IN THE COURT OF APPEALS OF MARYLAND

September Term, 2011

Petition Docket No. 90

CSX TRANSPORTATION, INC.,

Petitioner,

v.

EDWARD L. PITTS, SR.,

Respondent.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Mitchell Y. Mirviss
VENABLE LLP
750 E. Pratt Street, Suite 900
Baltimore , MD 21202
(410) 244-7412
mymirviss@venable.com

Evan M. Tager
Andrew E. Tauber
Carl J. Summers
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000
atauber@mayerbrown.com

C. Stephen Setliff
SETLIFF & HOLLAND, P.C.
4940 Dominion Blvd.
Glen Allen, VA 23060
(804) 377-1260
ssetliff@setliffholland.com

J. Christopher Nosher
SETLIFF & HOLLAND, P.C.
One Park Place, Suite 265
Annapolis, MD 21401
(443) 837-6800
cnosher@setliffholland.com

Counsel for CSX Transportation, Inc.

PRELIMINARY STATEMENT

Plaintiff's Answer to the Petition for Certiorari rests on a series of erroneous and misleading statements. In this brief reply, we correct the most egregious of those misstatements, so that the Court will not be laboring under any misapprehensions when it considers whether to grant review of the important, recurring issues raised in the Petition.

ARGUMENT

I. WHETHER 49 C.F.R. § 213.103 APPLIES TO TRACKS LOCATED IN RAIL YARDS IS AN IMPORTANT AND RECURRING QUESTION OF LAW WHICH THE COURT OF SPECIAL APPEALS ANSWERED ERRONEOUSLY.

Plaintiff is simply wrong when he denies that "the Court of Special Appeals held that the [federal ballast] regulation does not preclude claims pertaining to areas of track support in the rail yard." Answer 6. In fact, the Court of Special Appeals specifically excluded rail yards from the scope of 49 C.F.R. § 213.103. The Court of Special Appeals explicitly held, without qualification, that "***claims involving the use of ballast in rail yards*** and walkways are not precluded by 49 C.F.R. § 213.103." Slip op. 24 (emphasis added).

Plaintiff also is mistaken when he asserts that "CSX never demonstrated that the areas where Mr. Pitts alleged negligent ballast choice constituted areas of track support." Answer 7. The Petition cites undisputed evidence 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) (emphasis added), as well as undisputed evidence that Plaintiff's duties required him to work on such ballast. *See* Pet. 14–15 (citing E34-41, E79). Plaintiff does not even attempt to rebut that evidence. Nor could he: At trial, Plaintiff never disputed that the ballast on which he worked performed a track-support function.[1]

[1] Plaintiff hides behind the Court of Special Appeals' *sua sponte* finding that CSXT "did not present evidence at trial supporting its broad claim that ballast in

Plaintiff's suggestion that this case cannot be about track-supporting ballast because it (supposedly) involves "walkways" (Answer 1–2) rests on a false dichotomy. The fact that a particular area might serve as a "walkway" does not mean that it is distinct from the track-support structure. Although some "walkways" do not impinge on the track-support structure because they are sufficiently far from the tracks, other "walkways" are part of the track-support structure given their proximity to the tracks. Whether some of the areas at issue here might be deemed "walkways" or not, the evidence clearly establishes that the ballast on which Plaintiff worked ***is*** part of the track-support structure.

Plaintiff's assertion that the question of whether § 213.103 applies to track located within rail yards "is not an issue likely to reoccur" (Answer 3) is plainly untrue. This is the third reported Court of Special Appeals decision within the last eight years concerning this very issue. Indeed, Plaintiff himself admits that "[t]he case at bar presents a question identical to those in *Miller* and *Bickerstaff*." Answer 8; *see also id.* ("the same legal question" arose "in all three cases"). Moreover, Plaintiff does not dispute that there are at least eight ballast cases currently pending in the Circuit Court for Baltimore City. *Cf.* Pet. 10 n.4. As Plaintiff notes, this Court granted review in *Miller* before ultimately dismissing the petition as improvidently granted. The Court should take this opportunity to correct the Court of Special Appeals' repeated error, and clarify that § 213.103 does apply to ballast used to support track located within rail yards.

II. THE "EMPLOYEE-FRIENDLY" STANDARD OF REVIEW ADOPTED BY THE COURT OF SPECIAL APPEALS IS CONTRARY TO *SORRELL*.

Plaintiff asserts that "[t]he 'employee-friendly' standard of review utilized

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rail yards and walkways provides track support." Answer 7 (quoting slip op. 24). But, as explained in the Petition (at 14), 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 provides track support.

by the Court of Special Appeals comes directly from the United States Supreme Court's own FELA opinions." Answer 13. But Plaintiff does not cite a single Supreme Court decision holding that an "employee-friendly" standard of review is appropriate in FELA cases. To be sure, the Supreme Court has stated on various occasions that FELA is a remedial statute that should be liberally construed. But, as the Supreme Court squarely held in *Sorrell*, "[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). On the contrary, any departure from traditional common-law principles must have "a statutory basis" in "FELA's text." *Id.* Plaintiff does not—and cannot—identify anything in FELA's text that would justify the "employee-friendly" standard of review adopted by the Court of Special Appeals.[2]

III. THE DECISION BELOW IMMUNIZES UNRELIABLE EXPERT TESTIMONY FROM EFFECTIVE CROSS-EXAMINATION.

In opposing review of Judge Nance's refusal to allow CSXT to cross-examine Plaintiff's damages expert about work-expectancy statistics, Plaintiff asserts that CSXT "was able to cross-examine Dr. Hamilton on the reliability of his assumption that Mr. Pitts would retire at 67 as opposed to 60." Answer 22.

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[2] None of the cases that Plaintiff cites for the proposition that FELA is to be construed liberally (*see* Answer 14) relied on a non-textual pro-employee bias. Rather, the result in each case depended upon an ***express*** statutory provision. To cite just two examples: *McBride* held 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." *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2634 (2011) (quoting 45 U.S.C. § 51). And *Kernan*, a Jones Act case, held that the violation of a maritime safety statute, like the violation of a railroad safety statute, imposes strict liability under FELA, and therefore under the Jones Act, because 45 U.S.C. § 53 expressly provides that a plaintiff's damages shall not be reduced by virtue of the plaintiff's contributory negligence "in any case where the [defendant's] violation … of any statute enacted for the safety of employees contributed to the injury or death of such employee." *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 428–39 (1958).

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, Judge Nance's limitation on CSXT's cross-examination, which precluded CSXT from questioning Hamilton about the work-expectancy statistics, 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.

Plaintiff also asserts that the decision below does not merit review because it merely affirms a "discretionary call." Answer 25. But, of course, even discretionary decisions are subject to review. Review is particularly appropriate in this case because the decision below is, after *Bickerstaff*, the second reported decision in which the Court of Special Appeals has sustained Judge Nance's improper limitation on CSXT's cross-examination notwithstanding this Court's long-standing recognition that it is reversible error to restrict cross-examination that would expose relevant information ignored by an expert witness. *Cf. Plank v. Summers*, 205 Md. 598, 606-08, 109 A.2d 914, 917-19 (1954).

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Mitchell Y. Mirviss
VENABLE LLP
750 E. Pratt Street, Suite 900
Baltimore , MD 21202
(410) 244-7412
mymirviss@venable.com

Evan M. Tager
Andrew E. Tauber
Carl J. Summers
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000
atauber@mayerbrown.com

C. Stephen Setliff
SETLIFF & HOLLAND, P.C.
4940 Dominion Blvd.
Glen Allen, VA 23060
(804) 377-1260
ssetliff@setliffholland.com

J. Christopher Nosher
SETLIFF & HOLLAND, P.C.
One Park Place, Suite 265
Annapolis, MD 21401
(443) 837-6800
cnosher@setliffholland.com

Counsel for CSX Transportation, Inc.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of May, 2012, I served four copies of the foregoing Petition for Writ of Certiorari, two on each of the counsel listed below, via overnight courier, postage prepaid:

H. David Leibensperger, Esq.
BERMAN, SOBIN, GROSS, FELDMAN & DARBY, LLP
32 West Road
Towson, Maryland 21204
Counsel for Plaintiff

C. Richard Cranwell, Esq.
CRANWELL, MOORE & EMICK
P.O. Box 11804
Roanoke, Virginia 24022-1804

_____
J. Christopher Nosher