IN THE COURT OF APPEALS OF MARYLAND

September Term, 2011

No. ___

CSX TRANSPORTATION, INC.,

Petitioner,

v.

EDWARD L. PITTS, SR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

This is a personal injury action under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq*. Plaintiff, a locomotive engineer, received a judgment of $1,246,000.00 in the Circuit Court for Baltimore City (Nance, J.) against Petitioner CSX Transportation, Inc. ("CSXT") for knee injuries he allegedly sustained while working in CSXT's rail yards. Plaintiff attributed his injuries to having worked on ballast, the crushed stone that is used to support railroad tracks. Plaintiff alleged that CSXT was negligent in having selected large rather than small sized ballast to support its railroad tracks. The case raises two issues of critical importance under the FELA and a significant evidentiary issue, not limited to FELA cases, that has arisen repeatedly in the Circuit Court for Baltimore City.

First, in three recent reported decisions (including this case), the Court of Special Appeals has held that the federal regulation governing ballast used to support track does not apply in rail yards and that, consequently, the Federal Railroad Safety Act does not preclude claims based on the size of the ballast chosen by a railroad to support track in a rail yard. That conclusion is contrary to the numerous decisions in other jurisdictions that have held that FELA claims based on the size of ballast used to support rail-yard track are indeed precluded by the federal ballast regulation. The distinction drawn by the Court of Special Appeals between track located in rail yards and other track finds no support in the relevant federal regulations, and CSXT is not aware of any other court having recognized the distinction. In fact, as the Sixth Circuit squarely held in *Nickels v. Grand Trunk Western Railroad*, 560 F.3d 426 (6th Cir. 2009), the ballast regulation applies to all track, including track within rail yards. This case therefore raises a significant issue of first impression—whether the ballast regulation (and, by extension, the other federal track-safety regulations) will be given a narrower scope of application in Maryland than elsewhere in the nation.

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. If it is not reversed, the Court of Special Appeals' avowedly "employee-friendly" decision will—unfairly and impermissibly—tilt the balance in all future FELA cases, depriving the defendants of a level playing field and ensuring the repeated commission of reversible error.

Third, the Court of Special Appeals' decision in this case is now the second decision in which that court has affirmed Judge Nance's refusal to allow CSXT to query a plaintiff's damages expert about occupational work-expectancy data, which show that the plaintiff's assertion that he intended to work until a particular age is not credible and that his claim for future lost wages is 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 he would have retired. But work-expectancy statistics reveal that a substantial majority of railroad workers retire at age 60, and that almost none work to the age of 67. Judge Nance refused to allow CSXT to cross-examine Plaintiff's economist using those statistics, and the Court of Special Appeals once again sustained his ruling, preventing CSXT from rebutting a fundamental assumption underlying Plaintiff's damages claim. Because the Court of Special Appeals has twice affirmed Judge Nance's ruling in reported decisions, that ruling, which is in no

way limited to FELA cases, will control personal-injury actions across the State and thus warrants review by this Court.

ACTION AND JUDGMENT IN THE LOWER COURTS

The Circuit Court for Baltimore City (the Hon. Alfred Nance) entered judgment for Edward L. Pitts, Sr. ("Plaintiff") against CSXT in the matter of *Pitts v. CSX Transportation, Inc.*, No. 24-C-08-7698 (OT). The Court of Special Appeals affirmed in the matter of *CSX Transportation, Inc. v. Pitts*, No. 837, Sept. Term, 2010, slip op. (Feb. 8, 2012), *available at* 203 Md. App. 343, 38 A.3d 445. It issued its mandate on March 30, 2012.

QUESTIONS PRESENTED FOR REVIEW

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 work-life 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 likely would have retired.

PERTINENT STATUTES, REGULATIONS, AND RULES

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.

. . .

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.

DOCUMENTS REQUIRED UNDER RULE 8-303(b)(2)

All required documents are attached.

STATEMENT OF FACTS

A. Plaintiff's work history.[1]

Plaintiff began working for a predecessor of CSXT in the early 1970s. E25-26.[2] Although he has had several job titles over the last four decades, Plaintiff's occupation has involved almost exclusively operating locomotive engines. E49-50. Plaintiff testified that about "80 percent of [his] day is spent seated in the cab of a locomotive engine." E30; *see also* E137. Other tasks that Plaintiff performs or has 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, changing the direction of 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.*, the space between the rails).

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1 *See generally* slip op. 2-5.

2 "E__" refers to the Record Extract in the Court of Special Appeals.

B. Plaintiff's medical condition.[3]

Plaintiff claims that his work in CSXT's rail yards caused him to suffer from bilateral osteoarthritis of the knees, a degeneration of the cartilage that coats the ends of his femur and tibia. *See* E160. Both of Plaintiff's medical experts admitted that osteoarthritis is very common in men Plaintiff's age irrespective of their employment (E96, 172, 174) and is directly associated with certain other health conditions that afflict Plaintiff, particularly obesity (E97, 175-78).

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 condition would continue to deteriorate with age (E170-71)—Plaintiff was 59 at the time of trial—and that he would be "surprised" if Plaintiff were able to work for five more years (*id.*).

C. Plaintiff's theory of liability.

Depending on the location, CSXT's train tracks are supported by various materials that function to support the tracks (and the trains on those tracks), allow 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

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[3] *See generally* slip op. 5-6.

separate from the track-support structure.

Plaintiff alleged that CSXT negligently used large rather than small ballast in the areas where he worked while performing the 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 petition.

D. Proceedings below

CSXT moved for summary judgment, arguing that Plaintiff's claim is precluded by federal law because the ballast on which he worked supported CSXT's tracks and thus was "covered" by the federal ballast regulation. E245-46 Judge Nance denied that motion, and the case proceeded to trial. 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%). The court accordingly entered final judgment for Plaintiff in the amount of $1,246,000.00—*i.e.*, 70% of $1,779,000. The Court of Special Appeals affirmed.

REASONS FOR GRANTING PETITION FOR CERTIORARI

As noted above, this petition presents the Court with an opportunity to address three crucial errors that have arisen in the Court of Special Appeals' recent FELA jurisprudence. Because the Court of Special Appeals' erroneous rulings have been repeated, each of these errors will, absent corrective action by this Court, recur in future FELA litigation in Maryland, and one may spread to other personal-injury contexts.

The first error involves a question of regulatory interpretation: Does 49 C.F.R. § 213.103, the federal regulation governing the ballast used to support railroad tracks, apply within rail yards or, as the Court of Special Appeals held, only on the main line? If that regulation does apply in rail yards, then it precludes any claim based on the characteristics of the ballast that a railroad has chosen to support the track in its rail yards. As numerous courts have held, and as the relevant regulatory language plainly dictates, the federal ballast regulation applies to ***all*** tracks—including those in rail yards. Accordingly, the Court of Special Appeals' contrary conclusion (which is certain to be applied in future Maryland FELA litigation) should be corrected. Doing so would entitle CSXT to judgment. The evidence showed that all of the ballast on which Plaintiff worked was either within or immediately adjacent to the gauge of the tracks, which means that it necessarily performed a track-support function and that Plaintiff's FELA claim is therefore precluded by 49 U.S.C. § 20106(a)(2) because 49 C.F.R. § 213.103 covers the subject of track-supporting ballast. At the very least, CSXT is entitled to a new trial in which the jury is instructed to differentiate between work that was performed on track-supporting ballast (as to which any claim is precluded) and work that was performed on non-supportive ballast (as to which a claim could in principle be asserted).

The second error presented in this petition involves the aberrant "employee-friendly" methodology adopted by the Court of Special Appeals in FELA cases—an interpretive approach that finds no support in the statute and is directly contrary to the Supreme Court's recent decision in *Sorrell*, which instructed lower courts that the only advantages afforded FELA plaintiffs are those set forth in the explicit language of the statute. *Sorrell* plainly forecloses the thumb-on-the-scale methodology adopted by the Court of Special Appeals, under which the "remedial purpose" of FELA justifies a generalized preference for plaintiffs in all matters that might arise in a FELA action. Although that impermissibly one-sided interpretive methodology affected all aspects of the Court

of Special Appeals' decision in this case, the court's error is most evident in its rulings on two erroneous jury instructions given by Judge Nance. First, contrary to every other court to have considered the issue, the Court of Special Appeals held that Judge Nance did not err in instructing the jury on FELA's remedial purpose. Second, it held that an instruction on negligence per se, although improper, was harmless when evaluated under the "employee-friendly" standard of review that the Court mistakenly believed to be applicable. Thus, the Court of Special Appeals' ruling commits a fundamental interpretive error that will affect all future FELA litigation in Maryland, and condones underlying instructional errors by the Circuit Court that will likewise affect future FELA cases in Maryland.

The third error raised in this petition involves a recurring evidentiary issue that is both significant and not limited to FELA cases. Specifically, the Court of Special Appeals has created an evidentiary rule that allows any plaintiff who is or may become disabled to recover hundreds of thousands of dollars in unjustified "future lost income" damages simply by claiming that he would have worked for years longer than he in fact had intended to work before his injury. The Court of Special Appeals has insulated these unverifiable claims from refutation by repeatedly affirming Judge Nance's refusal to allow defendants to introduce objective evidence about typical work-life expectancies for employees in the relevant industry. Indeed, the rule adopted by the Court of Special Appeals has created a paradigmatic Catch-22: Defendants cannot cross-examine the plaintiff's economist about work-life expectancy data because the information is not yet in evidence, and defendants cannot get the information into evidence because they are prohibited from questioning the economist about it. This profoundly unfair distortion of the evidentiary picture presented to the jury on the issue of future economic loss is certain to be repeated again and again unless and until this Court intervenes.

In sum, as discussed in more detail below, each of the three issues presented in this petition has arisen in several recent Court of Special Appeals'

decisions reviewing cases presided over by Judge Nance. The issues will continue to arise, and—absent intervention by this Court—the lower courts' errors will be perpetuated. It is time for this Court to act.

I. The Court Should Grant Certiorari To Clarify That The Federal Ballast Regulation Applies To All Tracks, Including Tracks Located In A Rail Yard.

There is no dispute that the Federal Railroad Safety Act precludes a FELA claim if the Federal Railroad Administration ("FRA") has issued a regulation "covering the subject matter" of that claim. 49 U.S.C. § 20106(a)(2); *see Nickels v. Grand Trunk W. R.R.*, 560 F.3d 426, 430 (6th Cir. 2009); *Waymire v. Norfolk & W. Ry.*, 218 F.3d 773, 775-76 (7th Cir. 2000); *Lane v. R.A. Sims, Jr., Inc.*, 241 F.3d 439, 442-43 (5th Cir. 2001). The question presented in this case is narrow but important: Has the FRA issued a regulation covering the subject matter of ballast used to support track ***in rail yards***? Or, stated differently, does the federal regulation that governs ballast used to support railroad track, 49 C.F.R. § 213.103, apply to ***all*** track, including that in rail yards, or only to track on the main line?

Although narrow, this question has already arisen in three recent Court of Special Appeals decisions: this case; *CSX Transportation, Inc. v. Miller*, 159 Md. App. 123, 858 A.2d 1025 (2004); and *CSX Transportation, Inc. v. Bickerstaff*, 187 Md. App. 187, 978 A.2d 760 (2007). And, given the Court of Special Appeals' erroneous conclusion that § 213.103 does not apply in rail yards, the issue—which this Court has yet to address—is sure to arise in future FELA litigation.[4] This

[4] To our knowledge, at least the following ballast cases currently are pending in Maryland courts: *Castillo v. Norfolk S. Ry.*, No. 24C11003985 (Cir. Ct. for Baltimore City); *Frasca v. Norfolk S. Ry.*, No. 24C11003970 (Cir. Ct. for Baltimore City); *Lydon v. Norfolk S. Ry.*, No. 24C11003925 (Cir. Ct. for Baltimore City); *Nelson v. CSX Transp., Inc.*, No. 24C10005316 (Cir. Ct. for Baltimore City); *Rolf v. CSX Transp., Inc.*, No. 24C11007476 (Cir. Ct. for Baltimore City); *Schaefer v. CSX Transp., Inc.*, No. 24C11007480 (Cir. Ct. for Baltimore City); *Yesker v. CSX Transp., Inc.*, No. 24C12000804 (Cir. Ct. for Baltimore City); *Zapora v. Norfolk S. Ry.*, No. 24C11005576 (Cir. Ct. for Baltimore City).

Court's guidance, therefore, would resolve an important recurring issue in Maryland FELA litigation.

The relevant legal background is not in dispute: Congress has 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). A regulation issued by the FRA expressly preempts any state-law claim "covering the [same] subject matter" as the regulation. 49 U.S.C. § 20106(a)(2)); *see also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Similarly, an FRA regulation precludes a FELA claim whenever the "subject matter" of the FELA claim is "covered" by an FRA regulation. *See Nickels*, 560 F.3d at 430; *Waymire*, 218 F.3d at 775-76; *Lane*, 241 F.3d at 442-43.

The FRA's pertinent regulation, 49 C.F.R. § 213.103, covers the subject of ballast used to support railroad track. *See* pages 4-5, *supra*. Section 213.103 requires that ballast used to support track satisfy four specific functional requirements (each of which is further detailed in other FRA regulations). Given the tremendous variation in local conditions that might affect track stability, the regulation leaves the choice of which ballast to use in a particular location "to the railroads' discretion so long as the ballast performs the enumerated support functions." *Nickels*, 560 F.3d at 431.

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 size of the ballast used by the railroad. *See, e.g.*, *Nickels*, 560 F.3d at 433; *Brenner v. Consol. Rail Corp.*, 2011 WL 1474296, at *6-*7 (E.D. Pa. Apr. 18, 2011); *Kresel v. BNSF Ry.*, 806 F. Supp. 2d 786, 794-95 (D. Minn. 2011); *Potrykus v. CSX Transp., Inc.*, 2010 WL 2898782, at *3 (N.D. Ohio July 21, 2010); *McCain v. CSX Transp., Inc.*, 708 F. Supp. 2d 494, 504 (E.D. Pa. 2010); *Crabbe v. Consol. Rail Corp.*, 2007 WL

3227584, at *4 (E.D. Mich. Nov. 1, 2007); *Ferra v. Canadian Nat'l/Ill. Cent. R.R.*, 2007 U.S. Dist. LEXIS 88457, at *18 (E.D. Mich. May 4, 2007); *Cogburn v. CSX Transp., Inc.*, 2009 WL 6921363 (Fla. Cir. Ct. Apr. 22, 2009); *Norris v. Cent. of Ga. R.R.*, 635 S.E.2d 179, 182-84 (Ga. Ct. App. 2006).[5]

The Court of Special Appeals correctly concluded that "the plain language of 49 C.F.R. § 213.103 demonstrates that the regulation applies to ballast used for track support" (slip op. 22) 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 23-24). Inexplicably, however, the Court of Special Appeals held that the regulation neither "'covers [n]or 'substantially subsumes' the issue of ballast used in rail yards" (*id.* at 22) and, based on that erroneous legal determination, held that "whether reviewing the plain language of 49 C.F.R. § 213.103, the legislative history of the regulation, or relevant case law, FELA claims involving the use of ballast in rail yards and walkways are not precluded by 49 C.F.R. § 213.103." *Id.* at 24.

Although the Court of Special Appeals was correct that the regulation does not cover ballast used for walkways that are entirely separate from the track-support structure, it was mistaken that § 213.103 does not cover ballast that performs a track-support function when the track at issue is located in a rail yard.[6]

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[5] 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.*, *Elston v. Union Pac. R.R.*, 74 P.3d 478, 488 (Col. Ct. App. 2003); *Grimes v. Norfolk S. Ry*, 116 F. Supp. 2d 995, 1002-03 (N.D. Ind. 2000). CSXT is not aware of any court, other than the Court of Special Appeals, that has held that § 213.103 does not apply to track in rail yards.

[6] The dispositive issue is whether the ballast in question affects track structure, not the location of the track structure involved. Claims arising from ballast used for walkways that do not affect track structure may proceed, whether those walkways are in rail yards or on the main line; conversely, claims arising

The relevant federal regulations leave no doubt that § 213.103 covers all track-supporting ballast, regardless of its location.

A. The FRA ballast regulation applies to all track.

Section 213.103, like all FRA track-safety regulations, "applies to ***all*** standard gage track in the general railroad system of transportation." 49 C.F.R. § 213.3(a) (emphasis added); *see also* 49 C.F.R. § 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." 49 C.F.R. Pt. 209, App. A. That plainly includes both main-line track and track within rail yards. Accordingly, 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).

In sum, the critical inquiry is whether the ballast in question performs a track-support function, not whether it is located on the main line or in a rail yard. 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. There is nothing in the statute, regulations, or legislative history to suggest that § 213.103 does not apply to ballast that is used to support track in rail yards.

The significance of the Court of Special Appeals' contrary ruling cannot be overstated. If sustained, it could have a significant adverse impact on railroad safety, because it purports to exempt rail yards from federal track-safety regulations. If rail yards fall outside the scope of the federal track-safety regulations, as the Court of Special Appeals held, then a railroad could, for example, select ballast for use in its rail yards without any regard for the track-

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from ballast that affects track structure are precluded, no matter where the track in question is located.

support requirements set forth in § 213.103, a potentially disastrous result that could cause train derailments or other deadly accidents that the track-safety regulations are intended to prevent. Accordingly, the Court of Special Appeals' rule, which erroneously excludes rail yards from the scope of 49 C.F.R. § 213.103, should be corrected.

B. Plaintiff's claims are precluded in whole or in part.

Once the Court of Special Appeals' mistaken interpretation of federal regulations is corrected, CSXT will be entitled to judgment in this case. That is because the undisputed evidence at trial showed that the ballast on which Plaintiff worked serves a track-support function. It is true that the Court of Special Appeals stated, *sua sponte*, that CSXT "did not present evidence at trial supporting its broad claim that ballast in rail yards … provides track support." Slip op. 24. But CSXT never argued that ***all*** ballast in rail yards provides track support, and Plaintiff never contested that the ballast on which he worked in CSXT's rail yards—which is the only ballast at issue here—provides track support. Indeed, 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 (emphasis added). By his own admission, when he was not physically in the locomotive (which was the vast majority of the time), Plaintiff's work duties were of the sort that required him to be either within the gauge of the tracks or immediately adjacent to the tracks:

- Throwing the switches that physically move the rails that enable trains to move from one track to another. E34-35. Those switches necessarily are located immediately adjacent to the rails that they move. Indeed, such switches properly are considered a part of the track. *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 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 standing immediately adjacent to the track because the engine or car is sitting on the track.

Consistent with Plaintiff's own testimony, Plaintiff's expert described Plaintiff as walking "along the tracks or between the tracks." E79.

Thus, 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." Slip op. 24. Plaintiff's claim is therefore precluded under 49 U.S.C. § 20106(a)(2), and CSXT is entitled to judgment. *See Nickels*, 560 F.3d at 431.

Alternatively, if the Court were to conclude that there is some evidence that Plaintiff spent a non-trivial amount of time on ballast that does not support track, then CSXT would at the very least be entitled to a new trial in which the jury is instructed that it may impose damages only for injuries caused by working on non-supportive ballast.

II. The Court Should Grant Certiorari To Correct The Court Of Special Appeals' Erroneous Belief That FELA Requires Application Of An "Employee-Friendly" Standard Of Review.

In *Sorrell*, the Supreme Court held that FELA abrogated the common law only to the extent made explicit by the text of the statute. The Court explained that, while "FELA was indeed enacted to benefit railroad employees, as the express abrogation of such common-law defenses as assumption of risk, the contributory negligence bar, and the fellow servant rule make clear, … [i]t does not follow … that this remedial purpose requires us to interpret every uncertainty in the Act in favor of employees." *Id.* at 171 (citing *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) ("[i]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law")). The Court then 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 statutory text expressly modifies the common law, an action under FELA is not different from any other negligence action.

The interpretive framework adopted by the Court of Special Appeals here and in other recent FELA cases is directly contrary to *Sorrell*. In its opinion here, the court began its analysis by declaring that "FELA cases have a different standard of review than common law negligence cases." Slip op. 11. 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 [sic] [] in a suit for common law negligence.'" *Id.* at 11-12 (quoting *Norfolk S. Ry. v. Tiller*, 179 Md. App. 318, 324, 944 A.2d 1272, 1276 (2008) (alterations in original)). Compounding these errors—which have no basis in the statutory language—the court concluded 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, 858 A.2d at 1038).

That, however, is precisely the type of interpretive mindset rejected by the Supreme Court in *Sorrell.* Under *Sorrell*, courts may not tilt the playing field in favor of FELA plaintiffs in this way. The only departures from generally applicable common-law principles authorized by FELA are those mandated by statutory language that explicitly alters the otherwise applicable rule. *See Sorrell*, 549 U.S. at 165-66 ("Absent express language to the contrary, the elements of a FELA claim are determined by reference to the common law.").[7]

[7] 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

The Court of Special Appeals' mistaken assumption that it must bend over backward to facilitate Plaintiff's recovery simply because he sued under FELA is reason enough for this Court to grant review. And the fact that this mistaken assumption influenced the Court of Special Appeals' consideration of two jury instructions given by Judge Nance makes the case a particularly good one in which to do so.

In the first of those instructions, Judge Nance—over CSXT's objection (E145)—instructed the jury on FELA's history and purpose, telling the jurors:

> 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). As the Fourth and Ninth Circuits have held, informing the jury about the purpose of 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").

Rejecting these precedents, the Court of Special Appeals held that Judge Nance's instruction was proper because it did not "give rise to an implication that the jury was required to rule in favor of appellee." Slip op. 47. But, of course, an

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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).

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, 655-65, 20 A.3d 765, 768-74 (2011). Here, there was no legitimate reason to inform the jury about FELA's purpose or the historical context in which it was enacted, and neither Plaintiff nor the Court of Special Appeals even purported to identify one. But, by giving this otherwise-pointless instruction, Judge Nance 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 Judge Nance's instruction and the Court of Special Appeals' permissive attitude on appeal, which led the court to condone that instruction without considering its lack of legitimate purpose and its unfairly prejudicial effect, violate the Supreme Court's directive in *Sorrell*. If the decision is not overturned, this erroneous instruction likely will be requested and given in every future FELA case—certainly ones over which Judge Nance presides. Accordingly, review is warranted now to put a stop to this unnecessary and prejudicial practice.

In the second of the two instructions, Judge Nance—again over CSXT's objection (E145)—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. The Court of Special Appeals agreed with CSXT that it was error to give this instruction because there was no evidence of a statutory violation. Slip op. 48-49. 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." *Id.*; *see also id.* at 49 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 finds no basis in FELA's text. It is, therefore, a direct violation of *Sorrell* that, without more, warrants correction by this Court.

Moreover, if the Court of Special Appeals had applied the correct, even-handed standard of review, it would have concluded that 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, 20 A.3d at 177.

Moreover, the two instructions at issue here 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 need only prove that his injury was caused by walking on that ballast to recover under FELA.

The Court should grant certiorari to correct the Court of Special Appeals' mistaken assumption that FELA actions require a systematic bias in favor of plaintiffs. Without guidance from this Court, the Court of Special Appeals' methodological error will continue to color its review of every FELA case that comes up on appeal, and will mislead trial courts attempting to interpret and apply

FELA in individual cases. The Court also should grant certiorari to correct the specific instructional errors that the Court of Special Appeals authorized under that mistaken standard.

III. The Court Should Grant Certiorari To Correct The Evidentiary Regime Established By The Court Of Special Appeals, Which Enables Plaintiffs To Claim Years Of Unjustified Future Lost Income Without Fear Of Effective Cross-Examination.

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, 697 A.2d 1358, 1366 (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. To quantify such damages, a plaintiff must prove both the periodic income he likely would have earned and the length of time he likely would have worked but for his injury.

The most objective and reliable evidence on the issue is average retirement-age statistics for the relevant industry. 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 work-life 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 here not only allows an expert opining on future lost income to ignore available work-life statistics, but makes it impossible for a defendant to effectively cross-examine the expert about that methodological flaw.

As in a typical personal injury case, Plaintiff's evidence regarding how long he would have worked had he not been injured consisted of his own testimony. Plaintiff said that he had intended to work until age 67 or 68. E104, 107.[8] Work-life statistics for the railroad industry indicate, however, that the great majority of railroad employees retire at age 60 and that ***almost none*** work to age 67 or 68. E107-08. Nevertheless, at the instruction of Plaintiff's 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 or 68. E104, 107.

CSXT attempted to cross-examine Hamilton on the available work-life 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 projections.[9] E107-08. But Judge Nance sustained Plaintiff's objection to further questioning and prevented CSXT from asking Hamilton what those statistics show or how consideration of those statistics would impact his projections of Plaintiff's future lost income. E108-10.

The Court of Special Appeals affirmed Judge Nance's refusal to allow CSXT's intended cross-examination. Slip op. 43-44. Although the court did not identify anything in CSXT's intended cross-examination that was improper, misleading, or unfairly prejudicial, it held that Judge Nance had acted within his 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

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[8] Each year of "intended" work was worth more than $60,000 (E105-06), so this subjective and unverifiable testimony was unavoidably self-serving.

[9] In fact, those statistics suggest that Plaintiff would have lost ***no*** future income as a result of his injury because he was not expected to become disabled until age 63 or 64 (E94), years after most railroad employees retire.

information' that "did not relate to appellee 'individually.'" *Id.* at 44 (quoting *Bickerstaff*, 187 Md. App. at 243, 978 A.2d at 792). Of course, the fact that statistical information "does not relate to appellee individually" is irrelevant. Economists, including Hamilton in this very case (*see, e.g.*, E104), regularly rely on statistical information when forming their opinions. And preventing cross-examination about this highly relevant information because it is not "already in evidence" places defendants like CSXT in a Catch-22. They cannot question the 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.[10]

The Court of Special Appeals' holding thereby violates this Court's guidance regarding cross-examination of experts. As this Court has long held, a party's right to freely explore the basis of an expert's opinion, to expose flaws in his analysis, and to bring overlooked facts to the jury's attention is a critical aspect of the adversarial process. *See, e.g.*, *Plank v. Summers*, 205 Md. 598, 606-08, 109 A.2d 914, 917-19 (1954) (holding that it was reversible error to restrict cross-examination into information that an expert arguably had overlooked). That right should not be so easily curtailed. If it is, then, as in this case, deeply flawed expert

[10] It is no answer to say that the defendant can retain its own expert and offer the evidence in its own case. Even if the 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, 807 A.2d 1141 (2002) (quoting *Somerset v. Montgomery County Bd. of Appeals*, 245 Md. 52, 66, 225 A.2d 294 (1966)). Requiring the defendant to introduce the work-expectancy statistics through its own expert also would place a cost on the defendant—retaining an expert on the limited issue of the plaintiff's work-life expectancy—that it otherwise would not have to bear.

testimony will be effectively insulated from critical questioning, and the fact-finding process will be irreparably distorted.

As this case demonstrates, the result of the Court of Special Appeals' profoundly unfair rule is that plaintiffs in personal-injury cases can 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.[11] Given Judge Nance's repeated refusal to allow effective cross-examination, 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, 978 A.2d at 791), and Plaintiff in this case claimed that he would not have retired until age 67 or 68 (E104, 107). Unless and until this Court acts, all FELA plaintiffs, like all the children of Lake Wobegon, will be above average—and will continue to receive improper damages for fabricated "lost" future income.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

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[11] The Court of Special Appeals pointed out that the jury heard testimony that Plaintiff would not be entitled to future economic damages ***if*** he would have retired before age 63 or 64 regardless of his injury. Slip op. 39-40. That, of course, is irrelevant. The relevant fact is that the jury was denied critical evidence of ***how likely*** it was that Plaintiff would indeed have retired before age 63 or 64, and, conversely, how profoundly unlikely it was that he would have continued working to age 67 or 68, as he claimed.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of April, 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:

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