. Finally, even if using evidence of disability benefits to prove that plaintiff is a malinger were improper (which it is not), introduction of such evidence in this case was necessarily harmless given the other evidence of malingering, including Crowther's own admissions.

B. Crowther fares no better in seeking to overturn the trial court's grant of judgment as a matter of law on several of his claims. As to timeliness, the court below determined that Crowther knew or should have known prior to the limitations period that his neck and knee pains were connected to his work. Medical records and other evidence establish this conclusively.

With respect to the entry of judgment on his ergonomics and inadequate tools theories, Crowther's appeal must fail because his did not carry his burden of proving that defendants breached a duty of care. Crowther offered no particularized evidence as to what ergonomics measures or tools would have prevented his alleged injuries. Rather, as the trial court concluded, his vague, generalized contentions that ergonomics programs and tools could have been different fall far short of establishing any basis upon which a reasonable jury could find negligence.

ARGUMENT

I. THE ADMISSION OF RAILROAD RETIREMENT BOARD BENEFITS DOES NOT PROVIDE A BASIS TO DISTURB THE JURY VERDICT.

It is beyond dispute that "[u]nder the FELA * * * 'an injured plaintiff has a duty to mitigate his damages.'" *Fashauer v. N.J. Transit*

Rail Operations, Inc., 57 F.3d 1269, 1288 (3d Cir. 1995) (quoting *Jones v. Consol. Rail Corp.*, 800 F.2d 590, 593 (6th Cir. 1986)). *See also, e.g., Russell v. Nat'l R.R. Passenger Corp.*, 189 F.3d 590, 596 (7th Cir. 1999); *Wilson v. Union Pac. R.R.*, 56 F.3d 1226, 1232 (10th Cir. 1995); *Schneider v. Nat'l R.R. Passenger Corp.*, 987 F.2d 132, 136 (2d Cir. 1993). Accordingly, the defendant in a FELA action is entitled to introduce evidence that a plaintiff malingered – and thus failed to mitigate his or her damages. *See, e.g.*, *Yauch v. S. Pac. Transp. Co.*, 10 P.3d 1181, 1188 (Ariz. Ct. App. 2000) (reversing and remanding for new trial where court excluded "evidence relevant to [the railroad's] defense that [plaintiff] failed to reasonably mitigate his damages"); *Mikus v. Norfolk & W. Ry.*, 726 N.E.2d 95, 110 (Ill. App. Ct. 2000) (same); *Gautieri v. CSX Transp., Inc.*, 2010 WL 2347059, at *6-*7 (Pa. Super. Ct. 2010).

Reviewing the record here, the trial court concluded that malingering was "a huge issue." A800. It found Crowther's receipt of RRB disability benefits relevant to the malingering defense, as the payments are probative of Crowther's opportunity and incentive to malinger. A805-A807. The court thus permitted defendants to question Crowther

about his benefits, and it issued a limiting instruction that explained RRB benefits may not be used to offset Crowther's damages. *Id.*

Crowther appeals the jury verdict *solely* because the district court admitted this evidence. Crowther claims that RRB evidence is unfairly prejudicial, and seeks a *per se* rule barring admission of RRB benefits data in all circumstances. Crowther does not directly explain how the evidence causes unfair prejudice. Read fairly, plaintiff's brief could be understood as suggesting two possible theories. Crowther might be arguing that the jury could have improperly used the RRB benefits (a collateral source payment) to offset his asserted damages. Pl. Br. 24-25 (arguing collateral source rule).[5] Alternatively, Crowther might be arguing that it was unfair for defendants to use the evidence to show malingering. Pl. Br. 23 ("the railroads introduced the testimony to show alleged malingering"). Yet neither argument, either alone or in combination, would warrant reversal.

Regardless, Crowther's claim is – as he apparently recognizes (*cf.* Pl. Br. 24) – barred by binding circuit precedent. In *McGrath*, 136 F.3d at 841, this Court rejected exactly the argument Crowther makes here,

[5] Because plaintiff did not paginate his brief, we cite to the page numbers affixed to his brief by the Court's electronic file stamp.

finding that a trial court may admit RRB evidence pursuant to Federal Rule of Evidence 403. A court must weigh its probative value with any unfair prejudice, and consider a limiting instruction. *Id.* Here, the district court followed *McGrath* scrupulously. There was no error at all, much less "extraordinarily compelling circumstances" (*Fitzgerald.*, 177 F.3d at 75) that would justify reversal. Crowther may disagree with *McGrath*, but that decision is both binding and correct.

But before turning to *McGrath* and the general admissibility of RRB-benefits evidence, it is important to note that several aspects of this case in particular render Crowther's challenge to its admission here irrelevant.

A. The RRB Evidence Is Irrelevant To The Jury Verdict.

First, the jury's verdict moots Crowther's appeal insofar as it relies on the supposedly erroneous admission of the RRB-benefits evidence. The jury found that the railroads were not *negligent*. That finding completely disposes of his claims for injury to his left thumb, left elbow, and left forearm. Whether the railroads breached a duty of care is distinct from – and prior to – any question of whether Crowther failed to mitigate his purported damages because he malingered. Crowther

does not, and cannot, suggest that the jury's negligence determination was in any way affected by the evidence that he is receiving RRB disability benefits. Thus, there can be no argument that the jury's dispositive negligence finding would have been different but for the admission of that evidence.

Second, even if the issue were not moot in light of the jury's negligence determination, to the extent Crowther argues that he was unfairly prejudiced because the jury might have treated RRB benefits as an offset to his damages, he expressly invited the jury to do precisely that at trial. Having *asked* the jury to offset any damages by the amount of his disability benefits, Crowther cannot now assert that the possibility that the jury might actually have done so (had it found defendants negligent) constitutes reversible error.

Third, any contention that introducing evidence of RRB disability benefits is an unfair way of proving that plaintiff had the opportunity and means to malinger is not only wrong as a general matter, but certainly fails here, where its admission, if error at all, was rendered harmless by the other evidence of malingering.

1. *The defense verdict on negligence renders the RRB evidence irrelevant.*

Crowther contends, in general terms, that the RRB evidence was prejudicial, and thus the verdict should be overturned. Pl. Br. 23. But there is a fundamental gap in Crowther's logic: the RRB evidence is relevant to *malingering*, while the jury decided against Crowther on *negligence*. His argument, accordingly, is beside the point.

To reverse on an evidentiary ground, Crowther must demonstrate that "a substantial right" was "affected." *Espeaignnette v. Gene Tierney Co.*, 43 F.3d 1, 9 (1st Cir. 1994) (quotation omitted). Erroneous admission of evidence can support reversal only if the Court concludes "with fair assurance that the judgment was substantially swayed by its admission." *Zachar v. Lee*, 363 F.3d 70, 77 (1st Cir. 2004) (quotations and alterations omitted). Where "'it is highly probable that the error did not affect the outcome of the case,'" a judgment may not be disturbed. *Id.* at 76 (quoting *Moulton v. Rival Co.,* 116 F.3d 22, 26 (1st Cir. 1997)).

Here, it is entirely ***im***probable that the RRB-benefits evidence swayed the jury's verdict on *negligence* – a verdict that was dispositive of the claims before it. Presented with a special interrogatory, the jury was asked whether either CSXT or Conrail "was negligent by failing to

provide Plaintiff with sufficient manpower to perform his work safely." A48, A49. The jury answered "no" to both. A48, A49. Likewise, with respect to the September 8, 2005, injury to plaintiff's arm, the jury answered "no" as to whether CSXT "was negligent by failing to provide Plaintiff with a reasonably safe workplace." A51. The jury found for defendants because Crowther failed to prove either railroad breached a duty of care.

As we noted, Crowther appears to argue that the RRB-benefits evidence was somehow unfairly prejudicial, either because the jury might have considered it as an offset against his damages or because it unfairly showed him to be a malinger. Yet neither the amount of Crowther's purported damages nor Crowther's failure to mitigate those damages has any bearing whatsoever on the issue of whether defendants acted negligently. Indeed, Crowther does not even assert, much less show, that the RRB-benefits evidence had any influence on the jury's negligence determination. Because the RRB-benefits evidence was not relevant to the jury's dispositive negligence verdict, its use in this case was necessarily harmless.

2. *Had the jury offset plaintiff's asserted damages by the amount of his disability benefits, it would have been at plaintiff's invitation.*

Moreover, if Crowther contends that evidence of RRB disability benefits is unfairly prejudicial because a jury might improperly offset those payments against the plaintiff's damages, he has waived that argument here. *See* Pl. Br. 24.[6] Throughout the trial, Crowther – and only Crowther – *asked* the jury to treat his RRB disability payments as a set-off against his asserted damages. Having disavowed the collateral source rule below, Crowther cannot change course and rely on it for his appeal.

Not only was it Crowther who first introduced evidence of his RRB disability benefits during his direct examination (*see* A541-A543), but it was he and he alone who asked the jury to offset any damages awarded by the amount of his disability benefits. On direct examination, Crowther's counsel asked him, "If we were to do the math and compare what you made at the railroad when you left in 2006 and subtract what

[6] To the extent that any court excludes RRB evidence as unfairly prejudicial, it is because a jury could treat those payments as an offset against damages. *See Eichel v. N.Y. Cent. R.R.*, 375 U.S. 253, 255 (1963) (viewing the potential "misuse" of RRB evidence as "being considered by the jury for the incompetent purpose of a set-off against lost earnings").

you get on disability, would that indicate – would that be a fair representation of your wage loss in this case?" A542. Crowther agreed, answering "Yes." A543.

Crowther underscored this point on redirect. In response to a question posed by his attorney, he expressly affirmed that he was "not asking the jury to pay [him] all of [his] lost wages," but was instead "only asking the jury to pay [him] the difference between what [he is] getting on disability and what [he] made on the railroad." A894.

Lest the jury misunderstand what he was requesting, Crowther's counsel argued as follows during closing:

> What we're asking you to consider awarding Geoff, if you decide that we proved our case, is we're looking for you to consider compensating Geoff for the difference between what he was making on the railroad and what he is getting on disability.
>
> * * *
>
> What we do know is since he left the railroad, his disability provides for approximately $30,000 a year net. Okay. That's what we're talking about here. If we were in here saying you ought to give Geoff 60,000 bucks a year for the last four years, $240,000, we would be double-dipping. We would be asking for too much. We would be overstating our case. That's not what I'm asking for. That's not what Geoff is asking for.

A1182. *See also* A1185. There was no mistake in Crowther's argument – he *asked* that his disability benefits be offset against any possible award.[7]

Moreover, *only Crowther* treated RRB benefits as subject to an offset. In granting defendants' motion in limine to introduce RRB evidence, the district court noted that it would "give a limiting instruction." Endorsed Order (Dec. 23, 2010) (Add. ii). Far from objecting to the court's limiting instruction, defense counsel told the court:

> I just for the record reiterate how important it is to the defendant's position that limiting or cautionary instruction be given, and not to reduce his recovery by the amount he's getting. I understand that my brother's strategic position may be to ask them to do that, but we want to make sure that there is a cautionary instruction akin to the one that Judge Young gave in the *McGrath* case.

A810.

The court issued just such a limiting instruction, one that was particularly detailed and lengthy. *See*, *supra*, 10-11; A850-A852. The court explained, in part, that "if you do reach the issue of damages, you

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[7] Crowther's counsel made the same arguments to the trial court. *See*, *e.g.*, A801 ("What I'm asking, Your Honor, is for the – for the difference between what he made at the railroad and what he is getting on disability. I'm not asking the jury to compensate him for his lost wages. * * * I'm not – we're not here double-dipping or asking for extra money."); s*ee also* A803.

should not deduct from any damage award the amount of benefits that the plaintiff may be receiving as a result of some entitlement he earned during his work life." A852; *see also* A805-A806 (discussing instruction); A809 (same). Not only did the court give a limiting instruction during the presentation of the evidence, but reiterated that instruction in its charge to the jury, informing the jury that "you may not consider Mr. Crowther's receipt of disability benefits with regards to his damages," and that "[i]f you award damages, you should not deduct an amount he received as disability benefits from the award." A1222.

In short, the *only* suggestion that RRB disability benefits could be used to offset Crowther's damages came from his own counsel. Following closing argument, the court noted this "ironic issue":

> When the issue of the disability payments came up, I looked at the jury and I instructed them that they were not permitted to deduct from any damage award the railroad – the disability benefits that Mr. Crowther has been receiving, and I understand that's what the law is. It's a collateral source and there really wasn't any disagreement from [defendants' counsel] that it would be improper for the jury to deduct the disability benefits from any award they gave to Mr. Crowther for back wages.

A1190-A1191. The court speculated that Crowther may have argued for an offset "as a gesture perhaps to show reasonableness and restraint on

the part of the plaintiff." A1191. Crowther's counsel agreed, noting that "I'm trying to, you know, negotiate with them, if you will " *Id.* Crowther apparently saw a benefit in arguing for an offset.

Having affirmatively abandoned the collateral source rule at trial, Crowther cannot change course on appeal. Any suggestion that disability benefits should be treated as an offset against his asserted damages was an argument that Crowther introduced. It is well-established that "a party may not appeal from an error to which he contributed, either by failing to object or by affirmatively presenting to the court the wrong law." *Puerto Rico Hosp. Supply, Inc. v. Boston Scientific Corp.*, 426 F.3d 503, 505 (1st Cir. 2005) (quotation omitted); *see also Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 409 (1st Cir. 2002). He has waived reliance on the collateral source rule in this proceeding.

Crowther is bound by the strategic decisions he made below. The trial court allowed defendants to use evidence of Crowther's disability benefits – evidence which showed that Crowther had opportunity and incentive to malinger – to support their failure-to-mitigate defense. But the court, at the urging of defendants, carefully instructed the jury that it could not treat those benefits as a setoff against damages. Crowther

took a different tack. He decided to "negotiate" with the jury, telling them that he would not "double dip." That the jury did not return a verdict to Crowther's liking does not entitle him to change course now.

3. *The substantial weight of the evidence – including plaintiff's own admissions – demonstrates Crowther malingered.*

Because Crowther cannot premise his argument on the collateral source rule, he may attempt to argue that the RRB-benefits evidence prejudiced him because it painted him as a malingerer. *See* Pl. Br. 16. But, as we will explain below, that is a perfectly acceptable use of such evidence. Indeed, the evidence was admitted precisely *because* it is probative of Crowther's opportunity and incentive to malinger. Given its relevance, and the court's limiting instruction, admitting the evidence was entirely proper.

Yet, even if one assumes for sake of argument that it was somehow unfair to use Crowther's receipt of RRB disability benefits to prove malingering, Crowther's argument still fails. If its admission were error at all, that error would be harmless given the other evidence of malingering in this case.

Physical activity. The evidence at trial established that Crowther has engaged in an impressive variety of physical activity since going on disability. Indeed, Crowther admitted to:

- Walking up to four miles, every day (A545);
- Swimming laps, five days a week (A545, A664);
- Bicycle riding three times a week (A533; A665-A666);
- Fishing (A545-A46; A668-A669);
- Snowshoeing (A670); and
- Kayaking (A667).

Needless to say, such activity is, at minimum, suggestive of malingering.

Refusal of vocational rehabilitation. On August 30, 2007, CSXT sent Crowther a letter that informed him of its Vocation Rehabilitation Program and described the free services CSXT offers for training and job placement. A858-A859. Follow-up letters were sent as well. A862-A863. But Crowther never responded. *Id.* This, too, was evidence that he was not actively seeking employment in order to mitigate his damages. *See Wieczorek v. S. Pac. Transp. Co.*, 1998 WL 314365, at

*1-*3 (10th Cir. 1998); *Duren v. Union Pac. R.R.*, 980 S.W.2d 77, 80 (Mo. Ct. App. 1998); *Gautieri*, 2010 WL 2347059, at *6-*7.

Failure to look for work. Providing evidence that he had failed to mitigate his damages, Crowther conceded that he had never even looked for alternative employment. As elicited on cross-examination:

> Q. (By Mr. Flynn) You have not looked for any work since you left the railroad on December 18th of 2006, have you?
>
> A. I can't.
>
> THE COURT: The answer is have you?
>
> THE WITNESS: No. No.
>
> THE COURT: Okay.
>
> Q. (By Mr. Flynn) You've done nothing to even try to get another job, have you?
>
> A. No.

A857-A858.

Admissions of malingering. Finally, in what amounts to direct evidence of malingering, Crowther actually *admitted* that the reason he was neither working nor seeking work was so that he could retain his disability benefits. On plaintiff's *direct* examination, for example, there was the following set of questions and answers:

> Q. Why haven't you tried – if you couldn't work at the railroad, why didn't you try to get a job somewhere else off the railroad since you got hurt?
>
> A. Well, primarily for my health and financial security.
>
> Q. Okay. Would you getting a job affect your disability?
>
> A. Yes.

A540. And on plaintiff's redirect, there were the following questions and answers:

> Q. (By Mr. Joyce) Why aren't you working?
>
> A. Umm, well, it's like a catch-22. If I present myself that – basically because of health insurance, number one, and the other reason is I could lose my benefits if – you know, even if I volunteer and I'm stocking shelves at the survival center, somebody could – somebody could say, oh, look at that, he's stocking shelves. He can work at Stop & Shop for eight bucks an hour.
>
> Q. Is it your understanding that if you were working, that you would lose your disability from the Railroad Retirement Board?
>
> A. Yes.
>
> Q. And that's the reason you're not working?
>
> A. Yes.

A894. Thus, Crowther admitted that he was not looking for work because finding a new job would cost him the disability benefits. Crowther's counsel likewise stated that "all of the doctors were pretty clear

that he's not disabled from light and sedentary work. He could work." A802.[8]

* * *

Looking at this evidence, the district court stated that malingering was "a huge issue." A800. *See also* A809 ("I think this case is a case where the issue of malingering is quite prominent."). The court noted that "[w]e have a 59-year-old-guy who can do light and sedentary work, who has some college, and who is able to engage in quite an impressive variety of physical activities that many other 59-year-old people actually can't." A809; *see also* A800. Recognizing that Crowther would "be asking for lost wages," the court commented that it did not "know how you can ask for lost wages when he's admitted on the stand that he could very well go out and be earning wages right now." A800-A801.

Given the substantial evidence in the record that plaintiff malingered, any suggestion that the RRB evidence alone substantially influ-

[8] Lest there be any doubt, this point was made explicitly by Crowther's counsel during a deposition: "the reason he is not working is because he is on a disability annuity that he's earned for 31 plus years of working the railroad. That's why he is not working okay." Dkt. No. 106, Ex. A (Dep. of Martin J. Luber, at 98). At trial, Crowther's counsel made a similar remark: "He cannot – one of the things about the disability, Your Honor, is he cannot work or he loses his disability." A801.

enced the jury is not plausible. Accordingly, even if use of the RRB-benefits evidence were somehow an unfair form of proof on this point, the admission of the evidence here was harmless and therefore provides no basis for reversal. *Zachar*, 363 F.3d at 77; *Tiller v. Baghdady*, 244 F.3d 9, 15 (1st Cir. 2001).

B. The District Court Correctly Admitted RRB Benefits Evidence.

Beyond these thresholds issues, Crowther's RRB argument fails on its merits. Evidence of RRB disability benefits *is* a permissible way for defendants to show that a FELA plaintiff has the opportunity and incentive to malinger. This Court held so explicitly in *McGrath*, 136 F.3d at 841. And the district court faithfully implemented this Circuit's binding precedent. Crowther cannot come anywhere close to showing the "rare," "extraordinarily compelling circumstances," that would justify reversal of "a district court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect.'" *Fitzgerald*, 177 F.3d at 75. The jury verdict thus must be affirmed.

1. McGrath *is correct and binding.*

In *McGrath,* this Court provided flexibility for district courts to admit RRB-benefits evidence in the course of FELA actions. *McGrath*

affirmed the district court's admission of evidence that the plaintiff was receiving RRB disability benefits – evidence that was admitted, subject to a limiting instruction, "to show [the plaintiff's] lack of motivation for returning to work." 136 F.3d at 841. That is precisely the circumstance here.

Crowther appears to acknowledge that *McGrath* forecloses his argument, noting he "is both mindful and respectful of this Court's reasoning in *McGrath*." Pl. Br. 24. But Crowther nonetheless suggests that "*McGrath* is ripe for review." *Id.* Crowther did not, however, request *en banc* hearing in this case. *Cf.* Fed. R. App. P. 35(b) (permitting a petition for an initial hearing *en banc*). And "a new panel is bound by prior panel decisions directly on point absent intervening and binding authority which undermines or calls into question the prior panel's judgment." *United States v. Reyes*, 386 F.3d 332, 335 (1st Cir. 2004). Because it is directly on point, and no intervening authority calls it into question, *McGrath* disposes of Crowther's appeal.

Furthermore, Crowther offers no reason to revisit *McGrath*. There is "a strong presumption that relevant evidence should be admitted." *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1343 (3d Cir. 2002).

In fact, relevant evidence is admissible unless excluded by rule, statute, or the Constitution. *See* Fed. R. Evid. 402; *see also Corley v. United States*, 129 S. Ct. 1558, 1570 (2009). Evidence of RRB disability benefits is not excluded by rule, statute, or the Constitution. Accordingly, because it is relevant to the issue of whether a FELA defendant has satisfied his or her duty to mitigate damages, it is admissible.

Whether to admit the evidence is a question committed to the district court's discretion under Federal Rule of Evidence 403. *See McGrath*, 136 F.3d at 841. Pursuant to that Rule, the district court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. But the mere fact that certain evidence may not be admissible for one purpose (for example, offsetting a plaintiff's damages) does not mean that such evidence is not admissible for another purpose (for example, proving a plaintiff's malingering). Indeed, Federal Rule of Evidence 105 directs that when evidence is admissible for one purpose but not another, "the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." As this Court has found, such a li-

miting instruction provides an adequate safeguard against the improper use of collateral source evidence. *McGrath*, 136 F.3d at 841.

Accordingly, the district court has substantial discretion when deciding whether to admit collateral source evidence, such as the RRB benefits evidence at issue here. *Williams v. Drake*, 146 F.3d 44, 47 (1st Cir. 1998) ("Trial courts have significant leeway in determining whether to admit or exclude evidence under the aegis of Rule 403."). That substantial discretion necessitates a particularly deferential standard of appellate review: "This latitudinarian approach dictates that 'only rarely – and in extraordinary circumstances – will [this Court], from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect.'" *Id.* (quoting *Freeman v. Package Mach. Co.,* 865 F.2d 1331, 1340 (1st Cir. 1988)).

In arguing to the contrary, Crowther contends that *Eichel*, 375 U.S. at 253 (per curiam), established a rule categorically barring RRB evidence. *McGrath*, however, considered *Eichel*, and rejected the idea that it "requir[es] the per se exclusion of collateral source evidence in FELA cases." 136 F.3d at 841; *see also Valentine v. CSX Transp., Inc.*,

2011 WL 2066705, at *2 (S.D. Ind. 2011). The Court explained that "the narrow[] question in *Eichel* was simply 'whether or not to uphold the district court's discretionary ruling,'" which found RRB benefits unduly prejudicial in the particular context of that case. *McGrath*, 136 F.3d at 841 (quoting *DeMedeiros v. Koehring Co.*, 709 F.2d 734 (1st Cir. 1983)). Recognizing that "Rule 403 'confer[s] broad discretion upon the district court to weigh unfair prejudice against probative value'" (*id.* (quoting *DeMedeiros*, 709 F.2d at 741)), *McGrath* found that "the analysis in the *Eichel* decision 'does not appear inconsistent with Rule 403.'" *Id.* at 841 (quoting *Savoie v. Otto Candies, Inc.,* 692 F.2d 363, 371 n.8 (5th Cir. 1982)).[9]

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[9] Even if, contrary to this Court's holding in *McGrath*, *Eichel* had imposed a *per se* rule as Crowther suggests (Pl. Br. 26-27), that rule was abrogated when the Federal Rules of Evidence took effect in 1973. Categorical exclusion of any evidence, including RRB-benefits evidence, is flatly inconsistent with Rule 403's balancing test. As the Supreme Court, lower courts, and commentators have noted, "[r]elevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad *per se* rules." *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008); *see also, e.g.*, *United States v. Layton*, 767 F.2d 549, 554 (9th Cir. 1985) ("The considerations which arise under Rule 403, such as the potential for undue prejudice or confusion of the issues, are susceptible only to case-by-case determinations, requiring examination of the surrounding facts, circumstances, and issues."); 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice &

2. *The district court properly applied* McGrath.

The trial court properly applied *McGrath* when it admitted the evidence that Crowther is receiving RRB disability benefits, balancing its probative value against any unfair prejudice it could cause. *See* A798-A810. Having recognized that malingering is "a huge issue" in this case (A800), the court correctly determined that the evidence was highly relevant to the issue of whether Crowther failed to mitigate his damages, as it demonstrated that he had the financial means to support himself and a substantial incentive not to work. A805-A807.[10] Then, to safeguard against an improper use of the evidence, the court took substantial precautions to ensure that the jury would not treat the disability payments as an offset, giving a lengthy limiting instruction during the evidentiary phase (A850-A852), and then repeating the limitation in

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Procedure § 5162 (2010) ("Rule 401 not only abolishes the old categorical rules which might be used to exclude; it replaces those rules with an extremely broad definition of relevance. The only discretion explicitly conferred is in Rule 403, but that Rule permits relevant evidence to be excluded only after a careful balancing of specified factors.").

[10] The court noted a separate reason that it would permit RRB evidence. A807-A808. Defendants contended that Crowther made a material misrepresentation on the RRB application, and that this spoke to his credibility. *Id.* Such "an inconsistency" is something "the defense is able to put in" regardless of "whether it's an RRB form or any other kind of form." A807.

its final charge to the jury (A1222). The trial court's approach was a paradigmatic application of *McGrath*.

In attempting to argue that the admission of the RRB-benefits evidence was nonetheless improper, Crowther cites three references to the evidence by defense counsel. Pl. Br. 27-29. Yet none of these references was improper.

First, Crowther points to defense counsel's statement during opening that, in deciding "whether or not Mr. Crowther's claims of being disabled are credible," the jury may consider that "he's been receiving a disability annuity retroactive back to the day that he voluntarily left the railroad in December of 2006." A134. There is nothing improper about that statement. In fact, the evidence was relevant precisely because it demonstrated that plaintiff had the opportunity and incentive to malinger.

Second, Crowther points to defense counsel's inquiry into the amount of Crowther's monthly disability benefits. Pl. Br. 27 (citing A850). But because it did nothing more than quantify the extent of

plaintiff's opportunity and incentive to malinger, such inquiry was not improper.[11]

Finally, Crowther complains of defense counsel's argument in closing. Pl. Br. 28 (citing A1118-A1119). But defendants merely referenced Crowther's *own* testimony, elicited by his *own* counsel. It was Crowther on redirect who explained that he was in a "catch-22" because, if he worked, he would lose his disability benefits. A894. Likewise, it was Crowther who asked for an offset based on RRB benefits. A894-A895.

There can be no doubt that the RRB-benefits evidence "prejudiced" Crowther inasmuch as it was probative of his failure to mitigate his damages. But, "[b]y design, all evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided." *United States v. Rodriguez-Estrada*, 877 F.2d 153, 156 (1st Cir. 1989); *see also* Fed. R. Evid. 403 (allowing exclusion of evidence that causes "*unfair* prejudice" (emphasis added)). Crowther identifies no *unfair* prejudice in this trial.

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[11] Indeed, it was Crowther himself who, on direct examination, first introduced evidence of how much he was receiving. *See supra* 9. Defendants' cross-examination merely established that Crowther was in fact receiving approximately $3,100 monthly (A850), not the "2,700 and something dollars" to which he had testified on direct (A542).

And even if there were some potential for unfair prejudice from the evidence, the trial court properly weighed that against its probative value and carefully instructed the jury as to its permissible use. That is precisely the balancing that Rules 105 and 403, as well as *McGrath*, expressly authorize. The district court "is entitled to considerable deference" in such a determination, and Crowther identifies no "extraordinarily compelling circumstances" that would justify reversal of the district court's judgment. *Fitzgerald*, 177 F.3d at 75.

II. THE DISTRICT COURT PROPERLY GRANTED DEFENDANTS JUDGMENT AS A MATTER OF LAW.

The district court was correct to grant judgment as a matter of law on both statute-of-limitations and liability grounds. The evidence clearly established that certain of Crowther's claims are time-barred. It is also plain that Crowther failed to present sufficient evidence from which a jury could reasonably conclude that defendants were negligent for failure to provide ergonomic programs or adequate tools.

When a plaintiff cannot prove an essential element of his or her claim, district courts can – indeed, *must* – grant judgment. This Court has routinely affirmed decisions either granting summary judgment or judgment as a matter of law for a FELA defendant, and thus removed

the case from a jury. *See*, *e.g.*, *Moody v. Bos. & Me. Corp.*, 921 F.2d 1, 5 (1st Cir. 1990); *Albert v. Me. Cent. R.R.*, 905 F.2d 541, 545 (1st Cir. 1990); *Moody v. Me. Cent. R.R.*, 823 F.2d 693, 696 (1st Cir. 1987); *Robert v. Consol. Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987); *Finn v. Consol. Rail Corp.*, 782 F.2d 13, 17 (1st Cir. 1986). The same result is appropriate here.

A. The District Court Properly Granted Judgment As A Matter Of Law Based On The Statute Of Limitations.

FELA contains a three-year statute of limitations. 45 U.S.C. § 56. And "the three-year statute of limitations period begins to run when a plaintiff knows, or should know, of her injury and its cause." *Granfield v. CSX Transp., Inc.*, 597 F.3d 474, 482 (1st Cir. 2010). "[O]nce a plaintiff reaches the conclusion that she has an injury, and that such injury was caused by her employment, she has a duty to investigate the situation in order to confirm or deny her belief." *Id.*

As the district court noted, the relevant dates for the statute of limitations are not in dispute. Add. vi; *see also* Pl. Br. 29-33. Crowther's claims for injury to his knees and neck were filed in Pennsylvania state court on September 21, 2007; accordingly, those claims are timely only if they accrued on or after September 21, 2004. Add. vi; *see also* Dkt.

No. 39, Ex. A. Because Crowther's aggravation claims were not contained in the state action, those claims are timely only if they accrued on or after March 5, 2006, *i.e.*, three years prior to the filing of his federal suit on March 5, 2009. Add. vi; *see also* A36-A42.

The district court correctly concluded that Crowther's claims relating to his knees and his neck are barred by the statute of limitations. Its conclusion that his aggravation claims were untimely was likewise correct.

1. *Plaintiff's knee claim is untimely.*

In its order following trial, the district court catalogued the extensive evidence showing that Crowther knew or should have known that his knee injuries were work-related prior to September 21, 2004:

- A 1986 x-ray of Crowther's knee revealing an "extremely severe degree of osteoarthritis" (Def. Ex. YY, SA19))[12];
- A 1992 Conrail medical questionnaire in which Crowther reported having trouble with his right knee (Def. Ex. N-2, SA4));

[12] Although not specifically cited by the district court, a doctor's note accompanying the x-ray recorded Crowther's statement that he "injured [right] knee [at] work yesterday." Dkt. No. 39, Ex. F at 2.

- A 1998 Conrail medical history form recording Crowther's report of a "work/injury" and his complaint of a "bothersome" knee (Def. Ex. N-1, SA3));
- Testimony by Dr. Baustin that Crowther had been diagnosed with "[a]rthritic changes" in his left knee in 2003 (A947); and,
- A 2007 note made by Dr. Macatee reported that Crowther himself stated that "his knees became painful starting [in] 2002, probably due to overuse at work" as a result of "walking frequently [illegible] as welder/foreman for CSXT Railroad" (Def. Ex. O-6, SA7).

See Add. vii. Additionally, in a medical questionnaire that he completed for Dr. Lehman, Crowther attributed his knee pain to a July 1977 work injury. Def. Ex. O-9, SA15 (reporting pain in "both knees" and attributing pain to July 1977 incident in which he "fell from bed of large R.R. truck"). Crowther's medical records thus reveal that he has long connected his knee pain to his work duties. Considering this evidence, the court found that "the only reasonable conclusion the jury could draw was that Plaintiff should have known, prior to September 21, 2004, of his knee injuries and their potential relationship to his work." *Id.*; *see also* A1040.

Aside from the non-responsive assertion (based on his own testimony) that "he had no *continuous* knee pain from 1992 to the present (Pl. Br. 31 (citing A881) (emphasis added)),[13] Crowther offers no rebuttal to this evidence or the trial court's conclusion based thereon. He asserts that "[o]ther than some forms that he filled out for the Defendants, there is no record of him making complaints for knee pain nor is there any record of any doctor advising him that he had a work related injury." *Id.* But Crowther offers no explanation of why the trial court should have ignored plaintiff's own complaints of work-related injury to his knees, whether those complaints are documented in forms that he completed or in notes made by his doctors. Surely, the fact that it might have been Crowther himself, rather than his doctors, who first expressed the belief that his knee pain was work-related is no basis for concluding that Crowther did not know and should not have known that his knee pain was work-related. On the contrary, Crowther "ha[d] a duty to investigate the situation in order to confirm or deny [his] belief." *Granfield*, 97 F.3d at 482. Accordingly, judgment on plaintiff's knee claim was warranted.

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[13] Plaintiff admitted that his knee pain would "come and go." A881.

2. *Plaintiff's neck claim is untimely.*

As noted above (*see supra* 12-13 & n.4), the district court granted defendants judgment as a matter of law on plaintiff's neck claim for two independent reasons – because plaintiff's claim was untimely, and because plaintiff "failed to meet his burden in showing a causal medical connection between his neck injury and his work." Add. vii n.1. Inasmuch as Crowther does not challenge the court's causation determination on appeal, defendants would be entitled to judgment on his neck claim even if it were timely.

It is clear, however, that plaintiff's neck claim is in fact time-barred. As noted by the district court, Dr. Baustin testified that he ordered an x-ray of plaintiff's neck in 2002 because Crowther, who reported doing "a lot of heavy work as a welder installing rails," complained of neck pain. A944-A945; *see also* Def. Ex. BBB, SA1 (contemporaneous notes made by Dr. Baustin). Based on that x-ray, Crowther was diagnosed then as having "degenerative disc disease" in his neck. A946; *see also* Def. Ex. O-5, SA5 (record reporting result of 2002 x-ray). There can be no doubt that Crowther understood no later than 2002 that his neck pain might be work-related. As plaintiff himself con-

firmed at trial, Dr. Baustin specifically advised Crowther in 2002 to "stop * * * whatever you're doing" and to "[f]ind something like a management job or something." A836.[14]

In light of this unambiguous evidence, the district court stated:

> I don't see how you can argue with a straight face that Mr. Crowther did not know by 2002 at least that he was having problems with his neck. He knew that and knew or certainly should have known by 2002 that those problems were related to his work at the railroad. So you have got a statute of limitations problem.

A976; *see also* A1040-A1041. The court ultimately concluded that "the jury could not reasonably have found that Plaintiff reasonably should not have known of the relationship between his work and his neck pain in 2002." Add. vi-vii. Crowther offers no basis to disturb this conclusion.

3. *Plaintiff's aggravation claims are untimely.*

The court also properly found that plaintiff's aggravation claims were untimely. Add. vi. On redirect, Crowther admitted realizing by 2005 that his aggravation injuries were work related. A887. Thus, as

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[14] As noted by the district court (Add. vi), plaintiff was able to get away from welding several months later and "[e]verything was fine" until he subsequently resumed manual labor, at which point "the symptoms or the aches and pains that I had before just kind of came back over me." Dkt. No. 41, Ex. 16, at 107-08.

found by the district court, those claims fall outside the limitation date of March 5, 2006. Notably, Crowther does not challenge this aspect of the court's ruling, and has thus waived any challenge to it. *See In re Mercurio*, 402 F.3d 62, 64 n.1 (1st Cir. 2005) ("failure to brief an argument constitutes waiver").

B. The District Court Properly Granted Judgment As A Matter Of Law On Plaintiff's Ergonomics And Tool Theories.

The district court was similarly correct to enter judgment as a matter of law on two of Crowther's three liability theories: that defendants failed to provide adequate ergonomic programs or training, and that defendants failed to provide adequate tools. As the district court found, Crowther did not present sufficient evidence of negligence under either theory.

1. *A FELA plaintiff must prove negligence.*

Crowther's argument on appeal rests largely on his mistaken view that "virtually all FELA cases should be submitted to the jury." Pl. Br. 22. That is not so. "FELA provides a statutory cause of action sounding in negligence," and, "[a]bsent express language to the contrary, the elements of a FELA claim are determined by reference to the common law." *Norfolk S. R.R. v. Sorrell*, 549 U.S. 158, 165-66 (2007). The tradi-

tional common law standard applies to the questions relevant here – whether Crowther presented sufficient evidence to demonstrate that defendants acted negligently.[15]

To be sure, in *CSX Transportation, Inc. v. McBride*, 131 S. Ct. 2630, 2641 (2011), the Court determined that FELA contains a lesser standard for *proximate cause*. That is because FELA provides that a railroad is liable for injuries "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51. The language "in whole or in part" abrogates the common

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[15] Crowther attempts to obfuscate the issue by focusing on causation (Pl. Br. 36-37), but the district court granted defendants judgment not only and not primarily because plaintiff failed to prove causation, but first and foremost because plaintiff failed to prove that the defendants breached a duty of care. A1038-A1039; Add. viii-ix. Absent a breach of a duty, causation is irrelevant. Crowther's counsel similarly confused causation and a duty of care during trial, which the court noted and corrected:

> MR. JOYCE: Remember the law here, just as a preface, even the slightest bit of negligence.
>
> THE COURT: No. That's absolutely wrong.
>
> MR. JOYCE: No?
>
> THE COURT: That is absolutely wrong.
>
> MR. JOYCE: I'm reading from *Rogers*.
>
> THE COURT: Even the slightest bit of causation. Causation even in the slightest will get you there but * * * you have to show negligence.

A995.

law understanding of *causation*, replacing it with a lower standard. *McBride*, 131 S. Ct. at 2641.

Nothing in FELA, however, abrogates the common law understanding of negligence. Rather, a FELA plaintiff must prove a defendant is negligent under the traditional common law understanding of the concept. *See Coffey v. Ne. Ill. Reg'l Commuter R.R.*, 479 F.3d 472, 476 (7th Cir. 2007) (Under FELA, "causation and failure to exercise due care are separate inquiries, and the relaxation of common law standards of proof applies to the first rather than to the second."); *Van Gorder v. Grand Trunk W. R.R.*, 509 F.3d 265, 269 (6th Cir. 2007) ("the relaxed causation standard under FELA does not affect [a plaintiff's] obligation to prove that [a railroad] was in fact negligent"); *Robert*, 832 F.2d at 6 ("FELA does not impose strict liability on employers."); *see also McBride*, 131 S. Ct. at 2643 ("negligence" must be "proved"). Crowther's suggestion to the contrary (Pl. Br. 22) is simply wrong.

2. *Plaintiff failed to prove negligence with respect to his ergonomics claim.*

The court entered judgment for defendants on the ergonomics claim, correctly finding that the evidence plaintiff presented in support of that claim was "way too vague to demonstrate the sort of specific neg-

ligence that is needed to sustain plaintiff's burden." A1038-A1039. As the court observed, plaintiff failed to provide any evidence of what the defendants were "supposed to do physically to reduce the level of repetitive stress" that purportedly caused plaintiff's cumulative trauma. A.1027.

> Were they supposed to give him a pillow to put behind his back which an ergonomic program would have discovered? Were they supposed to give him a different type of tool, a shovel with a different bend in it, a different type of welder, a seat, a different seat to sit on?
>
> You've got to tell me what that ergonomic program would have produced in terms of some kind of concrete modification of Mr. Crowther's work situation which did not occur and the absence of which can be tied to the elbow, the thumb, the neck or the – I forgot what the other one is, but in any event, that's just not there.

Id.

Following trial, the court elaborated on the shortcomings of Crowther's ergonomic theory, finding that "Plaintiff's expert, Dr. Michael Shinnick, was the only witness to testify as to what Plaintiff might have gained from an ergonomics program, but – beyond generalities – this testimony was limited to statements about welding helmets and neck injuries," testimony that "is immaterial" because "Plaintiff's

neck injury claim is no longer at issue." Add. x.[16] As the district court explained, because "[t]he general testimony about ergonomics was never tied either to Plaintiff or to his injuries," the jury "was never informed as to how any hypothetical program might have made a difference to Plaintiff." *Id.* Accordingly, "the jury could not reasonably have found that Defendants, in relation to Plaintiff, were negligent for failing to offer ergonomic training." *Id.*[17]

In his brief here, Crowther again cites to the testimony of Dr. Shinnick (Pl. Br. 34-35), but plaintiff fails to plug the holes identified by the trial court. He argues that "Conrail never developed a program" relating to ergonomics (Pl. Br. 34), but Crowther does not detail what a reasonably prudent plan would have entailed. Nor does Crowther ex-

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[16] That evidence remains immaterial both because plaintiff's neck claim is untimely, and because plaintiff has not appealed the district court's separate determination that he failed to carry his burden of proving "a causal medical connection between his neck injury and his work." Add. vii n.1; *see also supra* 12 n.4.

[17] Incidentally, the court here is not the first to doubt a FELA ergonomics theory offered on the basis of Michael Shinnick's opinion. A district court "found that Shinnick's opinions were not sufficiently reliable and would not assist the trier of fact because such opinions failed to provide the necessary link between the conclusions reached and a recognized underlying scientific method." *Meyers v. Nat'l R.R. Passenger Corp.*, 619 F.3d 729, 732 (7th Cir. 2010). "The court therefore granted Amtrak's motion to strike the report and affidavit of Shinnick, and barred Shinnick as an expert witness." *Id.*

plain how such differences would have prevented his injuries. Crowther relies heavily on the Sixth Circuit's decision in *Aparicio v. Norfolk & Western R.R. Co.*, 84 F.3d 803, 811 (6th Cir. 1996), but there the plaintiff had provided particularized evidence of "known remedial measures that had been described and accepted by the scientific community." Because no such evidence of possible remedial measures was presented here, plaintiff failed to carry his burden of demonstrating that defendants were negligent. *See Doty v. Ill. Cent. R.R.*, 162 F.3d 460, 463 (7th Cir. 1998) (testimony that fails to take into account specific working circumstances or tools "is far too general to permit a jury to conclude that [a FELA plaintiff's] particular workplace was unsafe"). Where, like here, proof of negligence is lacking, the claim cannot survive. *Van Gorder*, 509 F.3d at 269; *Robert*, 832 F.2d at 6.

3. *Plaintiff failed to prove negligence with respect to his tools claim.*

Except with respect to plaintiff's claim for the September 8, 2005, incident in New Bedford that injured his arm (a claim that was considered and rejected by the jury), the district court concluded that "there simply is not sufficient evidence to show negligence * * * on the part of

the railroad in failing to provide adequate or sufficient tools." A1039. The court later elaborated:

> The only testimony that the jury heard regarding inadequate tools concerned a brief period in late 2005 when Plaintiff worked in New Bedford. Given that Plaintiff's career with the railroad began in 1977 and continued through December 2006, the testimony regarding 2005 was insufficient for the jury to have found that Defendants were negligent for failing to provide adequate tools and that this negligence resulted in "wear-out" injuries. Moreover, there was no testimony that linked Plaintiff's injured thumb and elbow to any failure on Defendants' part to provide adequate tools. Finally, there was no testimony about how the use of any other tools would have prevented injury. Since there was no evidence of any failure to use reasonable care with regard to tools, Plaintiff was prohibited from proceeding on this theory.

Add. ix.[18] The district court's conclusion that plaintiff had failed to prove negligence with respect to his tools claim is plainly correct.

Indeed, at trial, Crowther himself expressly acknowledged that defendants were engaged in a "constant search for better tools, better equipment to make things easier for [him] as a worker." A725-A726; *see also* A726-A727 (plaintiff conceding that defendants "purchased tools

[18] On appeal, plaintiff does not even attempt to address the district court's findings. Indeed, the entirety of plaintiff's argument is a single sentence in which he makes the entirely conclusory assertion that the trial court "erred in taking away the Plaintiff's theory of liability as to a lack of tools and equipment even after Geoffrey Crowther and his two co-worker fact witnesses, Everett Cooley and Charles Mead, testified as to a lack of tools and equipment." Pl. Br. 37-38.

that they thought were the best option at the time"); A727-A736 (testimony with respect to specific types of tools). Given that a railroad is "not 'required to furnish the latest, best and safest tools' to its employees" (*Hane v. Nat'l R.R. Passenger Corp.*, 110 F.3d 573, 575 (8th Cir. 1997) (citing *Wash. & Georgetown R.R. v. McDade*, 135 U.S. 554, 570 (1890))), plaintiff's concession is fatal to his tools claim.

Wholly apart from his concession, there can be no doubt that plaintiff failed to prove that defendants negligently failed to provide adequate tools. As the district court noted, Crowther never explained "[w]hat tools exactly, other than the spiker at the New Bedford project," were inadequate or unavailable. A1028. Nor did he offer any evidence that the availability of any particular tool would have prevented any particular injury. *Id.* Confronted with a similar record, the Seventh Circuit in *Doty*, 162 F.3d at 462-63, affirmed summary judgment for the railroad. There, the plaintiff "did not produce any evidence, for example, describing the particular tools he considered to be unsafe, nor did he detail the procedures or training methods that he believed to be inadequate." *Id.* at 462. And the plaintiff "had never complained to the railroad about the tools provided him or about the training he received

in using those tools." *Id.* The claim was therefore deficient. So too here.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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DATE: October 18, 2011

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel for Defendants-Appellees Consolidated Rail Corporation and CSX Transportation, Inc., certifies that this brief:

(i) complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,899 words, including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).

/s/ Paul W. Hughes

CERTIFICATE OF SERVICE

I certify that on this 18th day of October 2011, I served the foregoing Brief of Defendants-Appellees via the Court's ECF system upon Counsel for Plaintiff-Appellant.

/s/ *Paul W. Hughes*
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