COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2011-CA-001870

PEGGY BERRY, ADMINISTRATRIX FOR THE ESTATE OF KENDRA NICOLE JOHNSON, et al. **PLAINTIFF/APPELLANT**

v.

CSX TRANSPORTATION, INC. **DEFENDANT/APPELLEE**

ON APPEAL FROM THE
GALLATIN CIRCUIT COURT
CIVIL ACTION NO. 08-CI-00280

BRIEF FOR DEFENDANT/APPELLEE, CSX TRANSPORTATION, INC.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by mail on April 26, 2012: The Honorable J.R. Schrand, Gallatin Circuit Court Judge, 100 Main St., Warsaw, KY 41095; James B. Helmer, Jr. and Jennifer L. Lambert, Helmer, Martins, Rice & Popham Co., LPA, co-counsel for appellant Peggy Berry, 600 Vine Street, Suite 2704, Cincinnati, OH 45202; Meredith L. Lawrence, co-counsel for appellant Peggy Berry, 107 East High Street, Warsaw, KY 41095; and Charles J. Davis, Patsfall, Yeager & Pflum, LLC, counsel for appellant Marilyn Robbins, 205 W. Fourth Street, Suite 1280, Cincinnati, OH 45202. The undersigned does further certify that the record on appeal was not withdrawn by the party filing the brief.

Of Counsel:
ANDREW E. TAUBER
SCOTT M. NOVECK
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006-1101
Telephone: (202) 263-3000
Facsimile: (202) 263-3300
atauber@mayerbrown.com
snoveck@mayerbrown.com

LARRY C. DEENER
ELIZABETH A. DEENER
LANDRUM & SHOUSE LLP
P.O. Box 951
Lexington, KY 40588-0951
Telephone: (859) 255-2424
Facsimile: (859) 233-0308
ldeener@landrumshouse.com
edeener@landrumshouse.com

STATEMENT CONCERNING ORAL ARGUMENT

Although Defendant/Appellee CSX Transportation, Inc. ("CSXT") believes the arguments raised in this appeal lack merit, oral argument might assist the court in understanding the factual record presented in this case. CSXT would therefore welcome the opportunity to address any questions from the Court during oral argument.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

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COUNTERSTATEMENT OF THE CASE

Sometime after December 27, 2007, the car in which the Johnson family was traveling failed to negotiate a sharp right curve on KY 467, drove over a collapsed guardrail, and plunged into Lost Branch Creek. The car was not discovered until January 15, 2008. Subsequent autopsies revealed that all five members of the Johnson family—Glenn Johnson, Jr., Kendra Johnson, and their three children—had drowned.

Many possible causes of the accident have been identified. Poor signage along the roadway failed to give adequate notice of the dangerous curve ahead, especially to a driver who was inattentive, distracted, or impaired. The roadway was prone to flooding because it was built on a concrete box culvert too small for all the creek water to pass underneath; at other times it was littered with mud and debris left by the recurrent flood waters. The guardrail was in disrepair and failed to stop the Johnsons' vehicle from leaving the road and entering the creek. Evidence indicates that the Johnsons were driving at night at too fast a speed to negotiate the sharp curve safely, even under pristine driving conditions. And toxicology tests revealed that both adults were impaired: Kendra Johnson had taken a supratherapeutic amount of diphenhydramine, a drug often used as a sleep aid, and Glenn Johnson had cocaine in his bloodstream when the accident occurred.

None of those possible causes can be attributed to CSXT, which was named as the defendant in this wrongful-death action. Nevertheless, plaintiffs insist that CSXT must somehow be responsible because the accident occurred in an area where KY 467 runs alongside and underneath CSXT's railroad tracks. They speculate that railroad fill might somehow have migrated onto the roadway or that the railroad might somehow have aggravated the flooding in this area. But no credible evidence exists to suggest that these speculative theories were the actual cause of this tragic accident.

Following eight days of testimony, the jury deliberated for just two hours and five minutes before returning a unanimous verdict in favor of CSXT. None of Berry's arguments call that verdict into question.

A. History Of The Lost Branch Creek Overpass

The railroad tracks at issue were built on a 66-foot-wide right-of-way acquired by one of CSXT's predecessor companies in 1868. (VR 9/9/11 2:30:23-2:34:27; VR 9/21/11 9:24:18-9:27:22; CSXT Exs. 37A-37C.) The tracks pass over Lost Branch Creek by way of an elevated bridge, known as Bridge 19, which appears in records dating back to 1889. (VR 9/8/11 03:12:49-03:14:32; VR 9/21/11 9:37:50-9:38:40.)

Sometime after the railroad line was constructed, a county road began to take shape alongside CSXT's tracks. There are no known plans or deed for this road, which is today KY 467. (VR 9/15/11 4:24:08-4:25:40; VR 9/16/11 2:47:24-2:48:36.) West of Lost Branch Creek, the road runs along the northern edge of the tracks; east of the creek, it runs along the tracks' southern edge. The two segments are connected by a sharp S-curve that crosses underneath Bridge 19 where the elevated railroad tracks pass above the creek. (VR 9/20/11 1:49:14-1:52:33; CSXT Exs. 37A-37B.)

KY 467 has undergone significant transformations over the past century. A state highway map from 1942 reports that travelers could cross Lost Branch only by fording the creek where it passes under Bridge 19. (CSXT Ex. 73.) In 1964, the Commonwealth installed a concrete box culvert that allowed the road to pass over the creek while the waters flowed through below. (CSXT Ex. 40.) Records from the 1970s indicate that the road was then only 12 to 14 feet wide (VR 9/19/11 9:09:20-9:13:47); today it measures 15 to 18 feet wide (VR 9/9/11 2:32:45-2:34:27; VR 9/15/11 4:25:41-4:27:17; VR 9/20/11 9:25:35-9:26:47). Indeed, according to the plaintiffs' land survey, several portions of KY

467 now encroach onto land that actually falls within CSXT's deeded right-of-way. (VR 9/9/11 4:25:15-4:25:35; Berry Ex. 9-101.)

The railroad tracks remain in the same location as first built in the 1800s, but have received various repairs and improvements. In 1926, Bridge 19 was reconstructed to add concrete wing walls to support the elevated abutments, which form a hill that slopes down to its toe at the edge of the road. (VR 9/19/11 9:09:20-9:10:33; VR 9/21/11 9:39:52-9:41:17; CSXT Exs. 38A-38G.) In 1979, the railroad proposed widening the base of the hill to create a more gradual 2:1 slope, but that proposal was not implemented, in part because it would have required KY 467 to be relocated. (VR 9/21/11 9:49:03-9:54:24, 10:12:44-10:16:04, 10:41:55-10:43:00; CSXT Ex. 38.) In 2005, CSXT installed a wall of gabion baskets—that is, heavy rocks held in place by wire mesh—to further reinforce the eastern abutment. (VR 9/8/11 4:34:40-4:37:16; VR 9/21/11 9:59:22-10:00:42.) The gabion baskets extend approximately ten feet beyond the original railroad right-of-way deeded in 1868, but remain within the toe of the slope that the railroad has occupied since at least 1926. (VR 9/9/11 4:15:15-4:19:54; VR 9/21/11 9:45:20-9:46:54, 9:48:58-9:52:19, 9:59:06-10:03:34, 10:09:38-10:10:40, 10:44:30-10:45:37.)

B. The Accident Scene

On January 15 and 17, 2008, local authorities received reports of a car spotted in Lost Branch Creek. The car was submerged in a vertical position, with its front end nestled in a deep hole in the creek bed and the rear of the car pointing upward. (VR 9/15/11 9:45:05-9:46:32.) Damage to the car indicates that it rotated in the air after leaving the roadway and hit the water roof-first. (*Id.* 3:50:52-3:53:44; VR 9/21/11 11:34:42-11:35:51.) The impact crushed the roof and broke several windows, causing the car to fill rapidly with water and to sink straight to the bottom of the creek. (VR 9/21/11

11:34:42-11:37:03, 11:42:14-11:43:24.) The headlight switch was in the on position, suggesting that the accident may have occurred at night. (VR 9/15/11 9:52:10-9:53:16; VR 9/19/11 12:43:08-12:44:27.)

Yellow paint on the left front wheel and marks on the car's underside indicate that the car ran into and over a collapsed guardrail as it drove off the road. (VR 9/15/11 10:16:33-10:17:50; VR 9/19/11 12:33:58-12:34:53; VR 9/20/11 9:30:56-9:31:25.) State highway inspection records show that this guardrail had been in disrepair for many years. (VR 9/9/11 12:35:23-12:43:40; VR 9/19/11 9:18:20-9:27:08, 3:09:37-3:11:47; CSXT Exs. 45-46.) The location of the guardrail and where the vehicle was found in the creek both indicate that the car drove straight ahead as the road curved sharply to the right, continuing over the edge of the roadway and into the creek. (VR 9/15/11 3:50:06-3:50:25; VR 9/19/11 3:08:43-3:10:30; VR 9/20/11 9:18:20-9:18:32, 9:31:37-9:32:29, 10:06:03-10:06:10; VR 9/21/11 12:20:30-12:21:44.)

Based on evidence at the scene, CSXT's accident reconstruction expert estimated that the vehicle was traveling approximately 30 miles per hour at the time of the accident. (VR 9/21/11 11:59:18-12:00:50.) Other experts testified that the maximum safe speed for the curve was no more than 15 to 20 miles per hour. (VR 9/9/11 12:39:00-12:43:40; VR 9/15/11 3:48:54-3:50:06; VR 9/20/11 9:26:46-9:29:00.) At the time of the accident, the only road sign warning drivers about the dangerous curve ahead was a single arrow sign. (VR 9/15/11 2:04:45-2:05:24; VR 9/20/11 9:19:00-9:19:15, 9:40:52-9:41:04.) After the accident, the Kentucky Transportation Cabinet (KTC) installed signs warning drivers not to exceed a speed of 5 miles per hour through the curve. (VR 9/20/11 9:28:05-9:29:15.)

C. Proceedings In The Trial Court

Testimony in this case commenced on September 8, 2011, and lasted eight days.

The jury heard from 31 witnesses, including numerous expert witnesses. The trial initially included a second defendant, Ohio Valley Asphalt (OVA), but OVA was dismissed from the case when it settled with the plaintiffs mid-trial. (*See* VR 9/12/11 11:51:38-11:52:05.)

At the close of evidence, the jury was instructed to first determine whether CSXT failed to exercise ordinary care and, if so, whether that failure was a substantial factor in causing the accident. (VR 9/21/11 3:56:25-3:59:35; Jury Instr. No. 3, *at* R. 2896-98.) If, but only if, the jury found CSXT partly responsible for the accident, it would have been required to apportion liability among CSXT, the KTC, OVA, Glenn Johnson, and Kendra Johnson. (VR 9/21/11 7:51:06-8:09:25; Jury Instr. Nos. 4-6, *at* R. 2899-909.)

After deliberating just over two hours, the jury found that CSXT was not liable for the accident. (VR 9/21/11 7:51:06-8:09:25; Verdict Form, *at* R. 2898.) Having found that CSXT was not at fault, the jury did not consider the comparative negligence of Glenn and Kendra Johnson or the apportionment of fault to OVA and the KTC.

Although plaintiffs filed no post-trial motions, two appeals ensued: this appeal, filed by plaintiff Peggy Berry on behalf of the Estates of Kendra Johnson and the Johnson children, and a separate appeal, filed by plaintiff Marilyn Robbins on behalf of the Estate of Glenn Johnson, which is before this panel as Case No. 2011-CA-1921.

ARGUMENT

I. The Trial Court Did Not Commit Reversible Error In Permitting The Testimony Of CSXT's Accident Reconstruction Expert, Frank Entwisle.

A. Entwisle Was Properly Allowed To Testify To His Speed Calculation.

Berry claims on appeal that the testimony of CSXT's accident reconstruction expert, Frank Entwisle, should have been excluded under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Because plaintiffs failed to request a

Daubert hearing or to raise this issue in the trial court, however, that argument has been forfeited. In any event, the available evidence demonstrates that Entwisle's testimony clearly satisfied the *Daubert* reliability standard. And Berry's attempt to discredit Entwisle's conclusions because he was assisted by a trusted associate, who worked at Entwisle's direction and under his direct supervision, is utterly without merit.

1. Plaintiffs forfeited any *Daubert* challenge.

Although Berry argues that Entwisle's speed calculation should have been excluded under *Daubert* (Berry Br. 8-12), she fails to identify any location in the record where this issue was preserved for review. *Cf.* CR 76.12(4)(c)(v). Plaintiffs did not request a *Daubert* hearing; nor did they raise a *Daubert* objection in the trial court. That is fatal to Berry's argument, because it is well established that a party who does not raise a *Daubert* objection in the trial court fails to preserve that issue for appeal. *See, e.g.*, *Clay v. Commonwealth*, 291 S.W.3d 210, 216-17 (Ky. 2008); *Davis v. Commonwealth*, 147 S.W.3d 709, 728 (Ky. 2004); *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001); *Meadows v. Commonwealth*, 178 S.W.3d 527, 536 (Ky. App. 2005). An unpreserved *Daubert* challenge cannot support reversal of a jury verdict because "the failure to conduct a *Daubert* review does not amount to palpable error." *Davis*, 147 S.W.3d at 728.

This case is indistinguishable from *Love*, where the Supreme Court held that the appellant's *Daubert* argument "was not preserved for appellate review" because the objection at trial "was premised upon relevancy, not scientific reliability" and "the word '*Daubert*' was never even uttered during" the trial. 55 S.W.3d at 822 (internal citation omitted). As in *Love*, Berry did not invoke *Daubert* or KRE 702 as the basis for any objection during Entwisle's testimony. Her written motion to exclude Entwisle's

computer-generated renderings of the accident likewise makes no mention of *Daubert* or any of the *Daubert* factors. (*See* R. 2823-32.) Instead, as in *Love*, Berry's objection was premised on entirely different arguments that she does not renew in this appeal—namely, her contention that the renderings were inaccurate, unfairly prejudicial, and based on hearsay. A *Daubert* argument was neither raised nor preserved.[1]

2. Entwisle's speed calculation is admissible under *Daubert*.

Even if Berry had preserved a *Daubert* objection to Entwisle's testimony for appellate review, it would have no merit. The record evidence demonstrates that Entwisle's calculations were based on the sound application of reliable scientific principles and methods as required by *Daubert*.

Numerous witnesses testified at trial that reliable principles and methods exist in the field of accident reconstruction that would allow an expert to estimate the speed of the vehicle based on the location of its impact. For example, according to the testimony of the plaintiffs' own expert, Jerry Pigman:

> [T]o estimate speed in a case like this, the most typical formula or procedure would be to estimate what the horizontal and vertical fall is. So if you're going out on a ledge like this and you go 20 feet out and 10 feet down, that allows that information-- If you know that exactly, what those numbers are, then you can give a fairly--an estimate, at least, of what the speed would be in order to take--it's called the take-off speed. So like tests have been done and it's verified—basically, the laws of physics is what it is that allows you to do that.

(VR 9/15/11 4:45:24-4:46:19; *see also id.* 3:00:19-3:00:31 ("There are some standardized equations that we use in the accident reconstruction business to estimate speeds based on

[1] For this reason, it is grossly misleading for Berry to impugn the trial court for not "mak[ing] the central inquiry required by *Daubert*" on whether "the reasoning and methodology . . . is scientifically valid" (Berry Br. 10). The reason there are no specific *Daubert* findings in the record is that Berry failed to make a timely objection. It was plaintiffs' responsibility, not the trial court's, to develop an adequate record for appellate review. The failure to do so precludes this issue from being raised on appeal.

vertical and horizontal fall distance.").) Similarly, according to Ken Agent—an expert originally hired by the KTC—the speed calculation is "a pretty straightforward calculation. . . . a basic projectile physics-type formula you would use if you know . . . from Point A to Point B, if you know the horizontal distance and the vertical drop, you can calculate the speed back here where you start." (VR 9/20/11 9:45:34-9:45:59.)

Entwisle simply applied these established methods to the evidence introduced at trial. Indeed, Berry admits that she reviewed the underlying "calculations" contained in Entwisle's file materials produced by CSXT in discovery. (Berry Br. 10; *see also* R. 2827, *reprinted at* Berry Appx. 10.) Those speed calculations were a straightforward application of the "basic projectile physics-type formula" described by the other experts.

Berry tries to discredit Entwisle's calculation by pointing to testimony from other experts who said they were unable to calculate the speed of the vehicle (*e.g.*, Berry Br. 5, 11), but she misunderstands their testimony. These experts did not deny that there are established principles and methods in the field of accident reconstruction that can reliably estimate a vehicle's speed, nor did they deny that Entwisle faithfully applied those methods. Instead, these experts merely testified that they were unable to perform the calculation only because they did not have all of the necessary data. In fact, these experts confirmed that they ***would*** have been able to calculate the car's speed had they possessed that case-specific data. Ken Agent, for example, testified that "[i]f I knew where it landed, if I had some investigation that allowed me to come to a basis for where it landed, I could do a speed calculation." (VR 9/20/11 9:53:40-9:53:46; *see also id.* 9:46:22-9:46:36 ("It's possible, if you can get some logical assumptions based on some evidence . . . that would tell you where the vehicle landed. If you've got some evidence of that

then you can calculate it. You'd just have to get that evidence.").)

Unlike these other experts, Entwisle ***did*** collect the data necessary to estimate the vehicle's speed. He testified that he obtained the requisite information from James Robert Searcy, the wrecker owner/operator who retrieved the car from the creek. ((VR 9/21/11 11:47:12-11:51:01.) Searcy reported that the wrecker's boom was fully extended during retrieval and that it lifted the car directly upward. (*Id.*; *see also* VR 9/19/11 3:54:03-3:56:20.) Entwisle measured the boom at 14 feet, 5 inches, and he was able to determine the location of the wrecker using photographs and Searcy's testimony. (VR 9/21/11 11:47:12-11:51:01.) Using this information, Entwisle determined where the vehicle sank and was able to calculate the vehicle's speed when it left the roadway. This calculation fully complied with the *Daubert* requirements for expert testimony.

3. Entwisle testified based on his own knowledge and expertise.

Finally, Berry objects to Entwisle's testimony because he asked one of his associates, Bill Cloyd, to perform the initial speed calculation under his supervision. Entwisle reviewed Cloyd's calculations, confirmed them, and adopted them as part of his own expert opinion. (*Id.* 12:48:30-12:49:30.) Contrary to Berry's insinuations, the use of an assistant to aid with routine tasks does not render expert testimony inadmissible.

To begin with, Berry mischaracterizes the facts in two crucial respects. First, Cloyd was not in any sense an "unnamed hired consultant" (Berry Br. 5). He is a longstanding associate of Entwisle's consulting firm who, as Entwisle testified, "worked at [Entwisle's] direction" and "followed [Entwisle's] instructions." (VR 9/21/11 12:49:11-12:49:24.) Second, there is no truth to Berry's claims that Cloyd's work was "never . . . disclosed by CSX[T]" and "[n]ot [revealed] until cross-examination" (Berry Br. 5). To the contrary, CSXT supplied plaintiffs with copies of Cloyd's emails to

Entwisle and his handwritten notes. Not only were these materials produced in discovery, but Berry actually relied on them in a motion she filed on September 15, nearly a week before Entwisle testified at trial. (R. 2827, *reprinted at* Berry Appx. 10.)

In any event, Entwisle's trial testimony was properly based on ***his own*** expertise. Cloyd's calculations were performed "at [Entwisle's] direction," and Entwisle "always check[ed] his calculations to make sure he'[d] done things properly." (VR 9/21/11 12:49:11-12:49:24.) At trial, Entwisle adopted these calculations as his own, attesting to their accuracy based on his own expert knowledge, and presented an accident reconstruction that was based on his own expert investigation. This was proper expert testimony, as "there is no rule prohibiting an expert's use of assistants if the ultimate opinions are those of the expert and he is qualified to give those opinions." *Stephenson v. Honeywell Int'l, Inc.*, 703 F. Supp. 2d 1250, 1255 (D. Kan. 2010);[2] *see also*, *e.g.*, *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 612 (7th Cir. 2002) ("An expert witness is permitted to use assistants in formulating his expert opinion, and normally they need not themselves testify."); *McReynolds v. Sodexho Marriott Servs., Inc.*, 349 F. Supp. 2d 30, 35-38 (D.D.C. 2004) (collecting cases).[3] Plaintiffs were free to inquire into the substance of Entwisle's opinions and to dispute them before the jury, but the use of an

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[2] The Kentucky Supreme Court has followed federal court decisions applying *Daubert* and the Federal Rules of Evidence when interpreting analogous provisions of Kentucky law. *See, e.g.*, *Miller v. Eldridge*, 146 S.W.3d 909, 913, 915 (Ky. 2004).

[3] In a footnote, Berry cites several cases for the proposition that it is improper for "an expert [to] testif[y] as to the opinions of a non-testifying expert" (Berry Br. 10-11 & n.12), at least where the underlying work is not of a type that "experts in the particular field would reasonably rely on . . . in forming [their own] opinion on the subject" (KRE 703). But as *Stephenson* explains, those cases are inapposite because Entwisle "[wa]s not merely parroting the opinions of [other experts], but instead formed his own opinions based on work performed at his direction." 703 F. Supp. 2d at 1255 (distinguishing *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 732-33 (10th Cir. 1993)).

assistant to perform routine tasks is not a basis for excluding expert testimony from trial.

B. The Court Properly Denied Plaintiffs' Attempt To Introduce A Non-Testifying Expert's Opinions During Cross-Examination Of Entwisle.

Berry also argues that the trial court improperly limited her cross-examination of Entwisle when it did not allow her to read from a report prepared by another expert, Gary Cooper, who was not called as a witness.[4] (Berry Br. 12-15.) Notwithstanding the trial court's "broad discretion in regulating cross-examination," *Davenport v. Commonwealth*, 177 S.W.3d 763, 767-72 (Ky. 2005), Berry insists that she should have been able to read from Cooper's report because it was, purportedly, a basis for Entwisle's opinion, and because it would, purportedly, have impeached Entwisle's allegedly false testimony. Each argument, however, rests on a misrepresentation of the facts.

1. Cooper's report was not a basis for Entwisle's opinion.

The trial judge specifically authorized Berry's attorney to ask Entwisle whether he took Cooper's report "into consideration" when formulating his own opinion. (VR 9/21/11 12:38:50-12:39:07.) Contrary to Berry's repeated assertions in her brief, Entwisle did not "admit[]" having "relied on Mr. Cooper's report" as a basis for his opinion. (Berry Br. 13; *see also id.* at 6.) Rather, Entwisle's testimony was that he had merely "reviewed" and "looked at" Cooper's report. (VR 9/21/11 12:39:24-12:39:59.)

At no point did Entwisle ever state that he had relied on Cooper's report. Indeed, the timing of the Entwisle and Cooper reports conclusively refutes the claim that he did. Entwisle's initial report—dated January 13, 2001—could not have relied on Cooper's report, because Cooper did not submit his first report until January 21, or more than a

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[4] Cooper was retained by another party, OVA, before it reached a settlement with the plaintiffs. (*See* VR 9/21/11 12:36:50-12:37:30.) After OVA was dismissed from the case, none of the remaining parties sought to call Cooper as a witness at trial.

week ***after*** Entwisle's report was written. (*Compare* Entwisle Rep. 1, *reprinted at* Berry Appx. 31, *with* Cooper Rep. 1, *reprinted at* Berry Appx. 49.) The record does not support Berry's assertion that Entwisle relied on Cooper's report as a basis for his own opinions.[5]

Because Entwisle "did not rely on [the non-testifying expert] for the facts and data [he] used in forming [his] opinion" and "did not even receive [the non-testifying expert's report] until after [he] wrote [his] report," Entwisle's subsequent "review" of Cooper's report was not a sufficient basis for introducing Cooper's report during cross-examination. *Melton v. BNSF Ry. Co.*, 322 S.W.3d 174, 182-83 (Tenn. Ct. App. 2010).[6] The trial court did not err, much less abuse its discretion, when it concluded that Cooper's report was not a proper subject for cross-examination of this witness.

2. Cooper's report was not impeachment evidence.

Berry's contention that Cooper's report would have impeached Entwisle's purportedly "false" testimony is baseless. According to Berry, Entwisle testified falsely when on cross-examination he stated that Cooper "made some assumptions" with respect

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[5] While Entwisle's two-page supplemental report dated June 15 discloses that he had "reviewed" Cooper's first report and other supplemental materials by that time, it states unequivocally that those supplemental materials "ha[ve] not changed the opinions stated in my previous report"—opinions that did not rely, and could not have relied, on Cooper's work in any way. (Entwisle Supp. Ltr. 1, *reprinted at* Berry Appx. 36.) Berry's suggestion that Entwisle's opinions, memorialized in his January 15 report and reaffirmed in his June 15 report, somehow relied on Cooper's June 16 supplemental report (*cf.* Berry Br. 6) defies temporal logic.

[6] *See also, e.g.*, *Farrell v. Bass*, 879 A.2d 516, 524-526 (Conn. App. Ct. 2005) (expert could not be cross-examined about opinions expressed in a medical article that he did not rely on); *Sharman v. Skaggs Cos.*, 602 P.2d 833, 837 (Ariz. Ct. App. 1979) (expert may not be cross-examined using the report of a non-testifying expert when that report "was not referred to by [the testifying expert] in formulating his opinion"); 1 Kenneth S. Broun, *McCormick on Evidence* § 13 (4th ed. 1992) (although an expert may be asked how his opinion would change based on *facts* he failed to consider, "[i]t is . . . improper to inquire of the expert whether his opinion differs from another expert's opinion . . . if the other expert's opinion has not itself been admitted in evidence").

to the horizontal distance traveled by the Johnsons' car and, based on those assumptions, "came up with 30 miles an hour just like I did." (VR 9/21/11 12:44:35-12:45:23; *cf.* Berry Br. 6 n.4, 13-14.) Contrary to Berry's assertion, that testimony is both truthful and entirely consistent with Cooper's report.

Berry's assertion that Entwisle testified falsely rests on the statement in Cooper's report that "[t]he velocity of the vehicle when it left the pavement cannot be calculated with the data that now exist." (Cooper Rep. 13, *reprinted at* Berry Appx. 61; *cf.* Berry Br. 14.) But Berry ignores what Cooper wrote several sentences later:

> If the vehicle's final rest position was known, then a range of how far the vehicle dropped could be used to estimate the vehicle's takeoff velocity. For example, if the vehicle went horizontally 30 feet while dropping 7 feet, ***then the vehicle's takeoff velocity would be about 31 miles per hour***.

(Cooper Rep. 13 (emphasis added), *reprinted at* Berry Appx. 61.) Furthermore, Berry disregards Entwisle's testimony that "what Mr. Cooper said when he wrote his report" was that he was "not able to give this jury speed" because "he wasn't exactly sure how far [the Johnson's car] went after it left the guardrail." (VR 9/21/11 12:44:35-12:45:10.) Thus, when Cooper's report and Entwisle's testimony are viewed in their entirety, they are fully consistent with one another. There is no substance to Berry's assertion that Cooper's report would have contradicted, and thereby impeached, Entwisle's testimony.

Accordingly, the trial court properly denied Berry's attempt to introduce Cooper's report through Entwisle's testimony. *See Trustees of Highlands v. Rebholz*, 3 Ky. Op. 320 (Ky. 1869) (evidence that does not contradict statements by a witness is not a foundation for impeachment and may be excluded).

II. The Trial Court Did Not Commit Reversible Error In Declining To Instruct The Jury On Negligence Per Se.

A. Plaintiffs Were Not Entitled To A Negligence Per Se Instruction Based On 49 C.F.R. § 213.33.

Berry contends that the trial court should have given a negligence per se instruction on plaintiffs' claim that CSXT violated 49 C.F.R. § 213.33 by "permit[ing]" railroad fill to obstruct a drainage pipe or drainage ditch. (Berry Br. 18-19.) The trial court was correct to refuse that instruction for four independent reasons.

First, Kentucky law does not permit a negligence per se instruction based on the alleged violation of a *regulation*, much less a *federal* regulation. KRS 446.070 provides that "[a] person injured by the violation of any *statute* may recover from the offender such damages as he sustained by reason of the violation" (emphasis added). As the Kentucky Supreme Court has repeatedly held, the term "'any statute' in KRS 446.070" is "limited to Kentucky statutes" and thus does not encompass "federal statutes or local ordinances." *T & M Jewelry, Inc. v. Hicks ex rel. Hicks*, 189 S.W.3d 526, 530 (Ky. 2006); *see also St. Luke Hosp., Inc. v. Straub*, 354 S.W.3d 529, 534-35 (Ky. 2011). The trial court thus correctly recognized that Kentucky law does not permit a negligence per se instruction to be based on the federal regulation Berry sought to invoke. Plaintiffs remained free to argue, and did argue, that any blockage of drainage facilities was a breach of ordinary care; but they were not entitled to an instruction on negligence per se.

Second, there was no violation of the regulation at issue. The regulation states that "[e]ach drainage or other water carrying facility under or immediately adjacent *to the roadbed* shall be maintained and kept free of obstruction." 49 C.F.R. § 213.33 (emphasis added). As explained by Edward English, a former Director of the Office of Safety Assurance and Compliance in the Federal Railroad Administration, this language "only

refer[s] to ditches that are immediately adjacent to the roadbed, to the track." (VR 9/20/11 11:58:49-11:58:57.) It does not apply to any drainage pipe or highway drainage ditch that plaintiffs claim was obstructed, because neither of these would have been located immediately adjacent to the track itself. (*Id.*)

Third, this reading of the regulation's text demonstrates that the Johnsons are not within the class of persons that the regulation was designed to protect. The purpose of this regulation is to guarantee the safety of the railroad track for passing trains; it was not specifically intended to protect other persons, especially those who are removed from the railroad. *Cf. Carman v. Dunaway Timber Co.*, 949 S.W.2d 569, 570 (Ky. 1997) (denying negligence per se instruction where, "although the accident was an event which the regulation was designed to prevent, [the plaintiff] was not a member of the class of persons intended to be protected").

Fourth, even if plaintiffs had been entitled to a negligence per se instruction based on 49 C.F.R. § 213.33, the alleged error was harmless because there was no evidence from which the jury could have found that the accident was caused by any alleged violation of that regulation. The negligence per se statute permits recovery only with respect to those damages that are "sustained by reason of" the alleged statutory violation. KRS 446.070; *see, e.g.*, *Peak v. Barlow Holmes, Inc.*, 765 S.W.2d 577, 578-79 (Ky. App. 1988). Thus, although proof that the defendant violated a qualifying statute relieves the plaintiff of having to prove ***negligence***, it does not diminish the plaintiff's burden of having to prove ***causation***. There was, however, no such proof.

Plaintiffs' theory that CSXT's alleged obstruction of a highway drainage ditch caused the accident is rank speculation devoid of any evidentiary support. To begin with,

there is no evidence that KY 467 was flooded when the accident occurred. As plaintiffs' own expert acknowledged, rainfall around the time of the accident was minimal (VR 9/15/11 3:33:50-3:41:29), and the creek level was low enough that the Johnsons' car had time to rotate while falling and hit the water roof-first (*id.* 3:50:52-3:53:44; VR 9/21/11 11:34:42-11:35:51). And, even if there were evidence that KY 467 was flooded at the time of the accident, there was no showing that such flooding was caused by CSXT. Rather, the evidence was that flooding in this area has been a problem for decades, long before CSXT took any of the actions that plaintiffs seek to blame for the flooding that allegedly occurred on the (unknown) day of the accident. (*See, e.g.*, VR 9/9/11 12:42:20-12:43:40.) In fact, the recurrent flooding has long been attributed not to CSXT but to natural conditions and to the undersized culvert installed by the Commonwealth. (*See id.* 1:02:25-1:04:28; VR 9/16/11 3:06:02-3:08:33; VR 9/19/11 9:25:26-9:31:53; VR 9/20/11 9:51:06-9:53:31.) Most critically, there is simply no evidence that flooding is what caused the accident. Plaintiffs' own expert conceded that "***[t]here's no information that tells us that there was a loss of control*** before hitting the guardrail." (VR 9/15/11 3:56:12-3:56:20.) Instead, he admitted, the accident could be attributed to poor signage, inattention, distraction, excessive speed, and other factors. (*Id.* 3:55:06-3:56:37.)

Because plaintiffs failed to prove that their damages were "sustained by reason of" CSXT's alleged violation of 49 C.F.R. § 213.33, plaintiffs could not have prevailed even if they had received their requested instruction. Accordingly, any error in failing to give that instruction was harmless. *See* CR 61.01; *see also, e.g.*, *CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 69 (Ky. 2010).

B. Plaintiffs Were Not Entitled To A Negligence Per Se Instruction Based On KRS 177.106.

Berry also contends that the trial court should have given a negligence per se instruction based on CSXT's purported violation of KRS 177.106, which forbids "any encroachment under, on or over any part of the right-of-way of a state highway." Berry argues that CSXT encroached on the KY 467 right-of-way in three distinct ways—by allegedly placing gabion baskets within the right-of-way, by allegedly causing fill from Bridge 19 to fall onto KY 467, and by allegedly allowing fill to eliminate the ditch along KY 467. (*See* Berry Br. 16-17.) There is no merit to Berry's contentions. Moreover, even if Berry had proved that CSXT encroached on the KY 467 right-of-way, the refusal to give a negligence per se instruction was necessarily harmless because there was no evidence that such an encroachment caused the accident.

Gabion baskets. The record is clear that the gabion baskets did not encroach on the highway's right-of-way. For roads, like KY 467, that were established through prescriptive easement without dedication, the right-of-way is limited to the land actually occupied by the roadway, "based upon . . . the beaten path made by the public user vehicles." OAG 82-123, 1982 Ky. Op. Att'y Gen. 2-135, *available at* 1982 WL 176776 (citing *Whilden v. Compton*, 555 S.W.2d 272, 276 (Ky. App. 1977)); *see also Haffner v. Bittell*, 248 S.W. 223, 223-24 (Ky. 1923) (public roadway created by prescription that "is not inclosed" extends only to "the beaten path"). The gabions do not encroach on this right-of-way because they were built within the slope adjacent to the roadway, not on land occupied by the road itself.[7]

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[7] Because there is no evidence that KY 467 was ever dedicated to public use by the previous owner of the land upon which it is located, KRS 178.025 does not govern the width of the right-of-way. And even if the statute—which was enacted in 1966, long

The KTC evidently agrees that the gabion baskets do not encroach upon its right-of-way. If CSXT's gabion baskets had "interfere[ed] in any way with the safe, convenient and continuous use of" KY 467, then the KTC would have been statutorily obligated to notify CSXT of such encroachment and to remove the encroachment if CSXT failed to do so. KRS 177.106. Because the gabions did not encroach on KY 467, the KTC never issued such a notice, although it was aware of the gabion baskets for years. (*See, e.g.*, VR 9/16/11 2:52:21-2:53:48, 3:46:06-3:47:45.) Indeed, Mike Hughes, former the KTC foreman responsible for maintaining KY 467, testified that there was no encroachment "because it's the railroad's property."[8] (VR 9/15/11 12:25:40-12:25:44.)

Furthermore, even if the original ownership of the slope on which the gabions are installed were disputed, the evidence at trial demonstrates that CSXT had acquired that land by prescription decades prior to the accident. CSXT has openly occupied the slope in its current location continuously since 1926 (VR 9/21/11 9:45:20-9:47:15, 9:48:58-9:52:19, 9:59:06-10:03:34, 10:09:38-10:10:40, 10:44:30-10:45:37), satisfying all

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after KY 467 came into existence—did apply (*but see* KRS 446.080), there still would be no encroachment. KRS 178.025(3) provides that "[i]n the absence of both record or landmark, the right-of-way of a public road shall be deemed to extend . . . to the top of cuts or *toe of fills* where such exist" (emphasis added). Here, because there is neither record nor landmark delineating the KY 467 right-of-way (*see* VR 9/15/11 4:24:08-4:24:40; VR 9/16/11 2:47:24-2:48:36), the right-of-way extends no further than the toe of the fill constituting the slope that supports CSXT's track, even under KRS 178.025. The undisputed evidence at trial establishes that the gabion baskets were built within the footprint of that slope (*i.e.*, did not extend past the toe of the slope), and therefore did not encroach on the KY 467 right-of-way. (VR 9/9/11 4:15:15-4:19:54; VR 9/21/11 9:45:20-9:47:15, 9:48:58-9:52:19, 9:59:06-10:03:34, 10:09:38-10:10:40, 10:44:30-10:45:37.)

[8] The only evidence Berry cites in support of her assertion that the gabion baskets encroached the right-of-way is evidence purporting to show that "CSX rock had been piled far beyond CSX's deeded right-of-way and within 18 inches of the public road." Berry Br. 17 n.28. But even if one assumes that the evidence establishes those facts, it does not prove that the gabion baskets extended either onto the roadway itself, which is the dispositive issue under *Haffner*, 248 S.W. at 223-24, or even beyond the toe of the slope, which would be the dispositive issue under KRS 178.025(3).

elements of adverse possession. *Cf. Cowherd v. Brooks*, 456 S.W.2d 827, 830 (Ky. 1970). The slope on which the gabions sit had thus been acquired by prescription prior to the accident, and therefore could not belong to the KY 467 right-of-way.

Even if they did somehow encroach on the roadway, the trial court's decision not to give a negligence per se instruction based on the gabions was in any event harmless because plaintiffs failed to offer any evidence that the gabions' placement caused the accident. Every witness who testified to the issue testified that the gabions did not interfere with the Johnsons' driving. (*See, e.g.*, VR 9/9/11 9:48:04-9:49:54; *id.* 12:22:10-12:23:30; *id.* 4:40:19-4:42:43; VR 9/16/11 3:46:06-3:47:45; VR 9/20/11 10:01:10-10:02:01.) The gabion baskets showed no evidence of having been hit by the Johnsons or any other vehicle. (VR 9/19/11 3:09:37-3:10:43; VR 9/21/11 11:38:13-11:39:25, 12:19:19-12:21:44.) Because there is no basis upon which a jury could find that plaintiffs' damages were "sustained by reason of" the gabion baskets (KRS 446.070), the court's failure to instruct the jury on an alleged violation of KRS 177.106 through the placement of the gabions was not reversible error. *See* CR 61.01.

Falling fill. Berry's contention that plaintiffs were entitled to a negligence per se instruction based on fill falling from Bridge 19 onto KY 467 likewise fails as a matter of law. KRS 177.103 defines "encroachment" to mean "any improvement to land . . . or any change from the original contour thereof." Even assuming for purposes of argument that fill did fall onto KY 467, migrating fill is neither an "improvement to land" nor a "change from the original contour thereof," and thus is not an encroachment under Kentucky law.

Further, there was no evidence from which a jury could find that the accident was caused by bits of fill on the road. No one testified to the conditions of the road at the

time of the accident, let alone testified that there was any fill on the road at that time. To the contrary, Mike Hughes, a former KTC road supervisor for KY 467, testified that no fill spilled onto the roadway after the gabions were installed in 2005. (VR 9/15/11 12:29:38-12:30:42.) And even if bits of fill somehow migrated onto the road from time to time, there is no evidence to suggest that they caused the accident. (*See, e.g.*, VR 9/20/11 9:32:43-9:34:11.) Given the complete absence of any evidence that plaintiffs' damages were "sustained by reason of" falling fill (KRS 446.070), the failure to give a negligence per se instruction based on falling fill was at most harmless error. *See* CR 61.01.

Ditch elimination. Berry's final argument for a negligence per se instruction based on alleged violation of KRS 177.106 is that CSXT encroached on KY 467 by allowing railroad fill to eliminate a ditch adjacent to the road. Her brief, however, fails to identify what ditch was supposedly filled, or to explain how its purported filling caused the accident. She cites only to 35 seconds of testimony by her accident reconstruction expert, Jerry Pigman, who speculated that a ditch may have been eliminated immediately east of the bridge. (Berry Br. 17 & n.30.) Yet Pigman acknowledged shortly thereafter that although "there is a ditch existing back several hundred feet away" from the creek, there is no ditch "within 200 to 300 feet" of the bridge. (VR 9/15/11 2:28:24-2:28:30; *see also* VR 9/21/11 4:20:05-4:21:12.) Pigman apparently believed that the gabion baskets reside in "the general area where there was a ditch at one point" (VR 9/15/11 2:28:17-2:28:23), but the undisputed testimony was that the gabions sit within the toe of a slope which has not moved since 1925 and that the slope is adjacent to the edge of the roadway, leaving no room for any ditch to have existed (*see supra* pp. 17-19 & n.7). Berry's conclusory assertion to this Court that CSXT eliminated a drainage ditch adjacent

to the bridge simply lacks any foundation in the record presented at trial. In any event, Berry's ditch-elimination theory of negligence per se also fails for the same reason as her other theories: falling fill is not an "improvement to land" and thus cannot be an encroachment (*see supra* p. 19), and plaintiffs offered no evidence that flooding due to obstructed drainage was an actual cause of the accident (*see supra* pp. 15-16).

III. The Trial Court Did Not Commit Reversible Error By Including The Kentucky Transportation Cabinet In Its Apportionment Instruction.

Finally, Berry argues that the trial court erred by instructing the jury that it could consider the KTC's negligence when apportioning liability. (Berry Br. 19-25.) But even if the instruction were erroneous, it would not support reversal because the jury never reached the question of apportionment in this case. In any event, the trial court's apportionment instruction was correct because CSXT cannot be made liable for the share of damages that are wholly attributable to the KTC's negligence.

A. The Verdict At Issue Did Not Address Apportionment.

Berry's objections to the apportion instruction are moot; the jury never considered apportionment. The jury was specifically instructed that it was not to consider apportionment unless it first reached a threshold finding of liability against CSXT. (*See* Jury Instrs. at 5, *at* R. 2898 (directing jury to "return to the courtroom" in the event that its "answer to Question No. 1"—the liability question—"is 'no'"); *see also* VR 9/21/11 3:58:40-3:58:56 (same).) Because the jury found that CSXT was ***not*** liable (*see* Verdict Form, *at* R. 2898), it did not reach the apportionment question. Consequently, any error in the apportionment instruction necessarily was harmless and cannot support reversal. *Cf. Combs v. Stortz*, 276 S.W.3d 282, 291 (Ky. App. 2009) ("[E]ven if the court had committed error by providing the apportionment instruction, any such error was harmless

as it was cured by the verdict in this matter.").

B. The Apportionment Instruction Was Correct Under *Poole*.

In fact, the trial court's apportionment instruction was entirely proper under this Court's decision in *Poole Truck Line, Inc. v. Commonwealth of Kentucky Transportation Cabinet/Department of Highways*, 892 S.W.2d 611 (Ky. App. 1995). Like this case, *Poole* was a wrongful-death action arising from an automobile accident. *Id.* at 612. When the victim's estate brought suit against Poole Truck Line, which owned the truck that caused the accident, Poole brought a third-party complaint alleging that the KTC's faulty design and maintenance of an intersection contributed to the accident. *Id.*

Although this Court acknowledged that KTC had sovereign immunity against actions brought in court, the Court carefully explained that "[t]his does not mean that a defendant in a negligence action will always be forced to pay for negligence properly attributable to the Commonwealth," because "[o]rdinary rules of contributory negligence allow for an apportionment of damages based on a like apportionment of fault." *Id.* at 614. The same result follows here: an apportionment instruction is required in order to ensure that "[t]he defendant is protected in that he or she only has to pay damages based on his or her portion of the fault." *Id.*

Berry is incorrect that a different result is called for by *Jefferson County Commonwealth Attorney's Office v. Kaplan*, 65 S.W.3d 916 (Ky. 2001), or *Lexington-Fayette Urban County Government v. Smolcic*, 142 S.W.3d 128 (Ky. 2004). In each of those cases, the court held that apportionment was impermissible because the appellants had *absolute immunity from suit* and *had not waived* sovereign immunity. *See Kaplan*, 65 S.W.3d at 920 (prosecutors were entitled to absolute immunity from suit); *Smolcic*, 142 S.W.3d at 132-34 (county governments did not waive sovereign immunity under the

Board of Claims Act). *Kaplan* and *Smolcic* held that apportionment was incompatible with absolute immunity from suit because it could expose the immune party "to process; to the burdens of discovery, including the giving of depositions; and to testifying at trial." *Smolcic*, 142 S.W.3d at 135-36. But that reasoning is not implicated when, as here, a government agency has partially waived its sovereign immunity. As this Court explained in *Poole*, the Board of Claims Act constitutes "a partial waiver of the state's sovereign immunity," 892 S.W.2d at 613, that allows negligence actions against the KTC to be litigated before the Board of Claims. Therefore, unlike the immune parties in *Kaplan* and *Smolcic*, the KTC has consented to service of process, to the burdens of depositions and discovery, and to trial. Indeed, four of the five estates involved in this case—all except that of Kendra Johnson—are presently involved in a Board of Claims action against the KTC based on this very accident. (VR 9/16/11 10:02:06-10:03:13; *see* CSXT Ex. 96.)

The trial court correctly determined that *Poole* controls this case. As in *Poole*, the KTC was properly included in the apportionment instruction to ensure that other defendants would be held liable only for their own share of the fault.

C. The Apportionment Instruction Was Proper Under KRS 411.182.

KRS 411.182(1) provides for the apportionment of liability among "part[ies] to the action, including third-party defendants." The KTC was a third-party defendant to the action; it appeared in this case, and it answered the complaint. (*See* R. 827-34.) Hence, under KRS 411.182(1), the KTC was properly included in the court's apportionment instruction. It is true that KTC was dismissed from the case prior to trial, and that, given its sovereign immunity, the KTC would not have been liable in court for any share of fault assigned to it by the jury had the jury reached the apportionment issue. But Berry is incorrect that the statute permits apportionment only against those who appear as parties

"at the trial" itself (Berry Br. 20). To the contrary, when an immune party is at fault, "the practice is to bring the alleged wrongdoer into the case by a third party complaint only to then have it dismissed," in order to "[s]et up a possible apportionment instruction" later in the case. *Grimes v. Mazda N. Am. Operations*, 355 F.3d 566, 572 (6th Cir. 2004); *see also Prudential Life Ins. Co. v. Moody*, 696 S.W.2d 503, 504 (Ky. 1985) (upholding apportionment where party was dismissed on statute-of-limitations grounds).

D. CSXT Could Not Be Held Liable For The Share Of Damages Attributable To The KTC's Negligence.

Inclusion of the KTC in the apportionment instruction was not merely permissible; it was required to avoid an inequitable allocation of liability to CSXT. Although the trial court does not have jurisdiction to impose damages against the KTC, neither may it hold CSXT liable for the share of damages attributable to the KTC's negligence. *See Poole*, 892 S.W.2d at 614 ("The defendant . . . only has to pay damages based on his or her portion of the fault."). Accordingly, when fault is shared by a party with sovereign immunity, the same rule applies as when fault is shared by a party that has been granted a release: The jury shall be instructed on apportionment so that "the claim of the [plaintiff] against other persons shall be reduced by the amount of the released persons' equitable share of the obligation." KRS 411.182(4).

This is consistent with the rule that applies when other immune entities are involved in complex torts. For example, when one of two joint tortfeasors is exempt from liability on statute-of-limitations grounds, apportionment is required so that the other defendant is not required to pay more than its share of damages. *Prudential*, 696 S.W.2d at 504. The same rule applies for joint tortfeasors in workplace accidents when the employer is exempt from tort claims under the Workers' Compensation Act. *See*

Owens Corning Fiberglas Corp. v. Parrish, 58 S.W.3d 467, 479-81 (Ky. 2001). And this of course was the very rule applied by this Court in *Poole*. *See* 892 S.W.2d at 614.

The apportionment instruction was also consistent with cases establishing that the KTC, not CSXT, is responsible for maintaining KY 467 in a reasonably safe condition. *See Commonwealth of Ky. Transp. Cabinet v. Babbit*, 172 S.W.3d 786, 793-95 (Ky. 2005); *see also Cincinnati, New Orleans & Tex. Pac. Ry. v. Wright*, 549 S.W.2d 499, 504 (Ky. 1976) ("[T]he railroad company does not have a duty to perform ordinary maintenance on the highway within its right-of-way outside of the immediate area of the crossing."). Plaintiffs have asserted in their Board of Claims action that *the KTC* is responsible for the accident because it failed to maintain the road, the guardrail, adequate lighting, and adequate signage. (VR 9/16/11 10:02:15-10:03:38; CSXT Ex. 96.) Those claims were validated by the testimony in this trial.[9] The apportionment instruction was therefore warranted to ensure that CSXT would not be held liable for damages that are instead properly attributed to the KTC.

CONCLUSION

The judgment of the circuit court should be affirmed.

Respectfully submitted,

BY: _____

[9] Multiple experts, including plaintiffs' own expert, testified that signage on the roadway was inadequate to alert drivers to the dangerous curve ahead. (VR 9/15/11 2:04:45-2:05:12, 3:20:09-3:21:15, 3:55:06-3:58:01.) Evidence likewise revealed that the KTC had been aware of the defective guardrail, and had failed to adequately maintain it, for several decades. (VR 9/9/11 12:35:23-12:43:40; VR 9/19/11 9:18:20-9:27:08.) Numerous expert witnesses testified that a properly maintained guardrail would have prevented the car from going into the creek. (VR 9/19/11 12:49:39-12:50:37; VR 9/20/11 1:51:16-2:06:33; VR 9/21/11 12:21:45-12:23:08, 12:58:20-1:00:50.)