No. 08-3557

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ROBERT McBRIDE,

Plaintiff-Appellee,

v.

CSX TRANSPORTATION, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois
Case No. 3:06-cv-01017-JPG-CJP

The Honorable J. Phil Gilbert

REPLY BRIEF OF DEFENDANT-APPELLANT CSX TRANSPORTATION, INC.

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CIRCUIT RULE 26.1 AMENDED DISCLOSURE STATEMENT

Appellate Court No: 08-3557

Short Caption: McBride v. CSX Transportation, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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CSX Transportation, Inc.

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Mayer Brown LLP

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i) Identify all its parent corporations, if any; and

CSX Corporation

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

CSX Corporation

Attorney's Signature:_____ Date: April 28, 2009

Attorney's Printed Name: Dan Himmelfarb

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Attorney's Signature:_____ Date: April 28, 2009

Attorney's Printed Name: James A. Bax

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INTRODUCTION

As our opening brief explains, FELA requires injured rail workers to prove proximate causation for two related reasons. First, proximate cause is the common-law rule, and no statutory language rebuts the presumption that FELA incorporates it. *See* CB 24–28.[1] Second, both the Supreme Court and this Court have unequivocally held that FELA requires proof of proximate cause. *See* CB 28–42.

McBride's response to the first point is that the statute does abrogate the common-law rule, by authorizing recovery for injuries "resulting in whole or in part" from the railroad's negligence. 45 U.S.C. § 51. But McBride merely *asserts* that this language relieves plaintiffs of their obligation to prove proximate cause; he makes no attempt to support that assertion, which in any event *cannot* be supported. The more natural reading of the Act is that it allows recovery when the railroad's negligence is *one of the causes* of the plaintiff's injury and that it says nothing about the requisite *directness* of any particular cause. That is not only the more natural reading of "in whole or in part"; it is the one adopted by the

[1] We cite CSXT's opening brief as "CB __" and McBride's brief as "MB __."

Supreme Court, which recently confirmed that the language "make[s] clear that there could be recovery against the railroad even if it were only partially negligent." *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 170 (2007). At the very least, McBride cannot meet his burden of demonstrating that the statute *expressly* abrogates the common-law rule.

McBride's response to the second point is that *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), overruled the nearly half century of decisions holding that FELA requires proximate cause, by stating that a railroad is liable if its negligence "played any part, even the slightest," in causing the injury, *id.* at 506. But here, too, McBride does little more than *assert* that *Rogers* overruled the earlier cases; he makes only the barest effort to support that assertion, which, like the first, is in any event unsupportable. The better understanding of *Rogers* is that it simply interpreted the statutory phrase "in part" to mean "[in] *any* part." As three members of the Supreme Court explained in *Sorrell*, the language on which McBride relies "did not address and should not be read as affecting the necessary directness of cognizable causation, as distinct from the occasional multiplicity of causations." 549 U.S. at 175 (Souter, J., joined by Scalia and Alito, JJ., concurring). At the very least, McBride cannot produce the clear

evidence necessary to permit a conclusion that, despite the rule disfavoring overruling by implication, *Rogers* overruled more than 15 Supreme Court decisions *sub silentio*.

McBride's remaining arguments are equally meritless. No post-*Rogers* decision of the Supreme Court or this Court has abandoned proximate cause; it is manifestly not the case that all other circuits, or anything close to that number, have done so; neither the legislative purpose nor the legislative history supports McBride's position; and the instructional error here was not harmless. The Court should therefore reverse the judgment below and remand for a new trial before a properly instructed jury.

ARGUMENT

A. FELA Requires Proof Of Proximate Causation

According to McBride, a holding that FELA requires proof of proximate cause would amount to "a rewriting of the statute" and effect "a radical departure from *stare decisis*." MB 31. Precisely the opposite is true. As to the statutory text, "the elements of a FELA claim are determined by reference to the common law," unless the Act contains "express language to the contrary," *Sorrell*, 549 U.S. at 165–66; "it was clear common law" both

before and after FELA that "a plaintiff had to prove that a defendant's negligence caused his injury proximately," *id.* at 173 (Souter, J., concurring); and "FELA said nothing * * * about the familiar proximate cause standard," *id.* at 174 (Souter, J., concurring). As to judicial precedent, both the Supreme Court and this Court have "consistently recognized and applied proximate cause as the proper standard in FELA suits." *Id.* Contrary to McBride's assertion, moreover, there is nothing in FELA's purpose or history that compels a result different from the one mandated by text and precedent.

1. Proximate Causation is Required Under the Settled Interpretive Methodology

McBride does not dispute that FELA is deemed to incorporate common-law principles unless it explicitly provides otherwise. And he does not deny that proximate cause is a bedrock principle of common-law negligence. McBride does contend, however, that FELA abrogates that principle. MB 39–41. His contention is wrong.

As far as causation is concerned, the Act provides that a railroad is liable for an injury "resulting in whole or in part" from its negligence. 45 U.S.C. § 51. Without any citation of authority, and without any analysis

of the text, McBride asserts that "[t]he phrase 'in whole or in part' was designed to make it clear that negligence of an employer need not be either the sole *or the proximate cause* of injury in order to [sic] for a worker to recover." MB 26 (emphasis added). The better reading of the statutory language, however, is that it authorizes recovery when the railroad's negligence is *one of the causes* of the plaintiff's injury—either the "whole" cause or a "part[ial]" cause. The language does not address the requisite *directness* of any particular cause, an issue that, under the established methodology, is therefore governed by the common law. More to the point, McBride's reading of the statute is irreconcilable with decisions of this Court and the Supreme Court that interpreted the relevant language. According to them, the phrase "in whole or in part" indicates that "there may be a plurality of causes," thereby "enlarg[ing] the field or scope of proximate causes," *Eglsaer v. Scandrett*, 151 F.2d 562, 566 (7th Cir. 1945), and thus the language makes clear that "there could be recovery against the railroad even if it were only partially negligent," *Sorrell*, 549 U.S. at 170 (opinion of the Court).

Quoting *Coray v. Southern Pacific Co.*, 335 U.S. 520, 524 (1949), McBride claims that CSXT's reading of "in whole or in part" introduces

unwarranted "dialectical subtleties" into the Act. MB 24; *see also* MB 53. But *Coray* is a curious choice of authority, inasmuch as it permitted recovery when defective equipment was "the sole or a contributory *proximate cause*" of the employee's death. *Coray*, 335 U.S. at 523 (emphasis added). *Coray*, in other words, read the statute precisely as CSXT does.

At the very least, the text of the Act does not *unambiguously* abrogate the proximate-cause requirement. In light of the clear-statement rule, therefore, McBride cannot overcome the presumption that FELA incorporates the common-law principle.[2]

2. Proximate Causation is Required Under the Decisions of the Supreme Court and this Court

As we explain in our opening brief (at 28–31 & nn.6–7), and consistent with the established interpretive methodology, both the

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[2] McBride asserts that, if the phrase "in whole or in part" concerned only multiple causation, the language "would be disabled whenever the parties * * * did not allege * * * at least two causes for the plaintiff's injury." MB 53–54. Rather than being "disabled" in such cases, the statutory language merely sets forth one aspect of the standard governing an employee's right to recover: a railroad is liable when its negligence was either the sole cause ("in whole") or a partial cause ("in part") of the injury. Just as Section 3 of the Act addresses contributory negligence even though that issue may not arise in every case, 45 U.S.C. § 53, the relevant language in Section 1 addresses multiple causation even though *that* issue may not always arise.

Supreme Court and this Court repeatedly held, before *Rogers*, that FELA requires proof of proximate causation. McBride does not contend otherwise, and he does not challenge our characterization of those decisions. His only response is that they "are of no relevance here, because *Rogers* made it clear that such cases could not have been correct." MB 32 n.3. McBride's position thus reduces to the claim that *Rogers* not only overruled at least 15 prior decisions of the Supreme Court, but overruled them without saying (or even suggesting) that it was doing so—and, indeed, that it overruled the decisions even as it was citing a number of them with approval.

Such an understanding of *Rogers* is highly implausible, to put it mildly. An overruling by implication, like a repeal by implication, is disfavored. *E.g.*, *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 507 (6th Cir. 2004); *United States v. Rodriguez*, 311 F.3d 435, 439 (1st Cir. 2002); *In re Morrissey*, 168 F.3d 134, 139–40 (4th Cir. 1999). That is especially true when, as in this case, the precedent is long-settled, has been repeatedly reaffirmed, and involves an issue of statutory interpretation, where *stare decisis* considerations are strongest. *See, e.g., IBP, Inc. v. Alvarez*, 546 U.S. 21, 32 (2005). If at all possible, therefore, a court should adopt an interpretation of

Rogers that is consistent with the Supreme Court's prior decisions. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 98 (1998) (finding it "clear" that a decision "was not meant to overrule, *sub silentio*, two centuries of jurisprudence"). There is particular reason for a court of appeals to do so, because a lower court is obligated to "follow the [Supreme Court] case[s] which directly control[]," even if the cases "appear[] to rest on reasons rejected in some other line of decisions," and to "leav[e] to [the Supreme] Court the prerogative of overruling its own decision[s]." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *see, e.g., United States v. Henderson*, 536 F.3d 776, 779 n.2 (7th Cir. 2008) (declining to "reexamine" three Supreme Court decisions in light of a later decision, because "that is the Supreme Court's prerogative, not ours").

As three Justices explained in *Sorrell*, *see* 549 U.S. at 172–77 (Souter, J., concurring), and as we explained in our opening brief (at 31–37), an interpretation of *Rogers* that is consistent with the Court's prior decisions on proximate cause is not only possible but correct. Nor has proximate cause been abandoned in any post-*Rogers* decision of the Supreme Court or this Court. *See* CB 37–42. McBride's arguments to the contrary lack merit.

a. *Rogers*

Rogers interpreted the phrase "resulting in whole or in part" in Section 1 of FELA to mean that a railroad is liable if its negligence "played any part, even the slightest," in causing the employee's injury, regardless of whether the injury also had "other causes." 352 U.S. at 506. With respect to the requisite *directness* of any particular cause, however, *Rogers* "left th[e] law where it was," and indeed cited prior decisions that "unambiguously recognized proximate cause as the standard applicable in FELA suits." *Sorrell*, 549 U.S. at 174, 175–76 (Souter, J., concurring). *Rogers* was thus about *multiple* causation, not *proximate* causation.

McBride does not meaningfully engage this fundamental point. He is able to characterize *Rogers* as a case that abandoned the proximate-cause requirement only through a combination of *ipse dixit* and a mixing and matching of unrelated quotations.

For example, McBride quotes the following language from the Missouri Supreme Court's decision (the decision below) in *Rogers*: "there must not only be [a] causal connection so that the injury would not have occurred but for the negligence, but such negligence must also be a proximate (legal) cause of the injury.'" MB 29 (quoting *Rogers v. Thompson*,

284 S.W.2d 467, 471 (Mo. 1955), *rev'd*, 352 U.S. 500 (1957)). He then quotes language from the U.S. Supreme Court's decision to the effect that it had granted certiorari "to prevent [the Act's] erosion by narrow and niggardly construction" and that the decision below had "fail[ed] to take into account the special features of this statutory negligence action." MB 29 (quoting *Rogers*, 352 U.S. at 509). Contrary to the implication in McBride's brief, however, the latter language was not a response to the former, which was not quoted or even paraphrased in the U.S. Supreme Court's decision (and which was entirely consistent with prior decisions of that Court). Rather, the quoted language from the U.S. Supreme Court's decision concerned the lower court's failure to honor "the intention of the Congress to secure the right to a jury determination" of FELA claims. *Rogers*, 352 U.S. at 509. That issue is fundamentally different from the substantive standard of causation that a jury is required to apply.

McBride goes on to say that "the Court [in *Rogers*] held in particular that the proximate cause standard was not the correct test for employer liability under the FELA." MB 30. But the language he quotes in support of that claim does not mention proximate cause either. The quoted language is that "the test of a jury case" is "whether the proofs justify with

reason the conclusion that employer negligence played any part, even the slightest, in producing the injury." *Id.* (quoting *Rogers*, 352 U.S. at 506). That language concerns multiple—not proximate—causation, *see Sorrell*, 549 U.S. at 175 (Souter, J., concurring), a fact confirmed by the sentence in *Rogers* that immediately follows (and one that McBride does not quote): "It does not matter that * * * the jury may also * * * attribute the result to *other causes*, including the employee's contributory negligence." 352 U.S. at 506 (emphasis added).

McBride also relies on a statement in *Rogers* disapproving the lower court's "language of proximate causation," MB 30 (quoting 352 U.S. at 506), and asserts that the Court held that such "language" is not the "test of a jury case" under FELA, MB 24 (same). It was not proximate cause *in general* that the Court rejected, however, but proximate cause of the type that requires the defendant's negligence to be—in the Court's words—"the *sole*, efficient, producing cause of injury." *Rogers*, 352 U.S. at 506 (emphasis added). The "language of proximate causation" disapproved in *Rogers*—"that proximate cause must be exclusive proximate cause," *Sorrell*, 549 U.S. at 175 (Souter, J., concurring)—is thus not the causation standard that CSXT advocates here.

b. Post-*Rogers* decisions

Since *Rogers* was decided, some lower courts have erroneously interpreted the decision to have abandoned the proximate-cause requirement. Contrary to McBride's suggestion, however, the only courts whose decisions are binding here—the Supreme Court and this Court—have not made the same mistake.

(1) *Supreme Court Decisions*

McBride asserts that "[t]he Supreme Court, in cases subsequent to *Rogers*, has reaffirmed that proximate cause is not appropriate under FELA." MB 32. That is simply incorrect. The cases on which McBride relies, MB 31–34, are not remotely inconsistent with the long line of decisions recognizing and applying the requirement of proximate cause.

Most of the cases cited by McBride did not involve causation at all. *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326 (1958), decided whether a contractor was an "agent" of the railroad under Section 1 of FELA. *Crane v. Cedar Rapids & Iowa City Railway Co.*, 395 U.S. 164 (1969), determined whether a State could make the defense of contributory negligence available to a railroad sued by a non-employee under the common law. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), addressed the proper

standard for claims of negligent infliction of emotional distress under the Act. And *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003), considered whether FELA permits recovery for a genuine and serious fear of cancer and whether it authorizes joint and several liability.

The two other cases cited by McBride did involve a question of causation, but they held only that there was sufficient evidence that the railroad's negligence was a cause of the employee's injury. *See Gallick v. Balt. & Ohio R.R. Co.*, 372 U.S. 108, 113–17 (1963); *Dennis v. Denver & Rio Grande W. R.R. Co.*, 375 U.S. 208, 210 (1963) (per curiam). Neither decision called into question the requirement that the cause be a proximate one; indeed, in both cases the jury was instructed that it must be. *See Gallick*, 372 U.S. at 111; *Dennis*, 375 U.S. at 211 n.* (Douglas, J., dissenting).

McBride places particular emphasis on the dictum in *Crane* that a FELA plaintiff "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's [negligence]" and on the dictum in *Gottshall* that "a relaxed standard of causation applies under FELA." MB 33 (quoting *Crane*, 395 U.S. at 166, and *Gottshall*, 512 U.S. at 543); *see also* MB 52–53. As we explained in our opening brief (at 38–40), however, the quoted dicta are consistent with the

proper understanding of *Rogers*—*i.e.*, that FELA relaxes any requirement of *sole* proximate causation. In response, McBride argues that "[n]either of those cases suggested that the presence of multiple causes was a controlling consideration in *Rogers*." MB 36. But it is hardly surprising that the decisions did not engage in an extended discussion of FELA causation in general, or *Rogers* in particular, inasmuch as neither involved any issue of causation.[3]

(2) *Lower Court Decisions*

As Justice Souter observed in his *Sorrell* concurrence, lower courts are divided on whether *Rogers* "smuggled proximate cause out of * * * FELA." 549 U.S. at 173 n.*. Post-*Rogers*, five circuits and three state courts of last resort have either held or stated that a FELA plaintiff need not prove

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[3] McBride also argues that Supreme Court dicta are entitled to *stare decisis* respect. MB 35–37. But that is simply not true. As the Court reiterated just last year, "a formula repeated in dictum but never the basis for judgment is not owed *stare decisis* weight." *Gonzalez v. United States*, 128 S. Ct. 1765, 1774 (2008); *accord, e.g., Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006); *Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998). McBride invokes the principle that both the holding of a case and the reasoning underlying the holding are entitled to *stare decisis* respect. MB 35–36. But that principle does not encompass dicta. As far as the issue in this case is concerned, what is entitled to *stare decisis* effect are the decisions of the Supreme Court and this Court squarely holding that FELA requires proof of proximate cause.

proximate cause.[4] At the same time, at least one circuit and six state courts of last resort have reached the opposite conclusion.[5] The division is thus a relatively even one. McBride is wildly off the mark in suggesting, MB 41–

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[4] *See Marchica v. Long Island R.R. Co.*, 31 F.3d 1197, 1207 (2d Cir. 1994); *Page v. St. Louis Sw. Ry. Co.*, 312 F.2d 84, 89 (5th Cir. 1963); *Churchwell v. Bluegrass Marine, Inc.*, 444 F.3d 898, 907 (6th Cir. 2006); *Ogelsby v. S. Pac. Transp. Co.*, 6 F.3d 603, 609 (9th Cir. 1993); *Summers v. Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997); *Glass v. Birmingham S. R.R. Co.*. 905 So. 2d 789, 796 (Ala. 2004); *McCalley v. Seaboard Coast Line R.R. Co.*, 265 So. 2d 11, 15 (Fla. 1972); *Dutton v. S. Pac. Transp.*, 576 S.W.2d 782, 785 (Tex. 1978).

[5] *See Boston & Me. R.R. v. Talbert*, 360 F.2d 286, 288 (1st Cir. 1966) ("the plaintiff has the burden of proving negligence and proximate cause"); *Snipes v. Chi., Cent. & Pac. R.R. Co.*, 484 N.W.2d 162, 164 (Iowa 1992) ("an injured employee [must] prove that the defendant employer was negligent and that the negligence proximately caused, in whole or in part, the accident"); *Brabeck v. Chi. & Nw. Ry. Co.*, 117 N.W.2d 921, 923 (Minn. 1962) ("violation of an operating rule may impose liability on an employer if it is the proximate cause of the accident"); *Marazzato v. Burlington N. R.R. Co.*, 817 P.2d 672, 675 (Mont. 1991) ("The plaintiff has the burden of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's [death]."); *Chapman v. Union Pac. R.R.*, 467 N.W.2d 388, 395 (Neb. 1991) ("an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury"); *Reed v. Pa. R.R. Co.*, 171 N.E.2d 718, 721 n.3 (Ohio 1961) ("a [statutory] violation * * * must amount to *a* proximate cause of [the] injury, although it need not be *the* proximate cause thereof"); *Gardner v. CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997) ("a plaintiff employee must establish that the defendant employer acted negligently and that such negligence contributed proximately, in whole or in part, to plaintiff's injury").

50, that every circuit has rejected proximate cause post-*Rogers*. And he is particularly wrong in suggesting, MB 41–43, that this Court has done so.[6]

(a) *This Court*

McBride cannot identify a single decision of this Court that has held, or even stated, that FELA does not require proof of proximate cause. He quotes language from *Holbrook v. Norfolk Southern Railway Co.*, 414 F.3d 739, 741–42 (7th Cir. 2005), to the effect that "a plaintiff's burden when suing under the FELA is significantly lighter than in an ordinary negligence case." But we have already explained why that decision does not reject the proximate-cause requirement, CB 41–42, and McBride offers no response. McBride also cites *Harbin v. Burlington Northern Railroad Co.*, 921 F.2d 129 (7th Cir. 1990), MB 42, but that case involved the quantum of evidence necessary to enable a FELA plaintiff to survive a motion for summary judgment, not the substantive standard of causation. Indeed, *Harbin* did not involve causation at all; the element in question was negligence. *See id.* at 130–32.

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[6] McBride is also mistaken in his suggestion, MB 43 n.7, that a decision of a state court of last resort carries less weight than that of another federal court of appeals. The latter has no more binding force, and the former is entitled to no less respect. *Cf.* Sup. Ct. R. 10.

As we explain in our opening brief (at 39–40), far from having rejected the proximate-cause requirement after *Rogers*, this Court interpreted FELA to incorporate the requirement in at least two post-*Rogers* decisions. McBride contends that the reference to proximate cause in one of those cases—*Shupe v. New York Central System*, 339 F.2d 998 (7th Cir. 1965)—was dictum. MB 42–43. But McBride understandably makes no such claim about the other case, *Rogers v. Elgin, Joliet & Eastern Railway Co.*, 248 F.2d 710 (7th Cir. 1957), which affirmed a jury verdict for the plaintiff specifically because there was sufficient evidence of a statutory violation that was "the sole or contributory proximate cause of plaintiff's injuries." *Id.* at 712. And whether or not it was strictly necessary to the outcome, *Shupe*'s unequivocal statement that a FELA plaintiff "cannot recover damages which are not proximately caused by defendant's alleged negligence," 339 F.2d at 1000, is consistent with this Court's holding in the earlier post-*Rogers* case.

McBride also asserts that "[t]his Court" adopted the pattern jury instruction given by the district court here. MB 41 n.6, 50. As the pattern instructions themselves make clear, however, the Circuit Council has approved only "the publication of these instructions"; it "has not approved

their content." 7th Cir. Pattern Civil Jury Instrs. intro. at 1. Indeed, the instructions explicitly state that "[n]o trial judge is required to use them" and that they will be modified "as made necessary by evolving case law." *Id.* at 1, 3.[7]

(b) *Other Courts*

McBride is also wrong in asserting that six other circuits—the First, Third, Fourth, Eighth, Eleventh, and D.C.—have rejected the proximate-cause requirement in FELA cases. Most of the decisions discussed by McBride simply quoted *Rogers*' "any part, even the slightest" language, which concerns multiple causation, and did not address the issue of proximate cause.[8] One of the decisions—like *Gottshall*—cited *Rogers* for

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[7] It is unclear what McBride means to suggest when he states that "a Chicago-based member of the law firm that represents the company in this appeal is a member of the Circuit committee that drafted the instruction." MB 41 n.6. There is obviously no basis for estopping the client of a law firm from challenging a pattern instruction whenever a lawyer at that firm served on the drafting committee. In any event, the lawyer to whom McBride refers—Joel Bertocchi—was not a member of the sub-committee that drafted the pattern FELA instructions; he left the firm in 2006, nearly two years before the instructions were adopted; and we are aware of no evidence that he ever expressed approval—or, for that matter, any view at all—of the instruction at issue here.

[8] *See Moody v. Me. Cent. R.R. Co.*, 823 F.2d 693, 695 (1st Cir. 1987); *Hines v. Consol. Rail Corp.*, 926 F.2d 262, 267 (3d Cir. 1991); *Brown v. Balt. & Ohio*

the general proposition that FELA employs a "relaxed standard" of causation, without discussing (or even mentioning) proximate cause.[9] Others applied the distinct principle—not peculiar to causation—that a FELA plaintiff's claim should ordinarily be decided by a jury.[10] And one of the decisions, *Boston & Maine Railroad v. Talbert*, 360 F.2d 286 (1st Cir. 1966), affirmatively supports CSXT's position.

According to McBride, the First Circuit in *Talbert* "noted both its prior requirement that plaintiffs establish proximate cause in order to recover under the FELA and its need to conform to the 'contrary principles laid down' by the Supreme Court." MB 43. But McBride misrepresents what the First Circuit said; the word "contrary" does not appear in its decision. What the court actually said was that "the plaintiff has the burden of proving negligence and proximate cause" and that, in reviewing a jury

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R.R. Co., 805 F.2d 1133, 1137 (4th Cir. 1986); *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 436 (4th Cir. 1999); *Paul v. Mo. Pac. R.R. Co.*, 963 F.2d 1058, 1061 (8th Cir. 1992); *Sea-Land Serv., Inc. v. Sellan*, 231 F.3d 848, 851 (11th Cir. 2000); *Brooks v. Wash. Terminal Co.*, 593 F.2d 1285, 1288 (D.C. Cir. 1979).

9 *See Nordgren v. Burlington N. R.R. Co.*, 101 F.3d 1246, 1249 (8th Cir. 1996).

10 *See Pehowic v. Erie Lackawanna R.R. Co.*, 430 F.2d 697, 699–700 (3d Cir. 1970); *Estate of Larkins v. Farrell Lines, Inc.*, 806 F.2d 510, 512 (4th Cir. 1986).

verdict, the court "must be guided by the principles laid down in *Rogers*." *Talbert*, 360 F.2d at 288. The First Circuit then quoted *Rogers*' "any part, even the slightest" language. *Id.* (quoting 352 U.S. at 506). Far from suggesting a conflict between the *Rogers* formulation and proximate cause, the First Circuit treated them as two separate—and consistent—requirements.[11]

The lower courts that *have* interpreted *Rogers* to have abandoned proximate cause, *see supra* note 4, did so with little or no analysis of the decision. They also did so without the benefit of the comprehensive three-Justice concurrence in *Sorrell*, which undertook a thorough and careful explication of *Rogers*. For these reasons, the decisions concluding that FELA does not require proximate cause are entitled to little weight.

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[11] In a decision that McBride does not cite, the Third Circuit was even more explicit in recognizing that *Rogers* rejected only *sole* proximate causation, not proximate causation generally. *See Ely v. Reading Co.*, 424 F.2d 758, 762 (3d Cir. 1970) (holding that the jury charge, which repeatedly used the phrase "proximate cause," "clearly reflects the standard set forth in *Rogers*," because "it cannot be said that the jury was led to believe that proximate cause meant the only cause").

3. Neither the Legislative Purpose nor the Legislative History Supports McBride's Contention that FELA Does Not Require Proximate Causation

McBride also makes two arguments based on legislative purpose and two more based on legislative history. All four lack merit.

a. Legislative purpose

McBride contends that requiring proximate causation would be inconsistent with FELA's "broad remedial * * * purpose." MB 31; *see also* MB 27, 56. But the very same theory was explicitly rejected by the Supreme Court in *Sorrell*.

In arguing that FELA creates a less stringent standard of causation for the defendant's negligence than for the plaintiff's contributory negligence, the plaintiff in *Sorrell* likewise invoked FELA's "remedial purpose." 549 U.S. at 171. The Court was "not persuaded." *Id.* While acknowledging that FELA "was indeed enacted to benefit railroad employees"—"as the express abrogation of [certain] common-law defenses * * * make[s] clear"—the Court explained that it nevertheless "does not follow * * * that this remedial purpose requires [the Court] to interpret every uncertainty in the Act in favor of employees." *Id.* The Court went on to say that "FELA's text does not support the proposition that Congress

meant to take the unusual step of applying different causation standards" and that "the statute's remedial purpose cannot compensate for the lack of a statutory basis." *Id.* The Court therefore held that "FELA does not abrogate the common-law approach." *Id.* The Court's reasoning is equally applicable here.[12]

McBride also relies on the "legislative purpose" of "having juries determine" railroad workers' negligence claims. MB 28; *see also* MB 29. But that purpose is not implicated in this case, where the only issue is the standard of causation a jury should apply.

b. Legislative history

In the late 1930s, Congress considered but rejected an amendment to FELA that would have explicitly used the term "proximate cause." *See* MB 26–27. According to McBride, the rejection of the proposed language shows that Congress did not intend proximate cause to be the statutory standard. That argument is baseless.

"[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a * * * statute," because "several

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[12] In the same discussion, and for the same reasons, the Court in *Sorrell* rejected the plaintiff's reliance on "liberal construction" of FELA, 549 U.S. at 171, a canon that McBride also invokes here, MB 28, 31, 56.

equally tenable inferences may be drawn from [congressional] inaction, including the inference that the existing legislation already incorporated the offered change." *United States v. Craft*, 535 U.S. 274, 287 (2002) (citations and internal quotation marks omitted). That is the case here. Both before and after the proposed amendment at issue, the Supreme Court had repeatedly interpreted FELA to require proximate cause. *See* CB 29 & n.6. The most likely explanation for Congress's decision not to use the term "proximate cause" in the final bill, therefore, is that it was unnecessary. Indeed, a union representative testified that the language would be "pure surplusage, because unless the negligence proximately caused the injury there can be no recovery." *Hearings on H.R. 4988 and H.R. 4989 Before the H. Comm. on the Judiciary*, 76th Cong. 5 (1939) (statement of Tom J. McGrath, General Counsel of the Brotherhood of Railroad Trainmen). Given the Supreme Court's consistent interpretation of the Act, language concerning proximate cause would have been necessary only if Congress had wished to *abandon* the requirement. It did not do that in 1939, and it has not done so since.

McBride also relies on Congress's periodic rejection of requests to replace FELA with a workers' compensation law, suggesting that Congress

has thereby acquiesced in the Supreme Court's decisions interpreting the Act. MB 38–39. But there is no reason to think that this inaction reflects any congressional intent other than one not to adopt a workers' compensation regime. And even if it could be inferred that Congress's decision not to replace FELA somehow reflects acquiescence in the Supreme Court's decisions interpreting the Act, the only such decisions squarely addressing the issue of proximate cause hold that it is required.[13]

B. The District Court's Refusal To Instruct On Proximate Causation Was Not Harmless Error

1. As we explained in our opening brief (at 42–45), because proximate cause is an element of a FELA claim, the district court had an obligation to instruct on it. As we also explained (at 45–47), the district court failed to do so. Unlike the instruction proffered by CSXT, which would have charged on both *multiple* causation and *proximate* causation, the instruction given by the district court charged only on *multiple* causation, and authorized a verdict for McBride even if CSXT's negligence was merely a "but for" cause of his injury. *Compare* SA301 *with* A19-A20.

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[13] Insofar as there is any legislative history bearing upon the question here, it shows that Congress intended FELA to abrogate the common law in four respects, none of which had anything to do with proximate cause. *See* CB 25 n.5.

McBride does not directly dispute CSXT's contention that, if FELA requires proof of proximate cause, the causation instruction was erroneous.[14]

Instead, McBride contends that any instructional error was harmless. MB 57–61. But we have already explained why the error was *not* harmless, CB 48–53, and McBride offers no persuasive response. The standard for harmlessness, with which McBride takes no issue, is that an instructional error is prejudicial, and a new trial is therefore required, unless the evidence is so one-sided that any reasonable jury that was properly instructed would have reached the same result. *See* CB 48–49. Under that

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[14] McBride does argue, in passing, that proximate cause is confusing, and that the issue should therefore be decided by the court rather than the jury. MB 54–55. As we explained in our opening brief (at 43–45 & nn.10-11), however, juries are uniformly instructed on proximate cause in federal antitrust, securities, and RICO cases, and both the Supreme Court and this Court have made clear that proximate cause is for the jury in FELA cases as well. McBride offers no response to either point. McBride also asserts, in passing, that "proximate cause" is not "significantly different in substance from [the causation standard] submitted by the District Court." MB 61. But we explained in our opening brief (at 45–47) why that is wrong too, and McBride offers no response other than to suggest that FELA imposes a wholly novel concept of "proximate cause" not found in the common law, MB 61. That suggestion is refuted both by the settled interpretive methodology and by the precedent of the Supreme Court and this Court, which establish that proximate cause under FELA is precisely the same as under the common law (except insofar as the common law required *sole* proximate cause).

standard, and on this record, the district court's failure to instruct on proximate cause clearly was not harmless.

2. As we have explained, CB 49–53, a properly instructed jury could easily have found an absence of proximate cause for two related reasons. First, the "sheer number of links in the chain of causation," *Steamfitters Local Union No. 420 v. Philip Morris, Inc.*, 171 F.3d 912, 930 (3d Cir. 1999) (Becker, J.), from CSXT's alleged negligence (providing the wrong type and number of locomotives) to McBride's alleged injury (swelling and pain from hitting his hand) would have permitted a properly instructed jury to find the causal relationship too "indirect[] or remote[]," *Sorrell*, 549 U.S. at 173 (Souter, J., concurring), to amount to proximate cause, particularly given the jury's finding that McBride's own carelessness was part of the causal chain. Second, while McBride's principal theory of negligence was that CSXT's use of five locomotives with a wide-body locomotive in the lead created a risk of derailment or collision, McBride was not injured by either of those, and thus a properly instructed jury could have found that there was no proximate cause because CSXT's "duty was to take precautions against a different kind of loss from the one that materialized." *Movitz v. First Nat'l Bank of Chi.*, 148 F.3d 760, 763 (7th Cir.

1998). McBride offers no response to the first point; and his response to the second point is groundless.

A classic application of the latter principle is found in *Gorris v. Scott*, (1874) 9 L.R. Exch. 125 (U.K.), which this Court discussed in *Movitz*, 148 F.3d at 762–63. In *Gorris*, a negligent failure to equip a ship with pens for the sheep it was transporting, in breach of the shipowner's duty to protect against the spread of disease, was held not to be the proximate cause of the sheep being swept overboard by a storm, even though they would have been saved if the shipowner had complied with his duty (so that the negligence was the "but for" cause of the loss). McBride does not deny that, as in *Gorris*, "proximate cause rules * * * make the defendant's liability coextensive with [its] negligence," meaning that a defendant "is not liable for * * * harms unless the risk of such harms was one of the reasons for judging [it] to be negligent in the first place." 1 Dan B. Dobbs, *The Law of Torts* § 187, at 463 & n.1 (2001). But McBride does argue (or at least appears to argue) that the risk of the harm sustained in this case—an injury to his hand from hitting it on the brake—*was* one of the reasons for judging CSXT negligent.

While it is perhaps possible that the jury endorsed that theory of negligence, it is far more likely that the only negligence found by the jury was CSXT's failure to guard against the risks of derailment or collision. If that was the jury's finding, it is at the very least reasonably probable that the jury would not have found that CSXT's negligence proximately caused McBride's injury had it been told that proximate cause is a prerequisite to recovery. Under the standard for harmlessness, that possibility requires reversal and a new trial.[15]

3. The only evidence cited by McBride that supports the negligence theory he advances on appeal was provided by D. J. Baker, his supervising engineer. In testimony quoted by McBride, Baker explained what he believed to be wrong with the train configuration at issue by stating, in part, that "you could be injured, a back injury, lots of different

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[15] McBride might be understood to be making the (different) argument that CSXT's negligence was simply the act of providing him with improper equipment. *See* MB 59–60. If he is, McBride misapprehends the concept of proximate cause, which requires not only (a) that the defendant engaged in an act in breach of a duty of care and (b) that the defendant sustained an injury resulting from the act but (c) that the type of injury against which the defendant had a duty to protect is the same type that the plaintiff sustained. Even if (c) were *not* required, however, a properly instructed jury could still have found a lack of proximate cause on the ground that the causal relationship between (a) and (b) was too indirect. *See* CB 49–50.

things * * * including your hands as Mr. McBride injured himself." MB 12 (quoting SA59). But McBride omits the first part of Baker's answer: "the locomotives running in on you, depending on how much weight you have behind you." SA59. It was CSXT's alleged failure to protect against *that* risk that was the principal theory of negligence presented through McBride's witnesses.

For example, almost immediately before describing the switching process in the testimony quoted in his brief (at 9), McBride testified as follows: "At the time we had five engines. You don't switch five engines. You've got too much weight. So the cars, you don't want them to come in and hit the engines and maybe jackknife them off the track." SA115. Similarly, immediately after the testimony quoted in McBride's brief (at 14) that the equipment "served to create an unsafe situation," McBride's expert, Paul Byrnes, was specifically asked to "tell the jury what the problems of the size of the engines and locomotives are." SA85. His answer was that the design "diminishes greatly your visibility to the rear" and "creates blind spots," requiring the engineer "to be extremely careful when negotiating tight curves." SA86. Byrnes also emphasized the danger that "you have 2,000,000 pounds of locomotives which you want to stop

right now, and those cars are just going to sling-shot out, and you have a very good chance of breaking knuckles [between the cars] and even possibly putting something on the ground." SA92; *see also* SA 78, SA81-SA82, SA90, SA93.

Despite all of this evidence, McBride suggests that the jury could not have found that CSXT's "failure to guard against collision or derailment caused him to become fatigued and accidentally smash his hand into a brake control." MB 60. But the jury could easily have so found in a case in which (1) the district court concluded that FELA does not require proximate causation, (2) the jury was instructed that CSXT's negligence need only have "caused or contributed to" McBride's injury, A19, and (3) McBride's counsel was therefore able to urge the jury to return a verdict for him because the injury "never would have happened *but for* the defendant giving him that train," SA236 (emphasis added). While this theory of causation may be "goofy," as McBride now claims, MB 60, that is only because it depends upon a standard of "but for" causation that creates liability for any consequence of an unrelated breach of due care.

Because there is a very real possibility that the jury returned a verdict for McBride on the basis of just such a "but for" theory of causation, and

because a properly instructed jury could easily have found an absence of *proximate* causation, the failure to instruct on proximate cause prejudiced CSXT and thus was not harmless.

CONCLUSION

The judgment of the district court should be reversed and the case remanded for a new trial before a properly instructed jury.

Respectfully submitted,

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