No. 11-2735

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

RICK STERNA, Plaintiff-Appellant, v. CSX TRANSPORTATION, INC., Defendant-Appellee.	On Appeal from the Circuit Court Cook County, Law Division No. 06-L-7738 Honorable James D. Egan, Judge Presiding.

BRIEF OF DEFENDANT-APPELLEE

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NATURE OF THE ACTION

Plaintiff-appellant Rick Sterna began work with the Baltimore & Ohio Chicago Terminal Railroad ("B&OCT"), one of the predecessors of defendant-appellee CSX Transportation, Inc., (collectively, "CSXT") in 1969. In 2006, Sterna brought suit against CSXT under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, claiming that he sustained cumulative injuries to his feet and right knee on account of CSXT's alleged negligence. Sterna alleged two principal theories of negligence: (i) that CSXT's pre-1990 practice of allowing railroad employees to get on and off slow-moving equipment was negligent; and (ii) that CSXT negligently maintained the railyard in which he worked.

The case was tried before a jury from March 8 to March 16, 2011. During the trial, Sterna did not introduce any evidence that CSXT's pre-1990 moving-equipment practice was not reasonably safe or deviated from any standard or requirement. The trial court accordingly granted CSXT's motion for a directed verdict as to Sterna's theory that CSXT was negligent in allowing employees to get on and off slow-moving equipment up until 1990. However, the trial court denied CSXT's directed-verdict motion as to Sterna's theory that CSXT negligently maintained the railyard. The jury returned a verdict finding that CSXT was not negligent. The trial court denied Sterna's motion for a new trial. No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in granting a directed verdict in favor of CSXT on Sterna's theory that CSXT's pre-1990 practice of allowing employees to mount and dismount slow-moving trains constituted negligence.

2. Whether the trial court committed reversible error in excluding the testimony of Dr. Frederick Klepsch concerning various documents provided to him by Sterna's counsel on which he admittedly did *not* rely in forming his opinions.

3. Whether the trial court committed reversible error in limiting Sterna's future-wage-loss damages to the winter months and in refusing to instruct the jury regarding future disability.

STATEMENT OF FACTS

In 1969, Sterna started work as a "conductor/switchman/brakeman" in Barr Yard, which is located near Chicago. Vol. 4, C959. He claims that, as a result of his work in Barr Yard, he "experienced long term cumulative trauma resulting in injuries to his feet, knees and ankles." Vol. 4, C960 (emphasis omitted). According to Sterna, CSXT (and/or its predecessor) was negligent and failed to provide Sterna with a reasonably safe place to work in two respects. Sterna asserts that the ballast rock in Barr Yard was too large and uneven and that the railyard was poorly maintained, resulting in dangerous working conditions. Vol. 4, C960; Vol. 10 (March 10 Morning Tr.) pp. 14-20; Vol. 11 (March 16 Morning Tr.) pp. 105-106. Sterna also asserts that CSXT should have prohibited employees from mounting and dismounting moving equipment sooner than when it did so in 1990. Vol. 4, C960; Vol. 10 (March 10 Morning Tr.) pp. 12-14.

A. The Conditions In Barr Yard

Because Sterna does not challenge the sufficiency of the evidence supporting the jury's verdict in CSXT's favor as to his yard-conditions theory of liability, we will only briefly describe the evidence presented on this point, taking the evidence in the light most favorable to the prevailing party below—CSXT—as the standard of review requires.

Sterna worked predominantly in Barr Yard from 1969 until the 2000s, when he accumulated enough seniority to "bid" for other jobs that took him outside the yard. Vol. 10 (March 14 Morning Tr.) pp. 63-64; Vol. 11 (March 14 Afternoon Tr.) pp. 7-8, 66-67; *see infra* pp. 13-14. Roy Dean, CSXT's former Chief Engineer of Maintenance of Way, testified that CSXT complied with all applicable Federal Railroad Administration ("FRA") regulations and its own internal standards at Barr Yard. Vol. 4 (March 15 Morning Tr.) pp. 7, 62-63.

Barr Yard is a railroad switching yard where railroad cars from various incoming trains are sorted and reassembled into outgoing trains. Vol. 10 (March 11 Tr.) p. 52; Vol. 10 (March 14 Morning Tr.) p. 14. The tracks in the yard are supported and drained by rock ballast, which lends stability to the railroad tracks. Vol. 10 (March 10 Morning Tr.) pp. 71-72.

The FRA promulgates track and safety regulations with which CSXT is required to comply. Vol. 10 (March 10 Morning Tr.) p. 76; *see also* 49 C.F.R. § 213.103. These standards do not require any specific size of ballast to be used; in particular, they do not require railroads to construct walkways covered with smaller sized ballast in frequently travelled areas of a railyard. Vol. 10 (March 10 Morning Tr.) pp. 79-81; Vol. 11 (March 15 Morning Tr.) pp. 17-18; Vol. 5, C1039 (Beyerl Dep. 62-63). The FRA regulations require that the ballast structurally support the track and permit sufficient drainage of water. Vol. 10 (March 10 Morning Tr.) p. 83.

The American Railway Engineering and Maintenance-of-Way Association ("AREMA"), a voluntary association that provides non-binding recommendations to the railroad industry, has defined various "grades" of ballast. Vol. 10 (March 10 Morning

Tr.) pp. 86, 90; Vol. 11 (March 15 Morning Tr.) p. 13; Vol. 5, C1039 (Beyerl Dep. 64-65).[1] Generally speaking, larger-sized ballast rock is used on the "main line" (including portions of main-line track traversing rail yards) and smaller-sized ballast rock is used elsewhere. Vol. 10 (March 10 Morning Tr.) pp. 89, 108; Vol. 5, C1035 (Beyerl Dep. 48-49). CSXT (and its predecessors) used smaller-sized "yard" ballast in trackside walkways and the areas around switches at Barr Yard throughout Sterna's career. *See, e.g.*, Vol. 10 (March 10 Afternoon Tr.) pp. 10-11; Vol. 11 (March 15 Morning Tr.) pp. 39, 42, 78, 108; Vol. 5, C1008 (Fritts Dep. 63).

For example, Roy Dean (then CSXT's Assistant Chief Engineer) recalled that smaller ballast was used in Barr Yard in 1990 "where employees walked" and "in and around switches." Vol. 11 (March 15 Morning Tr.) pp. 6, 98. And Albert Fritts, who worked on the railroad almost three decades and eventually became CSXT's Safety Director, testified that conditions at Barr Yard were "good. " Vols. 4-5, C992, C1008 (Fritts Dep. 8, 63). He recalled in particular that, even in the 1980s, Barr Yard used smaller ballast in the vicinity of high-traffic areas, such as "switches and locations [where] employees would be doing a lot of work activity." Vol. 5, C1008 (Fritts Dep. 63). Barr Yard had an "active safety program" and an "excellent safety record." Vol. 5, C1008 (Fritts Dep. 64). "It was [a yard] where . . . they were attentive to yard conditions." Vol. 5, C1008 (Fritts Dep. 64).

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[1] Grade 4A ballast ranges in size from 0.75 to 2.0 inches; Grade 4 ballast ranges from 0.75 to 1.5 inches; and Grade 5 ballast ranges from 0.375 to 1.0 inches. Vol. 5, C1029-30 (Beyerl Dep. 23-27). Grade 5 ballast is often called "fill-in" or "yard" ballast. Vol. 11 (March 15 Morning Tr.) pp. 20, 29. These grades of ballast are all comparable in cost. Vol. 5, C1042 (Beyerl Dep. 76-77); Vol. 11 (March 15 Morning Tr.) pp. 104-105.

Moreover, a number of CSXT employees—including some called by Sterna in his case-in-chief—testified as to the absence of complaints about conditions in Barr Yard. Joseph Ciemny, who was a yardmaster at Barr Yard from 2002 to 2005 and a union safety official from 2005 through the present, did not recall receiving any complaints with respect to the walking conditions in Barr Yard. Vol. 10 (March 10 Afternoon Tr.) pp. 51, 55-56. Jonathan Phillips, who was Manager of Operating Practices in the Chicago area from 2001 to 2009 (and a trainmaster at Barr Yard in 2003), similarly testified that he did not recall hearing of any complaints about ballast, walkway, or walking issues in Barr Yard. Vol. 10 (March 11 Tr.) pp. 14-15, 33, 46-47. Fritts attended safety-committee meetings at Barr Yard and did not recall any complaints about the walking conditions there. Vol. 5, C1009 (Fritts Dep. 66).

Indeed, Peter Burrus, who was an assistant terminal trainmaster at Barr Yard from 1991 to 1993 and later served on the Chicago Division safety committee from 2004 to 2006, recalled that the *only* person who ever complained about ballast or walking conditions at Barr Yard was Sterna himself. Vol. 10 (March 10 Afternoon Tr.) pp. 64-70. Sterna never provided any specifics as to "exactly where he wanted [Burrus] to focus," so Burrus found it impossible to address Sterna's complaint. Vol. 10 (March 10 Afternoon Tr.) pp. 73-74.

B. CSXT's Practices Regarding The Mounting And Dismounting Of Moving Equipment

Sterna testified that when he started with the railroad in 1969, he was required to get on and off slow-moving trains in order to carry out some of his switching responsibilities in Barr Yard. Vol. 10 (March 14 Morning Tr.) p. 11. Sterna admitted that he was able to get on and off moving equipment safely:

> Q. With respect to getting on and off moving equipment, there was a lot of questioning on that earlier this morning. Do you prefer getting on and off stopped equipment, or do you prefer getting on and off moving equipment?
>
> A. I prefer getting off safely.
>
> Q. Okay. *When you got on and off moving equipment, were you able to do that safely*?
>
> A. *Yes*.
>
> Q. When you got on and off stopped equipment, were you able to do that safely?
>
> A. Yes.

Vol. 11 (March 14 Afternoon Tr.) pp. 33-34 (emphasis added). Sterna never reported any injuries from mounting or dismounting moving equipment while CSXT's pre-1990 practice of allowing employees to do so was in effect. Vol. 5, C1021 (Fritts Dep. 116); *see also* Vol. 11 (March 14 Afternoon Tr.) pp. 16-17.

In January 1990, CSXT revised its rules to prohibit mounting and dismounting moving equipment. Vol. 10 (March 14 Morning Tr.) p. 12; Vol. 11 (March 14 Afternoon Tr.) p. 34; Vol. 5, C1004 (Fritts Dep. 47-48). In November 1992—after the rule change—Sterna was charged with a rule violation for dismounting moving equipment. Vol. 11 (March 14 Afternoon Tr.) p. 35; Vol. 5, C1007 (Fritts Dep. 58).

No witness with expertise in railroad operations or railroad safety testified that mounting or dismounting slow-moving equipment is not reasonably safe or that CSXT's pre-1990 practice of allowing employees to do so reflected negligence. Vol. 11 (March 16 Morning Tr.) p. 91 ("Now, we didn't hire a liability expert. That's true.").

Former CSXT Safety Director Fritts testified extensively about the former practice of allowing employees to mount and dismount slow-moving equipment and

CSXT's discontinuation of that practice in 1990. At no point, however, did Fritts testify that CSXT's pre-1990 practice was not a reasonably safe one. Quite the contrary: Fritts stated that "mounting and dismounting moving equipment was a safe practice" and could be done safely by railroad employees. Vol. 5, C1012 (Fritts Dep. 78). Employees were told to mount or dismount trains only at a "speed which is safe to them," which could vary depending on the employee and the circumstances. Vol. 5, C1005 (Fritts Dep. 52); *see also* Vol. 5, C1004 (Fritts Dep. 46) ("safe speed"), C1016 (Fritts Dep. 94) (same), C1021 (Fritts Dep. 115-116) (same). Furthermore, employees were instructed not to attempt mounting or dismounting a car "moving over six miles per hour." Vol. 5, C1016-17 (Fritts Dep. 94, 100). Sterna did not know whether he had ever gotten on or off "moving equipment at speeds in excess of six miles an hour." Vol. 10 (March 14 Morning Tr.) p. 28.

It is undisputed that there is no "regulatory requirement that prevents railroads from allowing their employees to mount or dismount moving equipment." Vol. 5, C1007 (Fritts Dep. 58). In fact, CSXT was the first Class I railroad to prohibit employees from doing so.[2] Vol. 5, C1007 (Fritts Dep. 57). To this day, many "intermediate-size" or "short-line" railroads continue to allow their employees to mount and dismount moving equipment. Vol. 5, C1007 (Fritts Dep. 58). Although Fritts acknowledged that CSXT could have made the change even earlier, Vol. 5, C1011-12 (Fritts Dep. 76-77, 80), he reaffirmed that he "d[idn't] think that it is unsafe to mount and dismount moving equipment," Vol. 5, C1012 (Fritts Dep. 78-79).

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[2] Class I railroads are the largest railroads under the regulatory scheme established by the Surface Transportation Board. 49 C.F.R. § 1201.1-1(a).

There was conflicting evidence about the specific training that Sterna received with respect to mounting or dismounting moving equipment. Fritts testified that, in the 1960s, when Sterna was newly hired by CSXT's predecessor, Vol. 10 (March 14 Morning Tr.) p. 8; Vol. 4, C998 (Fritts Dep. 29), he would have received both classroom and on-the-job training, Vol. 4, C993, C994-95 (Fritts Dep. 9, 16-17). Fritts testified that employees would have been trained and retrained on how to mount or dismount moving equipment. Vol. 5, C1003, C1006 (Fritts Dep. 44, 54). For example, employees would have been shown and taught the proper way to do so and would have watched a film on that topic from the "Rail Green" safety series. Vols. 4-5, C994, C1006 (Fritts Dep. 13, 54). Fritts also testified that Safe Job Procedures were promulgated for mounting and dismounting moving equipment, Vols. 4-5, C999, C1002 (Fritts Dep. 36-37), which described the potential hazards involved and set forth step-by-step instructions for doing so properly, Vols. 4-5, C999, C1004, C1014-15 (Fritts Dep. 34, 45-46, 88-91).

On the other hand, Sterna testified that he did not receive any classroom training before starting his work as a switchman; that he did not recall seeing any training videos on that topic; and that he had never seen the applicable Safe Job Procedures before trial. Vol. 10 (March 14 Morning Tr.) pp. 9-11. Sterna did acknowledge, though, that he was "trained about how to get on and off moving equipment" by "watch[ing] other people do it." Vol. 10 (March 14 Morning Tr.) p. 11. In other words, Sterna had "on-the-job training" and learned from "watching and observing" the "older heads" how to do his job safely. Vol. 11 (March 14 Afternoon Tr.) pp. 6-7.

C. Sterna's Claimed Injuries

Sterna presented the testimony of two physicians, Dr. Larry Wapiennik (the podiatrist who treated him for his foot complaints) and Dr. Frederick Klepsch (the orthopedic surgeon who treated him for his right-knee complaints).

1. ***Foot complaints***

a. *Dr. Wapiennik's diagnoses*

In July 2003, Dr. Wapiennik diagnosed Sterna with a "plantar fibroma"—essentially a "soft tissue nodule" or an "abnormal thickening" of tissue—in his right foot. Vol. 5, C1045, C1046 (Wapiennik Dep. 5-6, 9). Sterna also had a bone fragment in his left foot from a 1974 motorcycle accident. Vol. 5, C1046, C1048 (Wapiennik Dep. 8, 15-16); Vol. 11 (March 14 Afternoon Tr.) p. 18. Sterna was prescribed anti-inflammatory medication, but eventually opted for surgical treatment of the plantar fibroma. Vol. 5, C1047 (Wapiennik Dep. 11-13). The June 2, 2004 surgery was successful, and Sterna returned to work within about a month, on July 4, without restrictions. Vol. 5, C1048, C1056 (Wapiennik Dep. 14, 46).

In June 2005, Dr. Wapiennik removed the bone fragment from Sterna's left foot. Vol. 5, C1048 (Wapiennik Dep. 15). That surgery also was a success. Vol. 5, C1048 (Wapiennik Dep. 17). Dr. Wapiennik cleared Sterna to return to work on August 30, 2005, again without restrictions. Vol. 5, C1049, C1056 (Wapiennik Dep. 18-19, 48).

In June 2006, Dr. Wapiennik diagnosed Sterna with a small plantar fibroma in his left foot. Vol. 5, C1049 (Wapiennik Dep. 20-21). Dr. Wapiennik prescribed painkillers and anti-inflammatory medication. Vol. 5, C1049-50 (Wapiennik Dep. 21-22).

In January 2009, Sterna was additionally diagnosed with arthritis of the left ankle and right-knee pain. Vol. 5, C1050 (Wapiennik Dep. 23-24). In November 2010, Dr.

Wapiennik diagnosed an "osteochondral dome lesion," or defect, on Sterna's left ankle. Vol. 5, C1051 (Wapiennik Dep. 26). Sterna did not have any subsequent follow up visits with Dr. Wapiennik. Vol. 5, C1051 (Wapiennik Dep. 27). For treatment of Sterna's right knee and left ankle, Dr. Wapiennik referred Sterna to Dr. Klepsch. Vol. 5, C1050, C1061 (Wapiennik Dep. 25, 66); *see supra* pp. 11-12.

b. *Dr. Wapiennik's failure to opine regarding causation*

Dr. Wapiennik testified that the cause of plantar fibroma is "unknown" and that he could not render an opinion about the cause of the plantar fibromas on Sterna's feet. Vol. 5, C1058 (Wapiennik Dep. 54-55).[3] Dr. Wapiennik also stated that Sterna's "line of work" at the railroad "*can* make symptomatic"—*i.e.*, was in principle *capable* of causing the symptoms of—"diagnoses" like those he treated in Sterna. Vol. 5, C1052, C1061 (Wapiennik Dep. 30-31, 68-69) (emphasis added). He did not testify that Sterna's working conditions *in fact* aggravated Sterna's claimed foot problems.

Dr. Wapiennik testified that he had never observed Sterna at work or otherwise evaluated Sterna's working conditions and acknowledged that the only thing that he knew about Sterna's job was that Sterna sometimes walked on rocks and got on and off trains. Vol. 5, C1058 (Wapiennik Dep. 55-56). For example, he did not know the size of the ballast used in Barr Yard or how frequently Sterna mounted or dismounted moving equipment. Vol. 5, C1058 (Wapiennik Dep. 56, 76). Furthermore, he admitted that there are many *non*-work activities that involve standing and walking on uneven surfaces and that those activities, too, could aggravate foot conditions. Vol. 5, C1058-59 (Wapiennik Dep. 57-59).

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[3] Dr. Wapiennik separately opined that the bone fragment in Sterna's left foot was the result of a motorcycle accident. Vol. 5, C1046, C1048 (Wapiennik Dep. 8, 15-16).

2. ***Right-knee complaints***

a. *Dr. Klepsch's diagnoses*

Dr. Wapiennik referred Sterna to Dr. Klepsch in February 2009 for treatment of Sterna's right knee and left ankle. Vol. 4, C965 (Klepsch Dep. 8). Dr. Klepsch diagnosed Sterna with joint-space narrowing, osteoarthritis, and meniscal tearing of the right knee. Vol. 4, C966-67 (Klepsch Dep. 10-11, 15). Dr. Klepsch successfully performed arthroscopic surgery on Sterna's right knee on March 27, 2009, and Sterna was released to return to work on May 18, 2009, without any restrictions. Vol. 4, C968, C973 (Klepsch Dep. 19, 39). Dr. Klepsch subsequently administered several "Synvisc" injections into Sterna's right knee, which lubricated the joint and provided some relief. Vol. 4, C968-69 (Klepsch Dep. 20-23).

Dr. Klepsch testified that the arthritis in Sterna's right knee would continue to worsen and that, "at some point," he would "most likely" need a right knee replacement. Vol. 4, C970, C979 (Klepsch Dep. 28, 65). Dr. Klepsch was unable to predict when a knee replacement would become necessary, and there were no current plans for surgery. Vol. 4, C970, C979 (Klepsch Dep. 29, 62).

b. *Dr. Klepsch's failure to opine regarding causation*

Dr. Klepsch testified that he could not relate CSXT's pre-1990 practice of allowing employees to mount and dismount slow-moving equipment to Sterna's present condition. Vol. 4, C976 (Klepsch Dep. 51-52). That practice "stopped 21 years ago," Dr. Klepsch noted, and could not be linked to Sterna's right-knee condition:

> Q. An exposure [*i.e.*, the pre-1990 moving-equipment practice] that stopped 21 years ago. Can you state with any reasonable certainty that is related to the condition that he presented to you back in 2009?

A. No.

Vol. 4, C976 (Klepsch Dep. 52). Dr. Klepsch also declined to testify that Sterna's osteoarthritis was caused by Sterna's work activities. Vol. 4, C976 (Klepsch Dep. 53 ("I think it's difficult to say that."); *see also* Vol. 4, C977 (Klepsch Dep. 54) (agreeing that "it wasn't possible . . . to make a direct connection between the wear and tear" occasioned by the job and Sterna's "knee arthritis").

Dr. Klepsch noted that "any physically demanding job or athletic activity," such as walking on uneven ground, could result in "wear and tear," and that, in turn, "could contribute" to osteoarthritis and meniscal tearing. Vol. 4, C972, C981 (Klepsch Dep. 36, 71). He stated, though, that he was *not* saying that Sterna's railroad work was a "direct cause" of these conditions. Vol. 4, C981 (Klepsch Dep. 71). He was unable to "single out any specific work activities as a cause for any arthritis that Mr. Sterna has in his knee." Vol. 4, C976 (Klepsch Dep. 52). Indeed, Dr. Klepsch agreed that such conditions were "the effect of an entire lifetime of activities on somebody's joints," including both work and non-work activities. Vol. 4, C974 (Klepsch Dep. 45). He could not distinguish between the possible "contribution from the work activities" as opposed to that from "other activities of daily living." Vol. 4, C976 (Klepsch Dep. 52), And, again, he specifically testified that he could *not* relate CSXT's pre-1990 moving-equipment practice to Sterna's present condition. Vol. 4, C976 (Klepsch Dep. 51-52).

Like Dr. Wapiennik, Dr. Klepsch was not aware of the specifics of Sterna's work activities when he formed his opinions. For example, he did not know the physical demands on Sterna's body from such activities; how frequently Sterna performed any particular activity; or the procedures that Sterna was supposed to follow when doing so. Vol. 4, C975-76 (Klepsch Dep. 46-50).

D. The Effect Of Sterna's Claimed Injuries On Sterna's Ability To Work

Although Sterna used to work in Barr Yard switching trains, by 2009 or 2010 Sterna was regularly working as a railroad flagman outside the yard, a much less taxing job. Vol. 10 (March 14 Morning Tr.) pp. 63-64; Vol. 11 (March 14 Afternoon Tr.) pp. 7-8, 30, 66-67; Vol. 11 (March 15 Morning Tr.) pp. 128-132. Being a flagman is, to borrow the phrasing of Sterna's trial counsel, "the easiest job on earth." Vol. 11 (March 16 Morning Tr.) 8. The flagman drives to a construction jobsite in his personal vehicle to protect construction workers from trains that pass through the work area. Vol. 10 (March 14 Morning Tr.) p. 64; Vol. 11 (March 15 Morning Tr.) pp. 121-122. He waits in his car until he is radioed that a train is approaching and then walks around the work site to make sure that all of the construction workers are off the tracks. Vol. 10 (March 14 Morning Tr.) pp. 65-67. According to Sterna, about six trains a day pass through a work site, and clearing a train typically takes between 30 and 45 minutes. Vol. 10 (March 14 Morning Tr.) p. 67.

Sterna has been able to consistently bid for and win flagman jobs in recent years because he acquired Number 1 seniority in October 2010. Vol. 11 (March 14 Afternoon Tr.) p. 31. As Sterna explained, the "older people in seniority get to pick their jobs. . . every day 365 days a year, and they take the better ones." Vol. 10 (March 14 Morning Tr.) p. 23. As the employee with top seniority, Sterna could not be "bump[ed]" from a job by any other employee; he could bid for and hold a flagman job as long as he desired it. Vol. 11 (March 14 Afternoon Tr.) pp. 8-9. Thus, he was able to work "almost exclusively flagman's jobs." Vol. 11 (March 14 Afternoon Tr.) p. 30; Vol. 11 (March 14 Afternoon Tr.) pp. 66-67 ("overwhelming number of jobs" that Sterna worked in 2010). Except for a handful of days a year when there was no construction going on anywhere in the Chicago

area, there was always a flagman job available for Sterna to bid on (and thus win). Vol. 11 (March 15 Morning Tr.) pp. 122-123.

1. ***Sterna's treating physicians agree that Sterna can work***

There was no medical evidence that Sterna was unable to work a conductor or flagman job for CSXT. Neither of Sterna's treating physicians opined that Sterna was unable to work or was medically disqualified from doing so. Dr. Wapiennik never took Sterna off work or placed any medical restrictions on him. Vol. 5, C1057 (Wapiennik Dep. 51-52, 74). Likewise, Dr. Klepsch did not place any medical restrictions on Sterna or disqualify Sterna from work. Vol. 4, C977, C979 (Klepsch Dep. 56, 64-65). In a November 1, 2010 letter, Dr. Klepsch stated that being a flagman was "very tolerable for [Sterna's] knee." Vol. 4, C969 (Klepsch Dep. 24). Although he opined that non-flagman jobs were "more demanding" and might bother Sterna's right knee more, Vol. 4, C977 (Klepsch Dep. 55), Dr. Klepsch confirmed that Sterna was still physically capable of performing—and not medically disqualified from—those other jobs. Vol. 4, C977 (Klepsch Dep. 55-56). Dr. Klepsch testified that, even if Sterna received a knee replacement in the future, that procedure would not disqualify him from working at the railroad. Vol. 4, C978-79 (Klepsch Dep. 60, 62-64).

Dr. Thomas Neilson, CSXT's Chief Medical Officer also concluded, based on a review of Sterna's records, that Sterna was not medically disqualified or restricted from working. Vol. 4, C988-89 (Neilson Dep. 17-21).

In fact, as the trial court noted, the only witness who testified that Sterna could not work was Sterna himself. Vol. 10 (March 14 Morning Tr.) p. 77; Vol. 11 (March 15 Afternoon Tr.) p. 97.

2. ***Winter safety boots***

For the safety of its employees, CSXT requires railroad workers to wear winter safety boots whenever there is snow or ice on the ground. Vol. 11 (March 15 Morning Tr.) pp. 115-116. On January 20, 2011, Dr. Klepsch wrote a note stating:

> Mr. Sterna is required to wear a rubber boot with metal studs or spikes on the sole. Because of the traction that they create he is having aggravation of his right knee arthritis and even left knee pain. The traction torques his knees unnecessarily and increases his pain. He would benefit from wearing another type of boot or shoe to lessen the traction.

Vol. 4, C970 (Klepsch Dep. 26). Dr. Klepsch confirmed that this note was not "stating a medical restriction" or "disqualification" from Sterna's job and that he was not saying that Sterna could not wear the winter safety boots. Vol. 4, C978 (Klepsch Dep. 61). In other words, Dr. Klepsch did not say that it was medically necessary that Sterna stop wearing the boots, only that they caused him some discomfort. Vol. 4, C989 (Neilson Dep. 20).

With Dr. Klepsch's note in hand, Sterna contacted CSXT's medical department, which investigated whether any alternative snow footwear existed; none did. Vol. 4, C987 (Nielsen Dep. 12-13). CSXT's medical department did not, however, pull Sterna out of service or say that he could not work. Vol. 4, C987 (Nielsen Dep. 14); Vol. 10 (March 14 Morning Tr.) pp. 73-74; Vol. 11 (March 15 Afternoon Tr.) p. 22. Sterna was told only that CSXT could not accommodate Dr. Klepsch's recommendation.

On January 28, 2011, Sterna was pulled out of service for not wearing the boots. Vol. 10 (March 14 Morning Tr.) pp. 71-72. The Chicago terminal superintendent directed one of his assistant superintendents to remove Sterna from his work assignment "until such time as that he could comply with the safety regulations"—that is, until he was

willing to wear the winter safety boots. Vol. 11 (March 15 Morning Tr.) pp. 115-116; Vol. 11 (March 15 Afternoon Tr.) pp. 5-6. Sterna was not medically disqualified from working. Vol. 11 (March 15 Afternoon Tr.) p. 8.

Sterna has not worked since, Vol. 10 (March 14 Morning Tr.) p. 71, even though CSXT does not require the boots when there no longer is any snow, Vol. 11 (March 15 Morning Tr.) p. 116. Dr. Klepsch agreed that "there's no reason" that Sterna could not continue with his flagman job once the snow is gone and Sterna is not required to wear the boots. Vol. 4, C978 (Klepsch Dep. 61). The boot requirement was lifted in early March 2011. Vol. 11 (March 15 Morning Tr.) p. 117. CSXT management tried to contact Sterna on multiple days when "there[] [was] no snow and ice" and so no possible "issue with wearing the spiked boots." Vol. 11 (March 15 Morning Tr.) pp. 136-137. Sterna did not respond. Vol. 11 (March 15 Morning Tr.) pp. 137-138.

E. Proceedings Below

Sterna brought suit against CSXT in 2006 and filed the operative complaint in 2009. Vol. 1, C3; Vol. 4, C959. The complaint asserted two bases for liability under FELA: the yard-conditions claim and the moving-equipment claim. Vol. 4, C960.

1. *CSXT's directed-verdict motion*

At the close of Sterna's case, CSXT moved for a directed verdict. Vol. 3, C739. As to the yard-conditions claim, CSXT argued that there was no evidence that it had failed to provide Sterna with a reasonably safe workplace. In particular, CSXT argued that there was no evidence that the larger sized ballast rock used in some areas of Barr Yard was not reasonably safe. Vol. 3, C740. As to the moving-equipment claim, CSXT argued that Sterna had presented no evidence that the pre-1990 practice of allowing

employees to mount and dismount slow-moving equipment was not reasonably safe or that it caused Sterna's alleged injuries. Vol. 3, C741.

The trial court denied CSXT's motion for a directed verdict as to the yard-conditions claim, concluding that, "[a]s to negligently maintaining the yard, . . . [Sterna] [had] put on enough evidence . . . that there might be a question of fact for the jury to decide." Vol. 11 (March 14 Afternoon Tr.) p. 86.

In opposing a directed verdict on the moving-equipment theory, Sterna argued that "[a] jury is clearly allowed to infer that [CSXT] should have never had [the pre-1990] rule [and] . . . should have never allowed [employees] to get on and off moving equipment." Vol. 11 (March 14 Afternoon Tr.) p. 84. The trial court granted CSXT's motion, reasoning that Sterna had not "shown that getting on or off moving equipment . . . [was] an unsafe practice, *per se*," because Sterna "testified that he was able to get off moving equipment . . . safely." Vol. 11 (March 14 Afternoon Tr.) pp. 86-87 (emphasis added). Notwithstanding its ruling that there was no evidence that the practice was unsafe, the court still permitted Sterna to argue that the practice contributed to his right-knee problem. Vol. 11 (March 14 Afternoon Tr.) p. 87. Sterna elected not to take advantage of the court's ruling and did not argue that the pre-1990 practice contributed to his claimed injuries.

2. ***Evidentiary and instructional rulings***

The trial court precluded Sterna from eliciting testimony about materials that Sterna's counsel had provided to Dr. Klepsch, but which Dr. Klepsch specifically denied relying upon in forming his opinions. Vol. 9 (March 8 Tr.) p. 151; Vol. 10 (March 9 Tr.) p. 71.

The trial court refused Sterna's proposed jury instruction on future-disability damages. Vol. 9 (March 8 Tr.) p. 104; Vol. 11 (March 15 Afternoon Tr.) p. 71; Vol. 11 (March 16 Morning Tr.) p. 14.

The trial court initially granted CSXT's motion in limine seeking to bar Sterna from arguing that he had sustained any future wage loss. Vol. 9 (March 8 Tr.) p. 104. Following Sterna's request for reconsideration, the trial court allowed him to argue that he sustained future wage loss in winter months, during which he was required to wear winter safety boots in order to be allowed to work. Vol. 11 (March 16 Morning Tr.) p. 14.

The trial court denied CSXT's request for a supplemental instruction that would have instructed the jury:

> You may not consider the practice of mounting or dismounting moving equipment in determining whether defendant or plaintiff were negligent as the Court determined no evidence of negligence with regard to this practice was presented at trial.

Vol. 11 (March 15 Afternoon Tr.) p. 138. Thus, the jury was never advised about the trial court's directed-verdict ruling that there was no evidence that the pre-1990 practice was negligent.

3. ***The jury's verdict***

Sterna's yard-conditions claim went to the jury, which was instructed that CSXT would be liable to Sterna under FELA if he could show that his injuries were caused by "any defect or insufficiency due to [CSXT's] negligence in its track or roadbed," including CSXT's alleged "fail[ure] to provide a reasonably safe and proper walking condition." Vol. 11 (March 16 Morning Tr.) pp. 105-106.

The jury retired for deliberations on the morning of March 16, and returned a verdict in CSXT's favor the same afternoon, after approximately one hour of deliberations. Vol. 11 (March 16 Afternoon Tr.) p. 3; Vol. 11 (August 17 Tr.) p. 32.

STANDARD OF REVIEW

FELA creates a cause of action for injuries sustained by railroad employees in the workplace. *See* 45 U.S.C. § 51. Under FELA, federal law governs as to both substantive issues, such as the standard for liability, *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 165 (2007), and certain procedural issues, such as the standard for a directed verdict, *Brady v. S. Ry. Co.*, 320 U.S. 476, 479-80 (1943), *overruled on other grounds sub nom., CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2639 n.4 (2011). "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by . . . directed verdict . . . without submission to the jury." *Brady*, 320 U.S. at 479-80.[4] The Court reviews the entry of a directed verdict *de novo*. *Bermudez v. Martinez Trucking*, 343 Ill. App. 3d 25, 29 (1st Dist. 2003).

"The trial court has discretion to determine which instructions to give the jury and that determination will not be disturbed absent an abuse of that discretion." *Schultz v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 201 Ill. 2d 260, 273 (2002) (citations omitted). "The question of what issues have been raised by the evidence is within the discretion of the

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[4] The Illinois state-law standard similarly authorizes courts to direct a verdict when the evidence is so one-sided as to allow only a single conclusion. *See Pedrick v. Peoria & E. R.R. Co.*, 37 Ill. 2d 494, 510 (1967) ("[V]erdicts ought to be directed . . . in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [the moving party] that no contrary verdict based on that evidence could ever stand.").

trial court." *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 406 (1998) (internal quotation marks omitted).

"[T]he admissibility of evidence is a matter for the sound discretion of the trial court, and its decision will not be reversed on appeal unless that discretion has been clearly abused." *Leonardi v. Loyola Univ. of Chi.*, 168 Ill. 2d 83, 92 (1995). "The threshold for finding an abuse of discretion [on an evidentiary ruling] is high." *Scales v. Benne*, 2011 IL App (1st) 102253, ¶ 33, 355 Ill. Dec. 350, 959 N.E.2d 764 (internal quotation marks omitted; alteration in original).

The trial court's decision denying a motion for a new trial is reviewed only for an abuse of discretion. *York v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 222 Ill.2d 147, 179 (2006)

SUMMARY OF ARGUMENT

The judgment should be affirmed in all respects.

I. The trial court correctly granted CSXT's directed-verdict motion as to Sterna's moving-equipment claim for two independent reasons.

First, Sterna presented no evidence that CSXT's pre-1990 practice of allowing employees to mount and dismount slow-moving equipment was not reasonably safe, constituted negligence, or deviated from any industry practice or standard. Only two witnesses testified about the safety of getting on and off slow-moving equipment, Fritts and Sterna himself. Both testified that it was safe. FELA is not a strict-liability statute and requires the injured employee to prove negligence on the part of the railroad in order to recover. Sterna failed to do this. It is settled law under FELA that the mere existence of a safer alternative practice does not mean that the original practice was negligent or not reasonably safe. *See, e.g., Walker v. Ne. Reg'l Commuter R.R. Corp.*, 225 F.3d 895, 899

(7th Cir. 2000) ("Safer methods . . . may be available, but [the railroad] need only use a reasonably safe [one].").

Given the lack of any evidence that CSXT's pre-1990 moving-equipment practice itself constituted negligence, Sterna tries to conflate his yard-conditions claim (which the trial court submitted to the jury and which the jury rejected) and his moving-equipment claim. But the claims are conceptually distinct—and were treated as such by both the parties and the trial court. In granting the directed verdict, the trial court made clear that the *only* aspect of Sterna's case that he was precluded from taking to the jury was the allegation that CSXT's pre-1990 moving-equipment practice constituted negligence. Although Sterna asserts here that there were fact questions as to whether the conditions in Barr Yard were unsafe and whether someone getting on or off moving equipment necessarily would encounter those yard conditions, that is just another way of saying that there was a question of fact about whether the *yard conditions* were not reasonably safe. Sterna was not barred from making precisely that argument to the jury, which nonetheless found in CSXT's favor.

Second, Sterna presented no evidence that CSXT's pre-1990 practice of allowing employees to mount and dismount slow-moving equipment caused him injury. Neither of Sterna's treating physicians tied that allegedly negligent practice to Sterna's claimed injuries. Dr. Klepsch specifically testified that he could not, from the vantage point of 2011, relate the pre-1990 practice to Sterna's right-knee condition (for which Sterna first sought treatment in 2009). Dr. Wapiennik testified that he was unable to render an opinion as to the cause of Sterna's plantar fibromas. He stated merely that Sterna's work involved activities that "can" or "could" *in principle* make that condition symptomatic.

But he did not testify that *Sterna*'s work *in fact* caused *Sterna*'s injuries. In other words, Dr. Wapiennik did not render a causation opinion as to Sterna *specifically*, which is required under the FELA causation standard.

II. Sterna contends that the trial court erroneously excluded Dr. Klepsch's testimony regarding certain documents, asserting that Dr. Klepsch said that he had "reviewed" those documents and that they "supported" his opinions. Opening Br. 25-26. Yet Sterna fails to acknowledge that Dr. Klepsch testified that he did not *rely* on those documents in forming his opinions. Vol. 4, C981, C982 (Klepsch Dep. 72, 75-76). The very case that Sterna cites in support of his claim of error confirms that all a trial court need do is allow an expert "to reveal the contents of materials upon which he *reasonably relies* in order to explain the *basis* of his opinion." *See People v. Anderson*, 113 Ill. 2d 1, 9 (1986) (emphasis added). The trial court's exclusion of testimony regarding documents that Dr. Klepsch did not rely on plainly was proper.

III. Finally, Sterna contends that the trial court abused its discretion by limiting his future-wage-loss damages to the winter months and refusing to permit him to ask for future-disability damages. These damages issues were never reached by the jury because it returned a verdict that CSXT was not negligent. Thus, Sterna could not possibly be entitled to a new trial. At any rate, Sterna's arguments are without merit. The trial court's rulings that there was no evidence to support the requested damages instructions were firmly supported by the record.

ARGUMENT

I. The Trial Court Correctly Directed A Verdict On Sterna's Moving-Equipment Claim.

"FELA provides for concurrent jurisdiction of the state and federal courts, [45 U.S.C.] § 56, although substantively FELA actions are governed by federal law." *Sorrell*, 549 U.S. at 165. Unlike "workers' compensation . . . , which provides relief without regard to fault, . . . FELA provides a statutory cause of action sounding in *negligence*." *Id.* (emphasis added). It provides that a railroad is liable to its employee for an "injury . . . resulting in whole or in part from the negligence" of the railroad. 45 U.S.C. § 51. The basic elements of a FELA cause of action are thus "breach of a duty of care (that is, conduct unreasonable in the face of a foreseeable risk of harm), injury, and causation," *Conrail v. Gottshall*, 512 U.S. 532, 538 (1994); *Coffey v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 479 F.3d 472, 476 (7th Cir. 2007). There is no liability under FELA unless the "employer was negligent *and* . . . this negligence played a part in causing the injury" since "[t]he FELA does not make employers the insurers of their employees." *Dawson v. Elgin, Joliet & E. Ry. Co.*, 266 Ill. App. 3d 329, 331 (3d Dist. 1994) (emphasis added).

Sterna presented no evidence either that CSXT's pre-1990 practice of allowing employees to mount and dismount slow-moving equipment was unsafe or that it caused his alleged injuries. The trial court's directed-verdict ruling was proper.

A. There was no evidence that CSXT's pre-1990 practice of allowing employees to mount and dismount slow-moving equipment constituted negligence.

As the U.S. Supreme Court has repeatedly explained, "FELA does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur." *Gottshall*, 512 U.S. at 543

(internal quotation marks omitted). A railroad "will not be liable for failing to provide a safe place to work [under FELA] if there is no showing that the carrier is guilty of negligence." *Lewis v. Norfolk & W. Ry. Co.*, 269 Ill. App. 3d 483, 486 (5th Dist. 1995); *accord Myers v. Ill. Cent. R.R. Co.*, 323 Ill. App. 3d 780, 787 (4th Dist. 2001); *Dawson*, 266 Ill. App. 3d at 331; *Gonet v. Chi. & Nw. Transp. Co.*, 195 Ill. App. 3d 766, 773 (1st Dist. 1990) ("[A] railroad is not subject to absolute liability to its employee; liability under the statute must arise from employer's negligence based upon substantial evidence in the record.").

Here, nobody—not a lay witness, not an expert, not even Sterna himself—testified that CSXT's pre-1990 practice of allowing employees to mount and dismount slow-moving equipment was not reasonably safe. Sterna's opening brief conspicuously fails to point to any such testimony or evidence.[5] Nor is there any evidence that the pre-1990 practice violated any regulatory requirement or industry standard. Vol. 5, C1007 (Fritts Dep. 58). In fact, it is undisputed that the FRA has never prohibited the practice and that some railroads continue to allow the practice to this day. *Id.* By itself, that confirms the correctness of the trial court's decision to grant CSXT's directed-verdict motion as to this aspect of Sterna's claim.

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[5] Sterna asserts that this case is analogous to *Bailey v. Central Vermont Railway*, 319 U.S. 350 (1943). Opening Br. 22. *Bailey*, a FELA case in which the U.S. Supreme Court reversed a directed verdict, could scarcely be more dissimilar. There, the employee was killed as a result of falling from a bridge where hopper cars were unloaded: "The floor of the bridge was about 18 feet above the ground. The only available footing at the side of the car was about 12 inches wide. Of this space 8 or 9 inches were taken up by a raised stringer." 319 U.S. at 351. Because there "was no guard rail," *id.*, the employee had to stand on the three-to-four inch strip by the side of the cars while performing his duties with no protection from falling.

Sterna cites *Stevens v. New Jersey Transit Rail Operations*, 812 A.2d 416 (N.J. Super. Ct. App. Div. 2003), for the proposition that expert testimony is not required to establish a prima facie case of negligence. Opening Br. 21.[6] That may be so, but the problem with Sterna's case was that there was no testimony from *any* witness—lay or expert—from which the jury reasonably could have inferred that the practice of allowing employees to mount and dismount slow-moving equipment constituted negligence. *Stevens*, moreover, is distinguishable, as it involved the use of a machine of which the unreasonably dangerous qualities were readily apparent. Getting on a "Hefty Herman" machine required the employee to place one foot on a step and then hoist himself onto a platform five feet off the ground while simultaneously making an "awkward twisting motion" and pushing a moveable safety bar (several feet higher still) upwards. 812 A.2d at 419 & 418 n.1. There were "constant complaints" about the machine, *id.* at 422, and the "defect was self-evident," *Bass-Bey v. N.J. Transit Rail Operations, Inc.*, 2006 WL 2085431, at *6 (N.J. Super. Ct. App. Div. 2006) (distinguishing *Stevens*).

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[6] Relatedly, although he does not cite it in his opening brief, Sterna relied on *Noakes v. National Railroad Passenger Corp.*, 363 Ill. App. 3d 851 (1st Dist. 2006), in his new-trial motion for the proposition that his moving-equipment claim should have been presented to the jury on the basis of his testimony alone. Yet in that case, the directed-verdict motion was granted solely on *causation* grounds—*i.e.*, the basis for the directed verdict in *Stevens* was not the absence of evidence pertaining to *negligence*. *See id.* at 854, 860. Here, by contrast, Sterna offered no evidence that the pre-1990 moving-equipment practice was negligent, either through his own testimony or that of other witnesses. Thus, *Noakes* is distinguishable on this basis alone. Furthermore, while the First District in *Noakes* did reverse the directed verdict, it did so only after finding that the plaintiff's physicians should have been permitted to offer expert testimony on causation. *See id.* at 859. Here, of course, Sterna's physicians *were* permitted to testify about causation. As discussed below (at 31-34), neither Dr. Klepsch nor Dr. Wapiennik testified that mounting and dismounting moving equipment before 1990 in fact caused or contributed to Sterna's claimed injuries.

In fact, only two witnesses said anything at all about the safety of getting on and off moving equipment, Fritts (CSXT's former Safety Director) and Sterna. Far from constituting evidence of negligence, their testimony established the absence of negligence.

Fritts testified that CSXT's pre-1990 practice of allowing the "mounting and dismounting [of] moving equipment was a safe practice." Vol. 5, C1012 (Fritts Dep. 78). He elaborated that it was not "unsafe to mount and dismount moving equipment." Vol. 5, C1012 (Fritts Dep. 78-79); *see also id.* at 80 ("we didn't . . . consider it unsafe"). The rule was simple: employees could mount or dismount moving equipment only when they considered it safe to do so (taking into account such factors as speed, weather, and terrain). Vol. 5, C1004-05, C1016, C1021 (Fritts Dep. 46, 52, 94, 115-116).

Fritts did acknowledge various "potential hazards associated with getting on and off moving equipment." Opening Br. 23-24; *see* Vol. 5, C1014-16 (Fritts Dep. 87-94). But the fact that a practice has some potential risks is not evidence that it is negligence to allow it or that the practice is itself unreasonably dangerous. Because FELA is not a strict-liability statute, "CSXT did not have to create the safest possible work environment . . . only a reasonably safe one." *Darrough v. CSX Transp., Inc.*, 321 F.3d 674, 676 (7th Cir. 2003); *see also, e.g.*, *Gottshall*, 512 U.S. at 538; *Sorrell*, 549 U.S. at 161; *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 558 (1987). It was Sterna's burden to prove that CSXT's pre-1990 moving-equipment practice did not provide him with a reasonably safe railroad workplace, which he failed to do.

As for Sterna, when asked "[w]hen you got on and off moving equipment, were you able to do that safely," he replied "yes." Vol. 11 (March 14 Afternoon Tr.) p. 34.

That self-assessment was confirmed by the fact that Sterna did not report any injuries from mounting or dismounting moving equipment before CSXT changed the practice in 1990. Vol. 5, C1021 (Fritts Dep. 116). Indeed, even after the policy change, Sterna continued to get on and off moving equipment—he was cited for doing so in 1992, two years after the change went into effect. Vol. 11 (March 14 Afternoon Tr.) p. 35.

Sterna's own testimony therefore affirmatively established that the pre-1990 practice of allowing employees to mount and dismount slow-moving equipment was reasonably safe. It follows that there can be no liability under FELA. *See, e.g.*, *Soto v. S. Pac. Transp. Co.*, 644 F.2d 1147, 1148 (5th Cir. 1981) (per curiam) (affirming entry of judgment *n.o.v.* for railroad based on, *inter alia*, the employee's "own testimony" which showed that the "task . . . was one that could be safely done by the method which he was told to use and was using"); *McKennon v. CSX Transp., Inc.*, 897 F. Supp. 1024, 1027 (M.D. Tenn.) (concluding that the railroad was not negligent as a matter of law, given employee's admission that he used the challenged method of work "safely for twenty years" and that it was "safe and appropriate"), *aff'd*, 56 F.3d 64 (6th Cir. 1995) (table); *Duhon v. S. Pac. Transp. Co.*, 720 So. 2d 117, 123 (La. Ct. App. 1998) (similar; relying on "plaintiff's own admission"), *abrogated on other grounds sub nom.*, *Independent Fire Ins. Co. v. Sunbeam Corp.*, 755 So. 2d 226, 232 (La. 2000).

Sterna's testimony that he personally did not receive *classroom* training or *written* instructions on how to get on and off moving equipment and never saw the safety *video* on that topic, Opening Br. 22-23 (citing Vol. 10 (March 14 Morning Tr.) pp. 9-10)—which CSXT disputed, *see supra* p. 8; Vols. 4-5, C994-95, C1003-04, C1006 (Fritts Dep. 13, 16-17, 44-46, 54)—is not evidence that the pre-1990 practice of allowing employees

to mount and dismount slow-moving equipment itself was negligent. Indeed, even if Sterna's allegations could be refashioned as an attack on his training rather than on the practice itself, Sterna admitted that he had on-the-job training from more experienced employees. Vol. 10 (March 14 Morning Tr.) p. 11; Vol. 11 (March 14 Afternoon Tr.) pp. 6-7. And in the final analysis, the dispute over whether Sterna received formal training in addition to on-the-job training—or just on-the-job training—is immaterial since he admitted that he was able to get on and off moving equipment "safely." Vol. 11 (March 14 Afternoon Tr.) p. 34.

Sterna argues that "'[w]hen the evidence shows that the railroad customarily does not enforce a safety rule, the jury is entitled to consider whether that custom constituted negligence.'" Opening Br. 24 (quoting *Ybarra v. Burlington N., Inc.*, 689 F.2d 147, 150 (8th Cir. 1982)). *Ybarra* is inapposite in three respects. First, CSXT's "safety training protocols," Opening Br. 24, are not *safety* rules like the no-twisting-while-lifting rule in *Ybarra*; they are *training* procedures.[7] Second, there is no evidence that CSXT *customarily* did not formally train employees about mounting and dismounting moving equipment. At most there is testimony from Sterna that he *personally* did not recall receiving any formal training; other employees testified that they did receive formal training. *See, e.g.*, Vol. 10 (March 10 Afternoon Tr.) pp. 19, 41-42; Vol. 10 (March 11 Tr.) pp. 25. Third, there is no evidence that CSXT "*knowingly* failed," *cf. Ybarra*, 689 F.2d at 151 (emphasis added), to formally train Sterna.

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[7] The evidence was that CSXT *did* enforce its safety rules relating to mounting or dismounting moving equipment. Indeed, Sterna was cited in 1992 for continuing to mount or dismount moving equipment after CSXT forbade employees from doing so in 1990. Vol. 11 (March 14 Afternoon Tr.) p. 35.

Contrary to Sterna's contention, Opening Br. 24, CSXT's decision in 1990 to prohibit employees from mounting and dismounting moving equipment also is not evidence that the prior practice was negligent. It is settled beyond peradventure that "proof of a safer alternative is not necessarily proof of negligence—[the railroad] could have provided a reasonably safe workplace notwithstanding the fact that safer workplace alternatives exist." *Taylor v. Ill. Cent. R. Co.*, 8 F.3d 584, 586 (7th Cir. 1993) (citing *Stillman v. Norfolk & W. Ry. Co.*, 811 F.2d 834, 838 (4th Cir. 1987)); *Darrough*, 321 F.3d at 676 ("[t]he question is whether the railroad exercised reasonable care in creating a reasonably safe working environment, not whether that working environment could have been safer") (citing *Walker*, 225 F.3d at 899); *Taylor v. Union Pac. R. Co.*, 2010 WL 5343295, at *3 (S.D. Ill. Dec. 21, 2010).

No doubt well aware that he lacked evidence that the pre-1990 practice of allowing employees to mount and dismount slow-moving equipment was negligent in and of itself, Sterna suggests that the real problem was that he had to mount and dismount moving equipment *in Barr Yard*, where the conditions allegedly made it unsafe to do so. *E.g.*, Opening Br. 19-20 (asserting that Barr Yard contained "uneven surfaces"; overly large "ballast"; "slip, trip and fall hazards"; "pooling water"; and "poor lighting"); *id.* at 23 (noting alleged "ground conditions"; "terrain and flooding conditions"; and "ballast issues"). But this contention is nothing more than a repackaging of his theory (which *was* submitted to, *and rejected by*, the jury) that the conditions in Barr Yard were unsafe.[8]

[8] Furthermore, as explained below, there was no evidence that Sterna's alleged injuries were caused by his working conditions at Barr Yard in any respect. *See infra* pp. 31-34.

The trial court's directed-verdict ruling—which was limited to Sterna's theory that CSXT's pre-1990 moving-equipment practice constituted negligence—did not preclude Sterna from arguing that Barr Yard was negligently maintained and therefore not a reasonably safe workplace for the sorts of work activities performed there. The trial court made that clear from the bench, explaining: "As to the negligence and the moving equipment *policy*, . . . I don't believe the plaintiff has shown that getting on or off moving equipment . . . [is] an unsafe *practice, per se*." Vol. 11 (March 14 Afternoon Tr.) p. 86 (emphasis added).

It was that, and only that, theory of negligence as to which CSXT had sought a directed verdict. *See* Vol. 3, C741 (seeking directed verdict on claim that "CSXT was negligent by . . . not prohibiting the *practice* of moving equipment prior to 1990") (emphasis added); Vol. 3, C742 (denying that "CSXT's prior rule was unsafe or negligent"); Vol. 11 (March 14 Afternoon Tr.) p. 77 (arguing for directed verdict as to "whether [CSXT] was negligent in its operating practices of mounting and dismounting moving equipment"). And Sterna understood that, arguing in response that "[a] jury is clearly allowed to infer that they should have never had the *rule*, they should have *never* allowed them to get on and off moving equipment." Vol. 11 (March 14 Afternoon Tr.) p. 84 (emphasis added); *see also* Vol. 10 (March 10 Morning Tr.) p. 13 (contending during opening statements that "it took too long and too many years for [CSXT] to disavow the rule of getting on and off moving equipment").

Thus, Sterna was free to argue that one of the reasons that the conditions in Barr Yard were not reasonably safe was that his (and other employees') job activities (at least before 1990) involved mounting and dismounting moving equipment onto, for example,

uneven surfaces, oversized ballast, or slipping hazards. And the jury was free to consider such an argument. Vol. 11 (March 15 Afternoon Tr.) p. 138; *see also* Vol. 11 (March 16 Morning Tr.) pp. 105-106. As noted above, the jury was *not* informed of the directed-verdict ruling (or advised to disregard the practice of mounting or dismounting moving equipment as evidence of negligence); nor was Sterna prohibited from arguing that the practice contributed to his injuries. Accordingly, insofar as Sterna means to suggest that the directed verdict on the moving-equipment theory somehow affected his ability to pursue his yard-conditions theory, he is mistaken.

In sum, there is no evidence that CSXT's pre-1990 practice of allowing employees to mount and dismount moving equipment created a workplace that was not reasonably safe, and affirmative testimony from Fritts and Sterna that mounting and dismounting moving equipment *was* safe. Accordingly, the trial court correctly granted CSXT's directed-verdict motion on this point.

B. There was no evidence that CSXT's pre-1990 practice of allowing employees to mount and dismount slow-moving equipment caused Sterna's alleged injuries.

Aside from the lack of evidence that CSXT's pre-1990 practice of allowing employees to mount and dismount slow-moving equipment was negligent, Sterna did not present evidence sufficient to create a jury issue on causation. Neither of Sterna's physicians connected CSXT's pre-1990 practice relating to moving equipment to his claimed injuries, which did not manifest themselves for almost two decades after discontinuation of that practice.

1. Dr. Klepsch affirmatively testified that he could *not* relate CSXT's pre-1990 practice to Sterna's right-knee complaint:

> Q. Now assuming, again, that the task of getting off moving equipment did stop 21 years ago [*i.e.*, in 1990] . . . you can't say with any degree or any reasonable degree of medical certainty that the . . . practice that stopped in 1990[] is related to the condition of his knee when you first saw him in 2009?
>
> . . .
>
> Q. An exposure that stopped 21 years ago[,] [*C*]*an you state with any reasonable medical certainty that is related to the condition that he presented to you back in 2009?*
>
> A. *No*.

Vol. 4, C1005 (Klepsch Dep. 51-52) (emphasis added). Dr. Klepsch also declined to say that Sterna's osteoarthritis was caused by his work activities generally. Vol. 4, C1006 (Klepsch Dep. 53) ("I think it's difficult to say that."); *see supra* pp. 11-12. And he was unable to distinguish between the effect of Sterna's work activities and that of Sterna's non-work activities. Vol. 4, C1006 (Klepsch Dep. 52).

Sterna points out (at Opening Br. 23) that Dr. Klepsch also was asked a hypothetical about whether "forty-plus years" of railroad work, "half of which includes getting on and off moving equipment, . . . can aggravate an osteoarthritic condition." Vol. 4, C981 (Klepsch Dep. 70). The hypothetical is irrelevant, however, since it omits the crucial fact that CSXT *abandoned the practice in 1990*. *See, e.g.*, *Royal Elm Nursing & Convalescent Ctr., Inc. v. N. Ill. Gas Co.*, 172 Ill. App. 3d 74, 79 (1st Dist. 1988) ("[An expert] is not permitted to speculate or to state a judgment based on conjecture, *i.e.*, a conclusion based on assumptions not in evidence or contradicted by the evidence."); *McCormick by McCormick v. Maplehurst Winter Sports, Ltd.*, 166 Ill. App. 3d 93, 99-100 (2d Dist. 1988) ("An expert's opinion is only as valid as the basis and reasons for that opinion."). When asked that more specific question—the exchange set forth in the

previous paragraph—Dr. Klepsch responded that he could not "relate" Sterna's claimed injuries to the long-since-discontinued practice. Vol. 4, C976 (Klepsch Dep. 51-52).

2. Dr. Wapiennik likewise testified that the "cause of plantar fibroma[s]" is "unknown" and that he could not render an opinion about the cause of the plantar fibromas in either of Sterna's feet. Vol. 5, C1058 (Wapiennik Dep. 54-55).[9]

In insisting that Dr. Wapiennik did sufficiently opine as to causation (Opening Br. 12, 25), Sterna relies on this exchange:

> Q. Doctor, to a reasonable degree of medical certainty, do you believe that the work Rick performed for 42 years at the railroad walking on uneven ground and large rocks and getting on and off moving equipment for half of his career . . . caused or made symptomatic the conditions for which you treated him?
>
> A. The *diagnoses* for which I was treating Mr. Sterna *can* be made symptomatic by his *line of work*.

Vol. 5, C1051-52 (Wapiennik Dep. 29-30) (emphasis added). But testimony that a "line of work" *can in principle* produce symptoms of certain "diagnoses" is not the same as testimony that *Sterna*'s work (much less negligence on the part of the railroad) *in fact* caused *Sterna*'s claimed injuries. Dr. Wapiennik did not render a causation opinion as to Sterna himself.

As a matter of substantive federal law, the plaintiff must establish *both* general causation and specific causation.[10] Sterna failed to do so here. Dr. Wapiennik's general-

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[9] The bone fragment in Sterna's left foot was from a 1974 motorcycle accident. Vol. 5, C1046, C1048 (Wapiennik Dep. 8, 15-16); Vol. 11 (March 14 Afternoon Tr.) p. 18.

[10] "General causation is whether [an exposure] is *capable* of causing a particular injury or condition . . . , while specific causation is whether [the exposure] caused a particular individual's injury." *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 351 (5th Cir. 2007) (internal quotation marks omitted; emphasis added); *see also Kilpatrick v.* (cont'd)

causation testimony was, at best, vague and speculative. Dr. Wapiennik did not know anything about Sterna's work activities except that they sometimes involved walking on rocks and getting on and off trains. Vol. 5, C1058 (Wapiennik Dep. 55-56). Moreover, Dr. Wapiennik also acknowledged that non-work activities, too, could aggravate foot conditions "just as [much], if not more so," than walking on uneven surfaces at work. Vol. 5, C1058-59 (Wapiennik Dep. 58-59).

What is more, Dr. Wapiennik did not even *purport* to give a specific-causation opinion. As the Seventh Circuit recently held, "expert testimony establishing *specific* causation is necessary for cumulative trauma disorders," such as those claimed by Sterna. *Myers v. Ill. Cent. R.R. Co.*, 629 F.3d 639, 643 (7th Cir. 2010) (emphasis added); *see also Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 503 (9th Cir. 1994) (rejecting argument that "FELA 'requires no such specific causation evidence'") (citation omitted); *Aurand v. Norfolk S. Ry. Co.*, 802 F. Supp. 2d 950, 953 (N.D. Ind. 2011). Because Dr. Wapiennik did not opine that mounting and dismounting moving equipment before 1990 *in fact* caused or aggravated or made symptomatic *Sterna's* foot conditions, the essential element of specific causation is absent. The trial court's entry of a directed verdict was justified on this basis as well.

Breg, Inc., 613 F.3d 1329, 1334 n.4 (11th Cir. 2010) ("[The plaintiff] must offer proof of both general causation—that the device in question *can* cause harm of the type [the plaintiff] alleges—and proof of specific causation—that the device *in fact* did cause [the] injury.") (emphasis added). Because the "FELA causation standard" applies in state court. *Baker v. CSX Transp., Inc.*, 221 Ill. App. 3d 121, 129 (5th Dist. 1991), it is irrelevant that "Illinois law does not define causation in terms of 'generic' or 'specific' causation," *Donaldson v. Cent. Ill. Pub. Serv. Co.*, 199 Ill. 2d 63, 90 (2002).

II. The Trial Court Did Not Commit Reversible Error By Excluding Testimony Concerning Documents That Dr. Klepsch Did Not Reply On In Forming His Opinions.

Sterna argues that it was an abuse of discretion for the trial court to exclude Dr. Klepsch's testimony regarding a number of documents that were supplied to him by Sterna's counsel. This contention is meritless.

There is no dispute that an expert should be allowed to "reveal the contents of materials upon which he *reasonably relies* in order to explain the basis of his opinion." *Anderson*, 113 Ill. 2d at 9 (emphasis added). Yet Sterna does not claim that Dr. Klepsch relied on the documents in question. *Cf.* Opening Br. 25-27 (asserting only that Dr. Klepsch "was given" or "reviewed" certain documents that "supported" some of his opinions). Nor can he. Dr. Klepsch unequivocally said that he did *not* rely on those documents in forming his opinions:

> Q. You did tell me that you did not specifically rely on those documents in terms of forming your conclusions in the case?
>
> A. Correct.
>
> Q. And that was a true statement?
>
> A. Yes.
>
> Q. As it is right now?
>
> A. Yes.

Vol. 4, C981 (Klepsch Dep. 72). And again:

> Q. And it still is the case that your opinions given here today, you have not relied on any of those materials that [Sterna's counsel] sent you having to do with either assessments of railroad industry job tasks or Mr. Sterna's description of his job and his affidavit?
>
> A. No.

Vol. 4, C982 (Klepsch Dep. 75-76). Dr. Klepsch's disavowal of any reliance on the documents is by itself dispositive. The trial court correctly found as much. Vol. 9 (March 8 Tr.) p. 151; Vol. 10 (March 9 Tr.) p. 72 ("[T]he testimony is he didn't rely on anything.").

As the Illinois Supreme Court has explained, the purpose of the rule requiring that experts be allowed to discuss the documents on which they relied to form their opinions is that "prevent[ing] the expert from referring to the contents of materials upon which he relied in arriving at his conclusion places an unreal stricture on him and compels him to be not only less than frank with the jury but also to appear to base his diagnosis upon reasons which are flimsy and inconclusive when *in fact they may not be*." *Anderson*, 113 Ill. 2d at 10-11 (internal quotation marks omitted; emphasis added). The converse is equally true: when the expert did *not* rely on particular documents, those documents should not be admitted lest the jury mistakenly believe that an opinion is firmly grounded "when in fact [it] may not be." Certainly, it was no abuse of discretion for the trial court so to conclude here.

III. Because The Jury Found That CSXT Was Not Negligent, It Is Not Necessary To Address Sterna's Challenges To The Trial Court's Evidentiary Rulings On Damages, Which, In Any Event, Were Correct.

Sterna also challenges two limitations on the damages for which he could seek recovery—specifically, the limitation of Sterna's future-wage-loss claim to the winter months and the court's refusal to permit Sterna to ask the jury to award him damages for future disability. This Court need not address these arguments, since any "question of damages . . . [is] rendered moot by the verdict" finding that CSXT was not liable at all. *Runyon v. Rich*, 120 Ill. App. 3d 631, 637 (4th Dist. 1983). When, as here, "[t]he jury . . . found in favor of the defendants as to liability, and thus never reached the question of

damages[,] [the Court] need not . . . consider whether the trial court erred in" such respects. *McDonnell v. McPartlin*, 192 Ill. 2d 505, 532 (2000).[11]

At any rate, the trial court's rulings were supported by the record and did not represent an abuse of discretion. Indeed, it would have been "reversible error for the trial court to allow the jury to award [Sterna] [such] damages," given his failure to "present[] . . . reasonably certain proof that such damages would endure." *Brown v. Chi. & Nw. Transp. Co.*, 162 Ill. App. 3d 926, 936 (1st Dist. 1987). There must be an evidentiary basis—one that is "reliable and grounded in more than mere possibilities"—"in order for a court to give a jury instruction on future disability and lost wages." *LaFever*, 185 Ill. 2d at 407-08 (internal quotation marks omitted). Here, there was none.

A. Sterna presented no evidence of future wage loss at all, let alone during those months when he would not have to wear safety boots.

The trial court initially granted CSXT's motion to exclude Sterna's claim for future wage loss in its entirety. Vol. 11 (March 15 Afternoon Tr.) p. 100 ("The doctors. . . say he could continue working and they never put any restriction on him."). As the trial court recognized, Sterna has "never been medically disqualified to work." Vol. 11 (March 15 Afternoon Tr.) p. 95. "[T]he only one who's saying he can't go back to work is Mr. Sterna. There's no doctor saying it." Vol. 11 (March 15 Afternoon Tr.) p. 97.

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[11] Although "[a]n exception exists where errors which go to the question of damages are so pervasive and prejudicial as to create the likelihood that they may have affected a jury's decision on the issue of liability," *id.* (internal quotation marks omitted), Sterna does not argue that this exception is applicable, so the issue is forfeited. Ill. S. Ct. R. 341(h)(7). Moreover, such an argument would be meritless. Given that Sterna was allowed to seek future wage loss in part (*i.e.*, during the winter months) and also future pain and suffering and future medical expenses, Vol. 11 (March 16 Morning Tr.) pp. 101-103, it is implausible that the narrow and discrete damages issues he raises here had a pervasive and prejudicial effect on the jury's verdict of non-liability.

This reasoning was correct, since both doctors agreed that Sterna could continue to work his current position as a railroad flagman—the least taxing job in Barr Yard. *See supra* pp. 13-14. Dr. Klepsch testified that Sterna is neither physically incapable of nor medically disqualified from performing "*any* position at his employer." Vol. 4, C977 (Klepsch Dep. 55) (emphasis added). Indeed, "[t]he work that he's doing now [*i.e.*, being a flagman] is very tolerable for his knee." Vol. 4, C969 (Klepsch Dep. 24); *see id.* at C978 (Klepsch Dep. 60) (knee-replacement surgery would not prevent Sterna from working as a flagman); *id.* at C979 (Klepsch Dep. 64) (knee-replacement surgery would not prevent Sterna from working other jobs on the railroad); *id.* at C979 (Klepsch Dep. 65) (no "medical restrictions" or medical disqualifications). Dr. Klepsch also testified that Sterna is not totally disabled. *Id.* at C973 (Klepsch Dep. 38). Dr. Wapiennik's testimony was in accord. He explained that he never "t[ook] Mr. Sterna off of work" or otherwise "place[d] any medical restrictions on him such that he could not perform his job duties at the railroad." Vol. 5, C1057 (Wapiennik Dep. 51); *see also id.* at C1063 (Wapiennik Dep. 74); Vol. 4, C988-89 (Neilson Dep. 17-21) (no medical disqualification or work restrictions). Moreover, there was no testimony that Sterna would be unable to work as, say, a conductor at the railroad even if he were—notwithstanding his Number 1 seniority—somehow unable to bid for a flagman position. *See supra* pp. 13-14.

After making this initial ruling, however, the trial court heard additional argument, reversed itself in part, and allowed Sterna to claim future wage loss for the winter months, during which Sterna would be required to wear safety boots. The trial court's ruling was, if anything, overly *generous* to Sterna, since neither doctor testified that Sterna is unable to wear safety boots. Dr. Klepsch testified that his *suggestion* that

Sterna "not wear [the boots] if [they're] not entirely needed" was *not* "stating a medical restriction" or "disqualification" from Sterna's job. Vol. 4, C978 (Klepsch Dep. 61); *see also* Vol. 5, C1057 (Wapiennik Dep. 51) (no medical restrictions). Sterna alone insisted that the safety-boot requirement restricts his ability to work in winter months. Vol. 10 (March 14 Morning Tr.) p. 77.

There is no conceivable error in the trial court's ruling that Sterna could not claim future wage loss outside of winter. Even assuming *arguendo* that Sterna cannot wear the boots—notwithstanding the absence of any medical testimony on that point—CSXT does not require them to be worn when there is no snow or ice on the ground. Vol. 11 (March 15 Morning Tr.) p. 116. Dr. Klepsch agreed that "there's no reason" that Sterna "couldn't continue the flag job without the boots when they are not required" once "the snow is gone." Vol. 4, C978 (Klepsch Dep. 61).

Sterna's argument therefore reduces to the contention that a plaintiff is entitled to an instruction on future wage loss on his mere say-so—contrary to the testimony of his own treating physicians—that he is unable to work. That is not the law.[12] *See, e.g.*, *Parra v. Atchison, Topeka & Santa Fe Ry. Co.*, 787 F.2d 507, 509 (10th Cir. 1986) ("An examination of the plaintiff's own expert medical testimony here would refute his claim for loss of future earnings."); *Dixon v. Pa. R.R. Co.*, 378 F.2d 392, 394 (3d Cir. 1967) (finding of impairment of future earning capacity would be "entirely conjectural" where

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[12] The U.S. Supreme Court has held that the "measure of damages" in an FELA action—even one brought in state court—is a substantive issue governed by federal law. *E.g., St. Louis Sw. Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985) (per curiam). It "is settled that the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of 'substance' determined by federal law." *Id.*; *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 335 (1988).

doctors "cleared [the plaintiff] for climbing work" and characterized his condition "as annoying rather than disabling").[13]

Nor, for that matter, is it the law in Illinois. *See, e.g.*, *Brown*, 162 Ill. App. 3d at 936; *Zapf v. Makridakis*, 46 Ill. App. 3d 764, 766-67 (2d Dist. 1977) (concluding that "the court's refusal to give the instructions pertaining to future loss of earnings was proper" since "aside from plaintiff's statements that she would not be able to teach tennis," neither physician testified that "she would not be able to engage in [that activity] based upon" the "objective findings"). Although, as a matter of Illinois law, "[e]xpert testimony is not necessary to establish loss of future earning ability," the plaintiff still must present *some* evidence—which "must be reliable and grounded in more than mere possibilities"—that the plaintiff's condition "prevented him from continuing employment." *LaFever*, 185 Ill. 2d at 406-07 (internal quotation marks omitted). Sterna's reliance upon *Lewis v. Cotton Belt Route—St. Louis Sw. Ry. Co.*, 217 Ill. App. 3d 94 (5th Dist. 1991), is misplaced. *Cf.* Opening Br. 29. In *Lewis*, the evidence of impaired earning capacity included testimony that the plaintiff had been "turned down for" or found it "necessary . . . to leave" numerous jobs because of his back injury, as well as his doctor's testimony that "it would be up to the individual employer whether they should hire an

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[13] The federal cases cited by Sterna are distinguishable. *Cf.* Opening Br. 30. In *Wiles v. New York, Chicago & St. Louis Railroad Co.*, 283 F.2d 328 (3d Cir. 1960), there was expert testimony that the plaintiff would have difficulty getting a job in other "heavy industry" if he ever left the railroad. There was no such testimony here. Moreover, particularly given Sterna's Number 1 seniority, "[a]ny suggestion that [he] might be forced to leave his regular employment with the Railroad was too speculative to have supported a damage award on that theory." *DeChico v. Metro-N. Commuter R.R.*, 758 F.2d 856, 861 (2d Cir. 1985). Sterna's seniority ensures that he cannot be "bumped" from working the easiest position at the railroad—being a flagman—until he decides to retire. Vol. 11 (March 14 Afternoon Tr.) pp. 8-9; *cf. Gorniak v. Amtrak*, 889 F.2d 481, 483 (3d Cir. 1989) (plaintiff was "101st most senior member" of the union); *Moore v. Chesapeake & Ohio Ry. Co.*, 649 F.2d 1004, 1012 (4th Cir. 1981).

applicant such as plaintiff with a history of prior back injury." *Id.* at 116. There is no such evidence or testimony here.

In all events, Sterna continued to work as a flagman until January 28, 2011—less than two months before the trial—and it is purely conjectural and speculative to suggest that his future earnings capacity was impaired in any respect. As the trial court recognized, there was no evidence that Sterna was medically disqualified from working his railroad job. Vol. 11 (March 15 Afternoon Tr.) p. 97.

B. Sterna presented no evidence of future disability

Sterna presents no distinct argument that the trial court abused its discretion in refusing to permit him to ask the jury to award him damages for future disability. Opening Br. 31 (asserting that the "same facts that support Sterna's broader claim for lost future earnings also supported Sterna's proposed jury instruction regarding Future Disability"). This argument is meritless for all of the same reasons discussed above. Moreover, this issue (much like that relating to future wage loss) necessarily cannot constitute a basis for reversal because the jury, having found that CSXT was not negligent, never reached any damages issue.

At any rate, the trial court did allow Sterna to seek damages for future pain and suffering, Vol. 11 (March 16 Morning Tr.) p. 102, so no prejudice resulted from its refusal to allow him separately to seek damages for future disability. "'[D]isability' . . . is an item which may be considered as a part of the element of pain and suffering, but it is not a separate and independent element of damages" in a FELA case. *Hendricks v. Riverway Harbor Serv. St. Louis, Inc.*, 314 Ill. App. 3d 800, 810 (5th Dist. 2000); *Van Holt v. Amtrak*, 283 Ill. App. 3d 62, 74-75 (1st Dist. 1996) ("'loss of a normal life' should

not be considered separately as an independent ground for damages").[14] In sum, Sterna was not entitled to an instruction on future disability and was in no way prejudiced by its omission.

CONCLUSION

The Court should affirm the judgment below.

Dated: June 27, 2012

Respectfully submitted,

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[14] *Hendricks* arose under the Jones Act, but the "substantive recovery provisions" of FELA and the Jones Act, including damages rules, are identical. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 341

The undersigned, an attorney, certifies that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 42 pages.

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Brian J. Wong (*pro hac vice*)

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on June 27, 2012, he served three copies of the foregoing Brief of Defendant-Appellee on all counsel of record by causing the same to be deposited, proper postage prepaid, with the U.S. Postal Service at 1999 K St. NW, Washington, DC 20006, before the hour of 8:00 p.m., for first class mail delivery to the following:

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CERTIFICATE OF FILING

The undersigned, an attorney, hereby certifies that on June 27, 2012, he filed the original and nine copies of the foregoing Brief of Defendant-Appellee by causing the same to be delivered, proper delivery charge prepaid, to a third-party commercial carrier (UPS) at 1999 K St. NW, Washington, DC 20006, before the hour of 8:00 p.m., for overnight delivery to the following:

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