No. 12-1934

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MD MALL ASSOCIATES, LLC,
trading as MacDade Mall Associates, L.P.,

Appellant,

– v. –

CSX TRANSPORTATION, INC.,

Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Eastern District of Pennsylvania

Honorable Juan R. Sánchez, District Judge
Case No. 2:11-cv-04068

BRIEF FOR APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit Local Appellate Rule 26.1, CSX Transportation, Inc. makes the following disclosures:

(1) For non-governmental corporate parties please list all parent corporations:

CSX Corporation.

(2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

CSX Corporation.

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INTRODUCTION

The parking lot of plaintiff MD Mall Associates, LLC ("the Mall") flooded in October 2010. The Mall claims that stormwater flowing downhill from a right-of-way owned by defendant CSX Transportation, Inc. ("CSXT") caused the problem. When the Mall informed CSXT about the flooding, CSXT attempted in good faith to ameliorate the problem—but the Mall peremptorily demanded that CSXT cease its initial efforts and declared CSXT's back-up plan insufficient. The Mall then filed suit, alleging that CSXT negligently and intentionally drained stormwater onto the Mall's property in violation of Pennsylvania law and demanding that CSXT implement a "fully engineered solution" to the Mall's water problem.

The Mall's claims are both preempted and meritless. The Federal Railroad Safety Act ("FRSA") expressly preempts state common-law actions that involve a subject matter covered by federal railroad safety regulations. The Mall's claims arise out of alleged problems with drainage under and around CSXT's track—a subject that is, as the Mall implicitly conceded in the district court, directly covered by those regulations. The FRSA thus precludes the Mall's claims. Furthermore, because the Mall seeks to use either the construction or the

maintenance of CSXT's track as the basis for imposing liability, its claims are also expressly preempted by the Interstate Commerce Commission Termination Act ("ICCTA").

Moreover, CSXT would be entitled to summary judgment even if the Mall's claims were not preempted. The Mall's merits argument rests on the assertion that because someone once built what is now CSXT's track, any flow of water from CSXT's property downhill onto the Mall's property exposes CSXT to liability. That assertion is contrary to well-settled Pennsylvania law—and there is no evidence in the record that even begins to suggest CSXT violated the actual state stormwater management standards.

JURISDICTION

The district court had jurisdiction over this diversity action under 28 U.S.C. § 1332. This court has jurisdiction under 28 U.S.C. § 1291, assuming the Mall's request for injunctive relief is not moot.[1] Plaintiff

[1] The case may in fact be moot. The Mall seeks only prospective relief in the form of an injunction ordering CSXT to "provide a fully engineered solution to prevent its stormwater from discharging onto the Mall property." Mall Br. 30; *see also* A8. The Mall has, however, taken steps to prevent further discharge. *See* Mall Br. 9. The Mall's hydrologist admitted that those steps might well prevent further flooding. A333-34:T103-09; *see also* A373-85 (photographs of site from

filed a notice of appeal on April 4, 2012 from the district court's judgment dated March 9, 2012. *See* A1-3, 13.[2]

ISSUES PRESENTED FOR REVIEW

The issues to be determined on appeal are as follows:

1. Did the district court correctly determine that the Mall's negligence and continuing trespass claims are preempted by the Federal Railroad Safety Act, 49 U.S.C. § 20106(a)(2)?

2. If the Mall's negligence and continuing trespass claims are not preempted by the FRSA, are they preempted by the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501(b)?

February 2012). And although the Mall cites to photographs it claims show continuing discharge onto its property (*see* Mall Br. 10 (citing A301-04)), it is impossible to discern any active runoff from those photographs.

If the problem has been fixed such that water is no longer draining onto the Mall's property, the Mall would no longer be able to "show that [it] is under threat of suffering 'injury in fact' that is concrete and particularized." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). The Mall's claim for injunctive relief would therefore be moot, and this case would have to be dismissed for lack of subject-matter jurisdiction. *See id.*

[2] Citations to "A" refer to the Mall's Appendix. Citations to "SA" refer to CSXT's Supplemental Appendix. CSXT submitted a motion for leave to file that supplemental appendix contemporaneously with this brief.

3. If the Mall's negligence and continuing trespass claims are not preempted by either the FRSA or ICCTA, is CSXT entitled to summary judgment on the merits of those claims?

RELATED CASES

There are no related proceedings pending before, or about to be presented to, this or any other court or agency. This matter has not previously been before this Court.

STATEMENT OF THE CASE

The Mall initiated this action on June 22, 2011, and filed an amended complaint on August 22, 2011. A16-17. Alleging that CSXT's "improper maintenance" of a drainage ditch caused stormwater to flow onto the Mall's property (A119), the amended complaint asserted negligence and continuing trespass claims based on that alleged drainage problem (A122-23). The complaint also asserted a separate trespass count alleging that CSXT employees had entered the Mall's property without permission while attempting to solve the Mall's water problem. *See* A120-21, 124.

CSXT filed a motion for summary judgment, and the Mall filed a cross-motion for partial summary judgment on its two trespass claims. *See* A19. Following a hearing, the district court concluded that the

FRSA preempts the Mall's stormwater-related negligence and continuing trespass claims and granted summary judgment to CSXT on those claims. *See* A5-8. The court denied both parties' summary judgment motions as to the claim that CSXT's employees had entered the Mall's property without permission. *See* A8.

The Mall orally moved for reconsideration of the district court's summary judgment ruling on the morning that trial was scheduled to begin on the lone remaining count. *See* SA163:T2. The district court orally denied the motion following argument. *See* SA170:T29 The Mall then voluntarily dismissed its remaining trespass claim. *See* SA170:T29-30. The district court filed a written order denying the motion to reconsider on March 13, 2012, and entered judgment on the same day. *See* A10-11, 13.

STATEMENT OF FACTS

The Properties. A CSXT right-of-way in Delaware County, Pennsylvania abuts the Mall's property. *See* A119; A176; SA27. CSXT's property includes a mainline track and two drainage ditches, one on either side of the track. *See, e.g.*, A109; A222:T18. The track itself sits on compacted ground and on ballast that lifts the rail ties to allow water to flow under the tracks, seep through the ballast, and

drain into the adjoining ditches. A223-24:T25-27. CSXT must keep water away from its tracks to ensure the stability of the track structure as required by 49 C.F.R. §§ 213.33 and 213.103(c)—two track-safety regulations promulgated by the Federal Railroad Administration pursuant to the FRSA. *See* A224:T26; SA55-56, 58.

CSXT's property sits at a higher elevation than the developed portion of the Mall's property. *See* A282-83. The two properties are separated by an earthen berm that stands adjacent to one of CSXT's drainage ditches. *See, e.g.*, *id.* On the other side of the berm, a hill slopes down into the Mall's parking lot. *See, e.g.*, A176. The Mall claims ownership of the entire hill and the crest of the berm. *See* SA2-3, 7-8 (deposition testimony of the Mall's property manager).

The Mall's Water Problem. In October 2010, water began flowing down the hill into the Mall's parking lot. *See* A41-47, 162-63; SA17-18. The Mall's property manager admitted that that Mall has no evidence that CSXT intentionally created the channel through which the water flowed, and conceded that he believes the water naturally collected at the top of—and then naturally flowed down—the hill. *See* SA31-32, 37, 40-41; *see also* A239:T86-87 (testimony of CSXT's

Roadmaster).[3] The Mall nevertheless complained to CSXT, claiming that CSXT has a duty to prevent water from running down the Mall's hill and into the Mall's parking lot. *See* A41, 48.

Notwithstanding the fact that CSXT had not created the Mall's water problem, CSXT employees attempted to work with the Mall to reach a mutually acceptable solution to the problem. *See* A56-65, 72-77. At one point, believing that the Mall had consented to the installation of a concrete spillway to stop mud and debris from entering the Mall's parking lot (*see* A238-40:T85, 89-90; A252:T138; A402), CSXT employees placed frames for the spillway on the Mall's property (*see, e.g.*, A82).[4] But before the spillway could be completed, the Mall's

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[3] There is no evidence to support the Mall's tendentious suggestion that "the cut in the curb" was intentionally cut "to allow CSXT's stormwater to travel directly into the Mall's stormwater inlet." Mall Br. 7.

[4] The Mall's assertion that CSXT sought to install the spillway in order to "discharge [stormwater] directly into the private stormwater inlet located in the Mall's parking lot" (Mall Br. 6) is both irrelevant and incorrect. First, the Mall does not—and cannot—claim that the aborted installation of the spillway in 2011 caused stormwater to begin flowing onto the Mall's property in 2010, which is the circumstance giving rise to the Mall's suit. *Cf. id.* at 4. On the contrary, as the Mall admits, construction of the spillway was intended "to ***resolve*** the stormwater problem." *Id.* (emphasis added). Second, CSXT's Roadmaster testified that he would ***not*** "direct [water] onto someone

property manager peremptorily demanded that CSXT halt its construction, alleging that CSXT never had permission to enter the Mall's property. *See* A86, 93-99. Then, with the Mall's express written consent, CSXT took the only other measure it concluded was feasible after study: it placed rip rap—which is to say, a barrier of large rocks—in the area to slow the water down. *See* A62, 68, 84, 100.

The Mall's Claims. Despite CSXT's efforts, the Mall filed suit, alleging that CSXT's "improper maintenance" of a drainage ditch adjacent to its tracks either negligently or intentionally caused stormwater to drain onto the Mall's parking lot. A119-20.[5] Subsequently, the Mall argued that maintenance CSXT performed on its tracks in March 2009 somehow caused drainage and discharge problems in October 2010. *E.g.*, SA82 ("modifications that CSX made … in spring 2009[] caused" the flooding); SA103 (same); SA141-

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else's property" and that the spillway was designed to prevent "mud [from] running down to [the Mall's] parking lot." A251:T134; *see also* SA59 (CSXT's staff engineer stating that spillway was "to prevent erosion"); SA61 (engineer acknowledging that email stating a "concrete trough" would "divert water" constituted a "poor word choice").

[5] The Mall refers to the ditch as a "swale." *See, e.g.*, Mall Br. 14; A119.

42:T50-53 (plaintiff relying at oral argument on the 2009 track maintenance as alleged evidence of changed topography). As relief, the Mall demanded that CSXT divert water from the Mall side of its tracks to the public stormwater system on the other side of its tracks. *See* A410; Mall Br. 7; SA144:T63-64; SA145-46:T68-69.

Although the Mall characterizes the March 2009 maintenance as "a major refurbishment" (Mall Br. 7), CSXT performed nothing more than a routine tie replacement and attendant ballast resurfacing. A230-31:T53-54. CSXT had previously replaced the ties on the same section of track without incident in both 1992 and 2001. A387-88. Moreover, Federal Railroad Administration regulations require CSXT to conduct such maintenance, which is designed to maintain the "gauge and surface" of the track (A231:T55) and "to maintain the track structure" so that CSXT can continue "to operate trains" (A386; *accord* A394). *See* 49 C.F.R. § 213.33 (drainage); *id.* § 213.103 (ballast); *id.* § 213.109 (cross-ties).

Since the Mall filed its amended complaint, it has dramatically altered the contours of its claims in three ways relevant to this appeal. First, although the Mall initially sought both damages and an

injunction (*see* A122-24), it subsequently expressly waived its claim to damages. The Mall is now "seeking entirely equitable relief" and "is not pursuing a claim to recover" the alleged "monetary losses that it has incurred." A405-06; *see also* Mall Br. 30 (requesting injunctive relief).

Second, the Mall has apparently abandoned its theory that CSXT's routine track maintenance caused the Mall's water problem. On appeal, it reverts instead to a theory it first propounded during the February 27, 2012 hearing on the parties' summary judgment motions. The Mall now contends that CSXT is liable for any and all stormwater runoff because CSXT's supposed predecessor in interest altered the topography of the area when the railroad line was built at some point in the distant past. *See* Mall Br. 12-15; SA143-44:T59-61. The record, however, does not reveal the actual topography before the rail line was constructed,[6] and the Mall concededly does not know who constructed

[6] The Mall cites to what it claims is a United States Geological Survey map showing the area before the track was installed. *See* Mall Br. 3 (citing A26-27). This map was never presented to the district court and therefore is not in the record on appeal. *See Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 682 (3d Cir. 2003) (the parties cannot "supplement[] the record on appeal with items never presented to the district court"). Nor is the map a proper subject of judicial notice. It is well-established that "a court of appeals should not take judicial

the tracks or when they were built. *See, e.g.*, SA157 (speculation by the Mall that "the railroad or its predecessor in interest" altered the local topography, "probably in the nineteenth century," to "create a roadbed for its tracks").

Third, although the parties extensively briefed and argued the issue of FRSA preemption in the district court, the Mall never argued, as it does for the first time on appeal, that federal railroad safety

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notice of documents on an appeal which were available before the district court decided the case but nevertheless were not tendered to that court." *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 303 (3d Cir. 2011). Given that the map was created in 1967 and revised in 1994 (*see* A26), *i.e.*, long before the Mall initiated this action, that is "the precise situation here" (*Wilkins*, 659 F.3d at 303).

Moreover, and more fundamentally, judicial notice is not permissible under Rule 201(b)(2) of the Federal Rules of Civil Procedure, which permits judicial notice of an adjudicative fact if, but only if, the fact "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." That necessary condition is not satisfied here. The Mall claims that the map depicts the area's "natural terrain" "before the track was installed." Mall Br. 3. But, given that neither party knows for certain when the track was built, the accuracy of the map's purported depiction of the natural terrain of the area prior to the track's construction ***can*** "reasonably be questioned." Indeed, given the Mall's admitted belief that the track was probably built "in the nineteenth century" (SA157), it is highly unlikely that a map created in 1967 and revised in 1994 accurately depicts the natural terrain prior to the track's construction.

regulations do not cover the same subject matter as the Mall's claims against CSXT. To the contrary, the Mall's attempt to resist FRSA preemption in the district court rested wholly on the Mall's assertion that "[b]y failing to control its stormwater, CSX violate[d] 49 C.F.R. § 213.33," and its argument that "claims alleging that the railroad failed to comply with federal regulations are not preempted by the FRSA." SA98-99 & n.6; *see also* SA111 (discussing purported "evidence that CSX violated 49 C.F.R. § 213.33"); SA145:T65-67 (arguing that § 213.33 provides an avenue for relief); SA160 ("Plaintiff's claim that CSX violate[d] 49 C.F.R. § 213.33 is not preempted under the Federal Railway [sic] Safety Act."); SA165:T12 (arguing that the Mall is "suing under a state law that is identical to the federal regulations").[7] In its summary judgment opinion, the district court accepted and relied upon this "implicit[] acknowledg[ment]" that the federal regulations covered the subject-matter of the claims at issue. A7.

[7] The "Concise Summary of the Case" the Mall filed in this Court on April 26, 2012, similarly asserts that the Mall's claims are brought under both state law and federal regulations. SA171.

SUMMARY OF ARGUMENT

CSXT is entitled to summary judgment on the Mall's negligence and continuing trespass claims for three independent reasons.

First, those claims are preempted by the FRSA, which precludes state regulation of any subject matter covered by federal railroad safety regulations. Although the Mall argues at length in its opening brief that no federal regulations cover the subject matter of its claims, the Mall forfeited that argument by failing to raise it in the district court. Moreover, the Mall is judicially estopped from asserting that argument now, after having taken the opposite position in the district court. Furthermore, and most fundamentally, the federal railroad safety regulations do in fact cover the subject matter of the Mall's claims by expressly regulating drainage under and around railroad tracks.

Congress's 2007 clarifying amendment to the FRSA does not save the Mall's claims from preemption. To start, the exception to preemption recognized by the amendment permits tort claims only in cases where a railroad has violated the applicable federal regulation. Here, there is no evidence that CSXT violated the federal track drainage regulations. And even if the Mall had adduced such evidence, the amendment permits only claims for damages. Here, however, the

Mall—having expressly waived any claim for damages—seeks solely injunctive relief. Therefore, as the district court correctly concluded, the Mall's claims are preempted by the FRSA.

Second, ICCTA would preempt the Mall's claims even if the FRSA did not. Adopting the approach endorsed by the Surface Transportation Board ("STB"), the agency charged with administering ICCTA, numerous courts of appeals have held that ICCTA categorically preempts all state regulation of matters directly regulated by the STB. Under that approach, the Mall's claims are categorically preempted. The Mall theorizes that either the construction or maintenance of CSXT track caused the Mall's water problem. Under either theory, the Mall is attempting to regulate matters that are directly regulated by the STB.

Although this Court has previously used an as-applied approach to ICCTA preemption, it has never before been faced with an attempt to use state law to regulate matters directly regulated by the STB—and has therefore never had occasion to consider the categorical approach endorsed by the STB and adopted by other courts of appeals. The Court should adopt that approach, and hold the Mall's claims to be categorically preempted, in order to effectuate Congress's intent to

exempt railroads from patchwork state regulations that burden core railroad operations. But even if the Court declines to follow the categorical approach, the Mall's claims are in any event preempted, because the injunctive relief it seeks would unreasonably burden CSXT's railroad operations.

Third, even if the Mall's claims were not preempted, CSXT would be entitled to summary judgment on the merits of the Mall's claim. The Mall asserts that it is entitled to relief simply because (1) some entity previously improved what is now CSXT's property by constructing the rail line, and (2) stormwater flows from CSXT's property downhill onto the Mall's property. But that standard, which borders on strict liability, finds no support in Pennsylvania law. In fact, Pennsylvania imposes liability on landowners for stormwater runoff in only very narrow circumstances, and there is no evidence that those circumstances are present here. The Mall also offered no evidence that CSXT intentionally diverted water onto the Mall's property, proof that would be necessary for the Mall to prevail on its trespass claim. Finally, the Mall cannot obtain equitable relief on its negligence claim, which is an

action at law. CSXT is entitled to summary judgment for each of these reasons.

STANDARD OF REVIEW

This Court "review[s] [the] District Court's grant of summary judgment *de novo*, applying the same standard the District Court applied." *Gonzalez v. Sec'y of Dep't of Homeland Sec.*, 678 F.3d 254, 257 (3d Cir. 2012) (internal quotation marks omitted). "When reviewing a grant of summary judgment the court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Id.* (internal quotation marks omitted).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE MALL'S CLAIMS ARE PREEMPTED BY THE FRSA.

"Congress enacted the [FRSA] 'to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents'" (*Norfolk S. Ry. v. Shanklin*, 529 U.S. 344, 347 (2000) (quoting 49 U.S.C. § 20101)) and to make "[l]aws, regulations, and orders related to railroad safety … nationally uniform to the extent practicable" (49 U.S.C. § 20106(a)(1)). To those ends, the statute "grants the Secretary of Transportation the authority to 'prescribe

regulations and issue orders for every area of railroad safety.'" *Shanklin*, 529 U.S. at 347 (quoting 49 U.S.C. § 20103(a)).

The FRSA expressly preempts state "law[s], regulation[s], or order[s] related to railroad safety" once "the Secretary of Transportation … prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2).[8] The statute, in other words, preempts state regulations, including state common-law claims, concerning subjects that are "substantially subsume[d]" by federal railroad safety regulations. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *accord, e.g.*, *Shanklin*, 529 U.S. at 352; *Strozyk v. Norfolk S. Corp.*, 358 F.3d 268, 271 (3d Cir. 2004). To "substantially subsume" a topic, regulations must do more than "touch upon or relate to" the topic. *Strozyk*, 358 F.3d at 273 (internal quotation marks omitted). "[A] regulatory framework need not," however, "impose bureaucratic micromanagement in order to

[8] Section 20106(a)(2) provides three exceptions to the rule that railroad safety federal regulations preempt all state regulation dealing with the same subject matter. The Mall does not claim, and has never claimed, that any of those exceptions applies to this case.

substantially subsume a particular subject matter." *In re Derailment Cases*, 416 F.3d 787, 794 (8th Cir. 2005).

In 2007, Congress adopted a "[c]larif[ying]" amendment stating that the FRSA does not preempt certain state-law actions that "seek[] damages for personal injury, death, or property damage." 49 U.S.C. § 20106(b)(1). That amendment permits a state-law damages action to proceed if it alleges a "fail[ure] to comply with the Federal standard of care established by a [safety] regulation or order issued by the Secretary of Transportation." *Id.* § 20106(b)(1)(A).

The FRSA preempts the Mall's claims. Although the Mall contends on appeal that federal regulations do not cover the subject matter of its claims, the Mall is barred by the doctrines of waiver and judicial estoppel from making that argument. In any event, the Mall is wrong: federal railroad safety regulations cover the subject of drainage under and around the tracks—and therefore preempt the Mall's claims, which concern precisely the same topic. Moreover, because the Mall has expressly waived any claim for "damages for" its alleged "property damage" (*id.* § 20106(b)(1)) and instead seeks only injunctive relief, the clarifying amendment does not apply to the Mall's claims.

A. The Mall Is Barred From Arguing That Federal Regulations Do Not Cover The Subject Matter Of Its Claims.

The contention that federal regulations do not cover the same subject-matter as the Mall's state-law claims forms the centerpiece of the Mall's brief on appeal. *See* Mall Br. 15-24. The Mall, however, did not make that argument in the district court. In fact, it took the directly contrary position, arguing that its water problem was caused by CSXT's purported violation of 49 C.F.R. § 213.33, the federal track drainage regulation. And, in granting summary judgment to CSXT, the district court relied on the Mall's "implicit[] acknowledg[ment]" that the regulation "'covers' the subject of drainage in and around the roadbed." A7. The doctrines of waiver and judicial estoppel should therefore be applied to bar the Mall from arguing to this Court that federal regulations do not cover the subject of its claims.

1. The Mall forfeited the argument that federal regulations do not cover its claims.

"'It is axiomatic that arguments asserted for the first time on appeal are deemed to be waived and consequently are not susceptible to review in this Court absent exceptional circumstances.'" *Birdman v. Office of the Governor*, 677 F.3d 167, 173 (3d Cir. 2012) (quoting *Tri-M*

Grp., LLC v. Sharp, 638 F.3d 406, 416 (3d Cir. 2011)); *accord, e.g.*, *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 261 (3d Cir. 2009). Thus, "[f]or an issue to be preserved for appeal, a party 'must unequivocally put its position before the trial court at a point and in a manner that permits the court to consider its merits.'" *Ins. Brokerage Antitrust Litig.*, 579 F.3d at 262 (quoting *Shell Petroleum, Inc. v. United States*, 182 F.3d 212, 218 (3d Cir. 1999)).

The Mall waived its argument that federal regulations do not cover the subject matter of the Mall's claims by failing to raise that argument in the district court. The Mall filed no fewer than three briefs in the district court that discuss preemption under the FRSA (*see* SA93-109; SA110-28; SA154-62), and its counsel participated in two hearings on that topic (*see* SA129-53; SA163-70). Despite those multiple opportunities, and despite the fact that the Mall was well-acquainted with the standard for FRSA preemption (*see, e.g.*, SA94-97), the Mall never so much as hinted that federal regulations do not cover the subject of its claims—much less "unequivocally put [that] position before the trial court" (*Ins. Brokerage Antitrust Litig.*, 579 F.3d at 262

(internal quotation marks omitted)). This is, therefore, a textbook case of waiver.[9]

2. The Mall is judicially estopped from arguing that federal regulations do not cover its claims.

Judicial estoppel also precludes consideration of the Mall's argument. "Judicial estoppel is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that [it] has previously asserted in the same or in a previous proceeding." *Macfarlan v. Ivy Hill SNF, LLC*, 675 F.3d 266, 272 (3d Cir. 2012) (internal quotation marks omitted). "The doctrine exists to protect the integrity of the judicial process and to prohibit parties from deliberately changing positions according to the exigencies of the moment." *Id.* (internal quotation marks omitted).

Estoppel applies only where "the defending party … convince[d] the District Court to accept"—or at least "rel[y] on"—"its earlier

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[9] The Mall might argue that refusing to consider the waived argument is inappropriate because preemption "present[s] a pure question of law." *Webb v. City of Phila.*, 562 F.3d 256, 263 (3d Cir. 2009). This Court, however, only considers such questions in the first instance "where refusal to reach the issue would result in a miscarriage of justice or where the issue's resolution is of public importance." *Id.* (internal quotation marks omitted). Neither condition holds here.

position." *G-I Holdings, Inc. v. Reliance Ins. Co.*, 586 F.3d 247, 262 (3d Cir. 2009). If that threshold criterion is satisfied, "three factors inform a federal court's decision whether to apply" estoppel: "there must be (1) irreconcilably inconsistent positions; (2) adopted in bad faith; and (3) a showing that estoppel addresses the harm and no lesser sanction is sufficient." *Id.* (internal quotation marks and alterations omitted).

The threshold criterion is satisfied in this case. In the district court, the Mall characterized its claims as "alleging that the railroad failed to comply with federal regulations," and argued that its claims are not preempted by the FRSA because, "[b]y failing to control its stormwater, CSX violate[d] 49 C.F.R. § 213.33." SA98-99 & n.6; *see also* SA111-13; SA160; SA165:T12. And although the district court ultimately granted summary judgment to CSXT, the court ***did*** accept the Mall's "implicit[] acknowledg[ment]" that "the drainage regulation 'covers' the subject of drainage" in the areas implicated by this case. A7-8. Given the Mall's assertion that "CSX's refusal to manage its stormwater so that it does not discharge onto the Plaintiff's property is a violation of Section 213.33" (SA161), the court never considered whether the regulation "covers" the Mall's claim of improper drainage,

and instead limited its analysis to whether a claim for injunctive relief based on a violation of that regulation survives preemption. A7-8. In taking CSXT's alleged violation as the starting point for its preemption analysis (*see id.*), the court "relied on" the Mall's earlier position. *G-I Holdings, Inc.*, 586 F.3d at 262.

Each of the three other factors also weighs in favor of estoppel in this case. First, the Mall's argument on appeal directly contradicts the argument it raised below. In the district court, the Mall repeatedly argued that CSXT's discharge of stormwater "on to the Mall Property" violated CSXT's "duty[] under Section 213.33." SA90; *see also* SA98-100; SA111-13; SA145:T65-67; SA160; SA165:T12. Now, the Mall asserts that § 213.33 does "not even relate to, let alone cover, the subject of a railroad's discharge of stormwater onto an adjoining property." Mall Br. 11; *see also id.* at 21. That newly minted contention cannot be squared with the Mall's prior statements to the district court.

Second, the Mall's reversal was made in bad faith—which is to say that the Mall is "play[ing] fast and loose" with the courts. *Greenway Ctr., Inc. v. Essex Ins. Co.*, 475 F.3d 139, 151 n.8 (3d Cir. 2007). In the district court, the Mall consistently argued that its claims are not

preempted by the FRSA because CSXT's discharge of stormwater onto the Mall's property "is a violation of Section 213.33." SA161. Now, after the district court held that its claims are preempted because the FRSA does not allow private parties to seek injunctive relief to remedy regulatory violations, the Mall argues exactly the opposite—that its claims escape preemption because § 213.33 does "not even relate to, let alone cover, a railroad's discharge of stormwater onto an adjoining property." Mall Br. 11.

Nor is this the first time the Mall has shifted its arguments in response to an adverse ruling. In the district court, when faced with skeptical questioning from the bench about its theory that CSXT's 2009 track maintenance caused its water problem, the Mall suddenly propounded a theory never advanced in its briefs—the argument that CSXT is liable because someone once built the rail line at issue. *See* SA143-44:T59-61; *compare* SA103 (attributing Mall's water problem to 2009 track maintenance) *with* SA160 (attributing Mall's water problem to alteration of the natural grade "when the tracks were originally installed"). The Mall's history of altering its positions based on "the

exigencies of the moment" (*Macfarlan*, 675 F.3d at 272) gives rise to an inference of bad faith.

Finally, no sanction less than estoppel could redress the harm. "[J]udicial acceptance of" the Mall's new, inconsistent position "would create the perception that either" the district court or this Court "was misled." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (internal quotation marks omitted). For that reason, the imposition of some lesser sanction would "send a message that" parties may freely reverse their positions on appeal. *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 325 (3d Cir. 2003) (discussing the concealment of assets). Estoppel is therefore necessary to "preserve the integrity of the earlier proceedings." *Id.* (internal quotation marks omitted).

B. Federal Regulations Cover The Subject Matter Of The Mall's Claims.

The Mall would have no basis for resisting FRSA preemption even if it had properly preserved its argument, because the Mall's claims seek to regulate drainage under and around the tracks—the very subject covered by 49 C.F.R. § 213.33 and 49 C.F.R. § 213.103(c).

1. The Mall's claims implicate drainage under and around the tracks.

Whether the source of the alleged problem is the original construction of the track (Mall Br. 12-13), the subsequent maintenance of the track (SA102-03), or the alleged failure to properly maintain the track "drainage facility … as required under Section 213.33" (SA90), the Mall's claims are based on the drainage of water from CSXT's track and the areas immediately adjacent to that track.[10] Indeed, if water does drain from CSXT's property onto the Mall's property, it ***must*** originate from under or around the tracks. CSXT's property consists of the "rail line" itself and the drainage ditches immediately adjacent to the track. *E.g.*, A36; A280. Thus, there is nowhere on CSXT's property for the water to originate ***except*** the area under or immediately adjacent to the tracks.

[10] As the Mall told the district court, "Section 213.33, by its own terms, pertains to '[e]ach drainage or other water carrying facility under or immediately adjacent to the roadbed' and therefore encompasses the drainage slope as well as the ditch line." SA112.

2. Federal regulations cover the topic of drainage under and around the tracks and therefore preempt the Mall's claims.

The Secretary of Transportation has promulgated safety regulations that directly cover the subject matter of drainage under or immediately adjacent to the tracks. Specifically, 49 C.F.R. § 213.33, entitled "Drainage," requires that "[e]ach drainage or other water carrying facility under or immediately adjacent to the roadbed be maintained and kept free of obstruction, to accommodate expected water flow for the area concerned." As the Mall admits (Mall Br. 20), "roadbed" refers to "the area under and adjacent to the tracks." *Anderson v. Wis. Cent. Transp. Co.*, 327 F. Supp. 2d 969, 979 n.11 (E.D. Wis. 2004); *accord Mo. Pac. R.R. v. R.R. Comm'n of Tex.*, 948 F.2d 179, 182 (5th Cir. 1991).

A related federal regulation requires railroads to use ballast that "[p]rovide[s] adequate drainage for the track." 49 C.F.R. § 213.103(c). Ballast—crushed rock placed beneath and beside the track—supports the rails and ties (*see id.* § 213.103; SA43-44), and acts to "drain [water] away from the track" (SA56) and into the adjacent drainage ditches (A223-24:T25-27; *see also* A29-35; A230-31). Both the drainage regulation and the ballast regulation thus cover the subject of drainage

under and around railroad tracks. *See, e.g.*, *Nickels v. Grand Trunk W. R.R.*, 560 F.3d 426, 430 (2009); *id.* at 434 (Rogers, J., dissenting); *Brenner v. Consolidated Rail Corp.*, 806 F. Supp. 2d 786, 796 (E.D. Pa. 2011).

In short, federal railroad safety regulations directly regulate the topic that the Mall seeks to regulate via state tort law—drainage under and around the tracks. Applying the plain language of 49 U.S.C. § 20106(a)(2), the federal courts routinely hold state-law tort claims preempted when such claims and a federal railroad safety regulation address the same subject matter. *See, e.g.*, *Grade v. BNSF Ry.*, 676 F.3d 680, 687 (8th Cir. 2012) (regulations and claims both concern "warning devices … on railcars"); *Henning v. Union Pac. R.R.*, 530 F.3d 1206, 1213 (10th Cir. 2008) ("warning devices at a crossing"); *Nye v. CSX Transp., Inc.*, 437 F.3d 556, 562-63 (6th Cir. 2006) (same); *In re Derailment Cases*, 416 F.3d at 793-94 (inspections); *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 672 (D.C. Cir. 2005) (hazardous material transport); *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 637 (5th Cir. 2005) (excessive speeds); *CSX Transp., Inc. v. City of Plymouth*, 283 F.3d 812, 817 (6th Cir. 2002) (train length).

More specifically, every court to directly address the issue has concluded that federal regulations "cover" drainage under and around the tracks and therefore preempt claims like those at issue here. In *Rooney v. City of Philadelphia*, 623 F. Supp. 2d 644 (E.D. Pa. 2009), for example, Judge Robreno held that the FRSA preempted claims functionally identical to the Mall's claims. The plaintiffs in *Rooney* were property owners who alleged that runoff and drainage problems from railroad tracks resulted in "flood[ing]" that "caus[ed] extensive damages to Plaintiffs' properties and businesses." *Id.* at 648. The court concluded that federal track safety regulations, including 49 C.F.R. § 213.33 and § 213.103, governed, among other things, "[d]rainage requirements"—and therefore "cover[ed] the subject matter at issue." *Rooney*, 623 F. Supp. 2d at 666.

The Indiana Court of Appeals reached a similar conclusion in *Black v. Baltimore & Ohio Railroad Co.*, 398 N.E.2d 1361 (Ind. Ct. App. 1980). The plaintiff in *Black* contended that muddy conditions hazardous to employees had result from, among other things, the "lack of good crossties, ballast and poor drainage." *Id.* at 1361. The court held that, even though there was no "specific regulation dealing with

muddy conditions," the plaintiff's claims were preempted by, among other regulations, 49 C.F.R. § 213.33 and § 213.103(c), which covered the "conditions that are alleged to have contributed to the" muddy conditions. *Id.* at 1363; *see also Mo. Pac. R.R.*, 948 F.2d at 182 n.2 (regulations require "maintain[ance] in order to prevent," *inter alia*, "drainage problems"); *Wilcox v. CSX Transp., Inc.*, 2007 WL 1576708, at *6 (N.D. Ind. May 30, 2007) ("The plain language of [Section 213.103] makes it clear that it was promulgated … to establish parameters for ensuring that railroad tracks were adequately supported and provided adequate drainage."); *Hendrix v. Port Terminal R.R. Ass'n*, 196 S.W.3d 188, 196 (Tex. Ct. App. 2006) ("regulations relate to track structure and drainage").

The situation here is even more direct: the Mall's claims arise directly from a claimed drainage problem either under or immediately adjacent to the tracks. Because 49 C.F.R. § 213.33 and § 213.103(c) specifically and unambiguously cover that very topic, the Mall's state-law claims are preempted by the FRSA.

3. The Mall's arguments against preemption are without merit.

In support of its untimely and unpersuasive argument that the federal railroad regulations do not cover the topic of track drainage, the Mall cites various cases involving unrelated regulations. *See* Mall Br. 17-20. But none of those cases permitted state-law claims to proceed when, as here, the claims would have imposed a state-law standard of care on a topic also governed by federal railroad safety regulations.

Many of the cases the Mall cites stand at most for the proposition that federal regulations speak only to the subjects they expressly address. For example, this Court's opinion in *Strozyk* held that regulations about "warning devices" did not preclude plaintiffs from bringing state-law claim about "sight lines" or the "general maintenance of a safe grade crossing." *See* 358 F.3d at 273. The Sixth Circuit's opinion on remand in *Shanklin* likewise held only that "adequate warning [signal] regulations … do not 'cover' state common law vegetation/sight distance claims." *Shanklin v. Norfolk S. Ry.*, 369 F.3d 978, 988 (6th Cir. 2004).[11] These cases cannot, and do not, support the

[11] *Accord Murrell v. Union Pac. R.R.*, 544 F. Supp. 2d 1138, 1153-54 (D. Or. 2008); *Anderson*, 327 F. Supp. 2d at 980; *see also Rushing v.*

proposition that state-law claims based on drainage practices under and around railroad tracks may proceed despite the existence of federal regulations governing drainage under and around railroad tracks.

Several of the Mall's other cases hold that a regulation governing vegetation "immediately adjacent to roadbed" does not preempt claims based on the "fail[ure] to trim vegetation" farther away from the roadbed. *Anderson*, 327 F. Supp. 2d at 980 ("up to 330 feet from roadbed"); *accord Peters v. Union Pac. R.R.*, 455 F. Supp. 2d 998, 1003 (W.D. Mo. 2006) (areas "not … on or immediately adjacent to the tracks"); *see also Mo. Pac. R.R. v. R.R. Comm'n of Tex.*, 833 F.2d 570, 577 (5th Cir. 1987) (state vegetation regulation not preempted because it was "designed to apply where the federal requirements end"); *Bowman v. Norfolk S. Ry.*, 832 F. Supp. 1014, 1020-21 (D.S.C. 1993)

Kansas City S. Ry., 185 F.3d 496, 515-16 (5th Cir. 1999) (regulations concerning "sound capacity" of whistles do not preempt nuisance claims based on when the whistles are sounded), *superseded by rule on other grounds, as stated in Mathis v. Exxon Corp.*, 302 F.3d 448, 459 n.16 (5th Cir. 2002); *Bradford v. Union Pac. R.R.*, 491 F. Supp. 2d 831, 838-39 (W.D. Ark. 2007) (regulations requiring reporting of hours do not preempt claims based on worker fatigue, and regulations regarding stopping distances and preparation do not preempt claims "akin to a failure to maintain a proper lookout").

(holding that claims about vegetation next to the roadbed are preempted but claims about vegetation "beyond the area" specified by the regulation are not). These cases are inapposite. The Mall's claims implicate the drainage system ***under and immediately adjacent*** to CSXT's tracks and roadbed (*e.g.*, A223-24:T24-27, A282-83), which is precisely the area governed by the federal drainage regulations (*see* 49 C.F.R. §§ 213.33 & 213.103(c)).

Finally, the Mall seeks to draw support from two cases holding that the FRSA does not preempt claims arising from activities, such as the sounding of whistles "for no apparent reason" (*Rushing*, 185 F.3d at 516) or "idling engine noise, pollution, and … employee harassment," that "do not serve any safety purpose" (*Jones v. Union Pac. R.R.*, 94 Cal. Rptr. 2d 661, 671 (Ct. App. 2000)). *See* Mall Br. 22. In this case, however, the claims asserted directly implicate a critical aspect of railroad safety: federal regulations require CSXT to maintain its drainage system to protect the structure and surface of the tracks. *See* 49 C.F.R. § 213.5(a); A223-24:T25-26; SA55-56, 58. Thus, *Jones* and

Rushing are distinguishable, like each of the other cases upon which the Mall relies.[12]

The Mall asserts that the federal track-drainage regulations do not preempt its claims because those regulations do not prohibit CSXT "from discharging stormwater onto the Mall property." Mall Br. 21. But that is irrelevant. Although the regulations may not prohibit the discharge of water from CSXT's tracks onto the Mall's property, that does not mean that the regulations do not cover the subject of track drainage.[13] "In effect," the Mall's "complaint is not that the federal government has not covered the subject matter of" track drainage; "rather, [the Mall's] charge is that [49 C.F.R. §§ 213.33 and 213.103(c)]

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[12] The Mall's brief conflates FRSA preemption and ICCTA preemption. *See* Mall Br. 22-24. The remaining cases on which the Mall attempts to rely—*Emerson v. Kansas City S. Ry.*, 503 F.3d 1126 (10th Cir. 2007), *N.Y. Susquehanna & W. Ry. v. Jackson*, 500 F.3d 238 (3d Cir. 2007), and *Rushing v. Kansas City S. Ry.*, 194 F. Supp. 2d 493 (S.D. Miss. 2001)—concern only ICCTA, not the FRSA. Similarly, the Mall's contentions that its claims are neither burdensome nor discriminatory apply solely to ICCTA preemption; they have no place in the FRSA preemption analysis delineated by *Easterwood* and *Shanklin*. We address those cases and arguments in Part II, *infra*.

[13] Below, the Mall argued that the alleged conduct giving rise to its claims—namely, CSXT's purported "fail[ure] to control its stormwater"—"violate[d] 49 C.F.R. § 213.33." SA99 n.6. CSXT's alleged conduct could not be a violation of § 213.33 unless the regulation covers that conduct, *i.e.*, covers the conduct giving rise to the Mall's claims.

inadequately do[] so." *Williams*, 406 F.3d at 672. "The FRSA preemption provision, however, authorizes the court ***only*** to determine whether the regulation covers the subject matter," not to evaluate the regulations' sufficiency. *Id.* Because the drainage regulations unambiguously cover the subject matter of drainage under and adjacent to the tracks, the Mall's claims are preempted by the FRSA.

C. The Mall's Claims Fall Outside The Scope Of The Clarifying Amendment.

Contrary to the Mall's suggestion (Mall Br. 27), the 2007 clarifying amendment to the FRSA does not except the Mall's claims from preemption. As an initial matter, the amendment applies only when a railroad "has failed to comply with the Federal standard of care established by a regulation." 49 U.S.C. § 20106(b)(1)(A). Here, there is no evidence of any such violation.[14] And even if there were, the district

[14] Contrary to the Mall's representation, the district court did ***not*** "h[old] that the Mall made out a claim for violation of a federal standard." Mall Br. 27. Moreover, there was no evidence on which the court could have so held. The only purported evidence of a violation that the Mall offered was the opinion of Frank Browne, who opined that "the changed hydrological conditions caused by the 2009 CSX modifications to the rail lines caused the earthen berm to erode, allowing stormwater from the CSX property to discharge onto the Mall property." A281 (cited at SA72). Even if one assumes that to be true, it does not establish a violation of 49 C.F.R. § 213.33, which, in

court correctly concluded that the clarifying amendment—which is expressly limited to actions for "damages"—does not apply to the Mall's suit because, having disavowed any claim for damages, the Mall seeks only injunctive relief.

1. The clarifying amendment covers only actions for damages.

Any "inquiry into the meaning of a statute begins with its plain language." *Birdman*, 677 F.3d at 176. The language of the clarifying amendment to the FRSA could not be plainer: it permits only certain claims "seeking ***damages*** for personal injury, death, or property damage." 49 U.S.C. § 20106(b)(1) (emphasis added); *see also, e.g.*, 75 Fed. Reg. 1180, 1209 (Jan. 8, 2010) ("The key concept of Section 20106(b) is permitting actions under State law seeking damages for personal injury, death, or property damage to proceed using a Federal standard of care."); *Nickels*, 560 F.3d at 432 (recognizing that the amendment permits specified "state cause[s] of action for 'damages for personal injury, death, or property damage'"). By its express terms,

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conjunction with § 213.31, requires that stormwater be drained from the "roadbed and areas immediately adjacent to [the] roadbed" but does not prohibit the discharge of stormwater onto neighboring property.

then, the clarifying amendment applies only claims for damages—but not to claims for other types of relief. If the amendment were interpreted as applying to ***all*** claims for property damage regardless of the remedy requested, the word "damages" would be read out of the amendment. Any such interpretation would violate the cardinal rule of statutory construction that "every word in a statute has meaning." *Disabled in Action of Pa. v. SEPTA*, 539 F.3d 199, 210 (3d Cir. 2008); *accord, e.g.*, *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 724 (2011).

The clarifying amendment's restriction to actions for damages makes perfect sense. Under the FRSA, "[t]he Secretary of Transportation has exclusive authority" to "request an injunction for a violation of a railroad safety regulation." 49 U.S.C. § 20111(a)(2). The sole exception to this exclusive authority permits "State authorit[ies] participating in investigative and surveillance activities" to seek injunctions under certain circumstances. *See id.* §§ 20111(a)(2) & 20113(a). Taken together, those statutory provisions prohibit private plaintiffs from ever requesting injunctive relief for violations of federal railroad safety regulations. *See, e.g.*, *Walsh v. CSX Transp., Inc.*, 2009

WL 425817, at *2 (N.D.N.Y. Feb. 18, 2009) ("[E]nforcement powers under the FRSA are vested solely with the Secretary of Transportation and, under certain conditions, the States or the Attorney General."). Thus, had the 2007 amendment not been limited to actions "for damages," it would have created an inconsistency in the statute. The amendment means what it says: it applies only to actions for damages.

2. The Mall is not seeking damages.

The Mall's claims fall outside the scope of the clarifying amendment because the Mall seeks solely injunctive relief, not damages. The Mall, in fact, expressly waived any claim to money damages in the district court. The Mall told the district court that it is "seeking entirely equitable relief" and "is not pursuing a claim to recover" the alleged "monetary losses that it has incurred." A405-06. On appeal, the Mall confirms that it seeks only an injunction directing CSXT to implement a "fully engineered solution" to the alleged drainage problem. Mall Br. 30.

The Mall's opening brief attempts to circumvent this concession by cursorily arguing that "the District Court could have fashioned injunctive relief as damages." *Id.* at 29. That statement is nonsensical. "Damages consist in compensation for loss sustained." *U.S. Steel Prods.*

Co. v. Adams, 275 U.S. 388, 391 (1928) (internal quotation marks omitted); *see also, e.g.*, *Miller v. Weller*, 288 F.2d 438, 439 (3d Cir. 1961) (defining "[d]amages" as "something paid in recompense for an infringement of a plaintiff's legal right by the defendant's liability-creating conduct"); *Hodges v. Rodriguez*, 645 A.2d 1340, 1348 (Pa. Super. Ct. 1994) (same); Restatement (Second) of Torts § 902 (1979) ("Restatement") ("'Damages' means a sum of money awarded to a person injured by the tort of another."). The Mall does not ask for compensation, recompense, or any kind of monetary relief.

Instead, it asks that CSXT be required to undertake a specific action—which is another way of saying that it seeks a mandatory injunction. *See, e.g.*, *Shepherd v. Pittsburgh Glass Works, LLC*, 25 A.3d 1233, 1241 (Pa. Super. Ct. 2011); Restatement div. 13, ch. 48 Note; Black's Law Dictionary (9th ed. 2009) (defining "injunction" as "[a] court order commanding or preventing an action"). Even if appropriate, such an injunction would not constitute "damages." *See, e.g.*, *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 316 (3d Cir. 2011) (contrasting "the injunctive remedy" and "the damage remedy") (internal quotation marks omitted); *202 Marketplace v. Evans Prods. Co.*, 824 F.2d 1363, 1367 (3d Cir. 1987)

("the landlord's remedy was to sue for trespass damages ***or*** injunctive relief") (emphasis added). In fact, the district court may issue injunctive relief only after determining that damages are inadequate. *E.g., Bennington Foods LLC v. St. Croix Renaissance Grp., LLP*, 528 F.3d 176, 178-79 (3d Cir. 2008); *Bd. of Revision of Taxes v. City of Phila.*, 4 A.3d 610, 627 (Pa. 2010).[15] Given that the Mall seeks only injunctive relief, its claims do not fall within the scope of the clarifying amendment and are thus preempted by the FRSA.

II. ICCTA PREEMPTS THE MALL'S CLAIMS.

Having determined that "FRSA preemption applies," the district court did "not address whether the Mall's claims are also preempted under … ICCTA." A8. In fact, because they seek to regulate the construction or operation of CSXT's tracks, the Mall's claims are preempted by ICCTA. The district court should accordingly be affirmed

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[15] The Mall badly misrepresents *Deibert v. Pennsylvania Turnpike Commission*, 18 Pa. D. & C.5th 177 (Pa. Com. Pl. 2010), the sole case it cites for the proposition that an injunction constitutes damages. The *Deibert* trial did not "grant[] injunctive relief in the form of damages." Mall Br. 28. Indeed, it did not grant injunctive relief in any form. It awarded *damages alone* and denied all claims to injunctive relief, either as meritless or because the plaintiffs had an adequate remedy at law. *See* 18 Pa. D&C.5th at 200, 204, 209-10, 219; *see also id.* at 223-24 (ordering damages remedy only).

even if this Court were to conclude that the Mall's claims are not preempted by the FRSA. *See, e.g.*, *Meditz v. City of Newark*, 658 F.3d 364, 370 (3d Cir. 2011) (this Court may "'affirm the District Court's order granting summary judgment on any grounds supported by the record'" (quoting *Kossler v. Crisanti*, 564 F.3d 181, 186 (3d Cir. 2009))).

A. The Mall's Claims Are Categorically Preempted.

ICCTA grants the STB "exclusive" jurisdiction over "transportation by rail carriers" (49 U.S.C. § 10501(b)), and defines "transportation" to include any "property, facility, instrumentality, or equipment … related to the movement of … property … by rail" (*id.* § 10102(9)). The "remedies provided" by ICCTA "with respect to regulation of rail transportation are exclusive and preempt the remedies provided under … State law." *Id.* § 10501(b). As several courts have noted, it is "'difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations.'" *City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1030 (9th Cir. 1998) (quoting *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)); *see also*, *e.g.*, *Friberg v. K.C. S. Ry.*, 267 F.3d 439, 443 (5th Cir. 2001) ("the plain language of the statute ...

is so certain and unambiguous as to preclude any need to look beyond that language for congressional intent").

ICCTA "does not preempt *all* state regulation affecting transportation by rail carrier." *N.Y. Susquehanna & W. Ry. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007). It does, however, "preempt[] all 'state laws that may reasonably be said to have the effect of managing or governing rail transportation.'" *Id.* (quoting *Fla. E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1337 (11th Cir. 2001)). Like the FRSA, ICCTA precludes state tort actions as well as regulation by state agencies. *See, e.g.*, *Pace v. CSX Transp., Inc.*, 613 F.3d 1066, 1069 (11th Cir. 2010); *Friberg*, 267 F.3d at 444; *see also Port City Props. v. Union Pac. R.R.*, 518 F.3d 1186, 1188 (10th Cir. 2008) (concluding that certain state tort claims were completely preempted for jurisdictional purposes).

1. The STB treats state regulations as categorically preempted by ICCTA if they concern topics directly regulated by the STB.

The STB, which is charged with administering ICCTA, "has articulated a comprehensive test for determining the extent to which a particular state action or remedy is preempted by" the statute. *New Orleans & Gulf Coast Ry. v. Barrois*, 533 F.3d 321, 332 (5th Cir. 2008).

That test distinguishes between state and local regulations that are "facially" or categorically preempted by ICCTA and those that are not. *CSX Transp., Inc.*, STB Fin. Dkt. No. 34662, 2005 WL 1024490, at *3 (S.T.B. May 3, 2005). A state regulation is categorically preempted if it either (1) constitutes a "form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized," or (2) pertains to "matters directly regulated by the [STB]—such as the construction, operation, and abandonment of rail lines." *Id.* at *2. "[S]tate and local laws that fall within one of [these two] precluded categories are a per se unreasonable interference with interstate commerce" (*id.* at *3), and ICCTA automatically preempts such regulations. For other regulations, ICCTA "preemption analysis requires a factual assessment of whether [the regulation] would have the effect of preventing or unreasonably interfering with railroad transportation." *Id.*

Several courts of appeals have adopted this distinction between regulations that are categorically preempted by ICCTA and regulations that are preempted only as applied. *See, e.g.*, *Pace*, 613 F.3d at 1069;

Adrian & Blissfield R.R. v. Vill. of Blissfield, 550 F.3d 533, 540 (6th Cir. 2008); *Barrois*, 533 F.3d at 331-33; *Emerson*, 503 F.3d at 1130; *see also Green Mountain R.R. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005) ("permitting process" held to be "preempted on its face" by ICCTA); *City of Auburn*, 154 F.3d at 1030 (ICCTA "grant[s] the STB exclusive authority over railway projects" and therefore preempts state environmental regulations of those projects).

2. The Mall's claims are categorically preempted under the STB's approach.

Under the STB's approach, ICCTA categorically preempts state regulation of the construction and operation of rail lines. As a threshold matter, rail lines fall within the STB's exclusive jurisdiction to regulate "transportation by rail carriers." 49 U.S.C. § 10501(b)(1). CSXT is a "rail carrier"—which is to say, an entity that "provid[es] common carrier rail transportation for compensation." *Id.* § 10102(5). And because rail lines constitute "property ... related to the movement of ... property ... by rail," they qualify as "transportation" within the meaning of ICCTA. 49 U.S.C. § 10102(9); *see also, e.g.*, *Wis. Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1014 n.4 (W.D. Wis. 2000) (holding that "passing track[s]" on a main line "clearly constitute[] 'property ... related to the

movement of ... property ... by rail'" (quoting 49 U.S.C. § 10102)). "[C]ongressional intent to preempt [certain] kind[s] of state and local regulation of rail lines is [therefore] explicit in the plain language of the ICCTA and the statutory framework surrounding it." *City of Auburn*, 154 F.3d at 1031.

ICCTA not only expressly but also categorically preempts state regulation of the construction and operation of rail lines. Because those activities are paradigmatic examples of matters the STB "directly regulate[s]" (*CSX Transp., Inc.*, 2005 WL 1024490, at *2 (citing 49 U.S.C. §§ 10901-10907)), state-law tort claims pertaining to the construction and operation of rail lines are categorically preempted under the agency's approach to ICCTA (*see id.*). The Mall's claims are therefore categorically preempted by ICCTA, because—whether based on the track's original installation (*see* Mall Br. 12-15) or its subsequent maintenance (*see* SA103)[16]—they necessarily implicate the construction and/or operation of CSXT's rail line.

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[16] The undisputed evidence shows that maintenance is necessary "in order to [preserve] the track structure [and] to be able to operate trains." A386; *accord* A394; *see also* 49 C.F.R. § 213.5(a)(1).

The only two federal courts to consider analogous tort claims have agreed with this conclusion. The district court in *Maynard v. CSX Transportation, Inc.*, 360 F. Supp. 2d 836 (E.D. Ky. 2004), faced circumstances almost identical to those presented in this case. There, the plaintiff alleged that a "drainage problem" had been "caused by the construction and/or maintenance of the [railroad's] tracks and crossings." *Id.* at 843. The court held that the plaintiff's claims arose from "the construction and operation of [CSXT's] side tracks"—and therefore held those claims to be preempted without any further analysis. *Id.* at 842. The Eleventh Circuit has likewise concluded that ICCTA categorically preempts nuisance claims "pertaining to the operation or construction of a side track." *Pace*, 613 F.3d at 1069.

The two cases on which the Mall relies to argue against ICCTA preemption, *Emerson* and *Rushing* (*see* Mall Br. 22), are not to the contrary, because neither case rejected preemption with respect to activities that the STB "directly regulate[s]." *CSX Transp., Inc.*, 2005 WL 1024490, at *2. *Emerson* involved the "discarding [of] old railroad ties into a wastewater drainage ditch." 503 F.3d at 1130. The disposal of railroad ties, however, is not a matter committed to the agency's

exclusive jurisdiction—let alone a matter the STB directly regulates. *See id.*

Rushing involved an "earthen berm" that a railroad had gratuitously constructed to "absorb noise emissions originating from the railyard." 194 F. Supp. 2d at 501. The court held that claims relating to the berm were not preempted because the berm was not used in rail transportation. Significantly, however, the court also held that other claims, which had sought "to use state common law to regulate the manner in which the [railroad] conducts operations at its switch yard," ***were*** preempted, because "ICCTA … vests exclusive jurisdiction in the STB over such matters." *Id.* at 500. Here, because the Mall's claims would use state common law to regulate the construction and operation of CSXT's tracks—*i.e.*, matters within the STB's exclusive authority that the STB directly regulates—those claims are categorically preempted by ICCTA under the STB's approach.

3. This Court should adopt the STB's approach.

At first blush, this Court's decision in *Jackson* may seem inconsistent with the STB's approach to ICCTA preemption. The Court in *Jackson* set out a two-part, as-applied test for ICCTA preemption without considering the possibility that ICCTA categorically preempts

certain claims. Specifically, the Court held that ICCTA preempts state regulations that either (1) "discriminate against rail carriage," or (2) "unreasonably burden rail carriage" in the context of a particular case. *Jackson*, 500 F.3d at 254.

The use of that as-applied test in *Jackson* is, however, perfectly consistent with the STB's approach. *Jackson* concerned state regulations that imposed restrictions on "transloading" facilities at which solid waste is transferred from trucks to rail cars. *See id.* at 242. Those regulations did not require any form of permitting or preclearance. *See id.* at 243-45, 256. Moreover, the operation of transloading facilities, unlike the operation of rail lines, is not an activity directly regulated by the STB. Thus, as the STB explained after Congress had expressly exempted most aspects of transloading facilities from STB jurisdiction (*see* 49 U.S.C. § 10908), the STB itself had concluded that state transloading regulations were ***not*** categorically preempted unless they constituted "permitting or preclearance requirements … that, by their nature, could be used to deny a railroad the right to conduct its operations." *Solid Waste Rail Transfer Facilities*, 2011 WL 1087246, at *2 (S.T.B. Mar. 14, 2011). All

other state regulations related to transloading facilities, were, in the STB's view, "preempted if, ***as applied***, they would have the effect of unreasonably burdening or interfering with transportation by rail carrier." *Id.* (citing *Jackson*, 500 F.3d at 252) (emphasis added). The regulations at issue in *Jackson* were, in other words, not ones that would be categorically preempted under the STB's approach. That case accordingly did not implicate the question whether ICCTA categorically preempts state regulation of activities directly regulated by the STB.

This Court should follow its sister circuits and adopt the STB's approach to categorical preemption under ICCTA for two reasons. First, the STB's determination that state regulation of the construction and operation of rail lines "would directly conflict with exclusive federal regulation of railroads" (*CSX Transp., Inc.*, 2005 WL 1024490, at *3) is entitled to tremendous deference. *See Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714-15 (1985) (when Congress has delegated authority to an expert federal agency to implement and enforce a federal regulatory scheme, the agency's determination that state law threatens to upset federal objectives "is dispositive … unless either the agency's position is inconsistent with clearly expressed

congressional intent, … or subsequent developments reveal a change in that position"). Here, "[t]he STB's approach is persuasive because the STB was authorized by Congress to administer [ICCTA] and is therefore 'uniquely qualified to determine whether state law should be preempted by [ICCTA].'" *Adrian & Blissfield R.R.*, 550 F.3d at 539 (quoting *Emerson*, 503 F.3d at 1130); *accord Green Mountain R.R.*, 404 F.3d at 642; *see also Bhd. of Locomotive Eng'rs v. United States*, 101 F.3d 718, 726 (D.C. Cir. 1996) (granting *Chevron* deference to the STB's interpretations of the Interstate Commerce Act).

Second, Congress passed ICCTA to prevent core railroad operations from being subject to a "patchwork of regulation." *Fla. E. Coast Ry.*, 266 F.3d at 1339. Congress replaced that patchwork with "uniform[] … Federal standards" and "minimal regulation for this intrinsically interstate form of transportation." H.R. Rep. No. 104-311, at 95-96 (1995). The Mall's claims—like other state-law tort claims implicating core railroad operations—threaten a return to the fifty-state regulatory patchwork for "decisions the ICCTA purposefully freed from outside regulation" and committed to the exclusive and active jurisdiction of a federal agency. *Id.* That result "would contradict the

language and purpose of the [statute]." *Pace*, 613 F.3d at 1070. The Court should therefore adopt the STB's approach, hold that state regulations, including state-law tort claims, are categorically preempted by ICCTA if the regulations impinge on "matters directly regulated by the [STB]" (*CSX Transp., Inc.*, 2005 WL 1024490, at *2), and find that ICCTA categorically preempts the Mall's claims for that reason.

B. The Mall's Claims Are Preempted Under The As-Applied Analysis In *Jackson*.

Even if the as-applied test from *Jackson* were the appropriate standard in this context, the Mall's claims are preempted, because the relief the Mall requests would place an "unreasonable burden on railroading." 500 F.3d at 253. The Mall seeks an injunction directing CSXT to implement a "fully engineered solution" to the alleged drainage problem. Mall Br. 30. More specifically, the Mall requests an order compelling CSXT to "install a drainage pipe on CSXT's property to divert the water away from the Mall property and into the public stormwater system." A410; *see also* Mall Br. 7 (referencing this supposed remedy).

The Mall's proposed remedy would impede CSXT's railroad operations. The municipal stormwater system lies on the opposite side

of the tracks from the Mall's property. *See* SA19-22 (testimony of the Mall's property manager). As a result, the Mall's remedy would require construction on, over, or under the tracks themselves. *See* SA144:T64 (admission by the Mall that its desired solution would involve "tear[ing] up" a rail crossing). Such work would, of course, substantially interfere with CSXT's operations. *See* A222:T18 (track is part of "a hundred miles of mainline track from Center City Philadelphia to Baltimore"); *see also A&W Props., Inc. v. Kansas City S. Ry.*, 200 S.W.3d 342, 346 n.5 (Tex. Ct. App. 2006) (holding a similar drainage claim involving a culvert to be preempted because it would "self-evident[ly] … necessitate making alterations to the bridge on which the tracks cross the culvert"). And even if the Mall had proposed, or could propose, a somewhat less onerous way of redressing the alleged problem, CSXT would still have to make substantial operational sacrifices. *See* SA64-65 (noting that the simple act of surveying the area for purposes of creating a topographical map required a great deal of operational coordination).

Furthermore, the impact of the Mall's claims would not end with one piece of mainline track outside Philadelphia. If the Mall's claims are allowed to proceed, railroads would be potentially subject to

stormwater actions in all fifty states. In fact, given the Mall's proposed remedy, acceptance of its claims could effectively require railroads to modify the configuration of their tracks throughout the country whenever any kind of drainage or runoff problem occurred. The Court should therefore hold that ICCTA preempts the Mall's claims even if the as-applied analysis in *Jackson* controls this case.

III. THE MALL'S CLAIMS FAIL ON THE MERITS.

The Mall's negligence and continuing trespass claims are meritless as well as preempted. Under Pennsylvania law, landowners are liable for stormwater discharge under only very narrow circumstances, and there is no evidence in the record to show that any of those circumstances exist in this case. Moreover, the Mall cannot prove the intent necessary to maintain a trespass claim, and it seeks a remedy that cannot be awarded in an action for negligence.

A. The Mall Misstates Pennsylvania Stormwater Law.

The Mall's affirmative case on appeal reduces to a single proposition: because, at some unspecified point in the distant past, CSXT's (alleged, unidentified) predecessor in interest altered the topography of the area at issue by building a railroad track, CSXT is "responsible" for any and all stormwater runoff from its property. Mall

Br. 13. That claim, which would essentially impose strict liability on all owners of improved land for all runoff from their properties, has no basis in Pennsylvania law.

To the contrary, Pennsylvania has long adhered to the "common enemy" doctrine concerning surface water. *E.g.*, *Wilson v. McCluskey*, 46 Pa. Super. 594, 1911 WL 4526, at *4 (1910) (the landowner's "right is to shut out the invading water, as a common enemy, for the protection of his own land"). Under that doctrine, every landowner "has the right to the natural, proper, and profitable use of his own land, and if, in the course of such use without negligence, unavoidable loss[] is brought upon his neighbor, it is *damnum absque injuria*."[17] *Strauss v. City of Allentown*, 63 A. 1073, 1073 (Pa. 1906). As a result, "a property owner may make improvements upon his own land by grading it and building upon it without incurring liability for any incidental effect upon an adjoining property, even though the result may be some additional flow of surface water." *Bower v. Hoefner*, 43 Pa. D. & C.3d 475, 480 (Pa. Com. Pl. 1986), *aff'd*, 545 A.2d 423 (Pa. Commw. Ct. 1988); *accord, e.g.*,

[17] "Damnum absque injuria" refers to harm that "occasions no legal remedy" because it does not arise from a wrongful act. Black's Law Dictionary (9th ed. 2009).

Leiper v. Heywood-Hall Constr. Co., 113 A.2d 148, 150 (Pa. 1955); *Chamberlin v. Ciaffoni*, 96 A.2d 140, 142 (Pa. 1953).

The Pennsylvania courts have specifically rejected the Mall's theory of liability in the context of railroads. Under Pennsylvania law, CSXT "ha[s] the unquestionable right to construct and maintain its railroad within the lines of its right-of-way at such grade … as the exigencies of its business require[]." *White v. Phila. & Reading Ry.*, 46 Pa. Super. 372, 1911 WL 4492, at *2 (1910). CSXT also "has the right to interfere with the natural flow of water resulting from rains or melting snow." *Flaherty v. Pittsburgh, Cincinnati, Chi., & St. Louis Ry.*, 63 Pa. Super. 622, 1916 WL 4622, at *1 (1916). Contrary to the Mall's theory, then, "[t]he mere fact that the surface water which fell upon or found its way to the embankment of the railroad" allegedly caused damage to the Mall "d[oes] not entitle [the Mall] to recover." *White*, 1911 WL 4492, at *2.

Railroads and other landowners are instead liable for stormwater discharge onto adjacent properties in only two narrow sets of circumstances. The first arises when an landowner "gather[s] the water into a body and precipitates it upon his neighbor's property" (*Leiper*,

113 A.2d at 150), "divert[s] it by unnatural channels where it is not wont to flow" (*McCormick Coal Co. v. Schubert*, 108 A.2d 723, 724 (Pa. 1954)), or "obstruct[s] a natural channel for the flow of water" (*Wilson*, 1911 WL 4526, at *4). Landowners are also liable if they are "guilty of negligence which causes unnecessary damage to the servient owner." *Leiper,* 113 A.2d at 149-50 (internal quotation marks omitted).[18] Even within these narrow confines, Pennsylvania law imposes liability only for changes to the flow of water that are made ***after*** the allegedly harmed landowner takes possession of its property. *See Olexa v. DeSales Univ.*, 78 Pa. D. & C.4th 171, 188-89 (Pa. Com. Pl. 2005).

The two cases cited by the Mall (*see* Mall Br. 13) apply precisely these standards. In *Lehigh*, the defendant "collect[ed] the surplus water in its mine and discharge[d] it through a tunnel or ditch upon the plaintiff's land." *Lehigh & Wilkes-Barre Coal Mining Co. v. Pittston Coal Mining Co.*, 137 A. 672, 673 (Pa. 1927). In *Pfeiffer*, the defendants

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[18] *Accord, e.g.*, *Shamnoski v. PG Energy*, 858 A.2d 589, 605-06 (Pa. 2004); *Ridgeway Court, Inc. v. Landon Courts, Inc.*, 442 A.2d 246, 247-48 (Pa. Super. Ct. 1981); *Rau v. Wilden Acres, Inc.*, 103 A.2d 422, 423-24 (Pa. 1954); *see also Flaherty*, 1916 WL 4622, at *2 (plaintiff must prove "some unlawful act or … negligence"); *White*, 1911 WL 4492, at *2 (plaintiff must "prove some negligence … and that such negligence caused the injury").

similarly "increased the aggregate quantity of water discharged[and] concentrated it at an artificial point of flow" onto neighboring land. *Pfeiffer v. Brown*, 30 A. 844, 844-45 (Pa. 1895). Both cases are therefore entirely consistent with the rule that landowners are liable if they gather and then precipitate water onto adjoining properties (*see Leiper*, 113 A.2d at 150), and neither case supports the Mall's proffered strict-liability standard.

B. CSXT Is Not Liable Under Pennsylvania Law.

There is no evidence that CSXT violated Pennsylvania stormwater law.

1. CSXT did not gather and precipitate water onto the Mall's property.

The Mall, for instance, provided no evidence to show that CSXT "gather[ed] the water into a body and precipitate[d] it upon [the Mall's] property." *Id.* (internal quotation marks omitted). Nor has the Mall adduced any evidence that CSXT "increased the aggregate quantity of water discharged" and "concentrated it at an artificial point of flow." *Pfeiffer*, 30 A. at 844-45.

2. CSXT did not create unnatural diversions or obstructions.

Similarly, there is no evidence that CSXT caused the Mall damage by "divert[ing] water by unnatural channels where it is not wont to flow" (*McCormick Coal Co.*, 108 A.2d at 724) or by "obstruct[ing] a natural channel for the flow of water" (*Wilson*, 46 Pa. Super. 594, 1911 WL 4526, at *4). On the contrary, the Mall's property managers conceded that they have no "information ... to suggest that [CSXT] created some sort of artificial channel to divert the water onto [the Mall's] property." SA31-32.

CSXT's right-of-way sits at a higher elevation than the Mall's property. *See* A119; A176; SA27. It is beyond any doubt that "water is descendible by nature." *Sweigart v. Burkholder*, 36 A.2d 181, 183 (Pa. Super. Ct. 1944); *accord, e.g.*, SA34-35. And so long as water is not artificially diverted from its downhill course, "the owner of [higher land] has an easement in the [lower land] for the discharge of all waters which by nature rise in or flow or fall upon the [higher land]." *Sweigart*, 36 A.2d at 183; *accord, e.g.*, *Bower*, 43 Pa. D. & C.3d at 481 (citing further cases); *see also Colombari v. Port Auth. of Allegheny*

Cnty., 951 A.2d 409, 413 (Pa. Commw. Ct. 2008) ("[t]he law of surface waters states that water must flow as it is wont to flow").

Here, the Mall has not presented any evidence to show either that CSXT artificially diverted water in any way that caused it to flow down the hill or that CSXT obstructed the water's natural flow. In fact, the Mall's property manager frankly admitted he believed that the water "natural[ly]" collected at the top of the hill (SA37) and then "natural[ly] flow[ed]"downhill (SA34). The Mall's water problem, in other words, is caused by the fact that water found a natural channel down the hill. CSXT has a "prescriptive right … to allow [its] water to run over the lower property" through such natural channels (*Bower*, 43 Pa. D & C.3d at 481), and it accordingly cannot be held liable for failing to block the water's downhill progress.

The Mall nevertheless contends that CSXT is liable because the construction of the rail line "changed the natural course of the water." Mall Br. 13. That argument fails for three independent reasons. First, because there is no evidence of what the "natural course of the water" was before the rail line was constructed, the Mall cannot show a change in that flow. Second, merely changing the course of water does not

amount to diverting the water ***by unnatural channels***, and railroads have the absolute right to change the course of water when building their tracks so long as they are not "guilty of some unlawful act or of negligence." *Flaherty*, 1916 WL 4622, at *1. And third, the Mall cannot show—as it must under Pennsylvania law (*see Olexa*, 78 Pa. D. & C.4th at 188-89)—that construction of the rail line unlawfully altered the flow of water ***after*** the Mall took possession of its property. On the contrary, the Mall has implicitly conceded that the railroad line existed long ***before*** the Mall. *See* SA143:T58-59 (suggesting the Mall has owned its property for roughly 40 years); SA157 (railroad was probably built "in the nineteenth century").

3. CSXT was not negligent.

Finally, there is no evidence that CSXT negligently "cause[d] unnecessary damage" to the Mall. *Leiper*, 113 A.2d at 149 (internal quotation marks omitted). To prevail on that theory, the Mall must, of course, prove both negligence and proximate causation. *See, e.g.*, Restatement § 165 ("[o]ne who recklessly or negligently … enters land in the possession of another or causes a thing … so to enter is subject to liability to the possessor if, but only if, [the entry] causes harm"); *see also Pyeritz v. Commonwealth*, 32 A.3d 687, 692 (Pa. 2011) (stating the

elements of a negligence claim). No matter which of the Mall's shifting theories of liability is considered, it can prove neither element.

The Mall admits that whatever entity built the railroad "took the steps necessary to manage its stormwater." Mall Br. 14. As a result, even if the Mall could impose liability on CSXT for actions that took place before the Mall purchased its property, there can be no material issue as to whether CSXT or its predecessor in interest breached the relevant standard of care at that time. Nor can the Mall possibly prove that the construction of a rail line that might or might not have changed the topography of the area at some undetermined point in the distant past ***proximately*** caused drainage damage in October 2010 to a parking lot that did not exist when the rail line was constructed.

The Mall's theory of negligence through faulty maintenance fares no better. That theory rests on unsupported speculation and an erroneous assumption. First, the Mall's hydrologist speculated that a small, six-inch high "hump" in the ballast adjacent to the track—which he hesitantly identified as the source of the Mall's water problem (*see infra* at 63-64)—was caused by the March 2009 track maintenance. A323:T64-65; A324:T66; A329:T88-89. Having speculated as to the

hump's origins, the hydrologist (implicitly invoking the concept of negligence per se) then "assume[d]" that the hump's existence violated a supposed Federal Railroad Administration regulation requiring a "2:1 slope coming off the track." A338:T124. But no such regulation exists. *See* 49 C.F.R. Part 213. Rather, a "two-to-one slope" is simply "what [CSXT] would" ideally "like to have." SA52-53. The Mall's claim of negligence is, in other words, based on the proposition that CSXT breached its duty of care by failing to eliminate a slight deviation from a standard that it is not required to meet. That claim cannot survive summary judgment.[19]

Even assuming that the Mall could possibly show negligence, it cannot prove that the March 2009 track maintenance caused the

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[19] In the district court, the Mall asserted that CSXT also was negligent for supposedly having violated 49 C.F.R. § 213.33—which requires that drainage facilities "be maintained and kept free of obstruction"—because CSXT "has not cleared the ditches along the tracks adjacent to the Mall Property the last five years." SA90. There is, however, no merit to that assertion. CSXT's Roadmaster testified that he emptied ditches whenever necessary, and that although it had been necessary to empty the ditch on the side of the tracks ***away*** from the Mall in 2003 (A225-26:T32-33, 36), the Mall's side of the ditch had been free of obstructions (A324:T67). The Roadmaster further stated that no subsequent maintenance was necessary on either ditch because they remained "clear and unobstructed" (A395). The Mall adduced no evidence to the contrary.

damage some eighteen months later. *See* SA26 (concession that the Mall's property manager does not know whether CSXT "did anything to cause the water to come down the hill"). The Mall's hydrologist initially opined that the routine maintenance "changed" unspecified "hydrological conditions" and unspecified portions of "the drainage system" in unspecified ways and thereby, via an unspecified causal mechanism, "allow[ed] stormwater from the [CSXT] property to discharge on to the Mall property." A281. But that kind of *ipse dixit* is inadmissible (*Oddi v. Ford Motor Co.*, 234 F.3d 136, 138 (3d Cir. 2000))—and therefore not a sufficient basis for resisting summary judgment (*e.g.*, *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38, 43 n.7 (3d Cir. 2009)).

At his deposition, the hydrologist elaborated slightly by blaming the small "hump." But the hydrologist acknowledged that he does not know when or how that "hump" was created (A324:T66; A329:T88-89), never even attempted to explain how the "hump" would cause increased water flow down the hill (*see* A324:T65), and—most crucially—expressly admitted that he has no idea whether the hump caused the flooding

problem in 2010 (A324:T67).[20] His opinion therefore amounts to "speculation and conjecture," which "may not defeat a motion for summary judgment." *Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 228 (3d Cir. 2009).

In short, the Mall has failed to raise a triable issue of fact concerning whether CSXT violated Pennsylvania stormwater law.

C. The Mall's Claims Would Fail Even If It Could Prove A Violation Of Pennsylvania Stormwater Standards.

Even assuming that the Mall's claims are not preempted by the FRSA or by ICCTA, and further assuming that the Mall has somehow raised a material issue of fact concerning whether CSXT violated Pennsylvania stormwater standards, CSXT would remain entitled to summary judgment. The Mall asserts claims for trespass and negligence—but cannot prove the intent necessary to maintain a trespass action, and requests relief it cannot receive through a negligence action.

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[20] Notably, because the "hump" runs parallel to the track, it does not direct water toward the Mall's property. *See* A29-35 (showing hump in cross-section).

1. The Mall cannot show the intent necessary for trespass.

The Mall's continuing trespass claim fails because the Mall cannot prove that CSXT acted with the requisite intent. The Mall must demonstrate that CSXT "inten[ded] to enter upon the particular piece of land in question." *Valley Forge Gardens, Inc. v. James D. Morrissey, Inc.*, 123 A.2d 888, 891 (Pa. 1956) (internal quotation marks omitted). It is ***not*** sufficient to show that CSXT intentionally constructed a railroad track or intentionally performed maintenance on that track, because neither of those facts demonstrates "that [CSXT] intended to invade the interests of the plaintiff." *Id.*[21]

Under the circumstances, the Mall's trespass claim can survive summary judgment ***only*** if there is a material issue of fact as to whether CSXT intentionally caused water to drain onto the Mall's property. *See* Restatement § 158, illus. 5 ("A is a trespasser" if "A erects a dam across a stream, thereby ***intentionally causing the water to***

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[21] To be sure, an entity who intentionally enters onto land mistakenly believing that it owns the land remains liable for trespass. *See, e.g.*, *Kopka v. Bell Tel. Co. of Pa.*, 91 A.2d 232, 235 (Pa. 1952). Even in that case, however, the trespasser ***intentionally*** enters onto land owned by someone else.

back up and flood the land of B") (emphasis added). But the Mall has never argued that CSXT intentionally drained water onto the Mall's property or intentionally changed the topography of the area to produce that result, and the record includes no evidence that could possibly support either proposition. Indeed, the Mall's property manager tacitly admitted that there is no evidence that CSXT possessed any such intent. *See* SA29-30, 36; *see also* SA67-70 (admission by plaintiff's managing member that he does not know why water problem occurred). Absent such evidence, the Mall cannot maintain an action in trespass.

2. The Mall may not receive injunctive relief on its negligence claim.

The Mall also cannot proceed with its negligence claim. As discussed in Section I.C.2 above, the Mall has abandoned its claim for damages and now seeks only injunctive relief. An injunction is a form of equitable relief that is to be awarded only when there is no adequate remedy at law. *E.g., Bennington Foods*, 528 F.3d at 178-79; *Bd. of Revision*, 4 A.3d at 627. A negligence claim, however, is an action at law. *E.g.*, *Stech v. W.C.A.B.*, 678 A.2d 1243, 1245 (Pa. Commw. Ct. 1996). The Mall thus seeks an equitable remedy in an action at law. It cannot do so, and its negligence claim is therefore futile.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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Dated: September 10, 2012

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Third Circuit Rule 31.1(c), the undersigned counsel for Appellee CSX Transportation, Inc. certifies that this electronic brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 13,642 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii);

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it was prepared using Microsoft Office Word 2007 and is set in 14-point sized Century Schoolbook font;

(iii) is identical to the ten hard copies sent to the Clerk of the Court on September 10, 2012 via overnight courier service; and

(iv) has been scanned with a virus detection program [Symantec Endpoint Protection, version 11.0.5005.343] and no virus was detected.

/s/ *Andrew E. Tauber*

THIRD CIRCUIT RULE 28.3(d) CERTIFICATION

Pursuant to Third Circuit Rule 28.3(d), the undersigned counsel for Appellee CSX Transportation, Inc. certifies that Andrew E. Tauber and Richard P. Caldarone are both members of the bar of this court.

/s/ *Andrew E. Tauber*

CERTIFICATE OF SERVICE

The undersigned counsel for Appellee CSX Transportation, Inc. certifies that the foregoing brief was served upon all counsel of record via the Court's electronic CM/ECF system on September 10, 2012.

The undersigned counsel further certifies that, on September 10, 2012, ten identical hard copies of the foregoing brief, together with four hard copies of the Supplemental Appendix, were provided to a third-party courier for overnight delivery to the Clerk of the Court.

/s/ *Andrew E. Tauber*