IN THE COURT OF APPEALS OF MARYLAND

September Term, 2012

No. 34

CSX TRANSPORTATION, INC.,

Petitioner,

v.

EDWARD L. PITTS, SR.,

Respondent.

REPLY BRIEF OF PETITIONER

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ARGUMENT

Plaintiff concedes the core of the first issue presented—admitting (for the first time) that the FRSA ballast regulation applies in rail yards. His argument on the second issue—whether FELA calls for an employee-friendly standard of review—fails to come to grips with the Supreme Court's dispositive decision in *Norfolk Southern Railway v. Sorrell*, 549 U.S. 158 (2007). And as to the third issue, Plaintiff not only fails to distinguish the many cases we cited for the proposition that work-life statistics are highly material to a jury's determination of future economic damages, but is unable to offer even one case that supports the exclusion of such evidence.

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

A. Plaintiff Concedes That 49 C.F.R. § 213.103 Precludes Any Claim Challenging Ballast That Affects Track Support.

Plaintiff's brief begins with an important concession: "There seems to be no disagreement between the parties that an FELA claim alleging negligent choice of track support ballast would be precluded, while an allegation of negligent ballast choice that does not pertain to the track support ballast would not be precluded." Pl.'s Br. 1. That is a correct statement of the law. But it is contrary to both Plaintiff's position until now and the opinion of the Court of Special Appeals ("CSA"). Nevertheless, CSXT and Plaintiff now agree—and this Court should clearly hold—that 49 C.F.R. § 213.103 categorically precludes any FELA claim alleging harm from ballast that affects track support. So holding will erase the factually baseless and legally erroneous distinction that the CSA drew (at Plaintiff's request) between ballast on the mainline and ballast in the rail yard.

By conceding this point, Plaintiff now ***agrees*** that a FELA claim is precluded if the subject matter of the claim is covered by a regulation promulgated under the FRSA.[1]

[1] Plaintiff tacitly disavows the unions' assertion that Congress repealed preemption, and thus preclusion, under the FRSA. *Compare* Pl.'s Br. 12 ("There is no dispute that the FRSA contains a state law preemption clause, 49 U.S.C. § 20106, which has been held to also preclude certain federal claims under the FELA.") *with* Unions Am. Br. 2 ("This brief … will show that the FRSA does not preempt/preclude actions pursuant to the FELA based upon state law."). And for good reason: The unions' contention that the

See CSXT Br. 12–16. And he also necessarily agrees that the FRSA ballast regulation, 49 C.F.R. § 213.103, covers the subject of ballast that affects track support—whether on the mainline or in a rail yard.[2] *See* CSXT Br. 16–24. Plaintiff's concession constitutes a fundamental change in position. Until now, Plaintiff, relying on the CSA's earlier decisions in *Miller* and *Bickerstaff*, had steadfastly insisted that § 213.103 does not preclude a FELA claim alleging injury from walking or working on ballast located in a rail yard. For example, in the circuit court, Plaintiff argued that "the FRSA does not preclude an FELA claim for CSXT's use of improper ballast in its yards." Rep. App. 7–8. And in the CSA, he argued that "49 C.F.R. 213.103 has no preclusive effect on FELA claims based on negligent ballast choice within the train yards," and thus no preclusive effect in this case because "Mr. Pitts' claims arise entirely from his work within the train yards and not on mainline track." Rep. App. 10.

Having finally acknowledged the legal principles that control this case, Plaintiff does not defend the CSA's contrary legal ruling. Although he accuses CSXT of misreading the CSA's opinion—asserting that "[t]he court never stated that claims pertaining to the track support ballast in the rail yards are not precluded" (Pl.'s Br. 14–

2007 "Clarification Amendment" to 49 U.S.C. § 20106 abolished FRSA preemption (Unions' Am. Br. 20–21), and thus the preclusion of FELA claims, has been squarely rejected by every court to consider it. *See, e.g.*, *Henning v. Union Pac. R.R.*, 530 F.3d 1206, 1215 (10th Cir. 2008); *S. Cal. Reg'l Rail Auth. v. Super. Ct.*, 77 Cal. Rptr. 3d 765, 782, 784 (Ct. App. 2008); *Smith v. Burlington N. & Santa Fe Ry.*, 187 P.3d 639, 646 (Mont. 2008); *Kill v. CSX Transp., Inc.*, 923 N.E.2d 1199, 1207 (Ohio Ct. App. 2009); *Mastrocola v. Se. Pa. Transp. Auth.*, 941 A.2d 81, 90 n.12 (Pa. Commw. Ct. 2008).

[2] Although Plaintiff reaches the correct result regarding the scope of § 213.103, he continues to contend that "'State and federal regulations … cannot be held to cover the same subject matter unless they address the same safety concerns.'" Pl.'s Br. 13 (quoting *S. Pac. Transp. Co. v. Pub. Utils. Comm'n*, 647 F. Supp. 1220, 1225 (N.D. Cal. 1986), *aff'd per curiam*, 820 F.2d 1111 (9th Cir. 1987)). As discussed in our opening brief (at 20–21 n.15), the Supreme Court has rejected that proposition, holding that the FRSA's preemption clause "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." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 675 (1993); *see also, e.g.*, *Waymire v. Norfolk & W. Ry.*, 218 F.3d 773, 776 (7th Cir. 2000) ("the preemption clause does not require an inspection of the regulation's motivation").

15)—it is Plaintiff, not CSXT, who misreads the opinion. Despite observing 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), the CSA squarely held that the regulation neither "covers [n]or 'substantially subsumes' the issue of ballast used in rail yards" (*id.*) and that "FELA claims involving the use of ballast in rail yards … are not precluded by 49 C.F.R. § 213.103" (*id.* at 371). *See* CSXT Br. 21. That is a categorical holding that—directly contrary to 49 C.F.R. § 213.3(a)—excludes rail yards from the scope of the ballast regulation, and thus from the preclusion analysis. In conceding that this categorical exclusion of rail yards from the preclusion analysis is wrong, Plaintiff has repudiated the CSA's holding.[3]

Plaintiff not only abandons the position he took below, but also mischaracterizes CSXT's position there. He says that CSXT argued "that the [ballast] regulation 'covers' ***walkways*** and, therefore, 'precludes' ***any*** suit under the FELA pertaining [to] walkway ballast choice." Pl.'s Br. 12 (emphasis added); *see also id.* at 26. But CSXT never argued that every claim related to "walkway" ballast is precluded. From the outset, CSXT has taken the position—now endorsed by Plaintiff—that "[t]he critical inquiry is whether the

[3] Plaintiff's about-face has resulted in some anomalies in his brief. For example, he retains a section from his CSA brief asserting that the preclusion of ballast claims will result in an "*ad hoc* patchwork of walkway ballast choices under the guise of national uniformity." Pl.'s Br. 28. Yet that assertion not only is inconsistent with his concession that § 213.103 precludes claims relating to ballast used for track support, but also is wrong on the merits. Although the size of ballast used to support the track structure might vary from location to location depending on local conditions (*see* CSXT Br. 16–17 & n.11; AAR Am. Br. 7–11), all track-support ballast will be selected according to a single, nationally uniform set of criteria, namely those set forth in § 213.103. And that is exactly as Congress and the Federal Railroad Administration intended it to be: Congress directed that "***regulations*** … related to railroad safety … shall be nationally uniform to the extent practicable" (49 U.S.C. § 20106(a)(1) (emphasis added)), but never suggested that those regulations should rigidly ignore highly localized conditions. And the FRA, fully aware of the tremendous variability in local conditions and its corresponding inability to dictate inflexible ballast-size requirements, deliberately chose to leave the selection of ballast for a particular location "to the railroads' discretion so long as the ballast performs the enumerated support functions." *Nickels v. Grand Trunk W. R.R.*, 560 F.3d 426, 431 (6th Cir. 2009).

ballast in question performs a track-support function" and that "***[i]f*** the material supports track, ***then*** it is covered by the regulation" and a FELA action based on the size of that ballast is precluded. CSXT Br. 22 (emphasis added).[4] Far from arguing that every claim related to "walkway" ballast is necessarily precluded, CSXT believes that the term "walkway" adds nothing but confusion to the preclusion analysis because that term denotes any surface on which employees regularly walk, without regard to whether that surface is part of the track structure or is completely separate from the track structure. *See* CSXT Br. 26.

Plaintiff says that "nothing in the record" supports our observation that some "walkways" are part of the track-support structure. Pl.'s Br. 17. To the contrary, Plaintiff's own expert admitted that, when testifying about "walkways," he was ***including*** areas that indisputably constitute part of the track-support structure. The expert "defined a walkway in a rail yard as essentially anywhere within that rail yard that an employee might walk" and acknowledged that this "would necessarily include areas alongside the track or perhaps even within what's known as the gauge of the track," both of which "help support the track structure." E79.[5] Thus, the facts here are like those in *Nickels*, in which the Sixth Circuit held FELA claims to be precluded because "the plaintiffs had not brought claims alleging negligence 'in the railroads' use of oversized ballast in areas ***completely separate*** from those where track stability and support were concerned.'" Pl.'s Br. 24 (quoting *Nickels*, 560 F.3d at 432).

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[4] In the circuit court, CSXT argued that Plaintiff's claim is precluded because it arose from the selection of ballast whose "purpose was to 'provide physical support for the track structures, and/or adequate drainage, and falls within the purview of 49 C.F.R. § 213.103.'" Rep. App. 2–3 (quoting Rep. App. 6); *see also* Rep. App. 12–13.

[5] At the summary-judgment stage, CSXT presented uncontroverted evidence that "the ballast complained of by Plaintiff was either under, alongside, or adjacent to the track (rails and ties) and/or switches, and constituted structural support and/or adequate drainage for the track." Rep. App. 5. Plaintiff never disputed that, arguing instead that, as a matter of law, his claim was not precluded under *Miller* and *Bickerstaff*, in which the CSA had held that "49 C.F.R. § 213.103 does not preclude FELA claims alleging negligent use of ballast on walkways" or "in the rail yard." *Pitts*, 203 Md. App. at 364–65.

Contrary to the CSA's holding below (as well as in *Miller* and *Bickerstaff*), it makes no difference whether the ballast at issue is located in a rail yard or used as a walkway. The only relevant distinction for preclusion purposes is between ballast that affects the track-support structure and ballast that does not. Claims relating to the former are precluded; claims relating to the latter are not.[6] Accordingly, consistent with Plaintiff's concession, this Court should hold that 49 C.F.R. § 213.103 precludes all FELA claims alleging injury from ballast ***that affects the track support structure***.

B. The Only Remaining Issue Is The Proper Form Of Relief—Judgment For CSXT Or A New Trial.

Plaintiff's repudiation of the CSA's holding below—and the manifest erroneousness of that holding (*see* CSXT Br. 11–23)—require relief for CSXT, leaving only the question of what form that relief should take. As we discuss below, CSXT is entitled to judgment because undisputed evidence shows that Plaintiff worked exclusively on track-supporting ballast. At minimum, CSXT is entitled to a new trial in which the

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[6] Plaintiff cites ten cases holding that § 213.103 either does not preclude FELA claims involving "walkways" or does not preempt state "walkway" regulations. Pl.'s Br. 24–25. Only two of those cases—*Davis v. Union Pac. R.R.*, 598 F. Supp. 2d 955 (E.D. Ark. 2009), and *Norfolk S. Ry. v. Box*, 556 F.3d 571 (7th Cir. 2009)—considered whether the claim or regulation at issue involved ballast that affected the track-support structure. The courts in both cases found no preclusion or preemption precisely because, as a matter of fact, the ballast at issue did not affect the track-support structure. In *Davis*, the court found that "[t]he area in which plaintiff was walking does not support any track." 598 F. Supp. 2d at 955. And in *Box*, the dispositive finding was the trial court's conclusion that the regulation at issue "has not caused demonstrable drainage … problems." 556 F.3d at 574. Another case cited by Plaintiff—*DeHahn v. CSX Transp., Inc.*, 925 N.E.2d 442 (Ind. Ct. App. 2010)—involved a plaintiff's allegation that the railroad's "placement of the ballast on top of the ties … caused him to slip and fall." *Id.* at 450. *DeHahn* is inapposite because ballast that is placed ***on top of the ties*** plainly is not part of the track-***support*** structure. The seven other cases cited by Plaintiff are premised on the factually erroneous and legally irrelevant ground that § 213.103 is, supposedly, concerned only with track stability and not employee safety. They accordingly are contrary not only to Plaintiff's concession that "FELA claims alleging negligent choice of track support ballast [are] precluded" (Pl.'s Br. 1), but also to the Supreme Court's admonition that the FRSA's preemption clause "does not … call for an inquiry into the [regulation's] purposes" (*Easterwood*, 507 U.S. at 675). *See* CSXT Br. 20 n.15; *see also* note 2, *supra*.

jury is instructed to apportion responsibility for Plaintiff's alleged injury between activities that occurred on track-supporting ballast (which are non-compensable) and those that occurred on ballast that was "completely separate" from track-supporting ballast (which are compensable if the other elements of a FELA claim have been proven).

1. CSXT is entitled to judgment because the undisputed evidence established that Plaintiff's activities did not involve walking or working on ballast "completely separate" from that used for track support.

Recognizing that § 213.103 precludes any FELA claim arising from ballast that affects the track-support structure, Plaintiff correctly notes that he may "'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 … [is] concerned.'" Pl.'s Br. 24 (quoting *Brenner v. Consol. Rail Corp.*, 806 F. Supp. 2d 786, 796 (E.D. Pa. 2011)) (emphasis added); *see also id.* (quoting *Nickels*, 560 F.3d at 432, for the proposition that claim alleging negligent ballast choice is precluded unless it relates to "areas completely separate from those where track stability and support [are] concerned"). Plaintiff's claim is precluded, and CSXT is entitled to judgment, precisely because the ballast on which he worked is ***not*** "completely separate" from the track-support structure.

Plaintiff does not dispute that he testified to having engaged in only four activities that regularly required him to walk or work on ballast. *See* CSXT Br. 25. He admits that to perform two of the activities he identified—throwing switches and attaching air-brake hoses—"he would have had to stand on the track structure." *See* Pl.'s Br. 15–16. But he contends that the record contains no evidence that he performed the other activities—mounting and dismounting locomotives and walking alongside and around locomotives—on the ballast "immediately adjacent to the track" that his expert admitted serves a track-support function.

Yet when describing the track-support ballast "immediately adjacent to the track," Plaintiff's expert plainly was referring to the areas where Plaintiff worked:

> Q. Ballast is directly underneath the track or within the gauge of the track. Does that help support the track structure?

A. Yes, it does.

Q. Does that help drain the track structure?

A. Yes.

Q. Ballast that's immediately adjacent to the track, is that also helping support and drain the track structure?

A. Yes, it is.

Q. Necessarily, the areas where Mr. Pitts would walk during the course of his career as a railroad engineer, would include areas that were immediately alongside the track and, in fact, occasionally within the gauge of the track because of the fact that he works on locomotives, would they not?

A. I believe so, yes.

E79. That testimony is, moreover, consistent with a commonsense understanding of the two tasks at issue. When mounting or dismounting a locomotive, Plaintiff would have had to stand (or land) "immediately adjacent to the track" on which the locomotive was located. Similarly, when walking around the locomotive to conduct an inspection, Plaintiff would have had to be "immediately adjacent to the track" on which the locomotive was located so that he could perform the inspection. As his expert admitted, the ballast there "help[s] support and drain the track structure." E79.

Plaintiff contends that "the photographs [admitted in evidence] show that the width of the trains would have made it nearly impossible to walk in an area of track support while walking alongside a train." Pl.'s Br. 16. On the contrary, the two photographs in which someone is shown walking alongside a train (E230 and E232) confirm that such activities occur on ballast that affects track support. This is evident from the diagram that Plaintiff himself employs, which indicates that the track-support structure extends at least 2.5 feet from the end of the cross-tie on tracks in the rail yard. *See* Pl.'s Br. 2 (discussing E241). At the end of the cross-tie in that diagram, there is a 6-inch "shoulder" of ballast that is level with the top of the cross-tie, beyond which is a slope of ballast that extends two units out for every unit down. *Id.* The total height of the ballast in this diagram is at least one foot: six inches of ballast under the tie, plus the height of the ballast surrounding the cross-tie up to the top of the cross-tie itself, which is

at least another six inches. *See id.* ("the total trapezoid [is] one foot tall"); E230 (revealing the exposed ends of some cross-ties). Thus, the track-support area in this diagram extends out at least two feet beyond the 6-inch shoulder (two feet out for one foot down), resulting in a total track-support area that extends at least 2.5 feet beyond the end of the cross-tie—an area large enough to encompass all of the jobs described by Plaintiff. The photographs depicting people walking alongside a train—including E230, in which a foot-long tape measure is visible—confirm not only that it is ***possible*** to walk within 2.5 feet of the end of a cross-tie, but that this is the most natural place to walk when performing the tasks Plaintiff described. Moreover, every photograph showing a railcar or locomotive on the track confirms that the car or locomotive may be wider than the ***rails***, but does ***not*** "extend[] out beyond the width [of] the crossties" (Pl.'s Br. 8) or prevent employees from walking in the track-support area that extends beyond the end of the cross-ties. *See* E211–13, 228–30, 232, 234–35. At the very least, it should be beyond dispute that, when mounting or dismounting a locomotive or walking around a locomotive to conduct an inspection, Plaintiff naturally would have stood within the area that affects track support (according to the evidence that Plaintiff himself cites).

Plaintiff contends that once the track-supporting ballast depicted in Exhibit 241 begins to slope down—*i.e.*, beyond the 6-inch shoulder of ballast that is level with the cross-tie—other material can be placed on top of it without affecting track support. Pl.'s Br. 2–3. Thus, he claims that railroads can "fill the darkened walkway areas" in his modified diagram with any material they want without affecting track stability, resulting in "an area that is not part of the track support" beginning "just seven inches from the end of the crosstie." *Id.* at 3. But Plaintiff's premise (which lacks any record support) is false; ballast that is placed on top of track-support ballast ***does*** affect the track-support structure. Indeed, Plaintiff's own expert testified that placing small ballast on top of large ballast is problematic because the small ballast will, like crumbs in a bowl of chips, gradually settle to the bottom. E69. When that happens, the small ballast can clog drainage channels between the large ballast, create a substrate for plant growth, or otherwise interfere with the stability of the large ballast by altering the way that the rocks

"interlock." As the brief submitted by the Association of American Railroads ("AAR") explains, "overlaying small ballast on top of larger ballast can impede the ability of the ballast effectively to perform its drainage function," as well as "destroy[]" its resilience and stability." AAR Am. Br. 9.[7] In short, ballast placed on top of track-supporting ballast is not "completely separate" from the track-support structure, but instead affects the track-support function of the underlying ballast. Accordingly, the discretion that § 213.103 accords railroads to select the appropriate ballast to guarantee track support in any given location necessarily includes the discretion to decide whether to place small ballast on top of large ballast.[8] Section 213.103 therefore precludes any claim challenging the exercise of that discretion.

Plaintiff's testimony, his expert's testimony, and the photographs Plaintiff introduced prove that the ballast on which Plaintiff worked was not "completely separate" from the track-support structure.[9] Plaintiff's claim is precluded, and CSXT is entitled to judgment as a matter of law.

2. At minimum, CSXT is entitled to a new trial.

Plaintiff grudgingly concedes that "CSX produced some general evidence that Mr.

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[7] Plaintiff does not dispute the substance of the AAR's amicus brief, which CSXT urges the Court to accept.

[8] To be sure, CSXT's internal planning diagram indicates that smaller ballast ***can*** be placed on top of large ballast (E241), but because the diagram depicts an area that is not "completely separate" from the track-support structure, § 213.103 entrusts the decision whether to do so in any particular location "to the railroads' discretion." *Nickels*, 560 F.3d at 431.

[9] Plaintiff is simply wrong in asserting that "CSX itself admitted that a substantial amount of Mr. Pitts' walking occurred away from any track support area." Pl.'s Br. 19 (citing CSXT Br. 6 & 25 n.18). As the cited passages of our brief confirm, CSXT merely pointed out that there is no evidence, one way or the other, whether the few hundred feet of ballast on which Plaintiff occasionally walked from the rail yard office to his locomotive was involved in track support or not. CSXT Br. 25 n.18 ("Plaintiff … 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."). Moreover, as we pointed out, this was not a material part of Plaintiff's work because it was required only occasionally and involved only a single short walk on those days when it was required.

Pitts may have walked on areas of track support from time to time." Pl.'s Br. 15. Specifically, he admits that two of the four tasks he performed on ballast—namely, throwing switches and coupling air hoses—are performed on ballast that affects track support. *Id.* at 16; *cf.* CSXT Br. 25. Thus, Plaintiff ***concedes*** that half the tasks he performed on ballast were performed on ***track-support*** ballast. He suggests that there is no evidence regarding the type of ballast that he walked on "as he walked from switch to switch" or "from hose to hose" (Pl.'s Br. 16), but there is no evidence that Plaintiff walked from switch to switch or hose to hose (as opposed to throwing a switch or connecting a hose and then re-boarding his locomotive). *See* E34–37. Moreover, even assuming, despite the lack of any record evidence, that Plaintiff did walk from one switch or one hose to another, he necessarily would have done so alongside the train, adjacent to the track. As discussed above (at 6–9), when walking alongside a track, Plaintiff was on track-support ballast.

More fundamentally, any dispute about the proportion of Plaintiff's time spent on track-support ballast is irrelevant to whether CSXT is entitled to a new trial. Plaintiff now has admitted that (i) §213.103 precludes any claim alleging injury from working on track-support ballast, and (ii) at least some of his work took place on ballast that affects track support. If the correct legal principle had been applied at trial, some percentage of liability for Plaintiff's injury would have had to have been apportioned to his work on track-support ballast, for which he now agrees that CSXT may not be held liable.

Plaintiff asserts that "what is important here is not so much the area where Mr. Pitts walked, but rather the area where he alleged CSX was negligent." Pl.'s Br. 8. That argument fails for two reasons.

First, Plaintiff is not entitled to compensation for negligent ballast selection in the abstract. Without regard to preclusion, Plaintiff has no cause of action for negligently selected ballast unless that ballast ***caused his injury***. *See, e.g.*, *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987) ("FELA does not impose strict liability on employers. Plaintiffs are still required to prove the traditional common law elements of negligence: duty, breach, foreseeability, and causation."). And the ballast cannot have

caused Plaintiff's injury unless he walked on it—indeed, unless he walked on it extensively for many years. *See* CSXT Br. 8 (describing Plaintiff's "cumulative trauma" theory of causation). Thus, Plaintiff has it exactly backward: His allegations of negligent ballast choice—and his expert's testimony on that subject—are relevant ***only*** to the extent that they involve ballast on which he walked. And Plaintiff concedes that the ballast on which he walked while performing two of the four tasks he described performed a track-supporting function. Pl.'s Br. 15–16.

Second, as discussed above (at 4), although Plaintiff's expert criticized CSXT's choice of ballast for "walkways," he admitted that he was using the term to refer to any area where employees walk, ***even if that area also is involved in track support***. *See* E79. In other words, Plaintiff's assertion that "not once did [his expert] allege that CSX should have used different ballast as track support" (Pl.'s Br. 6) is dead wrong.

In sum, because Plaintiff has conceded that at least some of the ballast on which he worked was involved in track support—and now has admitted that claims involving ballast that affects track support are precluded, even in the rail yard—CSXT is entitled, at minimum, to a new trial in which Plaintiff's alleged injury from working on large ballast is apportioned between (i) his work on track-supporting ballast (for which he concedes that he may not receive compensation) and (ii) his work, if any, on ballast that was completely separate from the track-support structure (for which he could receive compensation if he proves the other elements of a FELA claim).

Moreover, even if there were an evidentiary gap in the current record, CSXT still would be entitled to a new trial because any such gap is attributable to the fact that the first trial was litigated on the premise—urged by Plaintiff and accepted by the circuit court—that 49 C.F.R. § 213.103 does not preclude claims alleging injuries from working on ballast located anywhere in a rail yard. *See, e.g.*, Rep. App. 7–8 (arguing that *Miller* and *Bickerstaff* required the circuit court to reject CSXT's preclusion argument on the ground that 49 C.F.R. § 213.103 "does not preclude an FELA claim for CSXT's use of

improper ballast in its yards").[10] In that context, CSXT had no reason to introduce readily available evidence that the ballast on which Plaintiff worked was not "completely separate" from the track-support structure—including the testimony of railroad-engineering expert Roy Dean who had opined in an affidavit at the summary-judgment stage that "the ballast complained of by Plaintiff was either under, alongside, or adjacent to the track (rails and ties) and/or switches, and constituted structural support and/or drainage for the track, within the purview of and in compliance with 49 C.F.R. 213.103." Rep. App. 5–6. Thus, if the Court concludes that additional evidence was required to prove CSXT's preclusion defense, fairness dictates that CSXT be given an opportunity to develop the record regarding "the size and shape of the track support structure in its rail yards" and "where Mr. Pitts walked in relation to that track support." Pl.'s Br. 18.

II. There Is No "Employee-Friendly" Standard Of Review In FELA Cases—And, Under The Correct Standard Of Review, CSXT Is Entitled To A New Trial Because Of Two Prejudicial Instructional Errors.

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

Plaintiff contends that the CSA "never applied an employee-friendly standard of review when evaluating [the circuit court's jury] instructions." Pl.'s Br. 29. But the CSA clearly stated, without limitation, that "an 'employee-friendly standard of review' is applied in FELA cases." *Pitts*, 203 Md. App. at 360. That statement, which irreparably colored the CSA's opinion, misstates the law.[11]

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[10] Although the circuit court did not explain its reasons for denying CSXT's motion for summary judgment (*see* E246), the only argument that Plaintiff raised in opposing that motion was that the CSA's holding in *Miller* and *Bickerstaff* that 49 C.F.R. § 213.103 does not apply in rail yards was binding on the circuit court. *See* Rep. App. 7–8.

[11] Contrary to Plaintiff's contention, the CSA's error is not excused by the fact that a trial court has "'wide discretion as to the form'" of jury instructions and will not be reversed on appeal "'absent a clear abuse of that discretion.'" Pl.'s Br. 29 (quoting *Pitts*, 203 Md. App. at 390). CSXT challenges the substance of the instructions, not their form. The circuit court lacked discretion to give instructions that misstated the law or were not warranted on the facts of the case. *See Maurer v. Pa. Nat'l Mut. Cas. Ins. Co.*, 404 Md. 60, 68, 75 (2007) (reversing where instruction was not warranted by the evidence); *Benik*

As the U.S. Supreme Court has squarely held, FELA does not authorize courts to invent plaintiff-friendly rules out of thin air. If "FELA's text does not support [a] proposition," that proposition is ***not*** the law and "the statute's remedial purpose cannot compensate for the lack of a statutory basis." *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 171 (2007); *see also id.* ("It frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law") (internal quotation marks omitted.); *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 that 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"). Here, no statutory language supports the CSA's biased standard of review.

Plaintiff contests the plain teaching of *Sorrell* by citing the Supreme Court's much earlier opinion in *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958). Pl.'s Br. 31–33. According to Plaintiff, *Kernan* stands for the proposition that courts may deviate from the common law in FELA cases even when justification for such deviation "cannot be found in the statutory text." Pl.'s Br. 32. But *Kernan* stands for no such thing. The question in *Kernan* was whether, under the Jones Act, which extends "FELA … to seamen" (*Beech v. Hercules Drilling Co.*, 691 F.3d 566, 570 (5th Cir. 2012)), the violation of a safety statute constitutes negligence per se regardless of the injury at issue, notwithstanding the common-law rule that a statutory violation is negligence per se only if the statute was meant to avert the type of injury alleged. *Kernan* reaffirmed that FELA departs from the common law in this regard. 355 U.S. at 430. But contrary to Plaintiff's assertion, that departure from the common law is firmly grounded in statutory text—namely, the Safety Appliance Acts and the Boiler Inspection Act, which "supplement[] the Federal Employers' Liability Act by imposing on interstate railroads 'an absolute and continuing duty' to provide safe equipment." *Urie v. Thompson*, 337 U.S. 163, 188–89

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v. Hatcher, 358 Md. 507, 519 (2000) ("the instruction must correctly state the law") (internal quotation marks omitted).

(U.S. 1949) (quoting *Lilly v. Grand Trunk W. R.R.*, 317 U.S. 481, 485 (1943)).[12] *See* 49 U.S.C. §§ 20302, 20701. Thus, in FELA cases a violation of either railroad safety statute constitutes negligence per se regardless of the injury at issue, not because courts have license to abrogate the common law at will, but because the statutes, which "are *in pari materia*" with FELA (*Wagner*, 241 U.S. at 484), contain express, categorical language imposing an "absolute" duty on railroads (*Urie*, 337 U.S. at 188). But even if *Kernan* stood for the proposition that courts are authorized to interpret FELA in an "employee-friendly" manner even when support for such an interpretation "cannot be found in the statutory text" (Pl.'s Br. 32), as Plaintiff asserts, it would be superseded by the Supreme Court's more recent decision in *Sorrell*, which holds in no uncertain terms that courts may not deviate from traditional standards except when required to do so by the statute's explicit text.

Plaintiff's assertion that "the Supreme Court itself has adopted a liberal standard of review in FELA cases" (Pl.'s Br. 31) is equally mistaken. Although the Supreme Court has endorsed a liberal standard of ***statutory interpretation***; it has never approved a liberal ***standard of review*** in appeals of FELA cases. The methodology courts use when interpreting FELA's text and the standard under which an appellate court reviews allegations of error in a FELA case are entirely separate things. And while courts may liberally interpret the text of FELA (*see* CSXT Br. 27–28 & n.21), they may not create plaintiff-friendly rules from whole cloth where the statute is silent. Notably, Plaintiff does not even attempt to identify language in FELA that—on any theory of statutory interpretation—could be construed as enacting the changes to the standard of review that were endorsed by the CSA here.

In sum, there is no statutory basis for the CSA's assertion that "FELA cases have a different standard of review than common law negligence cases," much less its

[12] This is made plain by FELA itself, which creates a comparative-fault regime except "where the violation … of any statute enacted for the safety of employees contributed to the injury or death of such employee." 45 U.S.C. § 53. *See, e.g.*, *San Antonio & Ark. Pass Ry. v. Wagner*, 241 U.S. 476, 484 (1916) (FELA "recognizes that rights of action may arise out of the violation of the safety appliance act.").

conclusion that "an 'employee-friendly standard of review' is applied in FELA cases." *Pitts*, 203 Md. App. at 360–61. Because the text of FELA is silent and *Sorrell* prohibits deviations from traditional standards absent a statutory basis, the CSA's adoption of an "employee-friendly" standard of review in FELA cases is erroneous. That error skewed the entire framework within which the CSA considered this appeal.

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

Once the judicial thumb is removed from the scale, as *Sorrell* requires, it is clear that the circuit court's instructional errors necessitate a new trial. Plaintiff concedes that the negligence-per-se instruction should not have been given, and he has not identified a single case that would support giving the statutory-purpose instruction. Moreover, the prejudice that CSXT suffered from these insupportable instructions is palpable.

1. The erroneous statutory-purpose instruction requires a new trial.

We explained in our opening brief that it was prejudicial error to instruct the jury that the statute under which Plaintiff sued CSXT was enacted "'in recognition of the dangers involved in railroad work and to alleviate the harsh results ... thereof.'" CSXT Br. 30–31 (quoting E141). As we further explained, federal appellate courts repeatedly have held that juries should ***not*** be told about FELA's purposes, because doing so "will not assist the jury in understanding its current task of applying the law as instructed to the facts proven at trial" but instead is likely to "confuse the jury and be unduly prejudicial." *Johnson v. Union Pac. R.R.*, 2007 WL 2914886, at *7 (D. Neb. Oct 4, 2007); *see also, e.g., Cummings v. Amtrak Nat'l R.R. Passenger Corp.*, 199 F.3d 1331 (table), 1999 WL 980362, at *1 (9th Cir. 1999); *Stillman v. Norfolk & W. Ry.*, 811 F.2d 834, 838 (4th Cir. 1987). Plaintiff does not cite any cases to the contrary and has not identified even a single case, other than this one, in which the trial court instructed the jury on FELA's purposes. Instead, Plaintiff makes four arguments that miss the mark entirely.

First, Plaintiff contends that the instruction "actually told the jury that the dangers of railroad work and its harsh results were not really at issue in this case." Pl.'s Br. 35. We anticipatorily rebutted this argument in our opening brief (at 30 n.22), and Plaintiff

offers no response to that rebuttal. To reiterate, the instruction told the jurors that the ***purpose*** of FELA was not at issue in this case—*i.e.*, that there was no dispute over why the statute was enacted. It did ***not*** say that the purposes of the statute were irrelevant to the jury's deliberations, or, as Plaintiff would have it, that "dangers of railroad work and its harsh results were not really at issue in this case." Pl.'s Br. 35. On the contrary, the instruction told the jurors that railroad work is dangerous and implied that their role was "to alleviate the harsh results" of such work.

Second, Plaintiff argues that the instruction was justified under *Dillon v. State*, 277 Md. 571 (1976), a 36-year-old criminal case that affirmed a conviction under Maryland's handgun law even though the jury was instructed on the purpose of that law. Pl.'s Br. 35–36. But as Plaintiff concedes, *Dillon*'s outcome rests on an "essentially defunct" Maryland rule under which "jurors [were] judges of the facts as well as the law" in ***criminal*** trials. *Id.* at 37 n.11. And as Plaintiff also admits, even given that unique criminal rule, this Court concluded that it "'may have been wiser'" ***not*** to instruct the jury on statutory purpose and expressly warned lower courts that it did not "'encourage the practice.'" *Id.* at 37. For these reasons, *Dillon* would provide vanishingly little support under Maryland law for instructing a jury on the purpose of a criminal statue, and no support at all for instructing a civil jury on the purposes of FELA.

Third, Plaintiff tries to distinguish the federal cases we cited on the ground that they involved efforts by a plaintiff to inform the jury of FELA's purposes through evidence or argument, rather than instruction. Pl.'s Br. 37–38. But an instruction from the court, which the jury has a sworn duty to follow (*see* CSA Reply App. 1 (circuit court's instruction to the jurors that they must follow its instructions on the law)), carries far more weight—and is thus even more prejudicial—than evidence or argument offered by a party, which the jury may disbelieve or disregard as it sees fit. As other courts have recognized, "[i]nstructions have a different effect upon the jury than closing arguments" because "[h]aving just been warned that they need not accept the parties' closing arguments as fact, the members of the jury would not be likely to embrace and apply [the party's] … argument as fully as if it had come from on high." *DeMontiney v. Desert*

Manor Convalescent Ctr., Inc., 695 P.2d 255, 260 (Ariz. 1985) (en banc) (internal quotation marks omitted).

Finally, Plaintiff contends that CSXT was not prejudiced by the court's instruction. Pl.'s Br. 38. That defies common sense. Workplace safety was a central issue in the case. Plaintiff's closing argument concluded with the assertion that CSXT "didn't have a safe place to work" (E146), and CSXT's closing argument emphasized that Plaintiff's job was safe and sedentary (E149–50). Telling the jury that FELA was enacted "in recognition of the dangers involved in railroad work and to alleviate the harsh results ... thereof" (E 141) amounted to an improper judicial endorsement of Plaintiff's theory of the case. It skewed the juror's deliberations and deprived CSXT of a fair trial.

2. The erroneous negligence-per-se instruction prejudiced CSXT.

Plaintiff concedes (Pl.'s Br. 39), and the CSA held (*Pitts*, 203 Md. App. at 392), that it was error to instruct the jury that a violation of a statute is evidence of negligence. Plaintiff nevertheless contends that CSXT is not entitled to relief because it cannot prove that the instruction affected the verdict. But this Court has emphasized that the harmless-error analysis for jury instructions in a civil case must be "shape[d]" by the fact that a reviewing court "cannot 'unbake' the jury verdict and examine the impact of any one ingredient," a "difficulty" that "has led Maryland to adopt a presumption of prejudice for errors" in criminal trials. *Barksdale v. Wilkowsky*, 419 Md. 649, 665–66 (2011). Although there is no presumption of prejudice in civil cases, this Court has held that

> [a]n erroneous instruction may be prejudicial if it is misleading or distracting for the jury, and permits the jury members to speculate about inapplicable legal principles. … Moreover, in certain cases, the mere inability of a reviewing court to rule out prejudice, given the facts of the case, may be enough to declare an error reversible.

Id. at 669–70; *see also id.* at 673 ("Nor is 'tangible evidence' required to show prejudice in this context," given that "there is no 'tangible' proof of prejudice because we cannot read the minds of the jurors.").

Plaintiff does not deny that the CSA explicitly invoked its erroneous plaintiff-friendly standard of review when concluding that this instruction was harmless. *See Pitts*,

203 Md. App. at 392 & n.17. Nor does he deny that the jury easily could have been misled by this instruction, given the testimony by his expert that CSXT allegedly violated certain internal and external standards related to ballast selection. *See* CSXT Br. 32 (citing, *e.g.*, E62–66, 70–78). Instead, Plaintiff suggests that any speculation by the jury occasioned by the court's *sua sponte* instruction was justified because "violation of industry standards would rightfully be considered evidence of negligence." Pl.'s Br. 41. But Plaintiff makes no effort to show that the standards cited by his expert are appropriate proxies for a standard of care. Thus, there is no basis for this Court to find that the jurors could base their negligence verdict on a supposed violation of the standards identified by the expert, as the negligence-per-se instruction (which Plaintiff concedes should not have been given) allowed them to do.

In any event, Plaintiff offers no response to our argument (CSXT Br. 32) that even if each challenged instruction standing alone was not sufficiently prejudicial to warrant a new trial, their synergistic effect manifestly was. Nor does Plaintiff respond to our argument (CSXT Br. 33) that the prejudice from the instructions—particularly the statutory-purpose instruction—likely manifested itself not just in the liability finding, but also in the amount of damages awarded by the jury and its apportionment of fault between CSXT's alleged negligence, Plaintiff's contributory negligence, and other causes. Skewing those calculations in Plaintiff's favor would be a natural and probable result of telling the jurors that they were charged with enforcing a statute that was designed to "alleviate the harsh results" of Plaintiff's "danger[ous]" occupation.

III. The Circuit Court Committed Reversible Error By Refusing To Allow CSXT To Cross-Examine Plaintiff's Economist On Retirement-Age Statistics.

Plaintiff does not dispute the basic principle that a party is entitled to broad latitude when cross-examining an opponent's expert in order to expose flaws in the expert's analysis and bring overlooked facts to the jury's attention. CSXT Br. 39 (citing *Plank v. Summers*, 205 Md. 598, 606–08 (1954)). Nor does Plaintiff deny that his counsel instructed his damages expert to take Plaintiff's self-serving assertions at face value and

to assume that, but for his alleged injury, Plaintiff would have continued working until age 67 or 68, even though industry statistics show that the vast majority of railroad workers retire at age 60. Plaintiff likewise does not deny that the expert's future-wage-loss estimate would have been much lower if it had been based on those industry-wide statistics rather than Plaintiff's professed intent. *Id.* at 34–35. Plaintiff also offers no substantive response to the numerous cases we identified—including decisions from the Second, Fourth, Fifth, and D.C. Circuits—discussing the obvious relevance of retirement-age statistics to the calculation of future lost wages. And, finally, Plaintiff does not identify even a single case supporting the exclusion of such evidence. Rather than engage the substance of the issue, Plaintiff instead focuses on irrelevant tangents.[13]

Hinting that CSXT might have waived any objection to the circuit court's refusal to allow cross-examination of Plaintiff's economist on railroad industry retirement statistics, Plaintiff asserts that CSXT "never attempted to offer the statistics into evidence." Pl.'s Br. 44. That assertion is frivolous. CSXT attempted to introduce the statistics through its cross-examination of Plaintiff's expert but was prevented from doing so by the circuit court. *See* E108–09.[14] It is true that CSXT never offered the statistical tables as an exhibit, but that is immaterial. Plaintiff does not—and cannot—identify any rule requiring that evidence take written form. Plaintiff's expert admitted that he was

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[13] Plaintiff begins by suggesting that there is tension between CSXT's contention at trial that Plaintiff was medically able to continue working—*i.e.*, that his relatively common and minor knee condition would not prevent him from performing his largely sedentary occupation—and its attempt to show through cross-examination of Plaintiff's expert that Plaintiff, like almost every other railroad worker, probably would have retired at age 60 even if he had not been injured. Pl.'s Br. 42 & n.14. But there is no tension: The mere fact that Plaintiff ***could*** have worked past age 60, if he chose to do so, says nothing about whether he ***would*** in fact have done so or whether, like most railroad workers, he was instead likely to retire at age 60.

[14] After counsel for CSXT asked the circuit court whether "you are telling me I can't ask [Plaintiff's economist] about the AAR work life tables" and the court indicated that that was indeed the case, counsel for CSXT objected that the court was "preventing me from putting in evidence." E108–09. Acknowledging that that was so, the court explained that in its view prior CSA decisions compelled that result. E109.

familiar with the statistics (E107–08), and testimonial evidence, whether given on direct or cross-examination, is no less admissible than documentary evidence. Had the circuit court not blocked CSXT's intended cross-examination, the statistics would have been in evidence.[15] Moreover, to the extent that Plaintiff is suggesting that CSXT should have made a more detailed offer of proof, Plaintiff does not—and cannot—identify any rule imposing such a requirement. All that is necessary is that "the substance of the evidence was made known to the court by offer on the record ***or was apparent from the context within which the evidence was offered***." Md. R. Evid. 5-103(a)(2) (emphasis added). Here, the substance of the evidence was apparent from the context ***and*** already well known to the circuit court, because the same issue had been litigated by the same counsel before the same judge in *Bickerstaff*.[16]

Plaintiff also contends that it was within the circuit court's discretion to prevent cross-examination of his economist on retirement-age statistics because, he says:

> [T]he statistical information does not relate to Mr. Pitts individually. Many people's circumstances fall well outside the statistical averages. … All the statistical average tells you is the average; it provides no information regarding when a particular individual, given their unique circumstances, is going to retire.

Pl.'s Br. 43–44.[17] But as every decision identified by the parties—other than those

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[15] Plaintiff tries to place CSXT in a Catch-22, arguing that "without record evidence" of "exactly what those statistics are," CSXT "cannot actually substantiate" its assertion that "'[r]etirement 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.'" Pl.'s Br. 44 (quoting CSXT Br. 34). But the very reason that there is no "record evidence" of "exactly what those statistics are" is that the circuit court prevented CSXT from introducing such evidence. Notably, Plaintiff does not deny that CSXT has accurately characterized the statistics.

[16] Indeed, when counsel for CSXT attempted to make a proffer, he was cut off by the court after he began to explain that "I should be allowed to offer alternative facts to demonstrate that there is statistical analysis --." E109.

[17] Plaintiff's argument proves too much. On Plaintiff's theory, statistical evidence (such as the mortality data on which his economist relied) would ***always*** be subject to exclusion because statistics, by definition, aggregate data across many individuals.

rendered by the CSA—has held (CSXT Br. 34, 37–39), work-life statistics provide very good, if not conclusive, information about when a plaintiff would have retired. As the Fifth Circuit has explained, future wage-loss calculations "should be based on the statistical average," although an individual plaintiff always can attempt to show that he was "likely to live *and* work a longer, or shorter, period than the average" because of "his health or occupation or other factors." *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475, 478 (5th Cir. 1984). In other words, the statistics provide a baseline, and the question then becomes whether there is evidence that a particular plaintiff's individual circumstances justify a departure from the norm. *See generally* CSXT Br. 36–41. Indeed, that is the commonsense position adopted by Plaintiff's own expert, who relied on statistics from mortality tables to predict Plaintiff's lifespan and explicitly endorsed the common practice among economists of using statistics to reach conclusions about an individual. *See, e.g.*, E104–07.[18]

Plaintiff argues that it also was appropriate to prevent cross-examination on these

[18] In his opposition to CSXT's Motion to Take Judicial Notice of the fact that Plaintiff retired at the age of 60 years and 5 months, "based on age and service" rather than disability, Plaintiff asserts that "his retirement at 60 is completely consistent with his testimony, as well as the testimony of his expert physicians, who did not believe that Mr. Pitts would be able to work beyond age 61 or 62." Opp. 4 (citing E94, 102–03, 171). That is a flat misrepresentation of the record. No one—neither Plaintiff nor any of his physicians—ever testified that Plaintiff would not be able to work "beyond age 61 or 62." When Plaintiff's medical expert was asked how long Plaintiff, who was 59 years old at the time of trial, would likely be able to continue working, he testified that Plaintiff is "not going to last five years." E94. When asked whether Plaintiff would last four years, the medical expert answered "maybe, maybe not." *Id.* And Plaintiff's treating physician testified that he would "be surprised if [Plaintiff] was able to continue this successfully five years on out." E171. Thus, the medical testimony at trial was that Plaintiff would not likely be able to work beyond age 63 or 64. There is, therefore, no evidence whatsoever that Plaintiff "chose to retire … because of the injuries that are the subject of this case." Opp. 4. On the contrary, the judicially noticeable fact that Plaintiff retired at age 60, "based on age and service" rather than disability, is evidence that Plaintiff—like the vast majority of railroad workers—had always intended to retire at age 60, notwithstanding his self-serving testimony to the contrary, and is further proof that "absent a crystal ball, statistical analyses serve[] as the next best barometer of the reality of [a plaintiff's] stated intentions." *Finch v. Hercules Inc.*, 941 F. Supp. 1395, 1416 (D. Del. 1996).

statistics under *Norfolk Southern Railway v. Tiller*, 179 Md. App. 318 (2008). Pl.'s Br. 44–45.[19] But *Tiller* is a collateral-source decision that required exclusion of evidence about retirement benefits (intended to show that the plaintiff would be motivated to retire at a particular age) because "[t]he probative value [was] too attenuated to offset the potential misuse that the jury could make of the evidence." 179 Md. App. at 340. Whatever the merits of the balance struck by the CSA in *Tiller*, the calculus is completely different here. Work-life statistics convey ***no*** information about retirement benefits, but simply relate the actual age at which railroad workers retire. That information does not pose the risk of abuse that the collateral-source rule is meant to avert—that a jury will reduce a plaintiff's damages by the amount of benefits received—and is more directly probative of the age at which a given plaintiff likely would have retired but for his injury (because the statistical data subsume all of the factors that go into the decision to retire).[20] Indeed, there is simply no cognizable prejudice to Plaintiff from the statistical information at issue here (and thus no reason for excluding that relevant information).

Our opening brief cited over a dozen opinions (not to mention commentary by experts) discussing the relevance—indeed, the indispensability—of retirement statistics to the calculation of future lost wages. CSXT Br. 34, 37–39. Plaintiff bickers with minor aspects of a few of those opinions (Pl.'s Br. 45–47), but he fails to identify ***any*** authority that affirmatively supports the exclusion of such information. Instead, he characterizes many of the decisions we cited as "merely exercising or affirming a trial court's discretionary call to admit actual statistical data into evidence." Pl.'s Br. 46. But several of those decisions—including opinions from the Second, Fourth, Fifth, and D.C. Circuits—emphasize the importance of such information, and all of them hold that such

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[19] Plaintiff repeatedly implies that the circuit court's actions should be affirmed because they are consistent with the CSA's decisions in *Bickerstaff* and *Tiller*. *See, e.g.*, Pl.'s Br. 44. Even if those decisions were binding on the circuit court, they obviously are not binding on this Court and do not immunize the circuit court's actions against appeal.

[20] To the extent that there is any concern about follow-up questions leading to the subject of retirement benefits, that easily can be addressed through objections and instructions from the court.

evidence is relevant to the calculation of future lost wages. CSXT Br. 34, 37–39. Whatever the procedural posture of individual cases, the consistency of the case law on this issue reveals that, far from meriting exclusion, such evidence is a necessary component of any future wage-loss projection.

In short, every court to consider the issue, other than the CSA, has recognized that retirement statistics are highly relevant, if not indispensible, evidence whenever a plaintiff claims future wage loss. Trial courts do not have discretion to exclude relevant evidence arbitrarily, and neither the CSA nor Plaintiff has identified a valid basis for excluding this unquestionably relevant evidence (let alone a basis that is sufficiently strong to overcome CSXT's critical right to cross-examine Plaintiff's expert).

On a related note, Plaintiff contends that the CSA's opinion does not create a "rule" against the admission of work-life evidence, but simply affirms a "discretionary call" by the circuit court. Pl.'s Br. 49–50. That assertion belies reality. The CSA has now twice affirmed the exclusion of work-life evidence—here and in *Bickerstaff*—while rejecting its relevance in categorical terms. The circuit court considered itself bound to exclude the evidence even before the CSA's decision in this case; it surely isn't going to reverse course and invite reversal by admitting the evidence in future cases. In short, the exclusion of work-life statistics plainly has become a "rule" in the Circuit Court for Baltimore City—and the consequences are clear. Plaintiff does not dispute that the age at which FELA plaintiffs litigating in that court claim that they would have retired but for their alleged injuries has steadily risen—well past what the statistics would support—as emboldened plaintiffs' counsel have become increasingly confident that work-life statistics will be excluded. *See* CSXT Br. 41 n.30. In any event, this Court should establish a clear rule allowing parties to cross-examine an expert who ignores this evidence when calculating future lost wages (while leaving trial courts the same discretion they always have to deviate from an evidentiary rule when an individual case presents a valid reason for doing so). As every other court to have considered this issue has held, work-life statistics are obviously relevant to the calculation of future lost wages, and there is no legitimate reason to exclude them. A trial court should ***not*** have discretion

to exclude significant relevant evidence, and cut off cross-examination of an expert witness, based on nothing more than its personal belief—rejected by the expert being cross-examined—that statistics are not relevant to an individual.

Plaintiff's assertion that "nothing prevented CSX from introducing its own substantive evidence" on this point (Pl.'s Br. 49) is wrong. The circuit court's and CSA's reasons for cutting off CSXT's cross-examination relate to the statistical information itself and were not specific to Plaintiff's expert. Indeed, Plaintiff's expert admitted that he was familiar with this information and that he regularly relies on statistics such as this. E104–07. The objection and ruling obviously would have been the same if CSXT had wasted time and money bringing in its own expert. Moreover, Plaintiff's suggestion that CSXT could have introduced the evidence during its case-in-chief ignores this Court's recognition that 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." *Somerset v. Montgomery Cnty. Bd. of Appeals*, 245 Md. 52, 66 (1966).

Finally, Plaintiff's argument that CSXT suffered no prejudice from the circuit court's ruling is meritless. Contrary to Plaintiff's assertion, the jury was not "repeatedly reminded" that Plaintiff was "eligible to retire at age 60." Pl.'s Br. 48 (internal quotation marks omitted). CSXT obviously was not allowed to develop that evidence during its cross-examination of Plaintiff's economist. And while Plaintiff notes that CSXT "asked Mr. Pitts" whether he could retire at age 60 (*id.*), he fails to inform the Court that the question was never answered ***because the circuit court sustained Plaintiff's objection to that question*** (E56). In other words, Plaintiff has not identified a single instance, much less repeated instances, in which the jury heard evidence that Plaintiff was eligible to retire at age 60. In any event, evidence that Plaintiff was "eligible" to retire at age 60 is not at all equivalent to statistical evidence showing that Plaintiff was in fact extremely likely to retire at age 60.

Plaintiff says that the circuit court "told the jurors that a retirement age of 60 was consistent with statistics" that Plaintiff's economist "was familiar with." Pl.'s Br. 48 (citing E110). But that overstates matters. Although the economist was asked whether

retirement at age 60 was consistent with any statistical analysis of which he was aware, and the circuit court ultimately informed the jury that "the answer to the last question … is yes," the court's statement came after an objection and sidebar. E110. Given the passage of time and the somewhat cryptic nature of the court's statement, it is doubtful that the jury remembered what question had been asked. In any event, CSXT did not want to show that there are statistics "consistent" with Plaintiff retiring at age 60. Rather, it wanted to demonstrate that, according to the most reliable empirical data available—evidence of precisely the type typically relied on by Plaintiff's own expert—it is highly likely that Plaintiff would have retired at age 60 and extremely improbable that he would have worked to age 67 or 68.

Plaintiff observes that CSXT was permitted to ask his expert what Plaintiff's economic loss would have been if Plaintiff had retired at age 60 rather than 67, and that the expert testified that his economic loss would have been "zero" in that case. Pl.'s Br. 48 (citing E112). According to Plaintiff, "[i]t is difficult to see what more CSX could have wanted that would not have been merely cumulative." *Id.* In fact, it is easy to see what more CSXT could have wanted. Proof that Plaintiff's economic losses would be zero had he intended to retire at age 60 is largely meaningless absent evidence that Plaintiff was in fact likely to have retired at age 60. And it is ***that*** crucial evidence that CSXT was prevented from introducing when the circuit court prohibited cross-examination on railroad industry work-life statistics.

In sum, impermissibly cutting off CSXT's cross-examination on this obviously relevant topic—with no legitimate basis for doing so—effectively excluded significant information from the trial, with very real financial repercussions for the calculation of Plaintiff's future lost income. The prejudice CSXT suffered is beyond dispute.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Certification

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ***21st*** day of ***November, 2012***, 2 copies of the foregoing Reply Brief of Petitioner were served on each of the counsel listed below, via overnight courier, postage prepaid:

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_____
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REPLY APPENDIX

The following pleadings and record materials from this case were not included in the Deferred Joint Record Extract in the Court of Special Appeals.