IN THE COURT OF APPEALS OF MARYLAND

September Term, 2012

No. 34

CSX TRANSPORTATION, INC.,

Petitioner,

v.

EDWARD L. PITTS, SR.,

Respondent.

BRIEF OF PETITIONER

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STATEMENT OF THE CASE

Edward L. Pitts, Sr. filed a complaint against CSX Transportation, Inc. ("CSXT") under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.*, alleging injury to his knees. The jury returned a verdict against CSXT and awarded economic damages of $444,000 and non-economic damages of $1,335,000. It apportioned those damages to CSXT's negligence (70%), plaintiff's contributory negligence (20%), and other causes (10%). On June 11, 2010, the circuit court (Nance, J.) denied CSXT's post-trial motions and entered judgment against CSXT.

The Court of Special Appeals affirmed. *CSX Transp., Inc. v. Pitts*, 203 Md. App. 343 (2012) (attached in the Appendix). This Court then granted CSXT's timely filed petition for a writ of certiorari.

QUESTIONS PRESENTED

1. Whether the federal regulation governing the ballast used to support railroad track, 49 C.F.R.§ 213.103, applies to track located within rail yards—and therefore precludes claims based on the selection of ballast used to support track in rail yards—or, as the Court of Special Appeals held, applies only to track on the main line.

2. Whether the Court of Special Appeals acted contrary to the Supreme Court's decision in *Norfolk Southern Railway v. Sorrell*, 549 U.S. 158, 171 (2007), when it adopted "an employee-friendly standard of review" in FELA cases.

3. Whether a defendant should be allowed to cross-examine a plaintiff's economist about retirement statistics which show that the plaintiff's claim for future economic damages is likely exaggerated because it rests on an unrealistic assumption about when the plaintiff would have retired if he had not been injured.

STATEMENT OF FACTS

At the time of trial, Plaintiff was a 59-year-old train engineer who had spent the vast majority of his then 40-year career operating the locomotives used to move trains for CSXT and its predecessors. A small part of that work involved

walking and performing various other tasks on the rocks, or ballast, that support CSXT's train tracks. Plaintiff alleges that CSXT negligently used the wrong size of ballast and that walking on that ballast over the years caused osteoarthritis in his knees.

A. Statutory and Regulatory Background

1. The Federal Employers' Liability Act

Enacted in 1908, FELA creates a federal cause of action for railroad employees who are injured on the job. Unlike a typical workers' compensation scheme, which provides compensation without regard to fault, FELA requires proof of the employer's negligence. *See* 45 U.S.C. § 51. FELA neither prohibits nor requires specific conduct on the part of a railroad. Instead, FELA is "founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms." *Urie v. Thompson*, 337 U.S. 163, 182 (1949). Because the statute "does not define negligence, leaving that question to be determined … by the common law principles as established and applied in the federal courts" (*id.* at 174 (internal quotation marks omitted)), claims brought under FELA are decided by juries on a case-by-case basis.

2. The Federal Railroad Safety Act

In 1969, the Secretary of Transportation established a Task Force on Railroad Safety comprising "representatives of the railroad industry, railroad labor organizations, and State regulatory commissions." H.R. Rep. No. 91-1194, at App. F (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4125. Its mandate was to "examine railroad safety and to advise the Secretary" accordingly. *Id.*

Despite the "longstanding differences among the three groups represented on the task force" (*id.* at 4128), the task force issued a unanimous final report concluding that "legislation authorizing broad federal regulatory powers should be enacted." *Id.* at 4129. Dissatisfied with the inconsistency of existing state and federal regulations, the task force concluded that railroad safety required "a more comprehensive national approach" (*id.* at 4127) led by the Federal Railroad

Administration ("FRA"), which should "have authority to promulgate reasonable and necessary rules and regulations establishing safety standards in all areas of railroad safety." *Id.* at 4129.

Heeding the task force's recommendation for comprehensive and uniform federal railroad safety regulations (*see* H. Rep. No. 91-1194, at 2, 1970 U.S.C.C.A.N. at 4104–05), Congress enacted the Federal Railroad Safety Act of 1970 ("FRSA"), now codified as amended at 49 U.S.C. §§ 20101 *et seq*. The FRSA directs the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety" in order to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. §§ 20101, 20103(a).[1]

Recognizing that the railroad industry has "a truly interstate character calling for a uniform body of regulation and enforcement" (H.R. No. 91-1194, at 13, 1970 U.S.C.C.A.N. at 4110), Congress "declare[d] that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable." Pub. L. No. 91-458, 84 Stat. 972, § 205 (1970). As the House Report accompanying the FRSA concluded, "[t]he committee does not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." H.R. Rep. No. 91-1194, at 5, 1970 U.S.C.C.A.N. at 4109. "To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce." *Id.* at 7, 1970 U.S.C.C.A.N. at 4110–11. Accordingly, "where the federal government has authority, with respect to rail safety, ***it preempts the field.***" *Id.* at 5, 1970 U.S.C.C.A.N. at 4108 (emphasis added).

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[1] The Secretary of Transportation subsequently delegated this authority to the FRA. *See* 49 C.F.R. § 1.49(m).

Although amended since its initial passage, the FRSA continues to provide that "[l]aws, regulations, and orders related to railroad safety … ***shall be nationally uniform to the extent practicable***." 49 U.S.C. § 20106(a)(1) (emphasis added). In order to achieve Congress's goal of national uniformity in railroad safety regulation, the statute allows a state to "adopt or continue in force a law, regulation, or order related to railroad safety," ***but only*** "***until the Secretary of Transportation … prescribes a regulation or issues an order covering the subject matter of the State requirement***." *Id*. § 20106(a)(2) (emphasis added).[2]

3. FRA Ballast Regulation

Pursuant to the FRSA, the FRA has issued a comprehensive set of regulations governing the tracks on which locomotives operate.[3] Ballast, the material used to support the tracks and the subject of this case, is one of the matters specifically regulated by the FRA. The FRA regulation governing ballast provides:

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[2] The statute also contains a narrowly circumscribed exception, not relevant here, that allows states to adopt laws "necessary to eliminate or reduce an essentially local safety or security hazard." 49 U.S.C. § 20106(a)(2)(A).

[3] Soon after passage of the FRSA, the FRA promulgated initial Track Safety Standards, which "prescribe[d] initial minimum safety requirements for railroad track." 36 Fed. Reg. 20,336, 20,338 (Oct. 20, 1971). "[B]ased on the safety practices of the rail industry at that time, available track-related data, and public comments and testimony" (44 Fed. Reg. 52,104, 52,107 (Sept. 6, 1979)), these initial standards were intended to operate as an evolving set of safety requirements that would "be continually reviewed and revised by FRA in light of technical innovation, the results of the FRA research and development program, and [regulatory] experience." 36 Fed. Reg. at 20,336. In fact, the FRA has revised and expanded the Track Safety Standards several times since their initial promulgation. *See, e.g.*, 71 Fed. Reg. 59,677 (Oct. 11, 2006); 66 Fed. Reg. 1894 (Jan. 10, 2001); 63 Fed. Reg. 33,992 (June 22, 1998); 47 Fed. Reg. 39,398 (Sept. 7, 1982). Divided into several interconnected subparts, the standards regulate, *inter alia*, train speed, track alignment, track elevation, cross-ties, drainage, and vegetation control. *See* 49 C.F.R. §§ 213.1–.369.

> § 213.103 Ballast; general.
>
> Unless it is otherwise structurally supported, all track shall be supported by material which will—
>
> (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
>
> (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;
>
> (c) Provide adequate drainage for the track; and
>
> (d) Maintain proper track crosslevel, surface and alinement.

49 C.F.R. § 213.103. Section 213.103 establishes a number of performance requirements, but deliberately leaves to the railroad's discretion the size and type of material to be used in a given location in order to meet those requirements.[4]

Significantly, the ballast regulation was expressly reaffirmed by the FRA after a congressionally mandated safety review. Congress—through the Rail Safety Enforcement and Review Act of 1992, Pub. L. No. 102-365, 106 Stat. 972 (1992), as amended by the Federal Railroad Safety Authorization Act of 1994, Pub. L. No. 103-440, 108 Stat. 4615 (1994)—ordered the FRA to review all of its "regulations related to track safety standards." 49 U.S.C. § 20142(a). Congress mandated that the review consider, among other things, "employee safety" (*id*. § 20142(a)(3)) and that, upon conclusion of the review, the FRA "revise track safety standards, considering safety information presented during the review" (*id*. § 20142(b)). Pursuant to this congressional directive, the FRA convened a working group which—after having "systematically surveyed the existing regulations to identify those sections and subsections that needed updating" (63

[4] How ballast performs its track-supporting function, and why railroads must have the discretion to select the type of ballast appropriate for a given location, is explained in the Brief of the American Association of Railroads as Amicus Curiae in Support of Petitioner at 6–13.

Fed. Reg. 33,992, 33,993 (June 22, 1998))—unanimously recommended that the ballast regulation "remain as currently written" (*id*. at 34,006). The FRA "agree[d] with the recommendation" and affirmatively decided to let 49 C.F.R. § 213.103 stand unchanged. *Id.*

B. Factual Background

1. Plaintiff's occupation

Plaintiff began working for a predecessor of CSXT in the early 1970s. E25–26. Although he had several job titles over the subsequent four decades, Plaintiff's primary job, to the virtual exclusion of all else, was to operate locomotive engines. E49–50. Plaintiff testified that about "80 percent of [his] time every day" was spent "seated [in the cab of] an engine." E137; *see also* E50-52. Other tasks that Plaintiff performed include: (i) receiving his work order and a safety briefing in the rail-yard office at the beginning of his shift (E51, 126–27); (ii) walking to or from his engine at the beginning and end of his shift, which could be up to 500 feet if the engine is not parked next to the yard office (E52, 127); (iii) walking around and inspecting his engine, including the brakes (E39–41, 127–30); (iv) connecting or disconnecting air-brake hoses underneath and between the engines and cars (E36–37, 132–33); (v) throwing switches that physically move the rails, thereby directing the train from one track to another (E34–35, 134–35); and (vi) mounting or dismounting engines or cars (E38–39, 128, 130–31). Notably, all of these tasks (except receiving his daily briefings in the yard office and, perhaps, walking to or from the engine) necessarily are performed while standing within or immediately adjacent to the gauge of the tracks (*i.e.*, within or immediately adjacent to the space between the two rails).

2. Plaintiff's medical condition

Although Plaintiff said that he began to experience symptoms of osteoarthritis in his knees in 2003 or 2004, he did not seek medical attention until 2007. *See* E41. Osteoarthritis is a degeneration of the cartilage that coats the ends of bones in a joint (in this case the femur and tibia) and allows the bones to move

smoothly against each other when the joint moves. *See* E160. The stages of osteoarthritis range from superficial cracks in the surface of the cartilage through complete degeneration of the cartilage, resulting in bone-on-bone contact.[5] E162.

Osteoarthritis of the knees is a common condition among men of Plaintiff's age. Plaintiff's treating physician admitted that osteoarthritis is "one of the most prevalent chronic health problems in the United States today." E172; *see also* E174. And Plaintiff's paid medical expert described it as a "universal" condition that "everybody gets … [i]f you live long enough," specifically admitting that more than 30 percent of adults between ages 45 and 64 have been diagnosed with osteoarthritis. E96; *see also* E173. Moreover, osteoarthritis of the knees is directly associated with certain other health conditions, particularly being overweight. *See* E175–77; E97. Medical records revealed that, in 2002, Plaintiff—who is about 5-foot-10 (E178)—weighed in at 235 and 244 pounds and was diagnosed as obese. E207. Plaintiff denied having been "obese," but admitted that doctors have told him that he has a weight problem since at least 1982. E53–55. Plaintiff's treating physician testified that he had advised Plaintiff to lose weight numerous times and that Plaintiff's weight, along with his age, was a factor in causing his osteoarthritis. E177.

Although Plaintiff has had two arthroscopic surgeries, one on each knee (E43, 54), and expects to receive injections in his knees approximately every six months for the rest of his life (E44), at the time of trial he was not taking any pain medication other than Tylenol Arthritis, had no work restrictions, and had not missed a day of work in over two years (E54). Nevertheless, Plaintiff's treating physician, who performed his arthroscopic surgeries, stated that Plaintiff's

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[5] Plaintiff also claimed damage to the menisci in his knees. The menisci are horseshoe-shaped cartilage pads that sit between the femur and tibia (one on both the inside and outside of the knee). A healthy meniscus absorbs a significant amount of the force from any impact to the knee and protects the cartilage on the femur and tibia. In Plaintiff's case, the posterior segment of his menisci were torn. *See* E161, 165.

condition would continue to deteriorate with age. E170–71. He said that he would be "surprised" if Plaintiff were able to work for five more years (*id.*), but did not predict that Plaintiff would need any further medical procedures other than the injections described above.

3. Plaintiff's theory of liability

Depending on the location, CSXT employs various materials to support its tracks (and the trains on those tracks), facilitate drainage, and provide a walking surface for workers. *See* E58–59. Crushed rock, or "ballast," is the most common support material. *See* E58. Ballast comes in two varieties. The first—which is called "large," "mainline," or "track" ballast—consists of rocks that range from 0.75 to 2.5 inches in diameter. *See* E59, 61–62. The second—which is called "small," "yard," "walkway," or "walking" ballast—consists of rocks that range from 0.375 to 1 inch in diameter. *See id.* Whereas large ballast is generally used wherever it is necessary to ensure stability of the track, small ballast is generally used to provide a walking surface in areas that are separate from the track-support structure. E59; E61.

Plaintiff alleged that CSXT negligently used large rather than small ballast in the areas where he worked while performing the job tasks described above. His experts opined that working on this large ballast placed stress on Plaintiff's knees and that repetition of these activities over the years caused Plaintiff's cartilage to degenerate. The experts called this the "cumulative trauma" or "microtrauma" theory of causation. *See* E163. Although there were disputes at trial with respect to (1) the amount and location of large ballast in CSXT's rail yards, (2) whether working on large ballast could cause Plaintiff's medical condition, and (3) whether CSXT knew or had reason to know that working on large ballast could cause such a condition, those disputes are not relevant to this appeal.

4. Plaintiff's claim for future lost wages

Plaintiff, who was 59 years old and still working at the time of trial, claimed future lost wages. E146. The claim for future lost wages rested on

Plaintiff's assertion that, but for his alleged injury, he would have worked to the age of 67 or 68. E46; E104–07. In fact, statistics show that the vast majority of railroad workers retire soon after turning age 60, and that almost none work to the age of 67 or 68. E107–10. But the jury was not allowed to learn this because the circuit court prohibited CSXT from cross-examining Plaintiff's expert on the relevant statistics. *Id*. Consistent with what the statistics predicted, Plaintiff retired on June 24, 2011, after the trial was over, at the age of 60 years and 5 months "based on age and service." Railroad Retirement Board Response to Mandatory Railroad Medicare Secondary Payer Reporting Request (Aug. 10, 2012); *see also* Railroad Retirement Board, Certification of Records (Aug. 14, 2012).[6]

SUMMARY OF ARGUMENT

This appeal raises two issues of critical importance under FELA and a significant evidentiary issue, not limited to FELA cases, that has arisen repeatedly in the Circuit Court for Baltimore City.

First, the Court of Special Appeals held that the federal regulation governing ballast used to support track does not apply in rail yards and, consequently, that the Federal Railroad Safety Act does not preclude FELA claims that are based on the size of track-supporting ballast in rail yards. That conclusion is contrary to numerous decisions from other jurisdictions. Moreover, the distinction drawn by the Court of Special Appeals between track located in rail yards and other track is directly contrary to the relevant federal regulations. In fact, as the Sixth Circuit has squarely held, the ballast regulation applies to all track, including track within rail yards. *Nickels v. Grand Trunk W. R.R.*, 560 F.3d 426 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 1136 (2010). In order to give the regulation the correct interpretation, and the same scope of application in

[6] CSXT has filed a motion for judicial notice of this fact, which is "not subject to reasonable dispute in that it is … capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Md. Rule 5-201(b).

Maryland as elsewhere in the nation, the Court should hold that it applies to ***all*** ballast used to support track, regardless of where the track is located. Given its proper scope, the FRSA ballast regulation precludes Plaintiff's FELA claim because Plaintiff worked only on ballast that performs a track-support function, and his claim thus necessarily challenges the ballast that CSXT used to support its tracks.

Second, the Court of Special Appeals held that, because FELA is a remedial statute to be liberally construed, all debatable issues and close calls regarding alleged errors by the trial court must be resolved in favor of the plaintiff. The Court of Special Appeals' holding that "FELA cases have a different standard of review than common law negligence cases" is directly contrary to *Norfolk Southern Railway v. Sorrell*, 549 U.S. 158 (2007), in which the Supreme Court held that FELA abrogates common-law principles only to the extent it does so explicitly. There is no statutory text that supports the Court of Special Appeals' avowedly "employee-friendly" standard of review. This Court should reject that standard, which unfairly and impermissibly tilts the balance in favor of FELA plaintiffs, thereby depriving FELA defendants of a level playing field. The application of an improper standard of review calls into question all aspects of the Court of Special Appeals' opinion in this case—and its other recent FELA cases, in which it also has applied the same erroneous standard. In particular, under the correct standard of review, two erroneous jury instructions given by the circuit court require that CSXT, if not granted judgment on preclusion grounds, at least be granted a new trial.

Third, the Court of Special Appeals erroneously affirmed the circuit court's refusal to allow CSXT to cross-examine Plaintiff's damages expert on occupational work-expectancy data, which showed that Plaintiff's assertion that he intended to work until a particular age was not credible and that his claim for future lost wages was almost certainly exaggerated. To estimate a plaintiff's future lost wages, an expert must make an assumption about when the plaintiff would

have retired had he not been injured. The later a plaintiff would have retired, the greater the plaintiff's damages. Here, Plaintiff's economist based his damages estimate on the assumption that Plaintiff would not have retired until age 67 or 68—because that is when Plaintiff said that he would have retired. But statistics reveal that a substantial majority of railroad workers retire at age 60, and that almost none work to the age of 67. The circuit court refused to allow CSXT to cross-examine Plaintiff's economist using those statistics, even though the economist admitted familiarity with them; and the Court of Special Appeals sustained that ruling, thereby preventing CSXT from rebutting a fundamental assumption underlying Plaintiff's damages claim. This Court should reaffirm its longstanding recognition that the opportunity to cross-examine an opponent's expert is a fundamental right, and hold that this right specifically entitles a defendant to cross-examine the plaintiff's expert on retirement statistics for the relevant industry whenever there is a claim for future lost wages.

ARGUMENT

I. Plaintiff's Claims Are Precluded By The FRSA Because They Challenge The Ballast CSXT Used To Support Its Tracks.

Congress has expressly provided that the standards relating to railroad safety "shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). Responsibility for developing uniform safety standards has been vested in the FRA, the expert agency most familiar with railroad operations. *See* 49 C.F.R. § 1.49(m). In the agency's expert judgment, "piecemeal regulation" of matters falling within its purview "would be disruptive and contrary to the public interest." 43 Fed. Reg. 10,583, 10,586 (Mar. 14, 1978). Common-law litigation is the paradigmatic form of piecemeal regulation. It makes no difference whether such litigation arises under state or federal law; each is equally disruptive of national uniformity in railroad safety standards. Accordingly, it is well established that the FRSA preempts any state-law requirement, including a requirement imposed through a common-law tort action, whenever there is an FRA regulation

"covering the subject matter" of that state-law requirement. 49 U.S.C. § 20106(a)(2); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). It also is well established that the FRSA precludes a negligence claim brought under FELA whenever the "subject matter" of the FELA claim is covered by an FRA regulation. *See Nickels v. Grand Trunk W. R.R.*, 560 F.3d 426 (6th Cir. 2009), *cert. denied*, 120 S. Ct. 1136 (2010); *Waymire v. Norfolk & W. Ry.*, 218 F.3d 773 (7th Cir. 2000); *Lane v. R.A. Sims, Jr., Inc.*, 241 F.3d 439 (5th Cir. 2001). That background legal principle is not contested here.

Neither is it contested that, as part of its "integrated" track-safety requirements (43 Fed. Reg. at 10,585), the FRA has promulgated a regulation specifically governing the use of ballast to support track. But, contrary to the Court of Special Appeals' unprecedented holding, that regulation applies to ***all*** track, whether located on the main line, in a rail yard, or anywhere else in the national railroad system, and thus covers ***all*** ballast that performs a track-support function. Because Plaintiff worked on ballast that supported the track in CSXT's rail yards—and his FELA claim thus necessarily challenges the ballast that CSXT uses to support the track in its rail yards—his claim is precluded by the federal ballast regulation.

So that the Court may better understand both the regulatory and operational context in which this case arises and how the decision below obstructs Congress's goal of achieving railroad safety through nationally uniform railroad-safety regulation, our discussion begins by explaining the relevant background principles and how their application furthers Congress's statutorily codified goal.

A. FRSA Regulations Preclude FELA Claims Covering The Same Subject Matter.

The FRSA expressly preempts any state law "covering the [same] subject matter" as any federal railroad safety regulation. 49 U.S.C. § 20106(a)(2). This preemption clause is not limited to legislative or regulatory action: It has long been established that a state common-law negligence lawsuit is "covered"—and

thus preempted—if a federal regulation "substantially subsume[s]" the subject matter of the claim. *Easterwood*, 507 U.S. at 664.

Although the FRSA's preemption clause by its terms applies only to state-law claims, every federal court of appeals to have considered the issue has held that the FRSA also precludes claims brought under federal law. *See Nickels*, 560 F.3d 426; *Waymire*, 218 F.3d 773; *Lane*, 241 F.3d 439. In *Nickels*, the Sixth Circuit held that negligence claims under FELA are ***precluded*** by the FRSA to the same extent that negligence claims under state law are ***preempted*** by the FRSA. Like the Fifth and Seventh Circuits before it, the Sixth Circuit recognized that "the uniformity demanded by the FRSA 'can be achieved only if [federal rail safety regulations] are applied similarly to a FELA plaintiff's negligence claim and a non-railroad-employee plaintiff's state law negligence claim.'" *Nickels*, 560 F.3d at 430 (quoting *Lane*, 241 F.3d at 443); *see also Waymire*, 218 F.3d at 777 ("To treat cases brought under federal law differently from cases brought under state law would defeat FRSA's goal of uniformity."); *Lane*, 241 F.3d at 443 (explaining that "[d]issimilar treatment" of federal and state common-law claims "would have the untenable result of making the railroad safety regulations established under the FRSA virtually meaningless" because "'[t]he railroad could at one time be in compliance with federal railroad safety standards with respect to certain classes of plaintiffs yet be found negligent under the FELA with respect to other classes of plaintiffs for the very same conduct'").[7]

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[7] *See also, e.g.*, *Crabbe v. Consol. Rail Corp.*, 2007 WL 3227584, at *5 (E.D. Mich. Nov. 1, 2007) ("allowing Plaintiff to proceed with a FELA claim alleging that Defendant was negligent in its choice of ballast would undermine the FRSA's goal of national uniformity"); *Ferra v. Canadian Nat'l/Ill. Cent. R.R.*, 2007 U.S. Dist. LEXIS 88457, at *15 (E.D. Mich. May 4, 2007) (noting "danger that Congress's strived-for uniformity would be undermined by 'allowing juries in FELA cases to find negligence based on' choice of ballast even though it complied with the requirements set forth in the FRSA regulations"); *Dickerson v. Staten Trucking, Inc.*, 428 F. Supp. 2d 909, 913–14 (E.D. Ark. 2006) (noting that "courts have precluded FELA claims when the railroad's underlying conduct was in

The myriad decisions holding that the FRSA precludes FELA claims to the same extent as it preempts state-law claims recognize that permitting FELA actions to proceed notwithstanding FRSA regulations that cover the same subject matter would undermine the statutory goal that railroad safety regulation "be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). FELA actions, like all common-law actions, are subject to case-by-case adjudication. Thus, liability might be imposed in one case but not another even though the railroad's conduct in the two cases was identical. Faced with inconsistent verdicts returned by different juries, railroads would not know what conduct is required of them. Verdicts that are not merely inconsistent but outright contradictory pose an even greater threat. For example, one jury, hearing a claim brought by a worker suffering osteoarthritis, might hold a railroad liable for using mainline ballast in a particular yard, while another jury, hearing a claim brought by a worker injured in a derailment, might hold that same railroad liable for not using mainline ballast in the very same yard.[8] The railroad would be in an impossible quandary, and—

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compliance with specific FRSA regulations" and holding FELA claim challenging crashworthiness of locomotive precluded by FRSA); *Major v. CSX Transp.*, 278 F. Supp. 2d 597, 608–10 (D. Md. 2003) ("the district courts are agreed that a FELA claim may be preempted by the FRSA"); *In re Amtrak "Sunset Limited" Train Crash*, 188 F. Supp. 2d 1341, 1349 (S.D. Ala. 1999) ("Like common law negligence claims, FELA negligence claims may not be used to impose duties beyond those imposed by Congress or the FRA—that is, FELA claims may, indeed, be subject to pre-emption."); *Rice v. Cincinnati, New Orleans & Pac. Ry.*, 955 F. Supp. 739, 740 (E.D. Ky. 1997) ("To the extent that they are inconsistent, the FRSA will supersede the FELA based on the policy embodied in the FRSA to ensure uniformity in law pertaining to railway safety."); *Thirkill v. J.B. Hunt Transp., Inc.*, 950 F. Supp. 1105, 1107 (N.D. Ala. 1996) (concluding that FELA claim was precluded by FRSA regulations covering train speed); *Herndon v. Nat'l R.R. Passenger Corp.*, 814 A.2d 934, 936–37 (D.C. 2003) (finding differentiation between state and FELA common-law claims in context of FRSA to be "a distinction without a policy difference").

[8] This is no mere hypothetical risk. The plaintiff in this case alleges that CSXT used ballast that was too ***large***; the plaintiff in *Thanasiu v. CSX Transportation, Inc.*, No. CI 0200506962 (Ohio C.P.), by contrast, alleged that

because the selection of track-supporting ballast would be governed by the *ad hoc* requirements imposed by successive juries rather than the performance requirements set forth in 49 C.F.R. § 213.103—Congress's goal of national uniformity in railroad safety regulation would be defeated by "piecemeal regulation." 43 Fed. Reg. at 10,586; *see also Ferra*, 2007 U.S. Dist. LEXIS 88457, at *15 (noting "danger that Congress's strived-for uniformity would be undermined" because "juries could reach different verdicts in similar employee negligence cases"). Accordingly, "[t]o the extent that they are inconsistent, the FRSA will supersede the FELA based on the policy embodied in the FRSA to ensure uniformity in law pertaining to railway safety." *Rice*, 955 F. Supp. at 740.

Moreover, allowing FELA actions to proceed notwithstanding FRSA regulations that cover the same subject would undermine Congress's intent to "promote safety in every area of railroad operations." 49 U.S.C. § 20101. That is because each FRA regulation is part of "an integrated undertaking" that comprises "numerous elements." 43 Fed. Reg. at 10,585. Given their interdependence, "[a]s a general rule, it is not possible to regulate an individual hazard without impacting on other, related working conditions, nor without impacting on the safe transportation of persons and property." *Id.* But the jury that is called upon to hear a particular FELA claim considers that claim in relative isolation without due regard for the myriad implications its decision might have on railroad operations. Moreover, even if it did look beyond the plaintiff's narrow claim, a lay jury would lack the knowledge and expertise required to comprehend the far-reaching effects that imposition of a particular common-law standard would have on railroad operations.[9] Precisely because such "piecemeal regulation … would be disruptive

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CSXT used ballast that was too ***small***. Uncontroverted evidence introduced at trial established that derailments, and the injuries that they may cause, are a genuine risk in rail yards. *See* E121–22 (describing history of derailments in rail yard where large ballast had not been used).

[9] In a decision finding preemption in the medical-device context, the Supreme Court emphasized that "tort law[] applied by juries" produces distorted

and contrary to the public interest," it is—in the FRA's expert view—"essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on long-standing industry practices and pre-existing regulations." *Id.* at 10,585–86.[10] Because FELA actions that challenge railroad operations covered by FRA regulations are antithetical to that "informed and deliberate" process, they undermine Congress's goal of "promot[ing] safety in every area of railroad operations" and therefore are precluded.

B. The FRA Ballast Regulation Applies To All Ballast That Performs A Track-Support Function, Regardless Of Where It Is Located.

1. The ballast regulation covers the subject of ballast used to support track.

There is no dispute that the FRA has issued a regulation—49 C.F.R. § 213.103—that substantially subsumes the subject of the ballast that is used to support railroad track. 203 Md. App. at 369, 371 (App. A). That regulation requires that ballast used to support track meet four enumerated conditions (each of which is further detailed in other FRA regulations); but it affords railroads discretion to select the specific ballast that will meet those conditions in any given

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results because it fails to emulate the cost-benefit analysis that an expert agency would employ. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 325 (2008) ("A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.").

[10] The FRA's determination that "piecemeal regulation … would be disruptive" (43 Fed. Reg. at 10,586) is entitled to deference. *Cf. 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").

situation. *See* 49 C.F.R. § 213.103; *see also* 49 C.F.R. §§ 213.57, 213.63, and 213.55.[11] The fact that the regulation does not require the use of a particular size ballast in a particular situation or at a particular location does not deprive it of preclusive effect. On the contrary, the FRSA's "regulatory framework need not impose bureaucratic micromanagement in order to substantially subsume a particular subject matter." *In re Derailment Cases*, 416 F.3d 787, 794 (8th Cir. 2005); *see also Black v. Baltimore & Ohio R.R.*, 398 N.E.2d 1361, 1363 (Ind. Ct. App. 1980) (holding that FRSA track-structure regulations collectively preempted public service commission order addressing muddy yard conditions despite "absence of a specific regulation dealing with muddy conditions"). As the Sixth Circuit recently held, "[r]ather than prescribing ballast sizes for certain types or classes of track, the regulation leaves the matter to the railroads' discretion ***so long as the ballast performs the enumerated support functions***" and, "[i]n this way, … substantially subsumes the issue of ballast size." *Nickels*, 560 F.3d at 431 (emphasis added); *see also, e.g.*, *Norris v. Cent. of Ga. R.R.*, 635 S.E.2d 179, 183 (Ga. Ct. App. 2006) ("The fact that [49 C.F.R. § 213.103] does not specify any size for the various purposes of the ballast does not alter the fact that the regulation nonetheless 'covers' or 'substantially subsumes' the subject matter of a ballast selection relative to track maintenance."); *Ferra*, 2007 U.S. Dist. LEXIS 88457, at *18 ("[e]ven though" it does "not dictate the size of the ballast," 49 C.F.R. § 213.103 "'covers' or 'substantially subsumes' the subject matter of a ballast selection").

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[11] Having the discretion to determine which ballast is appropriate to use in a given location is essential if a railroad is to ensure that it remains in compliance with § 213.103 and the associated FRA track-safety regulations. *See infra* p. 18. What ballast is appropriate in a particular location depends on numerous factors, including topography, climate, soil composition, train speed, train weight, and—given the effect that spilled cargo can have on ballast performance—the type of cargo being handled. *See* AAR Br. at 6–13. With the exception of climate, these are variables that vary not only between rail yards, but often within a single rail yard.

Furthermore, the ballast regulation may not be viewed in isolation. When a court is deciding whether a regulation covers a particular subject matter, it must view the regulation in "the context of the overall structure of the regulations." *Easterwood*, 507 U.S. at 674. Thus, whether preclusion will be found "does not depend on a single federal regulation itself covering the subject matter." *Burlington N. & Santa Fe Ry. v. Doyle*, 186 F.3d 790, 795 (7th Cir. 1999). Rather, preclusion also will be found when several regulations in conjunction cover a given subject matter. *See, e.g., CSX Transp., Inc. v. City of Plymouth*, 283 F.3d 812, 817 (6th Cir. 2002) (holding that speed and brake regulations in combination covered subject of amount of time that trains could permissibly block a crossing).

The FRA ballast regulation unquestionably is part of "an integrated undertaking." 43 Fed. Reg. at 10,585. For example, subpart (d) of the regulation requires that the ballast "[m]aintain proper track crosslevel, surface and alinement" (49 C.F.R. § 213.103(d)), three technical characteristics critical to safe railroad operations for which highly detailed requirements are in turn set forth in 49 C.F.R. §§ 213.57, 213.63, and 213.55 respectively.[12] Similarly, the selection of ballast directly affects drainage and vegetation growth, which are themselves regulated by 49 C.F.R. §§ 213.33 and 213.37 respectively. Given the intricate matrix of regulations in this area—of which the ballast regulation itself is but one part—it is clear that a railroad cannot change the ballast it uses "without impacting on other related working conditions" and "without impacting on the safe transportation of persons and property." 43 Fed. Reg. at 10,585.[13] Indeed, it is precisely because ballast is "so much a part of the operating environment" that the

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[12] The performance specifications established by the cross-level, surface, and alinement regulations are defined in fractions of inches.

[13] Even Plaintiff's expert conceded that "if you're looking at something from an engineering standpoint you would want all large ballast, because it does a little better job supporting the track structure." E59.

FRA believes that it "must be regulated by the agency with primary responsibility for railroad safety." *Id.* at 10,587.[14]

Recognizing this regulatory structure, many courts have concluded that the FRA ballast regulation "substantially subsumes" the subject of—and therefore precludes—FELA claims such as Plaintiff's that are based on the use of allegedly oversized ballast to support track structure. *See, e.g.*, *Nickels*, 560 F.3d at 433 ("49 C.F.R. § 213.103 covers the issue of ballast size and precludes the plaintiffs' FELA claims"); *Lybrand v. Union Pac. R.R.*, 2012 WL 1436690, at *3 (E.D. Ark. Apr. 25, 2012) ("Plaintiff's claims regarding the size and slope of the ballast are precluded by FRSA"); *Brenner v. Consol. Rail Corp.*, 806 F. Supp. 2d 786, 796 (E.D. Pa. 2011) ("to the extent that Plaintiff's claims are predicated upon

[14] Allowing ballast claims such as Plaintiff's to proceed would open a Pandora's box. As noted above (at page 14 note 8), while the plaintiff in this case alleges that CSXT used ballast that was too large, the plaintiff in another case alleged that CSXT used ballast that was too small. Moreover, if this plaintiff can proceed with a claim based on the size of the ballast, nothing would stop other plaintiffs from basing claims on other aspects of the ballast. For example, a plaintiff in another case might challenge the shape of the ballast used, contending that angular ballast is more difficult to walk on than smooth ballast, while another plaintiff in yet another case might challenge the material used as ballast, alleging that granite ballast is more taxing on the legs than limestone ballast. But, as is true when deciding which size ballast to use in a particular location, railroad engineers must make complex calculations based on local conditions when selecting the most appropriate shape and material to use. Smooth ballast may be easier to walk on, but precisely because it is smooth it permits greater slippage than angular ballast, and is thus less able to satisfy the functional requirements imposed by the FRA track-safety regulations. *See* E61 (Plaintiff's expert testifying that "you wouldn't want all of your ballast to be perfectly sized the same shape like a square or a marble, because the [stones] wouldn't be able to interlock together"). Similarly, limestone ballast may be softer underfoot, but precisely because it compacts more readily than granite, it provides less support for the tracks, and is thus also less capable of fulfilling the technical specifications set forth in the FRA regulations. If ballast claims are not precluded, there could be an unending stream of such cases, each subject to *ad hoc* adjudication and each contrary to Congress's twin goals of national uniformity in railroad regulation and safety in every area of railroad operations.

allegations of negligence regarding the nature and size of ballast used for track stability, support, and drainage—including mainline, secondary, and yard track—such claims are precluded by 49 C.F.R. § 213.103"); *Kresel v. BNSF Ry.*, 2011 WL 1456766, at *7–*8 (D. Minn. Apr. 15, 2011) (plaintiff's "ballast-related claim is … preempted by § 213.103" because the ballast at issue "was track-supporting ballast that was subject to the requirements of § 213.103"); *Potrykus v. CSX Transp., Inc.*, 2010 WL 2898782, at *3 (N.D. Ohio July 21, 2010) ("the FRSA preempts plaintiff's claims with respect to ballast size"); *McCain v. CSX Transp., Inc.*, 708 F. Supp. 2d 494, 504 (E.D. Pa. 2010) ("Plaintiff's claims based on the nature and size of the track ballast are precluded"); *Crabbe v. Consol. Rail Corp.*, 2007 WL 3227584, at *4 (E.D. Mich. Nov. 1, 2007) ("to the extent that Plaintiff's FELA claim rests upon Defendant's use of improper or oversized ballast, such a claim is precluded"); *Ferra*, 2007 U.S. Dist. LEXIS 88457, at *18 ("negligent choice of ballast claim is precluded" by 49 C.F.R. § 213.103); *Cogburn v. CSX Transp., Inc.*, 2009 WL 6921363 (Fla. Cir. Ct. Apr. 22, 2009) (49 C.F.R. § 213.103 "preclude[s] a negligence claim under the FELA" where plaintiff alleged that railroad "us[ed] ballast rock that was too large"); *Norris*, 635 S.E.2d at 181–84 (plaintiff's "negligence claim" brought under FELA "is precluded" where plaintiff alleged that the railroad "should have used smaller, yard ballast in the area where he was working").[15]

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[15] Some courts have concluded that 49 C.F.R. § 213.103 does not preclude such claims, typically on the factually erroneous and legally irrelevant ground that § 213.103 is concerned only with track stability and not employee safety. *See, e.g.*, *Grimes v. Norfolk S. Ry.*, 116 F. Supp. 2d 995, 1002–03 (N.D. Ind. 2000); *Elston v. Union Pac. R.R.*, 74 P.3d 478, 488 (Col. Ct. App. 2003). Characterizing the ballast regulation as concerned with track stability rather than employee safety is factually incorrect because track stability—and the concomitant prevention of derailments, for example—is itself an important aspect of worker safety, and because the ballast regulation was expressly reaffirmed by the FRA after a congressionally mandated review that specifically considered employee safety. *See* 49 U.S.C. § 20142(a)(3); 63 Fed. Reg. at 34,006. Moreover, whether or not the

2. The ballast regulation applies to all track, including track located in rail yards.

Consistent with this authority, the Court of Special Appeals concluded that "the plain language of 49 C.F.R. § 213.103 demonstrates that the regulation applies to ballast used for track support" (203 Md. App. at 369) and appeared to agree with the courts in other jurisdictions that "have consistently held that FELA claims concerning ballast used for track support are precluded by 49 C.F.R. § 213.103" (*id.* at 371). Inexplicably, however, the court proceeded to hold that the regulation neither "'covers [n]or 'substantially subsumes' the issue of ***ballast used in rail yards***." *Id.* at 369 (emphasis added). And, based on that erroneous interpretation, further held that "***FELA claims involving the use of ballast in rail yards … are not precluded by 49 C.F.R. § 213.103***." *Id.* at 371 (emphasis added). That holding is manifestly incorrect.

To begin with, the Court of Special Appeals' interpretation is literally unprecedented: no other court anywhere in the country has embraced the distinction drawn by the court below. And that is hardly surprising, because that distinction cannot be squared with 49 C.F.R. § 213.3, which explicitly and unambiguously provides that each FRA track-safety regulation, including 49 C.F.R. § 213.103, "applies to ***all*** standard gage track in the general railroad system of transportation." 49 C.F.R. § 213.3(a) (emphasis added); *see also id.* § 213.1(a) (similar). As the FRA has explained, the term "general railroad system of transportation" "refers to the network of standard gage track over which goods may be transported throughout the nation." *Id.* Pt. 209, App. A. That plainly includes both mainline track and track within rail yards. Nor can the Court of

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purpose of the regulation is to ensure employee safety is legally irrelevant. As the Supreme Court held in *Easterwood*, the FRSA's preemption clause, 49 U.S.C. § 20106(a)(2), "does not … call for an inquiry into the Secretary's purposes, but instead directs the courts to determine whether regulations have been adopted that in fact cover the subject matter." 507 U.S. at 675; *see also Waymire*, 218 F.3d at 776 ("the preemption clause does not require an inspection of the regulation's motivation").

Special Appeals' distinction between track in rail yards and other track be squared with the language of § 213.103. As the Sixth Circuit has held, the FRA ballast "regulation … makes no distinction between mainline and secondary track; it provides that '***all*** track shall be supported by material'" that meets the specified criteria. *Nickels*, 560 F.3d at 431 (quoting 49 C.F.R. § 213.103) (emphasis in original). Thus, the critical inquiry is whether the ballast in question performs a track-support function, not where the track it is supporting is located. *See, e.g.*, *Kresel*, 2011 WL 1456766, at *7 ("whether his claim is preempted by § 213.103 turns on whether the ballast on which he was standing when he fell was track-supporting ballast or [non-supportive] walkway ballast").[16] If the material supports track, then it is covered by the regulation, and FELA actions based on the size of ballast used by the railroad are precluded, wherever that track is located.

Moreover, the Court of Special Appeals' interpretation would yield absurd consequences, because an inexorable corollary of the proposition that the ballast regulation in particular—and the rail safety regulations in general—do not cover rail yards is that the railroads need not comply with those regulations in the yards and that the FRA may not enforce those regulations there.[17] Of course, it is highly unlikely that a railroad would ever purposely fail to comply with a rail safety

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[16] Railroad tracks are the essence of a rail yard, which "'consists of rows of parallel railroad tracks.'" *Pitts*, 203 Md. App. at 354 n.5 (quoting *CSX Transp., Inc. v. Bickerstaff*, 187 Md. App. 187, 201 (2009)); *see also* E59 ("[y]ards are a system or series of tracks"). Lest derailments and other accidents occur in the rail yard, those tracks must be securely supported no less than mainline tracks. The Court of Special Appeals' statement that the FRA ballast regulation "concerns the track itself and not conditions in the rail yard." (*id.* at 370) is thus a *non sequitur*.

[17] The Court of Special Appeals did not suggest that § 213.103 has a narrower scope of application than any of the other FRA track-safety regulations. Nor could it. All of the track-safety regulations, which are codified in 49 C.F.R. Part 213, have the identical scope of application, namely that set forth in 49 C.F.R. § 213.3, which states that "***this part*** applies to all standard gage track in the general railroad system of operation." 49 C.F.R. § 213.3(a) (emphasis added). Thus, the decision below implicitly holds that ***none*** of the FRA track-safety regulations apply in rail yards.

regulation in a rail yard or anywhere else, but the point is that, under the Court of Special Appeals' interpretation, the FRA would not be able to require compliance and penalize non-compliance. Needless to say, courts should strive to interpret regulations to avoid these kinds of absurd results. *Anderson House, LLC v. Mayor & City Council of Rockville*, 402 Md. 689, 721-22 (2008).

Another undeniable consequence of the Court of Special Appeals' interpretation is that regulation of rail yards is the domain of lay juries making decisions on an *ad hoc* basis, rather than the expert agency guided by technical knowledge and years of experience. Railroads will be placed in an untenable dilemma as a result. This case perfectly illustrates the problem. CSXT was held liable for not placing small ballast in the areas where Plaintiff worked—areas that undeniably support track. In response to the verdict, CSXT could replace the larger ballast with small ballast. But that would risk derailments and other incidents—and liability to employees injured in such accidents. In the alternative, it could leave the large ballast in place and resign itself to being held liable in future cases brought by middle-age employees with osteoarthritis. To say that CSXT is at risk of liability regardless of the size of ballast it uses is to say that FELA is a strict-liability regime. FELA, however, most definitively "is not a strict liability statute." *Fulk v. Ill. Cent. R.R*, 22 F.3d 120, 124 (7th Cir. 1994); *accord Lyman v. CSX Transp., Inc.*, 364 Fed. App'x. 699, 700 (2d Cir. 2010); *Fashauer v. N.J. Transit Rail Operations, Inc.*, 57 F.3d 1269, 1283 (3d Cir. 1995); *Moody v. Boston & Maine Corp.*, 921 F.2d 1, 3 (1st Cir. 1990); *Major v. CSX Transp., Inc.*, 278 F. Supp. 2d 597, 606 (D. Md. 2003). Because the Court of Special Appeals' holding would effectively negate Congress's decision not to create a strict-liability regime, that holding cannot stand. *See Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994) ("FELA does not make the employer the insurer of the safety of [its] employees while they are on duty."); *Borger v. CSX Transp., Inc.*, 571 F.3d 559, 567 (6th Cir. 2009) (rejecting FELA claim where plaintiff argued that railroad was liable despite compliance with federal safety standards on the ground

that liability under such circumstances "would effectively replace the FELA's negligence standard with strict liability").

Finally, the Court of Special Appeals' holding is inimical to the congressional goal of promoting national uniformity of rail-safety regulation. If rail yards fall outside the scope of the FRA track-safety regulations, as the Court of Special Appeals held, then the regulations have no preemptive or preclusive force with respect to rail-yard track, and such track will be subject to whatever *ad hoc* standards that lay juries may impose on a case-by-case basis. Not only will railroads have no advance guidance as to what is expected of them in rail yards, but, as discussed above, there is every possibility that they will be sued regardless of what size ballast they ultimately use. Neither Congress nor the FRA conceivably could have intended that kind of chaotic regime.

For all of these reasons, this Court should correct the Court of Special Appeals' deviation from the previously unbroken national consensus on this issue and hold that the federal ballast regulation applies to "***all*** standard gage track in the general railroad system of transportation." 49 C.F.R. § 213.3(a) (emphasis added).

C. The FRA Ballast Regulation Precludes Plaintiff's FELA Claim, Because The Claim Implicates Track-Supporting Ballast.

Once it is recognized that § 213.103 applies within rail yards, it necessarily follows that Plaintiff's FELA claim is precluded.

At trial, Plaintiff never contested—and the evidence clearly established—that the ballast on which Plaintiff worked provides track support. Plaintiff's own expert testified that "[b]allast [that] is directly underneath the track or within the gauge of the track" and "[b]allast that's immediately adjacent to the track" both "support the track structure." E79. By Plaintiff's own admission, when he was not physically in the locomotive (which was the vast majority of the time), his work duties were of the sort that required him to be either within the gauge of the track

or immediately adjacent to the track. According to Plaintiff, those duties consisted of:

- Throwing the switches that physically move the rails that direct a train from one track to another. E34–35. Those switches necessarily are located immediately adjacent to the rails that they move. *See, e.g.*, E218. Indeed, switches are an integral part of the track structure and are regulated as such by the FRA. *See* 49 C.F.R. § 213.135.
- Coupling air hoses "between the cars and engines that supply air … to apply the brakes," a task that required Plaintiff to place "one foot … inside the rail and one foot … outside of the rail." E36–37.
- Walking around and inspecting engines, including the brakes underneath the engine (E39–41), which necessarily occurred while Plaintiff was standing immediately adjacent to the track (or within the gauge of the track when crossing in front of or behind an engine).
- Mounting or dismounting an engine or car (E38–39), which necessarily occurred while Plaintiff was standing immediately adjacent to the track because the engine or car is sitting on the track.[18]

Consistent with Plaintiff's own testimony, Plaintiff's expert similarly described Plaintiff as walking "along the tracks or between the tracks." E79. Thus, given the undisputed evidence adduced at trial, there can be no doubt that the ballast on which Plaintiff occasionally worked performed a track support function.[19]

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[18] Plaintiff also testified that he occasionally had to walk 300–500 feet to or from his engine at the beginning or end of a shift, but he did not specify whether this occurred within or adjacent to the gauge of the track or on pathways that formed no part of the track-support structure. E51–52. (Indeed, Plaintiff never actually testified that he walked anywhere other than within or adjacent to the gauge of the track.) Moreover, Plaintiff's medical experts never opined—and could not plausibly claim—that occasionally walking 300–500 feet on large ballast causes osteoarthritis.

[19] The Court of Special Appeals *sua sponte* found that CSXT "did not present evidence at trial supporting its broad claim that ballast in rail yards and walkways provides track support." 203 Md. App. at 371. But that finding is both irrelevant and misleading. CSXT never made the "broad claim" that ***all*** ballast in rail yards provides track support. What CSXT argued—and proved—was that the particular ballast on which Plaintiff worked in the rail yard provides track support. As Plaintiff's own expert testified, when ballast is underneath or immediately

In opposing review, Plaintiff asserted that his claim does not involve track-supporting ballast because his expert's testimony was addressed to "walkways." Answer to Cert. Pet. 1. Plaintiff's assertion rests on a false dichotomy. The fact that a particular area might serve as a "walkway" for employees does not mean that it is distinct from the track-support structure. Although some "walkways" do not implicate track support because they are sufficiently far from the tracks, other "walkways" are part of the track-support structure given their proximity to the tracks. *See Kresel*, 2011 WL 1456766, at *8 ("the fact that an internal engineering diagram labels an area of a standard track bed as 'walkway' does not mean that the area is not part of the support structure of the track"). Thus, whether or not some of the areas where Plaintiff worked might be considered "walkways," what matters is whether those areas provide track support. Because the undisputed evidence clearly establishes that the ballast on which Plaintiff worked is located between and immediately adjacent to the rails, that ballast indisputably provides track support.

In sum, the record contains clear, undisputed evidence—from Plaintiff and his expert—that the ballast at issue here (*i.e.*, the ballast on which Plaintiff worked) "provides track support as required by 49 C.F.R. § 213.103." 203 Md. App. at 371. Because 49 C.F.R. § 213.103 covers ballast used to support track, Plaintiff's claim is precluded under 49 U.S.C. § 20106(a)(2), and CSXT therefore is entitled to judgment. *See Nickels*, 560 F.3d at 433 ("49 C.F.R. § 213.103 covers the issue of ballast size and precludes the plaintiffs' FELA claims" based on the alleged use of oversized ballast).[20]

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adjacent to the track—wherever the track is located—it affects track support. E79. And Plaintiff's testimony confirms that he worked on ballast that was underneath or immediately adjacent to the tracks in CSXT's rail yards.

[20] Alternatively, if the Court were to conclude that the record contains some evidence from which a reasonable jury could find that activities performed by Plaintiff on non-track-supporting ballast contributed to his injury, then CSXT would at the very least be entitled to a new trial in which the jury is instructed that

II. Because There Is No "Employee-Friendly" Standard Of Review In FELA Cases, The Circuit Court's Instructional Errors Necessitate A New Trial.

A. FELA Does Not Authorize An "Employee-Friendly" Standard Of Review.

In *Sorrell*, the Supreme Court made clear that FELA abrogates the common law only to the extent it does so explicitly in the statutory text, explaining that, although "FELA was indeed enacted to benefit railroad employees, … [i]t does not follow … that this remedial purpose requires us to interpret every uncertainty in the Act in favor of employees." *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 171 (2007). To the contrary, "'[i]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.'" *Id*. (quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam)). The Court accordingly rejected the plaintiff's contention that FELA's remedial purpose justified a more plaintiff-friendly standard for contributory negligence, noting that "FELA's text does not support [that] proposition …, and the statute's remedial purpose cannot compensate for the lack of a statutory basis." *Id.* In other words, except to the extent that the statute expressly modifies the common law, a FELA action is no different than any other negligence action. *See also, e.g.*, *Coffey v. Ne. Ill. Reg'l Commuter R.R.*, 479 F.3d 472, 476 (7th Cir. 2007) (citing *Sorrell* and holding that the negligence requirement in a FELA action is identical to the standard in other common-law actions because, "[a]lthough the FELA is often said to require only slight evidence of negligence … that is not what the statute says").[21]

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it may impose damages only for the portion of Plaintiff's injury attributable to those activities. *See Brenner*, 806 F. Supp. 2d at 796 ("We will allow Plaintiff to pursue his ballast-related claims only to the extent that Plaintiff's claims relate to ballast being used in areas completely separate from those where track support, stability, and drainage are concerned.").

[21] Although the Supreme Court has stated, on various occasions, that FELA is a remedial statute that should be construed liberally, such statements were made in

The interpretive framework adopted by the Court of Special Appeals here—and in its other recent FELA decisions (*see CSX Transp., Inc. v. Bickerstaff*, 187 Md. App. 187, 208 (2009); *Norfolk S. Ry. v. Tiller*, 179 Md. App. 318, 326 (2008); *CSX Transp., Inc. v. Miller*, 159 Md. App. 123, 145 (2004))—is directly contrary to *Sorrell*. In its opinion here, the court began by declaring that "FELA cases have a different standard of review than common law negligence cases." 203 Md. App. at 360. According to the court, "an 'employee-friendly standard of review' is applied in FELA cases," which "'call[] for an interpretive approach that is significantly different from that which ordinarily prevail[s] in a suit for common law negligence.'" *Id*. at 360–61 (quoting *Tiller*, 179 Md. App. at 324). But there is no statutory basis for an "employee-friendly standard of review" under FELA. And the "significantly different" interpretive approach adopted by the Court of Special Appeals in FELA cases violates *Sorell*, which instructs courts to apply generally applicable common-law principles absent an express statutory directive to the contrary.

The Court of Special Appeals' conclusion that, "[g]iven this employee-friendly standard of review and liberal construction, … 'it is not hard to figure out who wins the ties and who gets the benefit of the close calls'" in a FELA case (*id.* at 12 (quoting *Miller*, 159 Md. App. at 145)), is precisely the approach that the

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addressing explicit changes to the common law enacted by the statutory text. For example, when Congress "abolished the fellow servant rule, rejected contributory negligence in favor of comparative negligence, prohibited employers from contracting around the Act, and abolished the assumption of risk defense" in FELA cases (*Sorrell*, 549 U.S. at 168), it did so expressly. *See Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542–43 (1994) (citing 45 U.S.C. §§ 53–55); *see also, e.g.*, *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2634 (2011) (holding that the causation standard in FELA cases is lower than in traditional common law cases because FELA explicitly provides that railroads are liable for any injury "'resulting in whole or in part from [the railroad's] negligence'") (quoting 45 U.S.C. § 51).

Supreme Court rejected in *Sorrell.* Under *Sorrell*, courts may not tilt the playing field in favor of FELA plaintiffs. "FELA's text does not support" the plaintiff-friendly standard of review or interpretive mindset adopted by the Court of Special Appeals. "and the statute's remedial purpose cannot compensate for the lack of a statutory basis." *Sorrell*, 549 U.S. at 171; *see also id.* at 165–66 ("Absent express language to the contrary, the elements of a FELA claim are determined by reference to the common law.").

This Court accordingly should reject the "employee-friendly" standard of review and "interpretive mindset" adopted by the Court of Special Appeals in this case (as well as in *Bickerstaff*, *Tiller*, and *Miller*) and direct Maryland courts to follow the even-handed, text-based jurisprudence mandated by the Supreme Court in *Sorrell*.

B. Under The Correct Standard Of Review, CSXT Is Entitled To A New Trial Due To Two Instructional Errors.

The Court of Special Appeals' mistaken assumption that it was obliged to bend over backward to uphold Plaintiff's judgment casts doubt on the entirety of the court's ruling. But the distorting effect of the Court of Special Appeals' mistaken approach is most evident in its treatment of two erroneous jury instructions given by the circuit court. These instructions served no purpose other than to skew the jury's deliberations in favor of Plaintiff and prejudice CSXT. As the Court of Special Appeals has stated, "[a]n instruction not supported by the evidence in the case amounts to an improper abstraction, and should not be given." *Rustin v. Smith*, 104 Md. App. 676, 680 (1995); *see also Barksdale v. Wilkowsky*, 192 Md. App. 366, 384 (2010) ("an instruction, even if a correct statement of law, is appropriate only if it is relevant to the issues before the jury"), *rev'd on other grounds*, 419 Md. 649 (2011).

1. The Court of Special Appeals erroneously upheld the circuit court's statutory-purpose instruction.

Over CSXT's objection (E145), the circuit court instructed the jury on FELA's history and purpose, stating:

> For your understanding, if you would please, is that the Federal Employers Liability Act was, in fact, enacted back in 1908 …. The reason, if you will, is not as much of a debate in this case, but it was ***in recognition of the dangers involved in railroad work and to alleviate the harsh results imposed by the results thereof***.

E141 (emphasis added).[22] As the Fourth and Ninth Circuits have held, informing the jury about Congress's reason for enacting FELA is improper. *See Cummings v. Amtrak Nat'l R.R. Passenger Corp.*, 199 F.3d 1331, 1999 WL 980362, at *1 (9th Cir. 1999) ("Neither the statutory purpose nor the congressional intent is relevant to [plaintiff's] FELA claim."); *Stillman v. Norfolk & W. Ry.*, 811 F.2d 834, 838 (4th Cir. 1987) ("[W]e can see no reason why it would be either necessary or appropriate for the jury to hear an argument about Congress's intent in enacting [FELA]."); *see also Johnson v. Union Pac. R.R.*, 2007 WL 2914886, at *7 (D. Neb. Oct. 4, 2007) (an instruction on the purpose of FELA "will not assist the jury in understanding its current task of applying the law as instructed to the facts proven at trial" but may instead "confuse the jury and be unduly prejudicial").

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[22] Emphasizing the instruction's statement that "[t]he reason" for FELA's enactment "is not as much of a debate in this case," Plaintiff argued below that this instruction was not prejudicial because, supposedly, "the trial court actually told the jury that the dangers of railroad work and its harsh results were not really at issue in this case." Pitts C.S.A. Br. 19. But Plaintiff's interpretation makes no sense, as workplace safety was a central issue in the case. *Compare, e.g.*, E146 (Plaintiff's closing argument, concluding with the assertion that CSXT "didn't have a safe place to work") *with* E149–50 (CSXT's closing argument emphasizing that plaintiff's job as an engineer was safe and sedentary). Contrary to Plaintiff's interpretation, the instruction actually told the jury that there was no dispute as to why FELA was enacted, namely, "in recognition of the dangers involved in railroad work and to alleviate the harsh results imposed by the results thereof," and thereby improperly suggested to the jurors that they could simply assume that Plaintiff's work was dangerous and entailed harsh results.

Rejecting these precedents, the Court of Special Appeals held that the circuit court's instruction was proper because it did not "give rise to an implication that the jury was required to rule in favor of appellee." 203 Md. App. at 391. But, of course, an instruction can constitute reversible error even if it does not compel a verdict for one side. *See, e.g.*, *Barksdale v. Wilkowsky*, 419 Md. 649, 655–64 (2011). Here, there was ***no*** legitimate reason to inform the jury about FELA's purpose or the historical context in which FELA was enacted, and neither Plaintiff nor the Court of Special Appeals ever purported to identify one. But, by giving this otherwise pointless instruction, the circuit court conveyed to the jurors that, under FELA, they should endeavor to compensate Plaintiff because railroad work is dangerous and imposes "harsh results" on employees.

Both the employee-friendly bias conveyed by the circuit court's instruction and the Court of Special Appeals' permissive attitude on appeal, which led the court to condone the instruction without considering its lack of legitimate purpose and its unfairly prejudicial effect, violate the Supreme Court's directive in *Sorrell*.

2. The Court of Special Appeals erroneously excused the circuit court's negligence-per-se instruction.

Again over CSXT's objection (E145), the circuit court told the jury that

> the violations of the statute which [are] caus[ally] related to the injury in question may be considered by you as evidence of negligence. If you find from the evidence that there was a violation of the statute which is caus[ally] related, you may consider such violation as evidence of negligence.

E143. Plaintiff conceded, and the Court of Special Appeals agreed, that it was error to give this instruction because there was no evidence of a statutory violation. *See* 203 Md. App. at 392; Pitts CSA Br. 22. Nevertheless, the court found the error to be harmless, reasoning that "the standard of review in FELA cases is an employee-friendly standard" and "[a]ny close calls or ties should be awarded to the employee's benefit." 203 Md. App. at 392; *see also id.* at n.17 (distinguishing this Court's opinion in *Barksdale* on the ground that "FELA cases

involve a different standard of review than common law negligence cases"). This deviation from the otherwise applicable standard of review on appeal is a direct violation of *Sorrell*.

Moreover, under the correct, even-handed standard of review, the improper negligence-per-se instruction was not a harmless error. Plaintiff's expert opined at length that, by using large ballast in its rail yard, CSXT had violated ballast standards promulgated by industry organizations. *See*, *e.g.*, E62–66, 70–78. Although the alleged violation was of industry rather than statutory standards, lay jurors can hardly be expected to discern that legal distinction or recognize that it matters for purposes of the erroneous instruction. On the contrary, if the jury credited the expert's testimony, it could well have believed that it was entitled to "consider such violation as evidence of negligence" (E143), an erroneous conclusion that effectively relieved Plaintiff of his burden to prove that CSXT was negligent. Thus, far from harmless, the erroneous instruction was "misleading or distracting for the jury, and permit[ted] the jury members to speculate about inapplicable legal principles." *Barksdale*, 419 Md. at 669.

Moreover, the two instructions at issue in this appeal had an obvious synergistic effect. The jury could have concluded that, because FELA is intended to alleviate the dangerous conditions of railroad employment, any such supposed condition—including the ballast that Plaintiff criticized here—is a violation of the statute and, because a violation of the statute constitutes negligence, Plaintiff needed only to prove that his injury was caused by walking on that ballast to recover under FELA.

Neither of these instructions should have been given: they were not supported by the evidence or required to help the jury understand the law that applied to this case. But both instructions were highly prejudicial to CSXT. They suggested an improper legal framework and an unwarranted set of background assumptions that were hostile to CSXT's defense. That prejudice could have

manifested itself not only in the liability finding but also by skewing both the jury's assessment of damages and its apportionment of liability between CSXT's negligence, Plaintiff's negligence, and other causes. For example, the jurors could have concluded that they would be serving the purposes of FELA by awarding higher damages or shifting the apportionment of liability to maximize Plaintiff's recovery—because it is the jury's legally assigned role to "alleviate the harsh results" that CSXT is presumed to have imposed on Plaintiff through dangerous and possibly illegal work conditions. Accordingly, in the event that Plaintiff's claim is not held precluded altogether, CSXT is entitled to a new trial on all issues.

III. A Defendant Should Be Allowed To Cross-Examine The Plaintiff's Economist On Available Retirement Statistics When There Is A Claim For Future Lost Wages.

This Court has stated that "recovery of damages based on future consequences of an injury may be had … if such consequences are ***reasonably probable or reasonably certain to occur***." *Johns Hopkins Hosp. v. Pepper*, 346 Md. 679, 695 (1997) (emphasis added; internal quotation marks omitted; omission in original). Accordingly, when a plaintiff claims that he is or will become permanently unable to work because of an injury, he can receive future economic damages to compensate for the income he would have been "reasonably probable or reasonably certain" to earn had he not been injured.

Calculating future wage loss in a personal-injury case depends, in the first instance, on three variables—the plaintiff's annual earning potential, the age at which the plaintiff was or would be forced to stop working as a result of his injury, and the age at which the plaintiff would otherwise have retired had he not been injured. E101–02.[23] The plaintiff's future wage loss equals the sum of his annual earning potential for each year between the age at which he was or will be forced to stop working and the age at which he would otherwise have retired. All else

[23] To determine actual compensable damages, that sum must be adjusted for taxes, decreased by the risk that the plaintiff would have died before reaching retirement age, and then reduced to a net present value. E101–04.

being equal, the later a plaintiff would otherwise have retired, the greater his future wage loss.

The most objective and reliable evidence of how long a plaintiff would have worked absent injury is average retirement-age statistics for the relevant industry—statistics showing the age at which workers in the industry tend to retire. Indeed, the Fourth Circuit has held that failing to account for such statistics when projecting the future lost income of a railroad employee constitutes reversible error. *Vida v. Patapsco & Back Rivers R.R.*, 814 F.2d 655, 1987 WL 35917, at *4 (4th Cir. 1987). In *Vida*, the Fourth Circuit upheld a trial court's order granting a new trial, because, among other reasons, the plaintiff's economist ignored standard retirement statistics for railroad employees when calculating future lost wages and instead simply assumed, at the direction of the plaintiff's counsel, that the plaintiff would have worked much longer than a typical railroad employee. The Fourth Circuit described this as a "flaw in the witness' calculations of lost wages" and noted that "[t]he effect of this was to inflate … the deceased's work expectancy." *Id.*

In stark contrast to the Fourth Circuit's opinion in *Vida*, the Court of Special Appeals' opinion in this case not only allows an expert opining on future lost income to ignore available retirement statistics, but makes it impossible for a defendant to effectively cross-examine the expert about that methodological flaw.

Here, the only evidence Plaintiff offered regarding how long he would have worked had he not been injured was his own testimony that he would have continued working until age 67 or 68. E46. That self-serving testimony was not credible. Retirement statistics for the railroad industry indicate that the great majority of railroad employees retire at age 60 and that ***almost none*** work to age 67, let alone age 68.[24] E107–08. Nevertheless, at the instruction of Plaintiff's

[24] That is because railroad employees are eligible to receive retirement benefits at age 60, a fact that the Court of Special Appeals has held is inadmissible

counsel, Plaintiff's economist, Dr. Bruce Hamilton, like the economist in *Vida*, simply accepted Plaintiff's assertion that he would have worked until age 67 and based his damages estimate on that unrealistic assumption. E102–04, 107. Moreover, although Hamilton—using statistical mortality tables (E104)—reduced each of his annual projections of lost income by the expected risk that Plaintiff would have died before that year, he made no similar reduction for the risk that Plaintiff would have retired before that year even without his knee condition (E104, 107).

CSXT attempted to cross-examine Hamilton on the available retirement statistics for railroad employees. Hamilton admitted that he is familiar with those statistics, and thus could have provided details regarding them and answered questions about their effect on his damages estimate. E107–08. Cross-examination on those statistics could have convinced the jury that Plaintiff would have ***no*** future lost income because he was not expected to become disabled until age 63 or 64 (E94), several years after most railroad employees retire. At the very least, the cross-examination would have demonstrated that Hamilton's lost-income estimate was substantially too high because it did not take into account the significant likelihood that Plaintiff would have retired before age 67 even in the absence of any injury (*i.e.*, because Hamilton failed to apply a retirement-risk discount analogous to his mortality-risk discount). As *Vida* held, this was a serious flaw in Hamilton's damages calculation.

But, immediately after Hamilton acknowledged his familiarity with the railroad industry retirement statistics, the circuit court sustained Plaintiff's objection to further questioning on the subject and prevented CSXT from cross-examining Hamilton on what those statistics show and how, if taken into

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because of the risk that it might prejudice the plaintiff. *See Tiller*, 179 Md. App. at 321.

consideration, they would impact his estimate of Plaintiff's future lost income.[25] E108–11. In preventing the cross-examination, the circuit court took guidance from the Court of Special Appeals, which had affirmed the same circuit court's previous foreclosure of cross-examination on retirement statistics in *Bickerstaff*. *See* E108 ("I'm concerned that we are getting into an area that clearly *Bickerstaff* is saying don't go to."). Indeed, the circuit court apparently concluded that, under *Bickerstaff*, a plaintiff's testimony about the age at which he intended to retire is conclusive, eventually instructing the jury that, when calculating any future wage loss, "the actual evidence itself of retirement is best from the evidence as to this employee[']s intention to retire and not that of another." E144.

The Court of Special Appeals affirmed the circuit court's refusal to allow CSXT's intended cross-examination. 203 Md. App. at 388–89. Although the Court of Special Appeals did not identify anything in CSXT's intended cross-examination that was improper, misleading, or unfairly prejudicial, it held that the circuit court had acted within its discretion because CSXT "did not question Dr. Hamilton as to facts already in evidence, but rather attempted to cross-examine Dr. Hamilton as to 'statistical information' that "did not relate to appellee 'individually.'" *Id.* at 388 (quoting *Bickerstaff*, 187 Md. App. at 243–44).

The circuit court's refusal to allow CSXT to cross-examine Plaintiff's expert on retirement statistics, and the Court of Special Appeals' affirmance of that ruling, are contrary to the overwhelming weight of—what is, to CSXT's

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[25] Plaintiff has argued that the circuit court allowed CSXT to effectively cross-examine Hamilton on this issue (Answer to Cert. Pet. 22), but that is not so. Although CSXT was allowed to ask what Plaintiff's damages would have been if Plaintiff would have retired at age 60 had he not been injured (*i.e.*, nothing), the circuit court's limitation on CSXT's cross-examination prevented CSXT from proving the very high probability that, contrary to Hamilton's assumption, Plaintiff would in fact have retired at age 60 rather than at age 67. It is the empirically demonstrable ***improbability*** of Hamilton's assumption about Plaintiff's retirement age (not the mathematical effect of that assumption on his calculation) that CSXT wanted to address with the retirement statistics.

knowledge, unanimous—national authority. Like the Fourth Circuit in *Vida*, courts around the country have held that retirement statistics are not only admissible, but indispensible, when future wage loss is at issue.

For example, the Fifth Circuit has reversed a judgment in a Jones Act case because the trial court, when calculating future wage loss, failed to use "the worklife expectancy rates compiled by the United States Department of Labor," explaining:

> Even if retirement age for [the plaintiff] could be anticipated to be age 65, it is far from certain that, even in the absence of this injury, he would have continued to work until that time. He might have, as some workers do, decided to retire early. He might have become disabled before then as a result of illness or some other misadventure. He might have died before then.

Madore v. Ingram Tank Ships, Inc., 732 F.2d 475, 478 (5th Cir. 1984).[26] Although recognizing that the statistics are "not conclusive," the Fifth Circuit held that damage "computations should be based on the statistical average" ***unless*** the individual plaintiff demonstrates, "by virtue of his health or occupation or other factors," that he is "likely to live *and* work a longer, or shorter, period than the average." *Id*. Following *Madore*, the Fifth Circuit ***requires*** that calculations of future wage loss be based on statistical retirement averages (absent proof that the

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[26] The Jones Act expressly incorporates FELA's remedial provisions with respect to claims brought by injured seamen. *See* 46 U.S.C. § 30104 ("Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section."). Accordingly, "the Jones Act adopts 'the entire judicially developed doctrine of liability' under the Federal Employers' Liability Act," including "the 'uniformity requirement' of the FELA, requiring state courts to apply a uniform federal law." *Am. Dredging Co. v. Miller*, 510 U.S. 443, 456 (1994). Cases interpreting the Jones Act are therefore applicable to FELA cases, and vice-versa. *See, e.g.*, *In re Asbestos Prods. Liab. Litig. (No. VI)*, --- F. Supp. 2d ----, 2012 WL 3242420, at *5 (E.D. Pa. Aug. 7, 2012) ("the Supreme Court has noted that 'the principles governing' FELA cases 'clearly should apply' to Jones Act cases"); *Barker v. Hercules Offshore, Inc.*, 2012 WL 434457, at *6 n.6 (S.D. Tex. Feb. 9, 2012) ("Decisions in FELA cases are applicable to cases brought under the Jones Act because the Jones Act incorporates FELA as a basis for recovery.").

individual plaintiff in a particular case is somehow atypical). Thus, the Fifth Circuit reversed a judgment, finding that "the district court clearly erred" by "accepting the prediction of plaintiff's expert that [the plaintiff] had a work-life expectancy of 65 years rather than the 62-year level reflected in the Department of Labor tables used by defendants' expert." *Muckleroy v. OPI Int'l, Inc.*, 42 F.3d 641, 1994 WL 708830, at *1 (5th Cir. 1994). *See also Johnston v. Harris Cnty. Flood Control Dist.*, 869 F.2d 1565, 1580–81 (5th Cir. 1989); *Naquin v. Elevating Boats, LLC*, 2012 WL 1664257, at *5–6 (E.D. La. May 11, 2012); *Lambert v. Teco Barge Line*, 2007 WL 2461681, at *3–4 (E.D. La. Aug. 23, 2007).

Recognizing their obvious relevance to the calculation of future wage loss, other courts have also endorsed the admission of retirement statistics. Thus, the Second Circuit approved expert testimony based, in part, "on widely accepted work-life tables published by the Department of Labor" (*Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 23 (2d Cir. 1996)), and the D.C. Circuit held that a party "may offer the Department of Labor statistics into evidence" (*Weil v. Seltzer*, 873 F.2d 1453, 1465 (D.C. Cir. 1989)). In *Finch v. Hercules Inc.*, 941 F. Supp. 1395 (D. Del. 1996), the parties disputed how long the plaintiff would have worked but for the defendant's misconduct, and thus the magnitude of the plaintiff's future wage loss. The plaintiff testified that he "had not intended to retire until age 65 or 70." *Id.* at 1414. To rebut that self-serving testimony, the defendant offered "statistical evidence regarding retirement age demographics" that showed that in fact "it was likely that [the plaintiff] would have retired somewhere between the ages of 60 and 62." *Id.* Claiming that its admission was error, the plaintiff in *Finch*, like Pitts here, argued that there was an insufficient "connection between" the "generalized data on retirement statistics and [the plaintiff] as an individual." *Id*. at 1416. The court squarely rejected that assertion, holding that the plaintiff's "work and life expectancies were both inherently germane to the calculation of his damages" and that, "absent a crystal ball, statistical analyses served as the next best barometer of the reality of [plaintiff's] stated intentions." *Id*.

Other courts agree that statistical evidence is relevant and admissible. *See, e.g.*, *Sales v. Republic of Uganda*, 828 F. Supp. 1032, 1042 (S.D.N.Y. 1993) ("'[s]tatistical charts, such as the mortality tables and work-life expectancy table prepared by the United States Department of Labor ... are often deemed authoritative' and are regularly used by the federal and state courts") (quoting *Earl v. Bouchard Transp. Co.*, 735 F. Supp. 1167, 1175 (E.D.N.Y. 1990), *aff'd in part, rev'd in part on other grounds*, 917 F.2d 1320 (2d Cir.1990). Indeed, the Court of Special Appeals itself has expressly approved the use of "general population statistics, *i.e.*, life expectancy and work life expectancy" to calculate damages. *Tempel v. Murphy*, 202 Md. App. 1, 19–20 (2011); *Great Coastal Express, Inc. v. Schruefer*, 34 Md. App. 706, 728 (1977).[27]

The circuit court's refusal to allow CSXT to cross-examine Plaintiff's expert on retirement statistics, and the Court of Special Appeals' affirmance of that ruling, are contrary not only to the overwhelming weight of national authority, but also to this Court's longstanding jurisprudence recognizing a party's right to freely explore the basis of an expert's opinion, to expose the flaws in his analysis, and to bring overlooked facts to the jury's attention. *See, e.g.*, *Plank v. Summers*, 205 Md. 598, 606–08 (1954) (holding that it was reversible error to restrict cross-examination into information that an expert arguably had overlooked). There must be a sound and compelling reason for curtailing that fundamental right, which is critical to the adversarial process, yet neither Plaintiff nor the circuit court nor the Court of Special Appeals ever identified such a reason here.

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[27] Commentators likewise approve of such statistical evidence. *See, e.g.*, 1 Toxic Torts Litigation Guide § 4:2 n.6 (2011) ("A wide range of evidence bearing on length of working life is potentially admissible, including evidence regarding the pre-accident intentions of the plaintiff and statistical charts, such as mortality and worklife expectancy tables."); Jerome M. Staller, *Economic Damages in Employment Discrimination*, SN059 ALI-ABA 639, 659 (2008) (citing *Finch* for proposition that "[e]conomists have been allowed to proffer testimony interpreting academic studies on retirement, as well as government and industry data, in light of the particular plaintiff's situation").

Of course, the fact that statistical information does "not relate to appellee 'individually'" (203 Md. App. at 388) is irrelevant. Economists—including Plaintiff's expert in this very case (*see*, *e.g.*, E104–07)—regularly rely on statistical data when forming their opinions, and such evidence—including retirement data—is routinely held admissible if not mandatory. *See* pages 34, 37–39, *supra* (collecting cases). Furthermore, preventing cross-examination about highly relevant retirement statistics because they are not "already in evidence" (203 Md. App. at 388) places defendants like CSXT in a Catch-22. They cannot question the plaintiff's expert about statistics that undermine his opinion as to future wage loss because those statistics are not in evidence, and they cannot introduce the statistics into evidence because they are prevented from questioning the expert about them.[28]

Statistical evidence of normal retirement age is particularly important in FELA cases such as this because it addresses a fundamental misconception that most jurors otherwise would have about employment in the railroad industry. Most people think of retirement between ages 65 and 67 as the norm because that is the age at which many people retire (because that is when most members of the work force qualify for full Social Security benefits). *See* Social Security Administration, Retirement Planner: Full Retirement Age, at www.ssa.gov/pubs/retirechart.htm. But that is not the case in the railroad industry, because railroad employees with

[28] It is no answer to say that a defendant can retain its own expert and offer the evidence in its own case. Even if a defendant were permitted to do so, it would be long after the plaintiff's expert has left the stand and therefore is a poor alternative to being able to debunk the expert's testimony in real time. As this Court has repeatedly recognized, delayed refutation of an adverse witness "'is not the substantial equivalent of the right to cross-examine immediately after the direct testimony of the witness has been concluded.'" *Gladwynne Constr. Co. v. Mayor & City Council of Baltimore*, 147 Md. App. 149, 194 (2002) (quoting *Somerset v. Montgomery Cnty. Bd. of Appeals*, 245 Md. 52, 66 (1966)). Requiring the defendant to introduce the retirement statistics through its own expert also would place a cost on the defendant—retaining an expert on the limited issue of the plaintiff's likely age of retirement—that it otherwise would not have to bear.

30 years of service are eligible for full retirement benefits at age 60. *See* Railroad Retirement and Survivor Benefits, at http://www.rrb.gov/forms/opa/ib2/ib2_ret .asp. Here, the jurors undoubtedly thought it completely unremarkable when Plaintiff claimed that he would have worked until age 67 or 68, but—as demonstrated by the retirement statistics excluded by the circuit court—such an outcome was in fact highly unlikely for a railroad employee.[29] Had it known the true facts, the jury would likely have treated Plaintiff's self-serving assertion with the skepticism it deserved, and discounted his expert's inflated damages estimate accordingly.

A rule, such as that adopted by the circuit court and the Court of Special Appeals, that artificially blinds jurors to a plaintiff's likely age of retirement is not only profoundly unfair to defendants, but also undermines the integrity of the judicial process. As this case demonstrates, such a rule allows plaintiffs in personal-injury cases to claim years of "lost" income—increasing their damage awards by hundreds of thousands of dollars—without any fear that they will be confronted with objective evidence undermining those claims. That rule's pernicious effect is particularly pronounced in FELA cases, because most jurors do not know how improbable it is that a railroad employee would work until the age of 67 or 68.[30] But there is nothing in either the circuit court's ruling or the

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[29] In fact, after the conclusion of trial, ***Plaintiff himself*** retired "based on age and service" at the age of 60 years and 5 months. *See* page 9 & n.6, *supra*.

[30] Indeed, given the circuit court's repeated refusal to allow cross-examination on this issue, and the Court of Special Appeals' persistent refusal to intervene, it is no surprise that FELA plaintiffs in the Circuit Court for Baltimore City routinely assert that, but for their alleged injuries, they would not have retired until years after most other railroad workers have already stopped working. For example, although the vast majority of railroad workers retire at age 60 (E107–08), all nine plaintiffs in *Bickerstaff* claimed that they would not have retired until age 64 or 65 (*see Bickerstaff*, 187 Md. App. at 240–42), and—grasping even further—Plaintiff in this case (represented by the same counsel) claimed that he would not have retired until age 67 or 68 (E46, 104, 107). If shielded from the railroad retirement

Court of Special Appeals' decision affirming it that limits the rule to FELA cases; unless reversed by this Court, it is now the rule in all personal-injury cases heard by Maryland trial courts.

Here, because there was no colorable basis for excluding the undeniably relevant and highly probative statistical evidence of when the plaintiff would likely have retired but for his injury (*see, e.g*, *Madore*, 732 F.2d at 478; *Vida*, 1987 WL 35917, at *4; *Finch*, 941 F. Supp. at 1416), CSXT is, at minimum, entitled to a new trial on damages.

CONCLUSION

The Court should hold that the federal ballast regulation applies to all track, regardless of location, and that the regulation therefore precludes all FELA claims that are based on the characteristics of track-supporting ballast, including those of employees who encountered such ballast in rail yards. Having so held, the Court should enter judgment for CSXT because it is beyond dispute that the ballast on which Plaintiff worked was used to support track.

The Court also should hold that a FELA case must be treated exactly as any other negligence action except to the extent expressly provided by the statutory text, and should explicitly reject the Court of Special Appeals' "employee friendly" standard of review. Because the Court of Special Appeals will undoubtedly continue to apply that erroneous standard of review in future FELA cases unless instructed to do otherwise by this Court, this Court should so instruct the Court of Special Appeals even if it holds that CSXT is entitled to judgment on preclusion grounds. And, if this Court does not enter judgment for CSXT on preclusion grounds, the Court should order a new trial on all issues in light of the erroneous instructions given by the circuit court.

Finally, the Court should hold that a defendant has the right to cross-examine a plaintiff's expert on retirement statistics whenever there is a claim for

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statistics, there is nothing that would prevent the next Baltimore FELA plaintiff from contending that he would have worked until age 70.

future wage loss. Because the lower courts will continue to apply this erroneous evidentiary rule unless instructed to do otherwise by this Court, this Court should instruct the lower courts that a defendant has the right to conduct such cross-examination even if it holds that CSXT is entitled to judgment or a new trial on all issues. If this Court does not grant CSXT judgment or a new trial on all issues, it should order a new trial on damages.

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This brief was prepared using Times New Roman 13-point font.

STATUTES

45 U.S.C. § 51 — Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, … for such injury … resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

49 U.S.C. § 20106 — Preemption.

(a) National uniformity of regulation.

(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

. . .

REGULATIONS

49 C.F.R. § 213.3 — Application.

(a) Except as provided in paragraph (b) of this section, this part applies to all standard gage track in the general railroad system of transportation.

(b) This part does not apply to track (1) Located inside an installation which is not part of the general railroad system of transportation; or (2) Used exclusively for rapid transit operations in an urban area that are not connected with the general railroad system of transportation.

49 C.F.R. § 213.103 — Ballast; general.

Unless it is otherwise structurally supported, all track shall be supported by material which will—

(a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;

(b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;

(c) Provide adequate drainage for the track; and

(d) Maintain proper track crosslevel, surface and alinement.

APPENDIX

CSX Transp., Inc. v. Pitts, 203 Md. App. 343 (2012).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ***20*** day of ***August, 2012***, two copies of the foregoing Brief of Petitioner were served on each of the counsel listed below, via overnight courier, postage prepaid:

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