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 ON JURISDICTION

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TABLE OF CONTENTS

Table of Citations ii
Introduction & Summary of Argument 1
Reasons for Declining Jurisdiction 2
A. There is no express and direct conflict here 2
1. This is a federal FELA case, not a state tort case 2
2. Even if state law were applicable, nothing in the decision below expressly and directly conflicts with *Limones* or *Hicks* 6
B. The issue presented is, in any event, fact-bound and unimportant 9
Conclusion 10

TABLE OF CITATIONS

CASES

Bell v. Norfolk S. Ry.,
476 S.E.2d 3 (Ga. Ct. App. 1996).....3

Chesapeake & Ohio R. v. Stapleton,
279 U.S. 587 (1929).....2

De Zon v. American President Lines, Ltd.,
318 U.S. 660 (1943).....4, 5, 9

Handy v. Union Pac. R.R.,
841 P.2d 1210 (Utah Ct. App. 1992).....3

Henderson v. CSX Transp., Inc.,
617 So. 2d 770 (Fla. 1st DCA1993).....2

Hicks v. Kemp,
79 So. 2d 696 (Fla. 1955).....*passim*

Jenkins v. State,
385 So. 2d 1356 (Fla. 1980).....2

Limones v. School District of Lee County,
161 So. 3d 384 (Fla. 2015).....*passim*

Norfolk S. Ry. Co. v. Sorrell,
549 U.S. 158 (2007).....2

Powers v. New York Central Railroad,
251 F.2d 813 (2d Cir. 1958).....9

Pulley v. Norfolk S. Ry.,
821 So. 2d 1008 (Ala. Civ. App. 2001).....3

Reaves v. State,
485 So. 2d 829 (Fla. 1986).....2

S. Pac. Co. v. Hendricks,
339 P.2d 731 (Ariz. 1959).....1, 3, 4, 5

Szabo v. Pa. R.R.,
40 A.2d 562 (N.J. 1945).....1, 4, 5

Wilke v. Chicago Great W. Ry.,
251 N.W. 11 (Minn. 1933).....*passim*

TABLE OF CITATIONS
(continued)

OTHER AUTHORITIES

Fla. Const. art. V, § 3(b)(3).....2, 7

INTRODUCTION & SUMMARY OF ARGUMENT

The District Court of Appeal's decision affirming the trial court's judgment in this case was based on a careful application of settled law to fact. The court's opinion recited nearly a century of precedent under the Federal Employers Liability Act ("FELA") establishing that, although railroads ***do*** have a federal 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," they ***do not*** have a duty "to take preventive actions in anticipation of an employee falling ill or becoming injured." Juris. Br. App. 3 (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); *Wilke v. Chicago Great W. Ry.*, 251 N.W. 11, 13 (Minn. 1933)). That holding represents a straightforward application of long-established legal principles to the unique facts of this case and does not satisfy the requirements for exercise of this Court's jurisdiction.

In nevertheless seeking further review before this Court, Sells asserts that the decision in this federal-law case directly and expressly conflicts with the Court's state-law holdings in *Limones v. School District of Lee County*, 161 So. 3d 384 (Fla. 2015), and *Hicks v. Kemp*, 79 So. 2d 696 (Fla. 1955). Juris. Br. 4. To the contrary, the Court in those cases answered different legal questions in connection with different fact patterns. Neither case is relevant to the decision below, much less in conflict with it. Jurisdiction must be declined.

REASONS FOR DECLINING JURISDICTION

A. There is no express and direct conflict here

To establish conflict jurisdiction under Section 3(b)(3) of Article V of the Florida Constitution, the decision of a district court of appeal must "expressly and directly conflict[] with a decision of another district court of appeal or of the supreme court on the same question of law." That is a demanding standard: The conflict "must appear within the four corners of the majority decision" itself and cannot rest on either the "dissenting opinion" or the "record." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986) (citing *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980)). The decision in this case does not come close to meeting that requirement.

1. This is a federal FELA case, not a state tort case

We begin with a point of clarification that is tellingly absent from Sells's jurisdictional brief: Although "FELA provides for concurrent jurisdiction of the state and federal courts, . . . substantively, FELA actions are governed by ***federal*** law." *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 165 (2007) (emphasis added) (citing *Chesapeake & Ohio R. v. Stapleton*, 279 U.S. 587, 590 (1929)); *accord, e.g.*, *Henderson v. CSX Transp., Inc.*, 617 So. 2d 770, 772 (Fla. 1st DCA1993). That is an essential observation because the cases that Sells says "directly conflict" with the decision below do not interpret federal law under FELA; rather, they are ***Florida*** tort cases interpreting ***Florida*** law. For that reason alone, *Limones* and *Hicks* cannot seriously be described as "directly" conflicting with the decision

below "on the same question of law" resolved by the District Court of Appeal.

As for the federal law actually at issue, no one denies that a railroad bears a duty, once a medical emergency arises, to take reasonable steps to obtain medical assistance for a sick or injured employee. *See, e.g.*, *Hendricks*, 339 P.2d at 733 (when an employee suddenly becomes ill and cannot help himself, "the employer must exercise reasonable care to procure medical aid and assistance for such helpless employee"). The question here is simply whether the railroad's duty to provide aid and obtain medical assistance ***post***-emergency entails a ***pre***-emergency duty to equip and train all of its employees to use life-saving medical devices or medical interventions in anticipation that such medical emergencies might arise.

In holding that it does not, the District Court of Appeal properly relied on precedents interpreting federal law under FELA, not state precedents interpreting Florida tort law. And the long-settled rule under FELA is that a railroad's duty "to use ordinary care to avert the peril and give proper care during [an] emergency" arises only once an employee is actually "by accident or illness suddenly rendered helpless and exposed to serious peril or death." *Wilke*, 251 N.W. at 13; *accord, e.g.*, *Pulley v. Norfolk S. Ry.*, 821 So. 2d 1008, 1014-15 (Ala. Civ. App. 2001); *Bell v. Norfolk S. Ry.*, 476 S.E.2d 3, 5 (Ga. Ct. App. 1996); *Handy v. Union Pac. R.R.*, 841 P.2d 1210, 1221 (Utah Ct. App. 1992). Thus, as the New Jersey Supreme Court has said, a railroad's duty to obtain medical assistance for non-work-related medical emergencies necessarily "arises with the emergency and expires with it."

Szabo, 40 A.2d at 563; *accord Hendricks*, 339 P.2d at 733.

As the District Court of Appeal recognized, those principles are dispositive here. Because the duty to provide emergency assistance arises and expires with the emergency itself, it does not include a duty, applicable when no emergency is at hand, "to anticipat[e] that the physical health and ability of a servant to care for himself while doing his ordinary work will suddenly cease." *Wilke*, 251 N.W. at 13. The duty to provide emergency care does not, in other words, impose an obligation to take anticipatory measures to ensure that a doctor or any other "means . . . to care for and treat" medical emergencies is present. *Id*. That rule is supported beyond dispute by *De Zon v. American President Lines, Ltd.*, 318 U.S. 660 (1943), in which the Supreme Court of the United States explained that vessel owners subject to the Jones Act (an analog to FELA, subject to the same substantive federal tort law) must take "reasonable measures to get" seriously ill employees to a doctor, but need not "carry a physician" on the ship. *Id*. at 668.

Although each of the foregoing cases was fully briefed before and addressed by the District Court of Appeal, Sells fails to acknowledge them in her jurisdictional brief. Ignoring those cases, she proclaims instead that "[t]his is the first time any court has ever expressly held that a railroad has no duty as a matter of law to even reasonably anticipate foreseeable medical emergencies." Juris. Br. 4. That is flatly incorrect—as *Hendricks*, *Szabo, Wilke*, and *De Zon* demonstrate.

In sum, every court (including the U.S. Supreme Court) to consider whether employers bear an obligation under FELA or the Jones Act to train and equip employees in anticipation of medical emergencies held that they ***do not***.[1] The duty to provide prompt medical care during emergencies, those courts have held, does not obligate railroads to take anticipatory steps before an emergency exists. Sells

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[1] The duty proposed by Sells would impose an incalculable burden on employers. Sells's expert testified that an effective emergency response entails "identify[ing] what risk potentials there are, where you may have issues that need to be addressed, whether it is an activity that could provoke an incident, such as a fall or an electrocution, or whether it is a condition of employment, such as working in a remote work site that could make response more difficult." R16:121-22. Once "these kinds of things have [been] identified," she continued, "different options need to be reevaluated to determine which is more reasonable, how many things you can do to really bolster that emergency response and make it more timely and more effective." R16:122. And after that, "then you have to put into place a plan that has to be implemented, that has to be quality control to see that it is being implemented effectively and consistently." *Id*.

What is more, according to Sell's expert, not only must the railroad "plan for any—control for any type of risk" (a burden that starts to sound a lot like general risk insurance), but there must be constant training "because emergency response is not something that happens every day." R16:126. "And people can panic; they can misunderstand; they can get confused. So many things can go wrong if the proper planning and preparation isn't there." *Id*. Accordingly, "it becomes very critical that there be a considerable amount of planning around how we're going to address this and making sure that the procedures are [in] place, the 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 and worry and try to figure it out as you go. You want it to be click, click, click." *Id*.

In effect, Sells asserts that CSXT was required to insure its employees against the risks of every day life by training its employees to stand in the shoes of emergency first responders. That is not the law.

asks this Court to disregard that settled federal rule and declare a direct and express conflict on the basis of inapplicable state law. That, it may not do.

2. Even if state law were applicable, nothing in the decision below expressly and directly conflicts with *Limones* or *Hicks*

Even supposing that a federal-law decision of the District Court of Appeal could "directly and expressly conflict" with a state-law decision of this Court, there still would be no basis for finding a conflict in this case.

Sells insists that the District Court of Appeal's treatment of the issue presented as a question of "duty" rather than a question of "breach" expressly and directly conflicts with this Court's decision in *Limones*. Juris. Br. 6. But *Limones* addressed an entirely different legal question against the backdrop of an entirely different fact pattern. The District Court of Appeal carefully considered and distinguished *Limones* on that basis. It should go without saying that an opinion that factually and legally distinguishes a case cannot "expressly" conflict with it.

The key issue here—whether CSXT had a duty to furnish AEDs and to train personnel to use them or to administer CPR in anticipation that an employee might suffer a non-work-related cardiac arrest—was not raised in *Limones*. There, the question presented was whether a school's "duty to take appropriate post-injury efforts to avoid or mitigate further aggravation of [a student's] injury" required the school's soccer coach to use a readily available AED on a student who had collapsed on a soccer field. *Limones*, 161 So. 3d at 391. The AED—which the school was ***already*** required by statute to acquire and maintain—was housed "at

the game facility located at the end of the soccer field," and the coach was ***already*** "certified in the use" of the device. *Id*. at 387. Thus, the only question in *Limones* was whether the coach (and hence the school district) breached a ***post***-emergency duty by failing to use the AED on the stricken student, given the ready availability of the AED and the coach's knowledge of how to use it. *Id*. at 391. The Court was not presented with—and did not address—the antecedent question of whether the school, in the absence of a statutory duty, would have had a common-law duty to furnish AEDs and to train personnel to use them. Thus, *Limones* plainly did not address the "same question of law" (Fla. Conts Art. V § 3(b)(3)) that was resolved by the District Court of Appeal in this case.[2]

Beyond that, the Court in *Limones* was careful to explain that its decision turned principally on the "special relationship between schools and their students based upon the fact that a school functions at least partially in the place of parents during the school day and school-sponsored activities." *Limones*, 161 So. 3d at 390. Sells asserts that a similar duty applied in this case. But the District Court of Appeal disagreed, quoting *Limones* for the commonsense propositions that "'the proprietor-customer relationship most frequently involves two adult parties, where-

[2] In trying to drum up a conflict, Sells describes the decision below as addressing the narrow question whether railroads have a duty ***specifically*** to furnish AEDs and train employees how to use them. Juris. Br. 5-6. That is inaccurate; in fact, the question was simply whether a post-emergency duty to obtain medical assistance entails a pre-emergency duty to "to take preventive measures" in anticipation of non-work-related injuries. Juris. Br. App. 4. Each of the FELA cases that we have just cited treats that question as one of ***duty*** and not breach.

as the school-student relationship usually involves a minor'" and that "'the business invitee freely enters into a commercial relationship with the proprietor." Juris. Br. App. 3 (quoting *Limones*, 161 So. 3d at 392). Far from creating a conflict with those observations, the District Court of Appeal held simply that "[t]he same distinction applies to this case" 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." *Id*. That is self-evidently true.

Undeterred, Sells says that "the majority's decision is expressly and directly contrary to *Hicks v. Kemp*, 79 So. 2d 696 (Fla. 1955)," which held that "an employer's common law duty to provide a safe workplace is broader than that of a business owner." Juris. Br. 9. But no plausible reading of the decision below is at odds with that holding. The District Court of Appeal did not hold that the duties owed by employers to their employees are ***the same*** as those owed by businesses to their customers. *See* Juris. Br. 4. Rather, it held that an employer's relationship with its employees is ***closer in kind*** to a business's relationship with its customers than it is to a school's relationship with its students. In making that observation, moreover, the District Court of Appeal relied substantially on the U.S. Supreme Court's decision in *De Zon*, the holding of which "would be illogical" if Sells were right that the relationship between Mr. Sells and CSXT were akin to the *in loco parentis* relationship at issue in *Limones*. *Id*. at 3-4. There is, in short, no incon-

sistency between the carefully-reasoned decision below and this Court's decisions in either *Limones* or *Hicks*.[3]

B. The issue presented is, in any event, fact-bound and unimportant

Sells finally claims that this case is "the first of its kind nationwide" and that it "will be used by FELA employers as persuasive authority in state and federal courts to support their failure to take precautionary measures to ensure their workers receive prompt medical care, even when they knowingly send them to remote areas that are too far from EMTs." Juris. Br. 9. Of course, "importance" is not an independent basis for the exercise of jurisdiction. But in any event there is no basis for Sells's assertion.

While this may indeed be the first FELA or Jones Act case involving AEDs or CPR, it is by no means the first case involving the broader question whether a railroad (or ship owner) has a duty to anticipate that an employee will suffer a

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[3] Sells suggests, as an afterthought, that the decision below also conflicts with the Second Circuit's decades-old decision in *Powers v. New York Central Railroad*, 251 F.2d 813 (2d Cir. 1958). *See* Juris. Br. 9. But that case is easily distinguishable because *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. There is no dispute that a railroad has a duty to "anticipate what is likely to happen to his employee" when the employee "engage[s] in hazardous work" (*Wilke*, 251 N.W. at 13), including when he works in an environment that is inherently dangerous, such as one that is on the water. That is a far cry from saying that a railroad has a duty to anticipate that an employee might suffer an illness or injury that is ***not*** the result of the dangers of his work environment, including sudden cardiac arrest.

The handful of U.S. Supreme Court cases that Sells cites in the final page of her brief are likewise irrelevant. Each concerns the standard for sending the question of causation to a jury in a FELA case. Nothing here turns on FELA's causation standard.

medical emergency in the work place. As to ***that*** issue, the holding below is entirely consistent with longstanding FELA and Jones Act precedents. The District Court of Appeal did no more than add its concurring voice to the uniform body of federal law that holds that a railroad's post-emergency duty to obtain medical assistance does not impose a pre-emergency duty to equip and train employees to use particular medical interventions.

And this Court's review is particularly unwarranted because the facts at issue—a railroad employee suffering a non-work-related medical emergency while on the job in a rural area—are extremely rare. Because the lower court's decision involves an unremarkable application of settled FELA law to a rare factual scenario, there is no reason to grant further review—supposing in the first place that there were a conflict sufficient authorize the exercise of jurisdiction, which there is not.

CONCLUSION

The Court should decline jurisdiction.

December 1, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

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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, 14 points.

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