In the Supreme Court of Florida

No. SC15-1639

CRYSTAL SELLS, *as personal representative of* THE ESTATE OF LARRY SELLS, *deceased*,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

District Court of Appeal Case No. 1D13-4775
Circuit Court Case No. 16-2009-CA-2330

RESPONDENT'S BRIEF

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INTRODUCTION

As petitioner sees it, CSX Transportation (CSXT) is liable for the death of her husband Larry Sells, not because he died as a result of an unsafe work environment, but because he happened to suffer sudden cardiac arrest while he was on duty for CSXT, and CSXT wasn't prepared to save his life with advanced medical interventions. That is a remarkable proposition. Sells' cardiac arrest was wholly unrelated to any workplace hazard; the only fact linking his death with CSXT is that it occurred while he was on the job. If Sells had suffered his cardiac arrest on his own time—while fishing, hunting, or hiking, or even just watching television at home alone—petitioner would not even have thought of suing CSXT. Petitioner nevertheless insists that CSXT should be held liable in this case on a theory that would effectively transform railroads into general risk insurers for their on-duty employees.

There are two glaring problems with that position. To begin with, petitioner's argument does not implicate a conflict within the meaning of Article V, Section 3(b)(3) of the Florida Constitution. The Court therefore should discharge jurisdiction without reaching the merits of any of petitioner's arguments. Setting that aside, petitioner's theory is flatly inconsistent with nearly a century of precedent construing federal common law under the Federal Employers' Liability Act (FELA). Holding CSXT liable under these circumstances would require railroads to assume something like an *in loco parentis* relationship with their employees, bound not only to ensure a work environment free of unreasonable hazards, but also to equip and train their employees to provide advanced medical interventions to save their fellow employees from any

non-work-related medical emergencies that might befall them while on the job. There is no limit to that theory of duty, which would oblige railroads (and ship owners) to anticipate and plan for not only cardiac arrests, but also acute asthma attacks, choking, anaphylactic allergic reactions, diabetic hypoglycemia, strokes, heart attacks, and more. The burdens associated with such a theory would be astronomical.

It therefore should come as little surprise that petitioner's theory runs counter to U.S. Supreme Court precedent and squarely conflicts with the holdings of numerous courts applying the federal common law of torts under FELA. Those courts have held repeatedly that, while railroads have a duty to render first aid and summon medical assistance within a reasonably time ***after*** becoming aware of an employee's medical emergency, they have no duty to prepare for medical emergencies ***before*** such emergencies arise. Petitioner has no persuasive response to these cases.

None of petitioner's other arguments is persuasive, either. The evidence uniformly indicated that Sells would have been brain dead long before the EMTs could have arrived, regardless of when or how CSXT had summoned them. And the evidence was easily sufficient to support the jury's finding that Sells' own negligence contributed to his death. Accordingly, the judgment of the First District Court of Appeal should be affirmed.

STATEMENT OF FACTS AND OF THE CASE

A. Legal background

Enacted in 1908, FELA establishes a compensation scheme for injuries sustained by railroad employees in the workplace. The Act gives state and federal courts

concurrent jurisdiction (45 U.S.C. § 56), but all FELA actions are governed substantively by federal law. *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 165 (2007). FELA provides the exclusive remedy for employees of interstate railroads, preempting state-law remedies. *Id.*

Unlike workers' compensation laws, which typically provide relief without regard to fault, FELA is a negligence statute. Section 1 of the Act provides:

> Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

45 U.S.C. § 51. The basic elements of a FELA cause of action are thus the same as those of any traditional tort: "breach of a duty of care (that is, conduct unreasonable in the face of a foreseeable risk of harm), injury, and causation." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 538 (1994).

"Absent express language to the contrary," these traditional tort elements and any defenses "are determined by reference to the common law." *Sorrell*, 549 U.S. at 165-166. That said, the Act "did away with several common-law tort defenses that had effectively barred recovery by injured workers." *Gottshall*, 512 U.S. at 542. "Specifically, the statute abolished the fellow servant rule, rejected the doctrine of contributory negligence in favor of that of comparative negligence, . . . prohibited employers from exempting themselves from FELA through contract, . . . abolished the assumption of risk defense," and "relaxed [the] standard of causation." *Id*. at 542-543. It is "[o]nly to the extent of these explicit statutory alterations" that the Act may be under-

stood as a "'departure from the rules of the common law.'" *Id.* at 544 (quoting *Sinkler v. Mo. Pac. R.R.*, 356 U.S. 326, 329 (1958)).

Finally, although FELA has in many instances made recovery by railroad employees easier, it "does not make the employer the insurer of the safety of his employees while they are on duty." *Gottshall*, 512 U.S. at 542-543. On the contrary, "[t]he basis of [a railroad's] liability [under FELA] is [its] negligence, not the fact that injuries occur." *Id*. at 543.

B. Factual background

In June 2005, while living in Long Island, New York, and anticipating a move to Florida, Sells underwent an electrocardiogram (EKG) that "indicat[ed] a possible abnormality." R17:91. *Id.* His physician referred him to a cardiologist to whom Sells reported that he had "had intermittent chest pain that comes and goes without any clear precipitants." R17:95; *see also* R19:9-10. The cardiologist performed a second EKG, which revealed the "same area of abnormality." R17:97; *see also* R19:10. She recommended that Sells visit a cardiologist for further testing once he arrived in Florida. R17:98, 101; R19:12-13. Sells did not do so. R17:101, 168; R18:297-98.

After his move, Sells applied to work at CSXT. R18:269, 305-06. As part of the hiring process, Sells completed a questionnaire concerning his health history. R6:1099-1100; R20:180. The questionnaire asked whether Sells had experienced either "heart, vein or artery trouble" or "chest pains." R20:181; R6:1099. Sells answered "no" to both questions. R20:182; R6:1099. Unaware of Sells' cardiac history, CSXT hired him as a conductor. R18:307-08; R20:183.

On August 14, 2006, Sells was working with Richard Wells, a CSXT engineer, on a "road switch[ing]" job in Clay County, Florida. R18:210-12; R15:56-57. After stopping the locomotive, Sells dismounted to operate a switch. R18:215-16. Wells heard the switch make the usual "clunk[ing]" noise, but heard nothing from Sells after that. *Id.* Wells initially "didn't think too much about it" and "got . . . a bottle of water" and "took a couple of sips." R18:216. But he then "got worried" because of their tight schedule and "looked out the back window," from which he saw Sells "laying on the ground face up." R18:216-17. Sells had gone into cardiac arrest. *E.g.*, R17:184-85.[1]

Wells immediately radioed CSXT's dispatcher on the "emergency channel." R18:217. Wells reported that Sells was "down" and that, as the only person in the vicinity, he would "try to help" him. R16:198; R18:217. By the time Wells reached Sells, two or three minutes had elapsed since they had last spoken. R18:219-20.[2] Sells was not breathing and had no pulse. R18:217. Wells did not know how to perform CPR but "attempted" to apply "chest compressions." *Id.* He was unsuccessful in reviving Sells. *Id.* That may have been in part because he stopped short: "[S]weat was

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[1] Sudden cardiac arrest is a condition in which the heart suddenly and unexpectedly stops beating, and blood therefore stops flowing to the brain and other vital organs. Sudden cardiac arrest is not the same thing as a heart attack, which occurs when blood flow to part of the heart is blocked, typically by a waxy plaque that builds up on arterial walls. During a heart attack, the heart usually does not stop beating. *See* R19:38-40.

[2] Contrary to petitioner's suggestion (Petr. Br. 9), Wells did not testify that using the radio "delayed him from helping Mr. Sells for a couple minutes." He said that two to three minutes ***in total*** passed from the time he "last heard from" Sells to the time he reached Sells after using the radio. R18:255.

pouring off me like crazy, and I just decided that since I did have a heart attack myself a few years earlier that was no sense in both of us being dead." R18:222.

After some confusion concerning Sells' location, CSXT's dispatcher called 911, and EMTs were dispatched to the scene. *See, e.g.*, R15:98-110; R18:224. It is undisputed that, regardless of any delay, "15 minutes was as quick as" the EMTs could have reached Sells. R17:78. Sells was declared dead at the scene. R17:67-68.

C. Procedural background

Pre-trial proceedings. Petitioner—Sells' surviving spouse—filed this lawsuit, alleging that CSXT's negligence contributed to Sells' death. Petitioner did not allege, and has not argued, that CSXT ***caused*** Sells' cardiac arrest. *See, e.g.*, R4:650-55; R9:1591-92. Instead, she alleges "that [CSXT] contributed to Mr. Sells' death by failing to furnish him with prompt … medical attention." R9:1592; *see also* R4:652. Petitioner maintains that CSXT "should have trained its employees in [CPR]" and "provided automated external defibrillators [('AEDs')]" or taken other steps "in anticipation of the possibility that an employee might suffer severe cardiac problems" while on the job, even when those problems are not caused by the employee's work or the conditions of the workplace. R9:1592. She "also argue[s] that [CSXT] negligently delayed the arrival of emergency medical personnel." *Id.*

CSXT moved for summary judgment (R1:15-36), and the circuit court granted the motion in part. Specifically, the circuit court held that the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20109(a)(2), precluded petitioner's theory that CSXT should have trained Wells in CPR. R14:3-4. Petitioner also conceded, and the circuit

court held, that the Locomotive Inspection Act ("LIA"), 49 U.S.C. § 20701, precluded "any claim [that] the locomotive didn't have [an AED on board]." R14:4. The court allowed petitioner's other theories to proceed. *E.g.*, R14:6, 12-14.

The circuit court also held that CSXT could not argue that Sells' failure to "take[] care of himself" constituted negligence. R14:24. It did, however, permit a comparative-negligence defense based on Sells' failure to "disclose[]" his cardiac history to CSXT. R14:19.

Trial proceedings and evidence. At trial, petitioner maintained that CSXT should have taken steps in anticipation of the possibility that Sells might suffer a sudden cardiac arrest (*e.g.*, R15:41-43) and that it negligently delayed the arrival of the EMTs (*e.g.*, R15:38-41). CSXT presented a comparative-negligence defense based on Sells' concealment of his cardiac condition. *E.g.*, R15:70-76.

1. With respect to petitioner's claim that CSXT negligently failed to anticipate and plan for non-work-related medical emergencies like Sells' cardiac arrest, petitioner's expert—industrial hygienist Michelle Copeland—acknowledged that CSXT cannot be liable under FELA for failing to install AEDs on its locomotives; she thus opined instead that "CSX is negligent because the engineer and the conductor didn't carry an AED up on the locomotive with them." R16:183. Copeland conceded, however, that it "would [not] be reasonable" to require CSXT, as an alternative, to "put AEDs every minute-and-a-half walking distance on the railroad track." R16:183 ("I've never said that, and I don't think that would be reasonable to do.").

As for CPR, Copeland admitted that CSXT "ha[s] been providing voluntary CPR training" to its employees for more than a decade. R16:148; *accord* R16:192. She also agreed that "the Railroad does not have a duty to train its engineers in the administration of CPR." R16:154. She opined nevertheless that "you can increase the odds that [engineers are] able to provide CPR, either by having them call 911 directly, or by having your dispatcher prepared to coach them through how to do a CPR response." R16:154.

2. The undisputed evidence at trial showed that the soonest that emergency personnel could have begun treating Sells was 17-18 minutes after Sells' collapse. Petitioner has conceded that Wells did not discover Sells until two to three minutes after Sells suffered cardiac arrest. *See* Petr. Br. 3; *see also* R15:38-39 (opening statement); R18:215-20, 255 (Wells' testimony). And it is undisputed that it took the EMTs just over 15 minutes from the time they were dispatched to the time they began treating Sells. R17:78 (testimony of EMT Brockwell).

Copeland testified that it was "absolutely true" that, absent earlier treatment with an AED or CPR, Sells' chance of surviving 15 minutes after cardiac arrest was "nonexistent." R16:197-98. The three testifying physicians corroborated that conclusion. Dr. Michael Fifer (petitioner's expert cardiologist) and Dr. Orlando Bautista (Sells' treating physician) both testified that "[b]rain death begins to occur after four or five minutes" following cardiac arrest (R17:186) and that a person will be irrevocably "brain dead" after ten minutes (R17:116; *see also* R17:120, 123). Because the evidence showed that the EMTs could not have begun CPR in less than 15 minutes, Dr.

Fifer thus concluded that, absent prior treatment with an AED or CPR, it did not "matter if the EMTs got there 15 minutes or 35 minutes" after Sells went into cardiac arrest, because "he would not be able to be resuscitated" at either time. R17:185, 191; *accord, e.g.*, R17:135. CSXT's expert cardiologist Michael Zile agreed, testifying that the delay in calling 911 "did not" "make any difference to Mr. Sells' survivability." R19:64.

Drs. Fifer and Zile both testified that Sells "had coronary artery disease," which—in Dr. Fifer's words—can lead "to an arrhythmia" that in turn could cause "sudden death." R17:165-66; *see also* R17:107-09, 134; R19:41-44. Drs. Fifer and Zile agreed that additional cardiologic "testing" could have uncovered the "condition in [Sells'] heart that was going to lead to his death." R17:172; *see also* R19:75. Dr. Zile added that, had Sells been diagnosed, "treatments would have reduced the likelihood that [he] would have suffered from sudden cardiac death." R19:79.

The jury found that negligence on the parts of both CSXT and Sells contributed to Sells' death. R7:1275-76. It found $1.98 million in damages and held Sells to be 45% responsible for those damages. *Id.*

Post-trial motions. CSXT filed a motion to enter judgment in accordance with its directed verdict motion or, in the alternative, for a new trial. R7:1322-29; R8:1427-77. Petitioner, meanwhile, filed a motion to set aside the jury's comparative-negligence finding. R8:1379-90.

The trial court granted CSXT's motion to enter judgment in accordance with the directed verdict motion. R9:1591-99. It held that CSXT "did not have a duty to make

AEDs available to its employees, to train its employees to use AEDs [or CPR]," or to take "other steps in anticipation of the possibility that Mr. Sells would suffer cardiac arrest." R9:1593. It further "conclude[d] that [CSXT] had no duty to provide its employees with AEDs" because doing so would be "unreasonably burdensome," meaning that any harm from failing to have AEDs was unforeseeable as a matter of law. R9:1595-96. And the court rejected petitioner's theory that CSXT "breached its duty to provide timely medical care," holding that "plaintiff presented no evidence that" any delay in summoning EMTs "caused [Sells'] death." R9:1597.

"To facilitate complete appellate review," the circuit court summarily addressed, and denied, CSXT's motion for new trial. R9:1598. It also denied petitioner's motion to set aside the comparative-negligence finding, holding that Sells' "nondisclosure of his cardiac … history provides a basis for [that] finding." *Id.*

Proceedings before the First District. By a 2-1 vote, the First District Court of Appeal affirmed. *See Sells v. CSX Transp., Inc.*, 170 So. 3d 27 (Fla. 1st DCA 2015).

With respect to petitioner's claim that CSXT should have procured AEDs and trained employees to use them, the First District began by observing that railroads' duty under FELA "to exercise reasonable care in providing a reasonably safe workplace" subsumes "the duty to . . . procure medical aid and assistance for an employee when, to the employer's knowledge, the employee becomes seriously ill and unable to care for himself." *Sells*, 170 So. 3d at 33 (citing *S. Pac. Co. v. Hendricks*, 339 P.2d 731, 733 (Ariz. 1959); *Szabo v. Pa. R.R.*, 40 A.2d 562, 563 (N.J. 1945)). But, the court explained, this obligation "to furnish prompt medical attention" is not a standing duty;

rather, "'[i]t arises with the emergency and expires with it.'" *Id*. (quoting *Hendricks*, 339 P.2d at 733).

As the court further explained, it follows that FELA imposes no ***pre***-emergency duty on railroads "to take preventive actions in anticipation of" medical emergencies that might arise on the job, when such emergencies are not related to railroad work itself. *Id*. (citing *Wilke v. Chi. Great W. Ry.*, 251 N.W. 11, 13 (Minn. 1933)). "Thus," the court concluded, "long-standing case law establishes that . . . CSX had to procure prompt emergency medical treatment for Sells once it knew that he was seriously ill," but "it did not have a duty to take anticipatory measures to prevent such emergency situations." *Id*.

Recognizing that "common law principles of duty are entitled to great weight in [any court's] analysis of [FELA]" (*Sells*, 170 So. 3d at 33 n.4), the court next looked to analogous cases, including *L.A. Fitness International, LLC v. Mayer*, 980 So. 2d 550 (Fla. 4th DCA 2008). There, "the Fourth District concluded that a business owner satisfied the legal duty to aid a patron experiencing a medical emergency by summoning medical assistance within a reasonable time" and as a matter of law could not be held liable "for failing to administer CPR, failing to have an AED on its premises and to use it on the deceased, and failing to properly train its employees in the handling of medical emergencies." *Sells*, 170 So. 3d at 34.

The court also considered this Court's decision in *Limones v. School District of Lee County*, 161 So. 3d 384 (Fla. 2015), which "held that it was for the jury to decide whether the school breached its duty to supervise its students when it failed to admin-

ister an AED on a student after he collapsed during a high school soccer game." *Sells*, 170 So. 3d at 34. But because "[t]he relationship between an employer and an employee is more similar to the relationship between a business and a customer than it is to the relationship between a school and a student," the court ultimately concluded that, "as in *L.A. Fitness*, CSX's duty was limited to summoning medical assistance once it learned that its employee was injured." *Id*.

As for petitioner's claim that CSXT negligently failed to summon the EMTs in a timely manner, the court held that petitioner had "presented no evidence to establish that CSX's delay in summoning medical assistance caused Sells' death." *Sells*, 170 So. 3d at 35. The court explained that "[t]he uncontroverted trial testimony established that, absent any delays, the EMTs could not have arrived on scene until fifteen minutes after Sells went into cardiac arrest," and "[a]s conceded by counsel at oral argument, the medical testimony conclusively demonstrated that the administration of emergency medical treatment at that point in time, without more, could not have prevented Sells' death." *Id*. at 36.

Concluding finally that CSXT had no obligation to require Wells or its other employees to provide CPR rather than simple first aid (*Sells*, 170 So. 3d at 37-39), the majority affirmed without addressing the jury's comparative-negligence finding.

SUMMARY OF ARGUMENT

I. As a threshold matter, the Court should discharge jurisdiction without reaching the merits. The question presented here—whether railroads have a duty ***under FELA*** to anticipate and plan for non-work-related medical emergencies suf-

fered by on-duty employees—has not been addressed by any other appellate court in this State. There is therefore no other decision with which the decision below can be said to conflict. In particular, there is no conflict with either *Limones* or *Hicks v. Kemp*, 79 So. 2d 696 (Fla. 1955), the two cases invoked in the petition. *Limones* involved an entirely different question: whether a soccer coach should have used an AED on a stricken student, given that the AED was available—indeed, required by statute—and the coach was trained to use it. The case turned on state law, not federal law, and on the special school-student relationship, which is not present here. 161 So. 3d at 392. *Hicks* meanwhile stands for the unremarkable proposition—with which the court below was in full accord (*see Sells*, 170 So. 3d at 33)—that "a master . . . has a positive duty to provide his servant with reasonably safe instrumentalities and places to work." 79 So. 2d at 699.

II. If the Court reaches the merits, it should affirm. To begin with, petitioner has conceded that the LIA prevents a court from imposing liability under FELA for failing to install AEDs aboard locomotives. And she similarly waived any challenge to the circuit court's determination that the FRSA prevents a court from imposing liability under FELA for failing to train engineers like Wells in CPR. That leaves petitioner defending the clumsy position that CSXT should have required its employees (including Wells) to ***carry*** AEDs with them and trained the ***radio dispatcher*** in CPR, so that the dispatcher could have coached Wells over the airwaves.

That theory is not only awkward—it is wrong. Although railroads (like other employers) have a duty to procure prompt medical attention for employees they know

to be ill or injured and unable to help themselves, the cases uniformly have held that this duty arises with the emergency and expires with it; in other words, railroads have no obligation to take affirmative steps to prepare for an emergency when no emergency yet exists. We have cited these cases at every step of this litigation, and the First District relied on them at length. Petitioner simply ignores them.

Beyond that, the rule for which petitioner advocates would convert railroads into general risk insurers for their employees while on duty. That unavoidable result is irreconcilable with the U.S. Supreme Court's repeated admonition that railroads may not be held liable under FELA merely because an injury or illness occurs on the job; rather, they are liable only when their own negligence contributes to the injury. Accepting petitioner's contrary view—that CSXT can be held liable because it failed to anticipate that Sells might suffer a cardiac arrest on the job and wasn't prepared to save his life—would impose a crippling burden on railroads to anticipate every potential injury or illness that might arise and to train and equip its employees to stand in the shoes of emergency first responders, prepared at any moment to administer advanced medical interventions.

III. Petitioner's theory that CSXT unreasonably delayed the arrival of EMTs is equally meritless. The undisputed evidence showed that the EMTs could not have arrived in time to save Sells from brain death in any circumstance. According to petitioner's own expert, brain death begins after just a couple of minutes following cardiac arrest and becomes irreversible after 10 minutes. The evidence showed unequivo-

cally that the earliest that the EMTs could have begun treating Sells was 17 to 18 minutes following his collapse—much too late to save his life.

IV. If the Court reaches the comparative-negligence issue, it should affirm the jury's finding. The evidence was amply sufficient to show that Sells' untruthful answers to certain questions concerning his health on CSXT's employment questionnaire made his death more likely.

STANDARD OF REVIEW

This Court reviews de novo a judgment notwithstanding the verdict. *Specialty Marine & Indus. Supplies, Inc. v. Venus*, 66 So. 3d 306, 309 (Fla. 1st DCA 2011).

ARGUMENT

I. JURISDICTION SHOULD BE DISCHARGED

Before reaching the merits, the Court must assure itself that review is proper under the "conflict jurisdiction" clause of Article V, Section 3(b)(3) of the Florida Constitution. It is not.

A. The Court's discretion to accept review under Section 3(b)(3) is "narrowly circumscribed by what the people have commanded" in the text of that provision. *Fla. Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988). Thus, although "this Court has the final and inherent power to determine what constitutes express and direct conflict," it must exercise that power in conformity with the limiting constitutional language and its precedents interpreting that language. *Id*. And it must "refus[e] to exercise [its] discretion where the opinion below establishes no point of law contrary to a decision of this Court or another district court." *Id*. at 288-289.

That two courts have employed discrepant reasoning in their approaches to different legal questions is insufficient for purposes of Section 3(b)(3). "It is conflict of Decisions, not conflict of Opinions or reasons that supplies jurisdiction for review by certiorari." *Gibson v. Maloney*, 231 So. 2d 823, 824 (Fla. 1970) (citing Fla. Const. art. V, § 4(2) (1968)). And because any ostensible conflict between two courts on ***different issues of law*** can never reflect more than discordant reasoning, it follows that Section 3(b)(3) jurisdiction requires "divergent decisions on the ***same point of law***." *Kyle v. Kyle*, 139 So. 2d 885, 887 (Fla. 1962) (emphasis added). "[I]f the points of law settled by the two cases are not the same, then no conflict can arise." *Id.*

Practically speaking, that means that the "conflict must be such that if the later decision and the earlier decision [had been] rendered by the same Court[,] the former would have the effect of overruling the latter." *Kyle*, 139 So. 2d at 887. More broadly put, "[t]he test of [this Court's] jurisdiction in [cases like this] is not measured simply by [its] view regarding the correctness of the Court of Appeal decision." *Id.*

B. Viewed in light of these standards, the First District's decision below does not conflict with any decision of this Court or any other district court of appeal.

The question in this case is whether a railroad's duty under FELA to provide employees with a reasonably safe workplace encompasses a duty to train and equip its employees to provide emergency medical care like CPR and defibrillation to co-workers who experience a non-work-related medical emergency while on the job. That question has not been answered by any Florida appellate court other than the court below. For that reason alone, there can be no conflict under Section 3(b)(3).

According to petitioner, the decision below conflicts with this Court's admonition in *Limones* that courts should not "expand[]" their roles and "invade[] the province of the jury" by narrowly defining the tort duty at issue. *See* Petr. Juris. Br. 7-8 (quoting *Limones*, 161 So. 3d at 389-390). She also has invoked the Court's conclusion in *Hicks* that the duty of master to servant is greater than the duty "exist[ing] between persons dealing at arm's length and in the absence of a master-servant relationship." *Id*. at 9 (quoting *Hicks*, 79 So. 2d at 699). Neither of those statements establishes a "point of law" that is "contrary" to the holding below. *Fla. Star*, 530 So. 2d at 289.

Limones involved a student who collapsed on the field at a school soccer game. 161 So. 3d at 387. Florida law ***already*** required all public schools to have an AED on the premises and all staff to be trained in its use. *See* Fla. Stat. § 1006.165. The problem in *Limones* was that the coach did not use the AED to attempt to revive the boy, who suffered severe brain damage as a result. 161 So. 3d at 387. Thus, the question was whether, by not using the readily available AED, the school breached its "duty to take appropriate ***post***-injury efforts to avoid or mitigate further aggravation of [the student's] injury." *Id*. at 391 (emphasis added). The Court rightly described that question as one of breach and not of the school's duty.

The Court in *Limones* had no occasion to address the issue that would have been analogous to the one presented here: whether the school's post-injury duty to mitigate students' injuries encompassed a ***pre***-injury duty to equip and train school staff to use devices like AEDs or to administer CPR. Florida Statutes § 1006.165 had

already imposed such a duty as a matter of law; and as a matter of fact, there was an AED present and the coach knew how to use it. Those are critical distinctions from the circumstances of this case.

Even if the Court had addressed the question whether the school had a pre-emergency duty to anticipate and plan for on-campus medical emergencies, however, there still would not be a conflict for purposes of Section 3(b)(3), for two reasons.

First, the relationship between a school and student (the relationship at issue in *Limones*) is manifestly distinguishable from the relationship between an employer and employee (the relationship at issue here). The Court said as much in *Limones*: "Compulsory schooling creates a ***unique*** relationship" between school staff and students that carries with it "a specific duty of supervision" arising from a school's assumption of "the place of parents during the school day and school-sponsored activities." 161 So. 3d at 390, 392 (emphasis added). By definition, a decision that turns on the "unique" relationship between schools and students cannot possibly conflict with a decision involving a different relationship.

Second, the relationship between a railroad and its employees is itself unique even among employer-employee relationships because it is governed not by state tort law, but by FELA—a ***federal*** law. Although "FELA provides for concurrent jurisdiction of the state and federal courts, . . . substantively, FELA actions are governed by federal law." *Sorrell*, 549 U.S. at 165 (citing *Chesapeake & Ohio Ry. v. Stapleton*, 279 U.S. 587, 590 (1929)). As the Texas Supreme Court has recently explained, in ascertaining federal common law in a FELA case, courts must "look to the common law,

not of Texas or any particular jurisdiction, but in general." *Union Pac. R.R. v. Nami*, ___ S.W.3d ___, 2016 WL 3536842, at *4 (Tex. June 24, 2016). Yet the Court in *Limones* was unmistakably clear that the Second District had "incorrectly expanded ***Florida*** law" defining the limits of the duty inquiry. 161 So. 3d at 389 (emphasis added). Because the decision below decided an issue of federal law, while *Limones* avowedly decided an issue of Florida law alone, the two decisions cannot in any conceivable sense be described as "divergent decisions on the ***same*** point of law." *Kyle*, 139 So. 2d at 887 (emphasis added).

Hicks likewise creates no conflict. There, the Court held simply that there were disputes in the evidence concerning the existence of an employer-employee relationship, making the grant of a summary judgment inappropriate. 79 So. 2d at 698-699. On the path to reaching that decision, the Court observed that "[a]lthough a master is not an insurer of his servant's safety, he has a positive duty to provide his servant with reasonably safe instrumentalities and places to work." *Id*. at 699. In contrast, "such a duty does not exist between persons dealing at arm's leng[th] and in the absence of a master-servant relationship." *Id*. No plausible reading of the decision below conflicts with that reasoning. The court below held only that an employer's relationship with its employees is closer to a business's relationship with its customers than it is to a school's *in loco parentis* relationship with its students. *Sells*, 170 So. 3d at 34. *Hicks* does not remotely suggest otherwise—indeed, it doesn't speak to that question at all. To the extent *Hicks* is saying anything relevant, it is that "a master is not an insurer of

his servant's safety" (*Hicks*, 79 So. 2d at 699), a proposition that is consistent—not in conflict—with the decision below. *See infra* Part II.C.

It would blink reality to say that, if *Limones* and *Hicks* had been decided by the First District, its decision in this case "would have the effect of overruling" either one of them. *Kyle*, 139 So. 2d at 887. Indeed, the approach taken by the First District is entirely consistent with *Limones* and *Hicks*, as we demonstrate below. There accordingly is no conflict sufficient to support jurisdiction under Article V, Section 3(b)(3), and the Court should therefore discharge jurisdiction.

II. THE CIRCUIT COURT WAS CORRECT IN ENTERING JUDGMENT IN FAVOR OF CSXT ON THE AED AND CPR CLAIM

If the Court reaches the merits of the appeal, it should affirm. To begin with, the LIA and FRSA preclude the heart of petitioner's claim: that CSXT is liable for failing to install AEDs on locomotives and for failing to train engineers like Wells in the use of CPR. Petitioner's remaining theories—that CSXT negligently failed to equip Wells and all similarly situated employees with AEDs to carry with them at all times, train its dispatchers to coach employees in CPR and other emergency procedures on the fly, and require employees to carry cell phones and use them to call 911 to receive coaching in CPR and other procedures for responding to medical emergencies—are meritless. For nearly a century, courts throughout the nation have held that FELA imposes no duty to anticipate and plan for non-work-related medical emergencies. On the contrary, a railroad's duty to aid a stricken employee arises with the emergency and expires with it. It therefore does not entail a duty to anticipate a non-work-related medi-

cal emergency by equipping and training employees to stand in the shoes of emergency first responders. Any other conclusion would convert railroads into general risk insurers, imposing disproportionate and unmanageable burdens.

A. Petitioner's Claim Is Narrowed By The LIA And The FRSA

We lead off with an important clarification. Although over the course of this case petitioner and her expert witness have argued that CSXT breached its duty to provide a reasonably safe work place in myriad ways, pre-trial rulings by the trial court, concessions by petitioner, and the relevant jury instructions—to which petitioner did not object—substantially narrowed the theories upon which petitioner is entitled to proceed.

To begin with, it is undisputed that the LIA precludes any claim that CSXT is liable for failing to keep AEDs on its locomotives. The circuit court so held (R14:4), and petitioner has conceded as much at every stage of this ligation, including before this Court. *See* Petr. Br. 4-5 (the "claim for failing to have an AED affixed to the locomotive [is] preempted"). Thus, the circuit court instructed the jury—***without objection from petitioner***—that "under the law CSX is not negligent for the fact that there was no Automated External Defibrillator, or AED, on the locomotive that Mr. Sells was working on" and therefore "you may not find CSX at fault for Mr. Sells' death by reason of the locomotive not having an AED on it." R7:1190.

The circuit court similarly held that the FRSA precludes petitioner's theory that CSXT should have trained Wells in CPR. R14:3-4.As the U.S. Court of Appeals for the Ninth Circuit has held, federal regulations promulgated under the FRSA to stand-

ardize the "training" and "continuing education" of engineers on the topics of "safety" and "operating rules and practices" (49 C.F.R. § 240.123) preempt all other laws, rules, and regulations on the same topic. *Union Pac. R.R. v. Cal. Pub. Utils. Comm'n*, 346 F.3d 851, 868 (9th Cir. 2003). The circuit court thus instructed the jury—***again without objection from petitioner***—that "under the law CSX is not negligent for the fact that [Wells] was not trained in [CPR]" and "you may not find CSX at fault for Mr. Sells' death by reason of the locomotive engineer, Mr. Wells, not having . . . CPR training." R7:1190.[3]

Precluded from arguing that CSXT should have kept AEDs on its locomotives or trained its engineers in CPR, petitioner is left defending the awkward proposition that CSXT should have required Wells to ***carry*** an AED with him in his bag or trained its ***radio dispatchers*** to coach engineers and other crew members how to perform CPR on the fly.

It is only these more contrived duties that are at issue here. As we now demonstrate, Sells' contention that FELA might require railroads to do such things is not just farfetched; it's simply ***wrong***.

[3] In her briefing in the First District, petitioner did not contest the circuit court's grant of summary judgment or the jury instructions concerning preclusion. Those issues are therefore "not before [this Court] on appeal." *Tillery v. Fla. Dep't of Juvenile Justice*, 104 So. 3d 1253, 1255-1256 (Fla. 1st DCA 2013).

B. FELA Does Not Obligate Railroads To Anticipate And Plan For Non-work-related Medical Emergencies That Happen On The Job

1. The duty to procure prompt medical attention imposes no standing obligations and instead arises and expires with the emergency itself

a. Under long-standing common law, employers generally owed no duty to provide medical care to injured or ill employees. *See, e.g.*, *Szabo*, 40 A.2d at 563. In the context of FELA cases, the Supreme Court has recognized an exception to this rule "when the servant, exposed by the conditions of the work to extraordinary risks, is helpless altogether unless relief is given on the spot." *Cortes v. Balt. Insular Lines, Inc.*, 287 U.S. 367, 376 (1932).[4] Following *Cortes*, other courts have explained that FELA requires railroads to "render medical assistance" to an employee "'when [the] employee, to the employer's knowledge, becomes so seriously ill while at work as to render him helpless to obtain medical aid or assistance for himself.'" *Bell v. Norfolk S. Ry.*, 476 S.E.2d 3, 5 (Ga. Ct. App. 1996) (quoting *Handy v. Union Pac. R.R.*, 841 P.2d 1210, 1221 (Utah Ct. App. 1992)); *accord Szabo*, 40 A.2d at 563.

The duty recognized in this cases is, however, a narrow one: "In order to recover on such a claim, the worker must establish that he became ill at work, that without prompt medical treatment he faced death or serious bodily harm, that the employer had notice of his illness, that the employer failed to furnish prompt medical at-

[4] *Cortes* arose under FELA's maritime cousin, the Jones Act. In the course of interpreting the Jones Act, however, the Court turned to FELA, noting that the two laws must be construed together, and that "the standards" from one are "carried over and adopted" by the other. *Id*.

tention, and that his death or injury resulted in whole or in part from the employer's delay in response." *Pulley v. Norfolk S. Ry.*, 821 So. 2d 1008, 1014-1015 (Ala. Civ. App. 2001); *accord Rival v. Atchison, Topeka & Santa Fe Ry.*, 306 P.2d 648, 651 (N.M. 1957). This is the universally accepted test for establishing liability under FELA for failure to respond to a medical emergency on the job. *See, e.g.*, *Randall v. Reading Co.*, 344 F. Supp. 879, 884 (M.D. Pa. 1972); *Hendricks*, 339 P.2d at 736; *Szabo*, 40 A.2d at 563; *Haggard v. Lowden*, 134 P.2d 676, 679-681 (Kan. 1943). And breaches of the duty recognized in these cases typically involve a failure to summon emergency medical services in a timely manner. *See, e.g.*, *Bridgeman v. Terminal R.R. Ass'n*, 552 N.E.2d 1146, 1148 (Ill. App. Ct. 1990) ("[medical] help was not summoned for some 45 minutes").

The test stated in *Pulley*, *Rival*, *Randall*, *Hendricks*, and other cases contains a requirement that is particularly important here: before FELA imposes a duty on a railroad to take steps to aid an employee facing a medical emergency, the employee must actually be facing an immediate medical emergency. The corollary is that FELA does not impose a duty on a railroad to take anticipatory steps in the absence of an actual emergency; in short, the duty that FELA imposes in cases like this "***arises with the emergency and expires with it***." *Szabo*, 40 A.2d at 563 (emphasis added).

Courts have consistently so held since the earliest days of FELA. *See*, *e.g.*, *Wilke v. Chicago Great W. Ry.*, 251 N.W. 11 (Minn. 1933). *Wilke* involved a rail worker who died of sun stroke. The plaintiff contended that the railroad had a duty to have a doctor on site or "to have … [the] means at hand to care for and treat one so

overcome." *Id.* at 13.[5] Applying longstanding common-law principles, the Minnesota Supreme Court held that the railroad had no duty to "anticipat[e] that the physical health and ability of a servant to care for himself while doing his ordinary work will suddenly cease" and that "the duty to care does not devolve upon the master until knowledge or notice that the servant is in urgent need of speedy succor is brought home to him." *Id.*; *see also Ohio & Miss. Ry. v. Early*, 40 N.E. 257, 259 (Ind. 1895) (pre-FELA case holding that the employer's duty to render medical assistance "arises with the emergency, and with it expires").[6]

The upshot is clear: CSXT had no duty to equip or train Wells or any other employees to be at the ready to respond to a non-work-related medical emergency. That

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[5] Amicus American Association for Justice ("AAJ")—formerly known as American Trial Lawyers Association or ATLA—maintains that *Wilke* "was not an FELA case, but a state law employment negligence case." AAJ Br. 16. Because the suit was between an interstate railroad (*see* perma.cc/T35H-T5AA) and its employee and hence within the scope of FELA, and because "the laws of the States, in so far as they cover the same field, are superseded" by FELA (*Mondou v. N.Y., New Haven, & Hartford R.R.*, 223 U.S. 1, 55 (1912)), that is surely incorrect. But even if *Wilke* were a state tort case, it would, at minimum, provide strong evidence of the common-law rule that Congress meant to incorporate into the statute.

[6] Courts applying the Jones Act, including the U.S. Supreme Court, have consistently reached the same conclusion. Those cases uniformly state that although vessel owners must take "reasonable measures to get" ill employees to a doctor, they need not "carry a physician" on the ship. *De Zon v. Am. President Lines, Ltd.*, 318 U.S. 660, 668 (1943); *accord, e.g.*, *Olsen v. Am. S.S. Co.*, 176 F.3d 891, 895 (6th Cir. 1999); *Carleno v. Marine Transp. Lines, Inc.*, 317 F.2d 662, 665 (4th Cir. 1963); *Billiot v. Two C's Marine, L.L.C.*, 2011 WL 2937237, at *3 (E.D. La. July 19, 2011). If vessel owners whose seriously ill employees might be days away from the nearest port have no duty under the Jones Act to take steps in anticipation of medical emergencies, *a fortiori* railroads whose employees are just minutes away from medical care have no such duty either.

goes not only for petitioner's AED theory, but also for her assertion that CSXT should have required employees to carry cell phones and trained them to call 911 in order to receive on-the-spot instruction for performing CPR—and, by implication, responding to all manner of other medical emergencies. As the First District explained, "CSX's duty was to summon medical assistance when it learned of Sells' condition and to take reasonable first aid measures until medical care arrived." *Sells*, 170 So. 3d at 38. First aid does not include CPR. *Id*.

b. In the face of all of this authority holding that there is no duty to anticipate a non-work-related medical emergency either under FELA or under the common law more generally, petitioner cannot cite a single case holding that a railroad or other employer had a common-law duty to anticipate and prepare for such a non-work-related emergency. Nor can she cite any case—in any context—holding that a business owes a common-law duty to install AEDs, train employees in CPR, or otherwise anticipate the possibility that someone—student, customer, employee, or business invitee—might suffer a sudden cardiac arrest.

The two cases that petitioner does cite for her contention that juries should be able to hold railroads liable for failing to anticipate and plan for medical emergencies suffered by employees on the job—*Powers v. New York Central Railroad*, 251 F.2d 813 (2d Cir. 1958), and *Monheim v. Union Railroad*, 788 F. Supp. 2d 394 (W.D. Pa. 2011)—cannot bear the weight she places on them.

Powers involved a crane operator who worked on the railroad's "docks, piers and float bridges" along the Hudson River. 251 F.2d at 814. Shortly after performing

his last duties of the day, he was found in the water. He was plucked from the water by a tug boat crew, resuscitated, and taken to the hospital, where he subsequently died. The jury found the railroad liable for, among other things, "failing to have blankets, inhalator, pulmotor, stretcher, [and] life-saving equipment" near the docks in case someone fell in the water ***and*** failing to summon the New York City Police Emergency Squad, which could have brought all the necessary life-saving equipment to the scene within a few minutes. *Id*. at 816. Without separately analyzing these two theories of liability, the Second Circuit refused to disturb the verdict. *Id.* at 818. The decision thus is exceptionally weak authority for the proposition that railroads owe any duty other than to promptly summon medical assistance. But even accepting that a railroad may have a duty to anticipate that employees who work near water may accidentally fall in, that is a far cry from giving juries carte blanche to hold railroads liable for failing to anticipate that an employee might suffer any one of dozens of possible medical emergencies that are ***not*** the result of the dangers of his work environment.

Monheim involved a work-related accident—a train collision resulting in a rail worker being buried under tons of freight—so it is entirely irrelevant to the issue presented here. 788 F. Supp. 2d at 397. But even if the case involved a non-work-related medical emergency, as this case does, its perfunctory statement that "[u]nder FELA, a railroad's failure to have certain rescue equipment may constitute negligence, as may the failure to summon trained rescue personnel" (*id.* at 403) hardly constitutes compelling precedent for petitioner's position. Because this statement occurs in an opinion denying a motion to dismiss, there was even less reason for the court to disentangle

the two different theories of liability—the latter of which is undeniably well-established—than there was in *Powers*. Moreover, although it is not specified in the opinion, the second amended complaint makes it clear that the plaintiff faulted the defendant for not having "sufficient tools and equipment to permit [emergency personnel] to locate and rescue plaintiff's decedent" in connection with her failure-to-rescue claim (Second Am. Compl. (ECF No. 98) ¶ 80, *Monheim v. Union R.R.*, No. 10-913 (W.D. Pa.)), not for failing to anticipate and plan for a ***medical emergency***. And the plaintiff thereafter abandoned that claim and focused her case solely on the collision itself. *See* Pl.'s Opp. to Def.'s Mot. for Summ. J. (ECF No. 162) at 1-2, *Monheim* (arguing only that defendant was negligent for not having a second crew member in train cab and failing to operate the train "long-nose facing forward"). *Monheim* accordingly cannot seriously be taken as a break from nearly a century of FELA case law holding that railroads have no duty to anticipate non-work-related medical emergencies.

Sells also cites *Anderson v. Atchison, Topeka & Santa Fe Railway*, 333 U.S. 821 (1948) for the proposition that railroads have a "duty to reasonably anticipate harm caused by [an] employee suffering [a] heart attack and falling off [of a] train." Petr. Br. 27. That is a striking mischaracterization. In *Anderson*, an employee fell off the back of a train, but the train crew waited three station stops before wiring station crews along their route that the employee was missing. 333 U.S. at 822-823. The station crews, in turn, delayed searching for the man, who later died of exposure. *Id*. at 823. The Supreme Court held that the railroad should have come to his aid earlier,

soon after learning that he was missing. *Id*. The holding is perfectly consistent with the First District's decision in this case and offers no support whatsoever to petitioner.

2. Petitioner's counterarguments are misguided

Rather than responding directly to the cases that expressly rule out a duty to anticipate and plan for non-work-related medical emergencies, petitioner attempts to obscure the question presented in three ways. *First*, invoking *Limones*, she contends that the lower courts mistook the question presented here to be a matter of duty rather than breach. Petr. Br. 32-38. *Second*, she notes that FELA entails "a relaxed standard of causation" (*id*. at 22) and reflects "broad . . . humanitarian and remedial purposes." Petr. Br. 22; *see also, e.g.*, *id.* at 35. *Finally*, she insinuates that CSXT is guilty of "statutory violations" under the Occupational Safety and Health Act ("OSHA"), which she says is relevant to the determination of "whether the railroad has acted unreasonably."*Id*. at 26-32. None of those contentions holds water.

a. Petitioner's resort to *Limones*—and her assertion that the question here is a matter of breach and not duty—is fundamentally misguided. The issue in *Limones* was one step removed from the issue here. As we explained above, there was no question that the school in that case had "a statutory duty . . . imposed by section 1006.165, Florida Statutes (2008)" to "acquire an AED, train personnel in its use, and register its location with the local EMS." 161 So. 3d at 388 & n.2. The only issue was whether the coach's failure to ***use*** the school's AED on a stricken student should be understood as an issue of breach (did the coach breach his *in loco parentis* duty of care by failing to use the AED?) or an issue of duty (did the coach have a duty to diagnose the need

for an AED in the first place?). The Court rightly held that it was a question of breach of the school's duty to supervise and aid students, including as required by section 1006.165. *Limones*, 161 So. 3d at 392, 394.

The question here is logically antecedent to the question presented in *Limones*: Does federal common law impose on railroads a duty to be constantly at the ready to save employees' lives if they become ill or injured (by no fault of the railroad) while on the job? That is not a question of breach, but instead of "'whether the law imposed upon the defendant the obligation to protect the plaintiff against the consequences which occurred.'" *Fulk v. Ill. Cent. R.R.*, 22 F.3d 120, 125 (7th Cir. 1994) (quoting *Gonzalez v. Volvo of Am. Corp*., 752 F.2d 295, 300 (7th Cir. 1985)). It addresses, in other words, the "standard of conduct" against which "the defendant's factual conduct" must be measured. *Dorsey v. Reider*, 139 So. 3d 860, 863 (Fla. 2014) (quoting *McCain v. Fla. Power Corp*., 593 So. 2d 500, 503 (Fla. 1992)).

Petitioner offers two responses. First, she asserts that the First District "narrowly framed the issue as whether CSX had duties as a matter of law to take specific post-injury actions concerning AEDs, CPR, or other life-saving measures to sustain his life pending EMT arrival." Petr. Br. 33-34 (emphasis added). That is incorrect. The court focused squarely on whether CSXT owed a ***pre***-emergency duty "to take anticipatory measures" in "anticipation of an employee falling ill or becoming injured." *Sells*, 170 So. 3d at 33. Consistent with FELA precedent, the First District held that railroads have no such duty as a general matter and that CSXT therefore cannot be at fault for failing to train its dispatchers to coach employees on CPR and other emergency medi-

cal procedures on the fly; failing to adopt rules requiring employees to carry cell phones, keep them charged, and use them to call 911 in order to receive coaching on CPR and other emergency procedures; or failing to require employees to carry AEDs with them when working.

Second, petitioner insists that the only real duty at issue here is "a broad duty under FELA to exercise reasonable care in providing a safe workplace with prompt medical care," implying that all else is a question of breach measured against that broad standard. Petr. Br. 33; *see also, e.g.*, *id*. at 26. That, too, is wrong. To be sure, a railroad's duty under FELA can be broadly stated. But since the earliest days of FELA, courts also have evaluated the duty issue more narrowly, holding that railroads did not owe particular duties as a matter of law, rather than treating every theory of liability as a matter of breach to be resolved by a jury post hoc.[7]

For example, "[i]t is a general rule of wide acceptation" that railroads owe a duty to remove snow and ice and can be held liable to injured employees for failing to do so only when "the snowfall was very considerable in quantity and allowed to remain for extended periods of time." *Raudenbush v. Balt. & Ohio R.R.*, 160 F.2d 363, 366-367 (3d Cir. 1947). Likewise, although railroads have a duty to assign employees to suitable work and train them to perform the work, "a railroad has no duty to ascertain

[7] *Patterson v. Norfolk & Western Railway*, 489 F.2d 303 (6th Cir. 1973) (cited at Petr. Br. 23), does not suggest otherwise. There, the trial court had taken the question of duty to a granularized level. In any event, the question presented was different: whether the railroad should have quarantined a sick employee whom it knew to be contagious. *Id*. at 305-306.

whether an employee is physically fit for his job." *Fletcher v. Union Pac. R.R.*, 621 F.2d 902, 909 (8th Cir. 1980). And the Supreme Court itself has refused to recognize "a duty to avoid creating a stressful work environment" because imposition of such a duty would "dramatically expand employers' FELA liability to cover the stresses and strains of everyday employment." *Gottshall*, 512 U.S. at 554; *see also, e.g.*, *Fulk*, 22 F.3d at 125-126 (finding that a railroad does not have a duty to supervise employee's adherence to a doctor's advice even when the railroad undertakes medical examinations of the employee); *Cent. Vt. Ry. v. Sullivan*, 86 F.2d 171, 174 (1st Cir. 1936) ("[A] railroad owes no duty toward its trackmen to look out for them and the burden of their protection from the danger of being hit by passing trains rests upon themselves."); *Isacs v. Nat'l R.R. Passenger Corp.*, 1996 WL 204505, at *6-7 (E.D.N.Y. Apr. 23, 1996) (report and recommendation) (finding that a railroad did not have a duty to use two-person crews in anticipation of possibility that a crew member will experience a medical emergency); *Conway v. Omega Protein, Inc.*, 2011 WL 8964927, at *1 (Va. Cir. Ct. 2011) (finding that a ship owner's duty of care does not require the performance of a job hazard analysis); *Kenney v. Bos. & Me. R.R.*, 33 A.2d 557, 560 (N.H. 1943) (finding that a railroad's duty to provide a safe workplace did not encompass a duty to provide a catwalk and railing on a railroad bridge).

More to the point, ***every*** court confronted with a claim that a railroad or ship owner negligently failed to anticipate a non-work-related medical emergency has treated the issue as a matter of duty and not breach. *See, e.g., Cortes*, 287 U.S. at 372 (question is one of "duty"); *Rival*, 306 P.2d at 651 (question is whether the circum-

stances "cast[] such duty upon the master") (citing *Cortes*); *Wilke*, 251 N.W. at 13 (question is whether the railroad has a "duty" to have "at hand" the means "to care for the employee if he meets with sudden illness"); *see also, e.g.*, *Verdugo v. Target Corp.*, 327 P.3d 774, 326 (Cal. 2014) (addressing whether "California common law may embody ***a duty*** to acquire and make available an AED as part of the general common law duty of care owed by a business establishment to its patrons or customers") (emphasis added); *L.A. Fitness*, 980 So. 2d at 562 ("L.A. Fitness did not have a legal ***duty*** to have CPR-qualified employees on site at all times, and their employees were under no legal ***duty*** to administer CPR to the deceased. Further, L.A. Fitness had no legal ***duty*** to have a defibrillator on the premises for emergency use on the deceased.") (emphases added).

In short, the notion that the only relevant duty is the broad duty to provide a reasonably safe workplace and that everything else is a question of breach for the jury to decide is dispelled by more than three-quarters of a century of FELA case law.

b. Petitioner's reliance on FELA's broad remedial purpose is similarly misplaced. While FELA was intended to override certain aspects of the common law of torts, it did not displace the common law altogether. Indeed, the opposite is true: The traditional tort elements and defenses under FELA must still be "determined by reference to the common law," unless—but only unless—the Act contains "express language to the contrary." *Sorrell*, 549 U.S. at 165-166. Thus, FELA may be understood as a "'departure from the rules of the common law'" only insofar as "the statute abolished the fellow servant rule, rejected the doctrine of contributory negligence, . . . pro-

hibited employers from exempting themselves from FELA through contract, . . . abolished the assumption of risk defense," and "relaxed [the] standard of causation." *Gottshall*, 512 U.S. at 542-544. The issue in this case implicates none of those deviations from the common law.[8]

The rules of the common law thus govern here—and they dispel any lingering doubt that the lower courts correctly answered the question presented. According to the U.S. Court of Appeals for the Third Circuit, for example, "the duty 'to take reasonable action to give first aid' in times of emergency requires only that carriers, innkeepers and landowners procure appropriate medical care as soon as the need for such care becomes apparent and provide such first aid prior to the arrival of qualified assistance as the carrier's, innkeeper's or landowner's employees are reasonably capable of giving." *Lundy v. Adamar of N.J., Inc.*, 34 F.3d 1173, 1179 (3d Cir. 1994) (quoting *Restatement (Second) of Torts* § 314A cmt. f (1965)). This "duty" does not "extend to providing all medical care that the carrier or innkeeper could reasonably foresee might be needed by a patron," including anything "beyond" basic "first aid." *Id*. Applying that same principle, the Pennsylvania Supreme Court has held that "[tennis] clubs do not owe a duty to have an AED available on their premises." *Atcovitz v. Gulph Mills Tennis Club, Inc*., 812 A.2d 1218, 1220 (Pa. 2002).

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[8] The Supreme Court's dictum that FELA imposed a far "'more drastic duty'" (Petr. Br. 21 (quoting *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 507 (1957)) refers not to the scope of the legal duties that railroads owe to their employees but to the so-called "duty" of "paying damages for injury or death at work due in whole or in part to the employer's negligence" (*Rogers*, 352 U.S. at 507). That is just another way of saying that FELA relaxed the common-law standard of causation.

That has been the view of this State's courts in the context of other business owners, as well. A business that invites customers onto its premises has a duty "to take reasonable action to give . . . first aid" to customers the business "knows . . . are ill or injured." *Pers. Rep. of Starling's Estate v. Fisherman's Pier, Inc.*, 401 So. 2d 1136, 1137 (Fla. 4th DCA 1981) (citing *Restatement (Second) of Torts* § 314A (1965)). But a "business owner satisfies" that duty "by summoning medical assistance within a reasonable time" and need not furnish "medical care or medical rescue services" beyond ordinary first aid. *L.A. Fitness*, 980 So. 2d at 558. Business owners accordingly have no duty to use AEDs on, or provide CPR to, stricken partrons. *Id.*[9]

The rationale for that limitation is the same rationale recognized by courts applying FELA: The duty to aid patrons "does not begin until the proprietor knows or should know that a patron is ill or injured and in need of assistance" and "ends when the care of the patron is assumed by someone else." *O'Gwin v. Isle of Capri-Natchez, Inc.*, 139 So. 3d 783, 788 (Ct. App. Miss. 2014). Common sense thus dictates that "the

[9] *Accord, e.g., Abramson v. Ritz Carlton Hotel Co.*, 480 F. App'x 158, 161 (3d Cir. 2012); *De La Flor v. Ritz-Carlton Hotel Co.*, 930 F. Supp. 2d 1325, 1329-1330 (S.D. Fla. 2013); *Verdugo v. Target Corp.*, 327 P.3d 774 (Cal. 2014); *Boller v. Robert W. Woodruff Arts Ctr., Inc.*, 716 S.E.2d 713, 715-716 (Ga. Ct. App. 2011); *Salte v. YMCA of Metro. Chi. Found.*, 814 N.E.2d 610, 615 (Ill. App. Ct. 2004); *Miglino v. Bally Total Fitness of Greater N.Y., Inc.*, 20 N.Y.3d 342, 349 (2013). Notably, all of these cases involve fixed locations where lots of people are present. The reasons for refusing to recognize a duty to provide AEDs or to perform CPR are all the more compelling when, as in this case, the work site has few people and is mobile. And that is why the fact that CSXT has chosen to provide AEDs at some of its highly populated, fixed work sites (*see* Petr. Br. 8) is irrelevant to whether it should be required—on pain of large damages awards—to provide them to all of its crews in the field.

duty to render aid does not saddle business owners with a duty [to be at the ready] to provide all medical services" that a patron might foreseeably need. *Id*. at 789.

Petitioner maintains that "FELA imposes a duty to provide aid to an injured worker that is not otherwise owed to a business customer." Petr. Br. 34-35. As explanation for that otherwise unsupported assertion, she notes only that whereas the railroad supposedly has "total control" over its employees, patrons of health clubs have "control" over "the location of the gym" that they join *Id*. at 35. Perhaps. But either way, that distinction (such as it is) provides no reason to think that CSXT's relationship with Sells is closer to a school's *in loco parentis* relationship with its students than it is to an inn's relationship with its guests or a store's relationship with its adult patrons. Simply put, Sells was not a child, and CSXT was not standing in "the place of [his] parents." *Limones*, 161 So. 3d at 390.[10]

c. Finally, petitioner resorts to an entirely different federal law, OSHA, for the proposition that CSXT breached its duty of care in this case. Petr. Br. 28-31. She insinuates (but does not expressly assert) that CSXT is guilty of "statutory violations" under OSHA (Petr. Br. 28) and claims that "OSHA publications . . . recommend[] that employers have AEDs and . . . requir[e] that they have personnel trained in first aid" (Petr. Br. 30-31). All of that, she implies, is evidence that CSXT's decision not to

[10] Petitioner faults the First District for citing *Restatement* § 314A, which concerns railroad passengers, rather than Section 314B, which concerns employees. Petr. Br. 37-38. But Section 314B says only that an employer must "give first aid to [an injured employee]" and "care for him until he can be cared for by others." *Restatement (Second) of Torts* § 314B(2) (1965). That is hardly supportive of petitioner's case.

equip its employees with personal AEDs and not to train the radio dispatcher to coach employees in CPR was a violation of CSXT's duty of care.

Before we explain why that is wrong, it bears emphasis that statutes like OSHA are generally understood as establishing ***duties***, not defining the circumstances of breach. *Cf. Limones*, 161 So. 3d at 388, 392 (discussing "duty" under section 1006.165). That is how the U.S. Court of Appeals for the Third Circuit treated OSHA, in the case cited by petitioner on page 28 of her brief: It questioned whether OSHA, of itself, creates a "duty of care under the FELA" and held that it does not. *Ries v. Nat'l R.R. Passenger Corp*., 960 F.2d 1156, 1160-1163 (3d Cir. 1992).[11]

Setting that aside, OSHA is not, in fact, helpful to petitioner's case. According to petitioner's own industrial hygiene expert, Michelle Copeland, "OSHA does not have direct regulatory authority over railroads," and "there is no federal regulation, federal statute, or federal rule that requires any railroad employees to be trained in CPR" or that "requires any railroad to have AEDs anywhere." R16:147, 170. The documents on which Copeland relied for her testimony were not binding rules, but the agency's advisory "Best Practices Guide." R16:171-172. Yet Copeland would not commit to a firm conclusion that CSXT had violated the advisory guidelines.

[11] Other courts have made clear that OSHA is relevant only to duty. *See Robertson v. Burlington N. R.R.*, 32 F.3d 408, 410 (9th Cir. 1994) ("OSHA standards" are at most relevant to "the applicable standard of care" under FELA). The Third Circuit in *Ries* found OSHA relevant to the negligence question because the injury in that case occurred in a "service building" near a train station, where the Federal Railroad Administration has delegated jurisdiction to the Occupational Safety and Health Administration. 960 F.2d at 1157, 1164 (citing 43 Fed. Reg. 10,587 (1978)).

R16:170. No wonder—all the guide says is that "[a]n automated external defibrillator (AED) should be ***considered*** when selecting first-aid supplies and equipment" and that "[e]ach workplace should ***assess*** its own requirements for an AED program as part of its first-aid response." R5:894-895 (emphasis added). And even if CSXT had violated OSHA's advisory recommendations, the guide states, clear as day, that its pronouncements are aspirational only and that a "failure to implement [the] guide is ***not***, in itself, a violation of [OSHA's] general duty clause" requiring employers to provide a safe workplace. R16:172 (emphasis added).

3. Petitioner's rule would impermissibly make railroads general risk insurers of their employees while they are on duty

The Supreme Court has made clear that FELA is not "a workers' compensation statute," and it "'does not make the employer the insurer of the safety of his employees while they are on duty.'" *Gottshall*, 512 U.S. at 543 (quoting *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947)). Thus, liability under FELA may not be based solely on the "'fact that injuries occur.'" *Id.* Petitioner's theory of liability cannot be squared with that basic limitation on FELA liability; in fact, if adopted by this Court, it would require railroads to assume the enormously burdensome role of general risk insurers for their on-duty employees. The crux of petitioner's theory of the case is that CSXT should be made to pay damages, not because any unreasonable hazards of the job caused Sells' sudden cardiac arrest, but because Sells happened to suffer his cardiac arrest while he was on duty for CSXT, and CSXT wasn't prepared to save his life. If

Sells had suffered cardiac arrest while fishing in a remote area or watching a ball game at home alone, CSXT never would have been sued.

Moreover, as we discuss more fully in the next section, petitioners' theory of liability is so boundless that railroads would be forced in many cases to simply accept liability for non-work-related medical emergencies rather than make the enormously burdensome expenditures necessary to avoid being second-guessed by juries. In short, if adopted by this Court, petitioners' approach would transform railroads into insurers in flat contravention of the Supreme Court's admonition that FELA "'does not make the employer the insurer of the safety of his employees while they are on duty.'" *Gottshall*, 512 U.S. at 543; *see also Gottshall v. Consol. Rail Corp.*, 988 F.2d 355, 380 (3d Cir. 1993) (finding that FELA does not provide recovery for injuries "expected as a part of daily life" or for "the myriad of possible consequences of living in a complex world"), *rev'd on other grounds*, 512 U.S. 532 (1994).

4. The enormous burden entailed by petitioner's theory weighs heavily in favor of affirming the judgment below

Even if this Court were writing on a clean slate, the factors relevant to determining whether to recognize a legal duty weigh overwhelmingly against recognizing a duty to anticipate non-work-related medical emergencies that might arise on the job. As a general matter, "the duty inquiry in a negligence case involves weighing 'the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.'" *Knight v. Merhige*, 133 So. 3d 1140, 1149 (4th DCA 2014) (quoting *Rupp v. Bryant*, 417 So. 2d 658, 667 (Fla. 1982)). Put different-

ly, in order to find the existence of a duty, a court must "balanc[e] the foreseeability of harm, in light of all the circumstances, against the burden to be imposed." *Levy v. Fla. Power & Light Co.*, 798 So. 2d 778, 780 (Fla. 4th DCA 2001); *accord, e.g.*, *Gottshall*, 988 F.2d at 380 (duty and foreseeability under FELA require courts to "evaluate the economic trade-offs and properly balance the competing policies"). Here, that balance tips decisively against imposing on railroads any duty to anticipate non-work-related medical emergencies.

There can be no doubt that the duty for which petitioner and her expert Michelle Copeland advocated would impose massive burdens on railroads that far outstrip its benefits. Copeland stoutly maintained that a railroad must "control for [every] day-in-day-out type of risk" that employees might encounter while on the job. R16:126. That, of course, covers far more than sudden cardiac arrest. Taken to its logical limit, petitioner's theory would mean that railroads would have to anticipate and plan for every conceivable emergency that might befall an employee—or otherwise accept liability when non-work-related incidents happen on the job.

That would be a crushing burden. While there are approximately 822,000 emergency department visits associated with sudden cardiac arrest each year in the United States, there are 3.68 million visits resulting from stroke, 1.8 million visits associated with asthma, over 100,000 associated with choking, nearly 300,000 associated with diabetic hypoglycemia, and 200,000 associated with food allergy reactions.[12]

[12] *See* CDC, *Annual number and percent distribution of ambulatory care visits by set-*

Under petitioner's theory, any railroad employee suffering emergencies of those sorts while on the job would have grounds for asserting that the railroad's duty to anticipate and plan for medical emergencies requires the railroad to equip fellow employees not only with AEDs, but also with emergency inhalers, insulin shots, and epinephrine injectors—and to train fellow employees not only in CPR but also in the Heimlich maneuver, the administration of insulin and epinephrine, and the recognition of and proper response to stroke and other emergencies. That would entail not only countless millions of dollars in medical supplies, but millions more spent on constant training and retraining.

Copeland was clear on this point: "[B]ecause emergency response is not something that happens every day," there must be constant training and re-training of employees to respond to emergencies as they arise. R16:126. That includes "a considerable amount of planning around how we're going to address [emergencies] and making sure that the procedures are [in] place." *Id*. "[T]he logistics have been considered, the equipment has been provided, people are prepared to follow the established procedures, understand what they are, and know how to just jump into them almost automatically rather than having to, you know, go back and forth and wonder

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ting type according to diagnosis group, United States, 2009-2010, perma.cc/AR7C-NP89; CDC, *Number of Emergency Department Visits (in Thousands) with Hypoglycemia as First-Listed Diagnosis and Diabetes as Secondary Diagnosis* (2009), perma.cc/PFV8-MMAS; CDC, *Asthma Facts: CDC's National Asthma Control Program Grantees (2013)*, perma.cc/LKE5-CP86; Dechoker, *Choking Statistics*, perma.cc/X5DD-V27A; Asthma and Allergy Foundation of America, *Allergy Facts and Figures* (2016), perma.cc/3SUW-SGCX.

and worry and try to figure it out as you go. You want it to be click, click, click." *Id*. According to this approach, CSXT should have trained and equipped Wells not just as a train engineer, but as an EMT as well, prepared to react on the spot to any medical emergency that might come to pass.

And the burden on railroads would not end there. As the First District recognized, "if an employee attempts to respond to a medical emergency but does so inadequately, the employer and the employee may be subject to a claim for having negligently rendered emergency medical services." *Sells*, 170 So. 3d at 39. This case proves the point. If Wells had been carrying an AED in his bag (as petitioner claims he should have been[13]) but panicked and failed to apply the paddles properly, petitioner would have brought a claim for negligent ***use*** of the AED. Or if the dispatcher had been trained to coach Wells in CPR, but Wells either refused to perform it out of fear for his own health or performed it incorrectly despite the coaching, petitioner would have brought a claim for negligent failure to perform CPR adequately. In every on-the-job medical emergency that does not end well, in other words, railroads would be on the hook for something akin to medical malpractice claims. *See L.A. Fitness*, 980

[13] Petitioner does not seriously dispute the lower courts' holding that requiring trackside AEDs would be unreasonably burdensome. R9:1597. Even Copeland conceded that point (R16:183-184**)**—for the good reasons that CSXT's rail system includes "many rural areas" spread "across twenty-three states [and] two Canadian provinces" and that "the devices would need to be placed" so "close . . . together" that "an employee could reach an AED on foot in a matter of seconds or minutes" (R9:1597). Petitioner's cursory suggestion that CSXT should place AEDs in some other unspecified but "accessible location" (Petr. Br. 29) fails for the same reason.

So. 2d at 559-560. We made these observations before the First District, which agreed. *See Sells*, 170 So. 3d at 39. Tellingly, petitioner offers no rejoinder.

And that still isn't the full extent of the burden. As the First District recognized, "[i]mposing a duty on employers to require its employees to render medical treatment implicates complex labor and collective bargaining issues," especially given that "there is no law requiring railroads to train its employees in life-saving measures, and there is no mechanism in place to indemnify and hold harmless those employees that do attempt to render medical care." *Sells*, 170 So. 3d at 39 n.8; *see also* R20:209 (testimony of CSXT's medical director that CSXT could not "mandate the union work force to learn CPR and be available to resuscitate someone if need be" because "[t]hat would have to be negotiated at a bargaining table"). It is thus unclear whether railroads would be legally able to compel their employees to accept CPR and AED training or to provide advanced medical aid if the need ever arose. That is true not only at the general level, as a matter of collective bargaining, but also at the individual level. What, after all, is a railroad to do when an employee simply refuses to perform CPR or use an AED because he is not comfortable with it? *Cf.* R18:222 (Wells' testimony that he was afraid that he might suffer a heart attack if he continued attempting chest compressions). Petitioner can cite no case imposing a duty on a business to do something that is not entirely within its control.

In short, adoption of petitioner's theory not only would be "unduly burdensome" (*Whitt v. Silverman*, 788 So. 2d 210, 222 (Fla. 2001)), but would entail practical impossibilities. It is thus hardly surprising that no court anywhere has imposed a

duty to have AEDs available, to train employees in CPR, or to set up a protocol so that employees can be coached on CPR on the fly. This Court should not be the first.

III. THE UNDISPUTED EVIDENCE SHOWED THAT THE EMERGENCY PERSONNEL COULD NOT HAVE ARRIVED IN TIME TO SAVE SELLS FROM BRAIN DEATH IN ANY CIRCUMSTANCE

Petitioner maintains that, separate and apart from its failure to anticipate and plan for Sells' medical emergency, CSXT is liable because it failed to summon emergency personnel in a timely manner. As both the circuit court and district court held, however, no rational juror could have found that the delay in summoning the EMTs contributed to Sells' death.

The undisputed evidence at trial showed that the soonest that the EMTs could have begun administering CPR was 17-18 minutes after Sells' collapse. Petitioner has conceded that Wells did not discover Sells until two to three minutes after Sells suffered cardiac arrest. *See* Petr. Br. 3; *accord* R15:38-39 (opening statement); R18:215-20, 255 (Wells' testimony). And it is undisputed that it took the EMTs just over 15 minutes from the time they were dispatched to the time they began treating Sells. R17:78 (testimony of EMT Brockwell).

Petitioner asserts that the EMTs actually "reached" the scene within 13 minutes of being dispatched. *See* Petr. Br. 3-4, 10. That is a red herring. Because it naturally takes time after an emergency vehicle arrives before emergency responders can begin administering care, the on-scene EMT testified that it took 15 minutes, not 13, from when they were dispatched ***to when they began treating*** Sells. R17:78.

Both Michael Fifer, petitioner's expert cardiologist, and Orlando Bautista, Sells' treating physician from New York, testified that "[b]rain death begins to occur after four or five minutes" following cardiac arrest (R17:186) and that a person will be irrevocably "brain dead" after ten minutes (R17:116; *see also* R17:120, 123). In Florida, legal death is defined to include brain death (Fla. Stat. Ann. § 382.009), so the medical testimony unambiguously confirmed that Sells would have died before the EMTs could have reached him, no matter what. Dr. Fifer thus concluded that, absent prior treatment with an AED or CPR, it did not "matter if the EMTs got there 15 minutes or 35 minutes" after Sells went into cardiac arrest, because "he would not be able to be resuscitated" at either time. R17:185, 191; *see also, e.g.*, R17:135. CSXT's expert cardiologist, Michael Zile, agreed, testifying that the delay in calling 911 "did not" "make any difference to Mr. Sells' survivability." R19:64.[14]

Petitioner notes that Dr. Bautista testified that ***heart rhythm*** might be restored after longer than 15 minutes. Petr. Br. 40. That misses the point. Bautista immediately qualified that statement by explaining: "However, if the brain has not received adequate oxygenation, I would say within 10 minutes of cardiac arrest, then a person will become brain dead. The heart will be alive, but the brain will be dead, and we essentially have lost the patient." R17:116. Again, brain death is ***legal*** death. Fla. Stat. Ann.

[14] Petitioner repeatedly conflates the timing and AED/CPR issues by citing testimony that Sells could have been saved if an AED had been employed or CPR had been administered before the EMTs arrived. *E.g.*, Petr. Br. 10 (testimony of Bautista); *id*. at 11 (testimony of Fifer). But if, as we have argued, there is no duty to equip personnel with AEDs or train them in CPR, the timing claim must stand on its own.

§ 382.009. In response to the question "you said after 10 minutes it pretty much doesn't matter if you get there fifteen minutes later because after 10 minutes of no oxygen you're brain dead?," Dr. Bautista therefore reaffirmed that "Yes, I would say that." R.17:120. Accordingly, petitioner is simply wrong in asserting that "[n]o expert testified there was zero probability that Mr. Sells could have survived, even absent CPR or an AED, had EMTs arrived in 15 minutes." Petr. Br. 10; *see also* Petr. Br. 11-12 (similar). In fact, that is ***exactly*** what petitioner's own medical witnesses said.

Against this background, it is unsurprising that counsel for petitioner conceded at oral argument before the First District that it is "correct based on the evidence in the record" to say that calling 911 sooner would not have saved Sells' life. *See* 1st DCA Oral Arg. Recording 4:54–5:40. In her brief before this Court, petitioner attempts to backtrack, asserting that "the record refutes any apparent concession." Petr. Br. 41-42 n.6. She separately contends that "[a] confession of error . . . is not binding on an appellate court" in any event. *Id*. (quoting *Gonzalez v. Dep't of Health*, 124 So. 3d 449, 450 (Fla. 1st DCA 2013) (per curiam)). But petitioner's lawyer did not confess error, which is when a party "admits to [an appellate court] that a lower court has committed an error in a case decided in [the party's] favor." David M. Rosenzweig, Note, *Confessions of Error in the Supreme Court by the Solicitor General*, 82 Geo. L.J. 2079, 2080 (1994). Rather, he made a concession of fact in a judicial proceeding—and courts ordinarily treat such "concessions as judicially binding admissions of fact." *United States v. Parra-Perez*, 471 F. App'x 395, 396 (5th Cir. 2012).

IV. IF THE COURT REACHES THE COMPARATIVE-NEGLIGENCE ISSUE, IT SHOULD AFFIRM THE JURY'S FINDING

FELA is a "comparative negligence" statute. *Gottshall*, 512 U.S. at 542-543. The statute thus "allow[s] a jury to apportion fault as it sees fit between negligent parties whose negligence was part of the legal and proximate cause of . . . [an] injury." *Birge v. Charron*, 107 So. 3d 350, 357 (Fla. 2012) (quoting *Hoffman v. Jones*, 280 So. 2d 431, 439 (Fla. 1973)). To show comparative negligence under FELA, an employee must prove that the employer's negligence played "'any part, even the slightest, in producing the injury or death.'" *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692 (2011) (quoting *Rogers*, 352 U.S. at 506). In this case, the jury found just that, assigning Sells 45% fault for failing to inform CSXT about his condition. As the only member of the panel to reach the issue agreed, there was ample evidence to uphold that finding. *Sells*, 170 So. 3d at 55 (Swanson, J., dissenting); *cf. Johnson v. Cenac Towing, Inc.*, 544 F.3d 296, 303 (5th Cir. 2008) (in Jones Act case, finding a "causal link" between the plaintiff's "preemployment misrepresentations" to his employer and his "injury").[15]

a. There was ample evidence that Sells had a pre-existing heart condition that he concealed from CSXT. Sells' former treating physician testified that, in 2005,

[15] Petitioner represents that *Norfolk Southern Railway v. Schumpert*, 608 S.E.2d 236 (Ga. Ct. App. 2004) held that comparative negligence provides a defense only if the worker's negligence "can be seen as the sole proximate cause of the accident." Petr. Br. 44 (internal quotation marks omitted). To the contrary, *Schumpert* held only that a negligent railroad cannot escape liability ***entirely*** unless the plaintiff's actions were the sole cause of his injury. *See* 608 S.E.2d at 238-239.

shortly before he moved to Florida, Sells had a "possible abnormality" on an EKG. R17:91. The physician therefore "referred [Sells] to a cardiologist." R17:92. Sells told the cardiologist that, in addition to the "abnormal electrocardiogram," he "had intermittent chest pain that comes and goes without any clear precipitants." R17:95. The cardiologist performed a second EKG, which showed "the same area of abnormality." R17:97; *see also* R19:12.

Sells "complained of . . . shortness of breath" to a new treating physician in Florida (R17:173), who performed another EKG, which was likewise "abnormal" (R17:175). Nevertheless, Sells did not follow up with a Florida cardiologist, and no additional tests were performed on his heart. R17:168. When Sells applied for work as a conductor at CSXT, he completed a "post-offer health questionnaire" that asked whether he "ever had" either "heart, vein or artery trouble" or "chest pains." R20:181; *see also* R6:1099-1100. Sells lied in response to both questions (R6:1099; R20:182) and did not disclose that he had had a "positive EKG or incomplete cardiac evaluation[] or chest pain . . . or shortness of breath." (R20:183). CSXT's chief medical officer testified that if Sells had truthfully disclosed these matters, CSXT would have required him to follow up with his cardiologist and obtain medical clearance before assigning him to his job as a conductor. R20:171-173, 182-183.

The jury heard that, despite knowing about his cardiac problem, Sells sought and accepted a job in which he would be required to work in rural areas, far from public roads or medical assistance. *See, e.g.*, R16:195-96. By doing so without disclosing his cardiac history to CSXT, Sells unquestionably "expose[d] his body to a risk of"

death from cardiac incident in a remote location. *Johnson*, 544 F.3d at 304. And Sells then "suffer[ed]" precisely that injury. *Id.*; *see also* R17:184-85. The evidence thus showed that Sells' misconduct made the circumstances that ultimately resulted in his untimely demise more likely.

b. In response, petitioner asserts that this was just an "alternative theory of causation," and CSXT was merely trying to disprove that its conduct was a proximate cause of Sells' death. Petr. Br. 43. But in any comparative-fault case, the defendant invariably argues first and foremost that its conduct was not a proximate cause of the injury at all and second, as a fall back, that the plaintiff was at least partially at fault. The instructions and verdict form permitted that, and, as often is the case, the jury chose the second option and allocated fault between the two parties.

Petitioner also asserts that CSXT's position "is based on an argument that, but for the nondisclosure, Mr. Sells would not have suffered cardiac arrest in a remote location" and observes that the Supreme Court has indicated that, while relaxing the standard of causation, FELA does not permit liability (or comparative fault) in "far out 'but for' situations." Petr. Br. 43 (citing *McBride*, 564 U.S. at 704). But this is no "far out" situation. As the Sixth Circuit has explained, a causal tie is sufficient under FELA if the injury falls "'within the risk created by'" the negligent conduct. *Szekeres v. CSX Transp., Inc.*, 731 F.3d 592, 601 (6th Cir. 2013) (finding that the district court erred in overturning jury's finding that failure to sanitize locomotive's lavatory was a cause of injury suffered by employee who fell while walking to relieve himself outdoors). Here, Sells' injury—death from cardiac arrest in a location where emergency

aid was not immediately available—was "within the risk created by" his failure to disclose his cardiac condition when applying for a job that required work in rural areas.

Finally, petitioner argues that Sells' untruthful answers to the health questionnaire did not contribute to his death because CSXT's chief medical officer admitted that CSXT would not have changed its emergency procedures even if it had known of Sells' health history. Petr. Br. That misses the point, which is that, had Sells disclosed his health history, CSXT would not have sent him into a rural area until he followed up with a physician and received the necessary medical clearance. Hence, Sells' nondisclosures most certainly did contribute to his death.

CONCLUSION

The judgment of the First District Court of Appeal should be affirmed.

Respectfully submitted,

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Dated: September 16, 2016

CERTIFICATE OF SERVICE

I hereby certify that that, on September 16, 2016, I served the foregoing Appellee's Answer Brief by email on the following counsel for Appellant:

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the typeface and type-style requirements of Florida Rule of Appellate Procedure 9.210(a)(2) because it has been prepared using Microsoft Office Word 2007 and is set in Times New Roman font in a size equivalent to 14 points or larger.

Dated: September 16, 2016

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