No. 2012–SC–750-D

IN THE SUPREME COURT OF KENTUCKY

JEFFREY T. CANIFF,
Plaintiff-Appellant,

– v. –

CSX TRANSPORTATION, INC.,
Defendant-Appellee.

On Appeal from the Commonwealth
of Kentucky Court of Appeals
No. 2011-CA-000178-MR

BRIEF FOR DEFENDANT-APPELLEE CSX TRANSPORTATION, INC.

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STATEMENT CONCERNING ORAL ARGUMENT

Defendant-Appellee CSX Transportation, Inc. agrees with plaintiff-appellant Jeffrey T. Caniff that oral argument may assist the Court in deciding the issues presented.

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COUNTERSTATEMENT OF THE CASE

Plaintiff-appellant Jeffrey T. Caniff, an employee of defendant-appellee CSX Transportation, Inc. ("CSXT"), was carrying a 75-pound device called a "knuckle" along a 200-foot stretch of railroad. About 70 or 80 feet into the walk, Caniff lost his footing, fell, and injured his back. Caniff filed a lawsuit alleging that CSXT violated the Federal Employers Liability Act ("FELA") by allowing him to carry the knuckle without assistance.

The circuit court determined, in its discretion, that Caniff was required to produce an expert witness to establish the industry custom and practice for transporting this type of railroad equipment. Without such evidence, the court reasoned, Caniff could not prove that CSXT had breached a duty of care. Caniff failed to produce an expert, and the circuit court therefore granted summary judgment to CSXT. Finding that the circuit court had not abused its discretion by requiring expert evidence, the Court of Appeals affirmed.

This Court should affirm as well. Caniff does not even try to demonstrate that the circuit court's decision to require expert evidence was so arbitrary and unreasonable as to amount to an abuse of discretion, which is the applicable standard of review. That is because he cannot.

Such a demonstration would do Caniff no good anyway, because the record is devoid of *any* evidence from which a jury might conclude that it was unreasonable for CSXT to ask him to carry the equipment by himself. If anything, the record shows that the industry custom at the time of Caniff's accident was for employees to carry knuckles alone for *greater* distances. The

record also contains no evidence that the assistance of another employee would have prevented the injury, which Caniff attributed not to the knuckle's weight or any difficulty in carrying it alone, but to his encounter with a wet ballast stone, a condition that could have caused him to slip whether he had assistance or not.

With or without the need for expert evidence, in short, Caniff cannot prove either negligence or causation, and CSXT was entitled to summary judgment.

A. Legal Background

Enacted in 1908, FELA establishes the compensation scheme for injuries sustained by railroad employees in the workplace. *See generally CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 57-60 (Ky. 2010). FELA provides for concurrent jurisdiction of state and federal courts (45 U.S.C. § 56), but FELA actions are substantively governed by federal law (*Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 165 (2007)). State-law remedies are preempted. *Id.*

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

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

45 U.S.C. § 51. The basic elements of a FELA cause of action are thus "breach of a duty of care (that is, conduct unreasonable in the face of a foreseeable risk

of harm), injury, and causation." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 538 (1994).

"Absent express language to the contrary," these elements, and a railroad's defenses, "are determined by reference to the common law." *Sorrell*, 549 U.S. at 165-66. "Only to the extent of . . . explicit statutory alterations" does FELA "'depart[] from the rules of the common law.'" *Gottshall*, 512 U.S. at 544 (quoting *Sinkler v. Mo. Pac. R.R.*, 356 U.S. 326, 329 (1958)).

B. Factual Background

On December 10, 2004, a stopped freight train belonging to CSXT was blocking a crossing. 1st Caniff Dep. 58-60. Caniff, a shop worker in the CSXT yard in Russell, Kentucky, was asked to see "what the trouble was" and "to fix it if [he] could." *Id.* at 60.

Caniff arrived at the location and determined that one of the train's knuckles—a 75-pound device used to link two train cars together (2d Caniff Dep. 20)—was broken and needed to be replaced (1st Caniff Dep. 65). Caniff returned to the shop in his truck and retrieved a replacement knuckle. *Id.* at 66-67. Before leaving to return to the train, Caniff asked his supervisor whether another railroad employee, L.A. Smith, was available to help. *Id.* at 94-95. The supervisor said that Smith was busy with other work and that Caniff should "do what [he could] do." *Id.* at 95. Caniff did not request assistance in carrying the knuckle from any other CSXT employee.

Caniff then returned to the train. Although it had been raining in the preceding days and was misting on that particular afternoon (2d Caniff Dep.

21), Caniff did not anticipate that he would "have any problems carrying the knuckle" by himself (1st Caniff Dep. 94) and began walking the 200 feet from the truck to the train (*id.* at 64, 67-68). About 80 feet into the walk (2d Caniff Dep. 5), as he was stepping over a rail, Caniff "almost lost his footing" on wet ballast (1st Caniff Dep. 68). Ballast is the crushed stone used for track support, drainage, and erosion control. To avoid dropping the knuckle on his feet, Caniff "twisted to the side" and then fell, injuring his back. *Id.* at 68-69.

A train conductor was standing nearby and witnessed the fall. 1st Caniff Dep. 69; 2d Caniff Dep. 26-27. The conductor came to Caniff's aid, carrying the knuckle the remaining distance and helping Caniff to install it on the train. 1st Caniff Dep. 69-70. It had been Caniff's intention all along to ask the conductor for assistance in installing the knuckle, but Caniff did not "ask[] him to help . . . carry the knuckle." 2d Caniff Dep. 26-27. The conductor, meanwhile, had been "[j]ust standing there . . . waiting on" Caniff to complete the job, until he saw Caniff fall. *Id.*

C. Procedural History

1. Caniff's lawsuit

On November 30, 2007, Caniff sued CSXT in the Perry Circuit Court, asserting two claims under FELA. First, he alleged that CSXT had "negligently fail[ed] to maintain," "inspect," and "make repairs to the walkway ballast" at the site of his fall. RA3. Second, Caniff alleged that CSXT had "negligently requir[ed] [him] to carry excessive weight for a substantial distance without providing . . . assistance." *Id.*

The case proceeded to discovery. On the question of liability, there were just two fact witnesses, Caniff and a colleague named John Quillen.

Concerning the ballast-maintenance claim, Caniff testified at his deposition that CSXT generally was not "good" about "resolv[ing]" conditions like "mud or water or excess ballast." 1st Caniff Dep. 40. He noted that there was "a lot more mud" around the tracks in December 2004 than there was at the time of his testimony, but only in the "general area" near the site of the accident, not "on the track" itself, where he actually fell. 2d Caniff Dep. 10-11. Ultimately, Caniff "couldn't say" with any certainty what "made [his] foot slip" and attributed his fall simply to "gravity." *Id.* at 20-21.

Quillen confirmed that there had been "mud" and "drainage" problems, and "water standing on the tracks," on the mainline near the Russell Yard in years past, but he acknowledged that he did not "know the exact location" of Caniff's fall or whether such problems were present there in December 2004. Quillen Dep. 18, 21. Quillen also did not witness Caniff's fall (*id.* at 10) and testified that he "ha[d] no clue" whether the condition of the ballast at the site of the fall contributed to the accident (*id.* at 21).

Concerning the failure-to-assist claim, Caniff admitted that, when he was informed by his supervisor that L.A. Smith was unavailable to help, he did not request the assistance of any other CSXT employee (2d Caniff Dep. 26-27), because he did not anticipate having any trouble carrying the knuckle by himself (1st Caniff Dep. 94). Caniff acknowledged that he could have "asked

[the conductor] to help [him] . . . carry the knuckle" but chose not to. 2d Caniff Dep. 26-27.

There was no expert testimony concerning the industry custom and practice for carrying a knuckle in December 2004. But Caniff's official job description provided that his "working conditions" would require him to "lift up to 70 pounds occasionally and up to 100 pounds on a rare basis." RA506. The testimonial evidence indicated that, when it was necessary for railroad employees to carry a knuckle in and before December 2004, they typically did it by themselves. Quillen testified that he had "carried [a knuckle]" by himself more than 3,000 feet "many a time" before Caniff's accident. Quillen Dep. 44. When he was asked, "Do you believe that you could safely carry a knuckle 200 feet on main line ballast, you yourself," Quillen answered, "back then, I would have done it." *Id.* Caniff testified that he, too, had "carried [a] knuckle by [him]self before" the accident. 2d Caniff Dep. 28.

In January 2009, more than four years after Caniff was injured, and more than a year after he filed this lawsuit, CSXT introduced a device called a "knuckle mate," which enables employees to carry knuckles in two-man teams. Quillen Dep. 42. "You can set a knuckle" on a knuckle mate, "and then one guy gets on one side and one gets on the other, and you can carry it and lift it up in a car and set it up there that way." *Id.* at 43. Introduction of the knuckle mate represented a shift in the prevailing custom and practice. As Quillen explained, "I don't carry one by myself . . . any more, because . . . they come out with . . . a knuckle mate," and "[t]hey don't want . . . one man carrying them no

more." *Id.* at 42; *see also* RA576-580 (CSXT safety procedure for use of knuckle mate).

2. The circuit court's grant of summary judgment to CSXT

a. CSXT moved for summary judgment on both of Caniff's claims, arguing that there was no evidence that it was negligent in the maintenance of the ballast at the site of his fall (RA491-494) and no evidence that it had a duty to provide him with assistance in carrying the knuckle (RA494-499). CSXT argued that Caniff was required to, but did not, produce expert testimony to support his failure-to-assist claim. RA499-502. In opposing the motion, Caniff took the position that there was sufficient evidence to withstand summary judgment (RA543-546) but did not claim that there is a relaxed standard of negligence in FELA actions.

The circuit court granted CSXT's motion for summary judgment. RA560-563. With respect to the ballast-maintenance claim, the court found that Caniff had "failed to identify any act or omission on CSXT's part with respect to its premises that caused or contributed to his slip and fall." RA561. With respect to the failure-to-assist claim, the court found that the question whether "CSXT's standards or practices were outside accepted railroad practices in December 2004" is a matter "outside the common knowledge of a lay juror" and thus "require[s] expert testimony," which Caniff "does not have." *Id.* The court therefore held that Caniff had "failed as a matter of law to establish any genuine issue of material fact" as to either claim. RA562.

b. Caniff subsequently filed a motion to vacate the judgment. RA565-567. To his motion, Caniff attached a new affidavit; to the affidavit, he attached an unauthenticated August 1, 1995 memorandum from an unidentified individual to a group of 27 other unidentified individuals concerning the standards for carrying an "end of train," or EOT, device. RA571. While there is no evidence in the record on the subject, an EOT device is an electronic device mounted on the end of a freight train that functions as a flashing red taillight and may transmit data to the train's crew.

The memorandum attached to Caniff's affidavit states that "Mechanical Department employees shall not be required to carry an EOT device more than five (5) car lengths (300 feet)." RA571. Although he had testified at deposition that the distance from his truck to the train was about 200 feet (1st Caniff Dep. 61, 64) and that he had fallen after walking just 70 or 80 feet (2d Caniff Dep. 5), Caniff changed his story in his affidavit and asserted that the distance he "would have had to carry the replacement knuckle from the truck to where the broken knuckle was located was more than 300 feet." RA570. Pointing to this new evidence, Caniff argued that, "[s]ince [he] was required to carry the knuckle on the night of the accident more than 300 feet and since a knuckle weighs far more than an End of Train Device, it is not necessary to have a liability expert explain to a jury that this is a violation of CSX Transportation's own rule." RA566.

The circuit court denied Caniff's motion to vacate the judgment. RA608-609. Its rationale was the same as that for granting summary judgment in the

first place: "Whether [it] constitutes negligence on CSXT's part" to have Caniff carry the knuckle by himself "requires proof of industry practice, a subject that is outside the common knowledge of lay jurors and thus requires expert testimony." RA608. Caniff "has no such expert testimony," the court said, "and, as a result, his negligence claim fails as a matter of law." *Id.*

3. The Court of Appeals' affirmance

Caniff appealed. He argued, in the main, that he should not have been required to produce an expert witness and that the non-expert evidence was sufficient to withstand summary judgment. C.A. Br. 8-14; C.A. Reply Br. 1-5. Apart from that, Caniff asserted that the circuit court had made an improper finding of fact concerning the distance from his truck to the train, and pointed to CSXT's supposed policy on EOT devices as proof that the question of distance was relevant. C.A. Br. 14-17. Caniff did not challenge the circuit court's grant of summary judgment on his ballast-maintenance claim. As in the circuit court, Caniff also did not claim that the standard for establishing negligence is lower in a FELA case than in other kinds of tort actions. The Court of Appeals rejected Caniff's arguments and affirmed the grant of summary judgment to CSXT.

The Court of Appeals first held that "Caniff has abandoned his claim about improperly maintained ballast." Slip op. 7. In light of the waiver, the court found that "no further discussion of the ballast maintenance issue is warranted." *Id.* at 8.

Moving to Caniff's failure-to-assist claim, the court first observed that, "[a]lthough FELA relaxes the standard of proof regarding causation, it does not lessen the burden to prove the elements of negligence." Slip op. 8 (citing *Van Gorder v. Grand Trunk W. R.R.*, 509 F.3d 265, 271 (6th Cir. 2007)). The court then explained that "'FELA claims, like common law negligence claims, must be supported by expert testimony where they involve issues . . . beyond the common experience and understanding of the average jury.'" *Id.* (quoting *In re Amtrak "Sunset Limited" Train Crash*, 188 F.Supp.2d 1341, 1349 (S.D. Ala. 1999); ellipsis added by court). Citing decisions of this Court and its predecessor, the Court of Appeals went on to say that "[w]hether expert testimony is required in a given case is squarely within the trial court's discretion" and that, "[a]bsent an abuse of discretion, we will not disturb the trial court's ruling." *Id.* (citing *Keene v. Commonwealth*, 516 S.W.2d 852, 855 (Ky. 1974), and *Baptist Healthcare Sys., Inc. v. Miller*, 177 S.W.3d 676, 680-81 (Ky. 2005)).

Applying the abuse-of-discretion standard to the decision to require expert evidence here, the Court of Appeals concluded that the circuit court had permissibly found that "a lay juror would not possess sufficient knowledge of the working conditions of a railyard to independently determine whether CSXT put Caniff at an unreasonable risk of traumatic injury." Slip op. 8-9. "Because the 'business of operating a railroad entails technical and logistical problems with which the ordinary layman has had little or no experience,'" the Court of Appeals determined that "the failure to provide expert testimony

regarding the applicable standard of care is fatal to Caniff's claims." *Id.* at 8 (quoting *Bridger v. Union Ry.*, 355 F.2d 382, 389 (6th Cir. 1966)).

As to Caniff's failure-to-assist claim, in sum, the Court of Appeals held that the circuit court "did not abuse its discretion in holding Caniff was required to present expert testimony regarding the applicable standard of care"; that Caniff's "inability to do so precluded his ability to establish a *prima facie* case of negligence"; and that the circuit court therefore "correctly granted summary judgment" to CSXT. Slip op. 9.

ARGUMENT

FELA authorizes an employee to recover for a workplace "injury . . . resulting in whole or in part from the negligence" of the railroad. 45 U.S.C. § 51. To withstand summary judgment, therefore, Caniff was required to produce evidence permitting a reasonable jury to find that his injury was the result of some negligent act or omission by CSXT. He was required to offer proof, in other words, of each of "the traditional common-law elements of negligence, including duty, breach, foreseeability, causation, and injury." *Begley*, 313 S.W.3d at 58.

He did not. The circuit court thus correctly decided that there was no genuine issue of material fact for a jury to resolve, and the Court of Appeals correctly affirmed that decision. This Court should reach the same conclusion, and affirm the Court of Appeals' decision, for three independent reasons.

First, the circuit court did not abuse its discretion by requiring expert evidence, based on its determination that the standard of care for transporting

railroad equipment involves technical issues that are not within the common experience and understanding of lay jurors. A trial court abuses its discretion only when it acts arbitrarily or unreasonably, and that does not remotely describe what the circuit court did here. Because there was no abuse of discretion in requiring expert evidence, and because Caniff did not have any, CSXT was entitled to summary judgment. *See infra* Point I.

Second, even if expert evidence was *not* required, CSXT still was entitled to summary judgment because there is not a shred of evidence—expert or otherwise—that it was unreasonable for CSXT to ask Caniff to carry a train knuckle by himself. Quite the contrary. The evidence uniformly shows that employees often carried knuckles alone, without incident and for even greater distances, at and before the time of Caniff's accident, and there is nothing to suggest that the industry practice was to have two people perform that task. With or without the need for expert evidence, therefore, Caniff cannot prove that CSXT breached any duty of care. *See infra* Point II.A.

Third, even if there was sufficient evidence of negligence to withstand summary judgment, there was not sufficient evidence of causation, because there is no evidence that providing the assistance of another employee would have prevented Caniff's fall. Neither Caniff nor anyone else was able to say what made him fall, and a jury would have been left to speculate whether the cause of his fall was the lack of assistance. In a FELA case as in any other, speculation cannot substitute for proof. *See infra* Point II.B.

In an attempt to surmount the evident absence of proof, Caniff makes an argument that he did not make in either the circuit court or the Court of Appeals: that FELA relaxes the standard of negligence. Because Caniff failed to raise that issue in either of the lower courts, this case presents no occasion for deciding it. If the Court does address the claim, however, it should categorically reject it, because FELA incorporates ordinary, common-law principles unless the text provides otherwise and FELA's use of the term "negligence" reflects no departure from the common law. *See infra* Point III.

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN REQUIRING EXPERT EVIDENCE, WHICH CANIFF LACKED, AND IT CORRECTLY GRANTED SUMMARY JUDGMENT TO CSXT ON THIS BASIS

We begin with the ground that both the circuit court and the Court of Appeals found sufficient to dispose of Caniff's duty-to-assist claim, which is the only claim remaining in the case. Because the circuit court reasonably believed that the standard of care for carrying knuckles is an issue outside the common understanding of a lay jury, it acted within its discretion in requiring Caniff to produce expert evidence on the matter. And because Caniff did not produce expert evidence, he could not meet his burden of proving negligence, thus entitling CSXT to summary judgment. Even if it were possible to come out differently on the necessity of expert evidence, reversal would not be warranted unless the circuit court's decision to require such evidence was arbitrary or unreasonable. It was not; far from it. On that single, settled, and straightforward basis, the decision below must be affirmed.

A. A Trial Court's Determination That Expert Evidence Is Required To Establish The Standard Of Care Is Reviewed For An Abuse Of Discretion

As this Court has held, "requiring expert testimony as to the standard of care" is "proper" in a negligence case if "the standard of care is not within the scope of common experience of jurors." *Baptist Healthcare*, 177 S.W.3d at 680-81; *accord, e.g., Blankenship v. Collier*, 302 S.W.3d 665, 671 (Ky. 2010). Kentucky courts have applied that principle time and time again, in a variety of common-law negligence cases. *See, e.g., Horn v. Mountain Enters., Inc.*, 2012 WL 1900134, at *6 (Ky. Ct. App. 2012) (construction); *Celina Mut. Ins. Co. v. Harbor Ins. Agency,* LLC, 332 S.E.3d 107, 111-12 (Ky. Ct. App. 2010) (insurance); *Burton v. Helmers*, 2009 WL 4021148, at *1-*2 (Ky. Ct. App. 2009) (law); *Cardinal Indus. Insulation Co. v. Norris*, 2009 WL 562614, at *17-*18 (Ky. Ct. App. 2009) (design and engineering); *Green v. Owensboro Med. Health Sys.*, 231 S.W.3d 781, 783-84 (Ky. Ct. App. 2007) (medicine); *Russell v. Rhodes*, 2005 WL 736612, at *4 (Ky. Ct. App. 2005) (air travel).

Kentucky courts have applied the principle in FELA actions, too, and not just in this one. They have held that "'FELA claims, like common law negligence claims, must be supported by expert testimony where they involve issues . . . beyond the common experience and understanding of the average jury.'" *Adkins v. CSX Transp., Inc.*, 2011 WL 2935399, *4 (Ky. Ct. App. 2011) (quoting *Amtrak "Sunset Limited" Train Crash*, 188 F. Supp. 2d at 1349; ellipsis added by *Adkins* Court); *accord* slip op. 8 (decision below).

As this Court also has held, a "trial court's ruling with regard to" whether the applicable "standard of care is . . . within the scope of common experience of jurors," and thus with regard to "the necessity of an expert witness" to establish the standard of care, is "within the [trial] court's sound discretion." *Baptist Healthcare*, 177 S.W.3d at 680-81; *accord Blankenship*, 302 S.W.3d at 671. Thus, Kentucky appellate courts "review [a] trial court's ruling in regard to the necessity of an expert witness for an abuse of discretion." *Celina Mut. Ins.*, 332 S.W.3d at 111; *accord, e.g., Horn*, 2012 WL 1900134, at *5; *Adkins*, 2011 WL 2935399, at *4; *Burton*, 2009 WL 4021148, at *1; *Green*, 231 S.W.3d at 783.

In this context as in others, "[t]he test for abuse of discretion" is not whether the challenged decision is *incorrect*, in the sense that the appellate court necessarily would have reached a different conclusion on *de novo* review, but rather "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Celina Mut. Ins.*, 332 S.W.3d at 111 (quoting *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)); *accord, e.g., Fryman v. Wiczkowski*, 2012 WL 6061727, at *2 (Ky. Ct. App. 2012). Even when "the necessity of an expert witness" is "not so clear-cut that reasonable persons could not have differed," such that it would "not [be] unreasonable . . . to con[clude] that *no* expert witness was necessary," a trial court that "saw it otherwise" will be affirmed so long as the decision to *require* expert evidence *also* is not unreasonable and thus is "within the court's sound discretion." *Baptist Healthcare*, 177 S.W.3d at 681 (emphasis added);

see, e.g., Celina Mut. Ins., 332 S.W.3d at 112 (suggesting that argument that expert testimony was unnecessary "has merit" but according "deference" to trial court's contrary finding "based on our standard of review").

B. There Was No Abuse Of Discretion Here

Caniff does not dispute that Kentucky appellate courts accord deferential review to a trial court's determination that expert evidence is necessary in a particular case. And he does not cite any Kentucky decisions holding that a trial court abused its discretion by requiring expert testimony, whether in a FELA action or in any other tort case. Indeed, he does not cite any Kentucky decisions on this question at all. *See* Br. 23-28.

That is unsurprising, since the exercise of such discretion by Kentucky trial courts has overwhelmingly been affirmed. *See, e.g., Baptist Healthcare*, 177 S.W.3d at 679-82; *Jackson v. Ghayoumi*, ___ S.W.3d ___, 2012 WL 6214169, at *4 (Ky. Ct. App. 2012); *Fryman*, 2012 WL 6061727, at *3-5; *Horn*, 2012 WL 1900134, at *5-*6; *Adkins*, 2011 WL 2935399, at *4; *Celina Mut. Ins.*, 332 S.W.3d at 111-13; *Luttrell v. Jewish Hosp. & St. Mary's Healthcare, Inc.*, 2009 WL 4406058, at *4 (Ky. Ct. App. 2009); *Burton*, 2009 WL 4021148, at *1-2; *Cardinal Indus.*, 2009 WL 562614, at *17-18; *Trepanier v. Jewish Hosp. & St. Mary's Healthcare*, 2009 WL 276774, at *2-3 (Ky. Ct. App. 2009); *Carmicle v. Casey Cnty. Hosp.*, 2008 WL 5102114, at *8-9 (Ky. Ct. App. 2008); *Nalley v. Banis*, 240 S.W.3d 658, 660-62 (Ky. Ct. App. 2007); *Green*, 231 S.W.3d at 783-84; *Russell*, 2005 WL 736612, at *4. As in those cases, the Court of Appeals

was correct to affirm the circuit court's discretionary decision requiring Caniff to produce expert evidence here.

"[I]ndustry practice" is generally "the test of an employer's diligence" under FELA (*Conway v. Consol. Rail Corp.*, 720 F.2d 221, 223 (1st Cir. 1983); *Kuberski v. N.Y. Cent. R.R.*, 359 F.2d 90, 95 (2d Cir. 1966)) and "the yardstick against which a railroad's actions must be judged" (*Wilson v. Norfolk & W. Ry.*, 440 N.E.2d 238, 248 (Ill. App. Ct. 1982)). *See, e.g., Garza v. Norfolk S. Ry.*, 2013 WL 4082215, at *3 (6th Cir. 2013) (affirming summary judgment for railroad where plaintiff did not present evidence of "industry practice" and thus could not establish breach of duty of care); *see also Carman v. Dunaway Timber Co.*, 949 S.W.2d 569, 571 (Ky. 1997) ("custom within the industry" is proof of "th[e] standard of care"). As the U.S. Court of Appeals for the Sixth Circuit has observed, moreover, in language quoted by the Kentucky Court of Appeals in both this case (slip op. 8) and an earlier one (*Adkins*, 2011 WL 2935399, at *4), "the business of operating a railroad entails technical and logistical problems with which the ordinary layman has had little or no experience." *Bridger*, 355 F.2d at 389. For these reasons, and depending upon the particular facts of the case, it is often permissible, even if it is not always obligatory, for a trial court to conclude that a railroad's standard of care is beyond the common experience and understanding of an average jury, and thus to require a FELA plaintiff to offer expert evidence to prove that the railroad breached a duty of care to its employee.

In a prior case, for example, the Kentucky Court of Appeals found no abuse of discretion in the circuit court's decision requiring expert evidence to establish the standard of care when the FELA plaintiff claimed that the railroad had used improper ballast in rail yards. *Adkins*, 2011 WL 2935399, at *4. Other courts have required expert evidence to establish the standard of care in FELA cases in which the plaintiff alleged that the railroad had provided inadequate lighting in a rail yard (*Rawson v. Midsouth Rail Corp.*, 738 So. 2d 280, 292 (Miss. Ct. App. 1999)), failed to evaluate an employee's physical capacity to perform her job (*Jones v. Nat'l R.R. Passenger Corp.*, 942 A.2d 1103, 1108 (D.C. 2008)), or allowed a train to travel too fast (*Amtrak "Sunset Limited" Train Crash*, 188 F. Supp. 2d at 1349).

Likewise here, the circuit court permissibly found that expert evidence was necessary to establish the standard of care for transporting train equipment. In its view, (1) the conditions under which railroad employees were reasonably expected to carry a particular type of equipment by themselves, (2) for what distances, and (3) over what surfaces presented technical and logistical issues outside the common understanding of a lay jury. The circuit court's determination was entirely appropriate, since those issues fall within the "specialized nature of railroading" and "unique skills and knowledge required for effective railroad operations" (*Nat'l R.R. Passenger Corp. v. Ry. Express, LLC*, 268 F.R.D. 211, 214 (D. Md. 2010)) with which jurors are unlikely to be familiar. At the very least, it was not "arbitrary" or "unreason-

able" for the circuit court to require expert evidence—which is the only question for this Court to decide. *Celina Mut. Ins.*, 332 S.W.3d at 111.

C. Caniff's Arguments To The Contrary Lack Merit

Caniff does not offer any coherent argument—or really any argument at all—as to how or why the circuit court abused its discretion in requiring expert evidence. He simply cites four out-of-jurisdiction FELA decisions holding that expert evidence was not necessary in those cases. Br. 23-28. The cited decisions, one assumes, are meant to demonstrate that the Court of Appeals' decision here was erroneous. This approach is flawed on multiple levels.

First, insofar as Caniff is relying on the decisions for the idea that expert evidence is *never* required, that proposition is flatly inconsistent with the scores of Kentucky decisions holding that expert evidence may be required in a negligence case if "the standard of care is not within the scope of common experience of jurors." *Baptist Healthcare*, 177 S.W.3d at 680. To the extent that the decisions adopt a different view, therefore, they are not persuasive authority in this Commonwealth.

Second, insofar as the decisions instead recognize, as at least some of them appear to, that expert evidence may or may not be required in a particular case, depending on whether the issue is within the common understanding of lay jurors, they are consistent with Kentucky decisions but simply apply the governing legal standard to a different set of facts. In that event, too, the decisions have little persuasive force, because, when it comes to whether expert evidence is required in a specific case, analogizing to other cases is not a

useful exercise. As the South Carolina Supreme Court has explained, "[d]eciding what is within the knowledge of a lay jury and what requires expert testimony depends on the particular facts of the case." *Babb v. Lee Cnty. Landfill SC, LLC*, 747 S.E.2d 468, 154 (S.C. 2013). "The determination of whether expert testimony is required" is thus "a fact-specific inquiry that can only be made on a case-by-case basis." *Id.* at 153. Prior decisions addressed to inevitably different facts are unlikely to be informative.

Third, the other cases are not in fact analogous. Those decisions held that expert testimony was not necessary to prove a railroad's negligence in failing to protect against the risk of injury from exposure to smoke and soot in an enclosed area (*Harbin v. Burlington N. R.R.*, 921 F.2d 129, 131-32 (7th Cir. 1990)), prolonged exposure to paint fumes in a tunnel (*Ulfik v. Metro-N. Commuter R.R.*, 77 F.3d 54, 58-60 (2d Cir. 1996)), deafening horn blasts (*Tufariello v. Long Island R.R.*, 458 F.3d 80, 87-91 (2d Cir. 2006)), and mud on the ground where an employee was working (*Szekeres v. CSX Transp., Inc.*, 731 F.3d 592, 603 (6th Cir. 2013)). A trial judge could reasonably conclude, in contrast, that a lay jury *would* require the assistance of an expert to decide whether it fell outside the standard of ordinary care in December 2004 for a railroad employee, whose job description expressly contemplated it, to transport a particular piece of railroad equipment by himself for a particular distance over a particular surface.

Finally, to the extent that the decisions on which Caniff relies actually reviewed a trial court's ruling that expert evidence was necessary, as opposed

to having merely responded to the railroad's argument to that effect on appeal, the appellate courts in all of those cases appear to have employed a *de novo* standard of review. For that reason as well, the decisions have little persuasive force, for Kentucky decisions make clear that a trial court's determination of whether to require expert evidence is "within the court's sound discretion" (*Baptist Healthcare*, 177 S.W.3d at 681) and therefore reviewed deferentially. Even if one believed that Caniff's authorities were factually analogous to this case, therefore, they still would be distinguishable, because they would stand only for the proposition that "the reviewing court . . . decided the issue differently" than the trial judge, not that "the trial judge abused his discretion." *Sommerkamp v. Linton*, 114 S.W.3d 811, 815 (Ky. 2003).

There was no finding of an abuse of discretion in those cases. And it is not enough for Caniff to show, as he maintains, that the circuit court "erred" in requiring expert evidence here (Br. 24); he must demonstrate that its decision was "arbitrary" or "unreasonable" (*Celina Mut. Ins.*, 332 S.W.3d at 111). As we have explained, Caniff cannot come close to making that showing.

II. THERE WOULD BE INSUFFICIENT EVIDENCE TO SUPPORT CANIFF'S CLAIM, AND SUMMARY JUDGMENT TO CSXT WOULD THEREFORE BE WARRANTED, EVEN IF EXPERT EVIDENCE WERE NOT REQUIRED

Even if all that we have said were wrong—even supposing, that is, that the circuit court *had* abused its discretion in requiring Caniff to produce expert evidence concerning the standard of care—that conclusion would not change the ultimate outcome of this case. Summary judgment still would be warrant-

ed because there is not a shred of evidence—expert or non-expert—that it was negligent of CSXT not to provide Caniff assistance in carrying a knuckle in 2004. Beyond this, there is no evidence that providing someone to help carry the knuckle would have prevented Caniff's injury, and accordingly no evidence that the failure to do so played even the slightest part in causing the injury. If the judgment below is not affirmed on the basis that the circuit court acted within its discretion in requiring expert evidence, therefore, it should be affirmed on either or both of these two independent grounds.

A. There Is Insufficient Evidence Of Negligence

Negligence is the "breach of a duty of care." *Gottshall*, 512 U.S. at 538. The central question concerning Caniff's duty-to-assist claim is whether CSXT had a duty to make another employee available to help him carry a knuckle in December 2004. There is absolutely no evidence that it did, and nothing in Caniff's brief demonstrates otherwise.

1. There is no evidence that CSXT had a duty to make another employee available to help Caniff carry a knuckle

"In most cases where plaintiffs have survived summary judgment on lack of manpower claims, the plaintiffs have presented evidence that they were forced to perform a particular task that *usually required more assistance* and that under the circumstances, it was unreasonable to require the plaintiff to perform the task without assistance." *Lewis v. CSX Transp., Inc.*, 778 F. Supp. 2d 821, 840 (S.D. Ohio 2011) (emphasis added). In one such case, for example, the South Carolina Supreme Court held that the plaintiff could withstand

summary judgment on the element of negligence because there was evidence that it violated industry practice for the railroad to assign the particular task to the plaintiff without providing the assistance of another employee. *Montgomery v. CSX Transp., Inc.*, 656 S.E.2d 20, 23-24, 29-30 (S.C. 2008).

Here, by contrast, Caniff presented *no* evidence that transporting a knuckle was, in 2004, a task that "usually required [the] assistance" of a second employee. *Lewis*, 778 F. Supp. 2d at 840. It goes without saying that "the [mere] fact that Plaintiff's job would have been easier if there had been more workers does not constitute negligence on the part of Defendant, nor does it create an unreasonably unsafe work environment." *McKennon v. CSX Transp., Inc.*, 897 F. Supp. 1024, 1027 (M.D. Tenn. 1995), *aff'd per curiam*, 56 F.3d 64 (6th Cir. 1995).

Caniff's failure to produce any evidence that CSXT had a duty to provide a second person to help carry the knuckle is sufficient, without more, to require summary judgment for CSXT (whether or not expert evidence was necessary). But there *is* more. The evidence in the summary judgment record demonstrates that, in December 2004, it was standard industry practice for a railroad employee to carry a knuckle by himself, *without* the assistance of another person.

To begin with, Caniff's job description expressly required him to lift objects as large as and larger than a knuckle by himself. *See* RA506 ("working conditions" required Caniff to "lift up to 70 pounds occasionally and up to 100 pounds on a rare basis"). A railroad employee's official job description is surely

indicative of the ordinary practice in the industry. We have pointed to Caniff's job description at every stage of this litigation, yet he has not once attempted to address this glaring problem with his failure-to-assist claim.

Beyond this, the testimonial evidence uniformly demonstrated that carrying a knuckle was not a task that usually required the assistance of a second person at the time of Caniff's accident. In particular, the evidence showed that—notwithstanding the contrary insinuation in his brief (at 4-5)—Caniff had carried knuckles by himself before. 2d Caniff Dep. 28. True, Caniff testified that he had done so only on "shop track" and not on the "mainline." *Id.* But he offers no evidence, or even an explanation, as to why that distinction makes any difference.

As for Quillen, his testimony was that he, too, had carried knuckles by himself "many a time" before December 2004, on the mainline and often as far as 3,000 feet. Quillen Dep. 41. Quillen even testified that, if he had been in Caniff's position, he would have carried the knuckle alone in December 2004. *Id.* at 42-45. Caniff himself testified that he did not anticipate having any trouble carrying the knuckle by himself on the date of the accident (1st Caniff Dep. 94), an admission that strongly suggests that it was *reasonable* for him to do just that. *Cf. Richards v. Consol. Rail Corp.*, 330 F.3d 428, 433 (6th Cir. 2003) (a "plaintiff['s] opinions" are relevant when they "are based on [his] experience and perceptions at the time of the[] accident").

Finally, the introduction of the "knuckle mate" more than four years *after* Caniff's accident confirms that the custom was different in December

2004, for the change in policy in February 2009 (*see* RA576-580) would not have been necessary if the standard practice already had been that knuckles were to be carried by two employees. As Quillen explained at his 2010 deposition, "I don't carry [a knuckle] by myself . . . *any more*, because . . . they come out with . . . a knuckle mate," and "[t]hey don't want . . . one man carrying them *no more*." Quillen Dep. 42 (emphasis added). The necessary implication is that, prior to introduction of the knuckle mate, the ordinary practice was for "one man" to carry a knuckle by himself. *Id.*

2. Caniff's arguments to the contrary lack merit

The evidence and legal authorities on which Caniff relies do not remotely support his contention that summary judgment was unwarranted.

a. Caniff claims that there is deposition testimony that "carrying a knuckle [wa]s not a one-man job . . . back in 2004." Br. 5 (citing 2d Caniff Dep. 25); *see also* Br. 7 (asserting that Caniff testified at "his second deposition that replacement of a knuckle was a two-man job as of the date of his accident"). That is simply incorrect. Caniff's testimony was that *installing* a knuckle—that is, "putting the knuckle in"—was "not really a one-man job" and that Caniff therefore "plan[ned] to have the conductor give [him] a hand," as was the custom and practice at the time. 2d Caniff Dep. 24-25. Caniff made clear that he did not intend to ask the conductor to help *carry* the knuckle, because that was Caniff's job to do by himself. *Id.* at 25.

Caniff also quotes Quillen's testimony that he would not carry a knuckle by himself "unless I was just flat ordered to do it." Br. 9 (quoting Quillen Dep.

44). But Quillen's testimony was that he would not carry a knuckle by himself *at the time of his deposition in 2010*. Quillen Dep. 44. His statement on that score stands in stark contrast with his acknowledgement, just moments later, that the custom and practice was different *at the time of Caniff's accident in 2004* and that Quillen would have carried the knuckle by himself at that time:

> Q: Do you believe that you could safely carry a knuckle 200 feet on main line ballast, you yourself?
>
> A: By myself?
>
> Q: Yes, sir.
>
> A: First of all, I wouldn't do it by myself, not unless I was just flat ordered to do it or threatened to be fired for insubordination.
>
> Q: But it—that job—
>
> A: At—*back then, I would have done it*, because—
>
> Q: That was my question, I guess.

Id. (emphasis added).

b. Apart from his reliance on this deposition testimony, Caniff claims that a jury could find negligence because requiring him to carry a knuckle by himself in December 2004 was a violation of an internal CSXT rule. Br. 6-7, 28, 31. He points to what is purportedly a 1995 version of a "Safety Policy of CSXT" (Br. 7) concerning EOT devices. *See* RA571. The "Policy," printed on plain paper without any identifying marks or titles (or even a reference to CSXT), states that "Mechanical Department employees shall not be required to carry an EOT device more than five (5) car lengths (300 feet)." *Id.* Relying on this language, Caniff asserts that, "once CSXT issued its safety rule regarding

carrying of a EOT, it was obligated to enforce the rule," and that, "if it is a violation of a safety rule to require an individual to carry an object weighing 45 to 55 pounds for a distance of 300 feet," it is "a violation of that same safety rule to require an individual to carry an object weighing considerably more than the EOT for 200 or 300 feet." Br. 31.

This theory is wrong in every conceivable respect. As explained below, the EOT rule—assuming for the sake of argument that it is such—cannot defeat summary judgment both because it is irrelevant and because it is not properly before the Court.

First, a rule for carrying an *EOT device* has no bearing on the standard of care for carrying a *knuckle*. That is especially true because there is no evidence establishing either the conditions or circumstances under which an EOT device is typically carried by railroad employees or the device-specific factors that make it unsafe to carry an EOT device further than 300 feet. Without evidence of those things, no reasonable jury could extrapolate from the EOT rule to answer the question whether it was reasonable for Caniff to carry a different piece of equipment by himself. If anything, that there was a rule for EOT devices but not for knuckles suggests both that the railroad wanted to ensure that such tasks were undertaken safely and that it made a considered judgment that no similar rule was necessary for carrying knuckles.

Second, 300-plus feet was assertedly "the distance [Caniff] *would* have had to carry the replacement knuckle" from his truck to the train if he had not fallen. RA570 (emphasis added). The uncontested evidence is that he fell after

walking just *70 or 80 feet*. *See* 2d Caniff Dep. 5 (testimony that Caniff fell "within a car length, . . . which is about seventy, eighty foot"). How much beyond 70 or 80 feet he would have had to carry the knuckle is therefore beside the point, because allowing or requiring him to carry the knuckle further than 70 or 80 feet could not have played a part in Caniff's fall. For that reason, too, the EOT rule is a red herring.

Third, even if the distance from Caniff's truck to the train is material, Caniff's reliance on the EOT rule seems to depend on the idea that he would have had to carry the knuckle beyond the limit for carrying an EOT device—*i.e.*, further than 300 feet. That is presumably why Caniff asserted in the affidavit to which the EOT memo was attached that he would have had to carry the knuckle "more than 300 feet." RA570. But Caniff had already testified at his deposition that the distance from his truck to the train was about 200 feet. 1st Caniff Dep. 61, 64. "[A]n affidavit which merely contradicts earlier testimony cannot be submitted for the purpose of attempting to create a genuine issue of material fact." *Lipsteuer v. CSX Transp., Inc.*, 37 S.W.3d 732, 736 (Ky. 2000). The EOT rule is thus of no assistance to Caniff for that reason as well.

Fourth, quite apart from their irrelevance, neither Caniff's affidavit (in which he claimed for the first time that the distance from his truck to the train was 300 rather than 200 feet) nor any of the exhibits attached to it (including the supposed EOT policy) are properly part of the record. It is a basic principle of civil procedure that a party cannot use a motion to vacate a judgment "to

raise arguments and introduce evidence that could and should have been presented during the proceedings before entry of the judgment." *Hopkins v. Ratliff*, 957 S.W.2d 300, 301 (Ky. Ct. App. 1997) (internal quotation marks omitted). Yet that is just what Caniff has attempted to do, introducing a new affidavit and new documents that could have been presented before the circuit court's grant of summary judgment but were not.

Finally, the 1995 memo in any event was inadmissible. "[A] document must be authenticated before it can be admitted into evidence." *Thrasher v. Durham*, 313 S.W.3d 545, 549 (Ky. 2010). Here, however, "the provenance of the document[] . . . is a matter of pure speculation," both because "[t]he maker is not identified on [its] face" and because there is no "indication of how or where [Caniff] obtained [it]." *Id.* Thus, even if the memo were relevant, and even if it had been produced at the proper time, it still could not be considered in deciding whether summary judgment was warranted, because "evidence relied upon by the party opposing summary judgment must be admissible." *Breedlove v. City of Eddyville*, 2005 WL 195059, at *7 (Ky. Ct. App. 2005). The 1995 memo was not.

c. Like the evidence on which he relies, the legal authorities cited by Caniff (Br. 18-23) do not support reversal.

Caniff cites three decisions merely for the general proposition that FELA imposes a duty on railroads to provide adequate assistance to employees in performing their work. *See Yawn v. S. Ry.*, 591 F.2d 312, 315 (5th Cir. 1979) ("the carrier is required to provide its employee with sufficient help in the

performance of the work assigned to him"); *Beeber v. Norfolk S. Corp.*, 754 F. Supp. 1364, 1372 (N.D. Ind. 1990) ("[a]n employer's failure to provide adequate assistance to its employees can constitute a breach of the employer's duty under the FELA"); *Kalanick v. Burlington N. R.R.*, 788 P.2d 901, 905 (Mont. 1990) (FELA imposes on railroads "the duty to provide sufficient manpower to complete work in a reasonably safe manner"). We have never suggested otherwise. The issue here is not whether there is such a duty under the law in general, but whether a reasonable jury could find that that duty was breached in this particular case. As we have explained, it could not, because there is no evidence that carrying a knuckle by oneself was anything other than the usual and customary practice among railroad employees at the time of Caniff's accident.

In three other decisions cited by Caniff, the question whether the railroad had breached a duty to assist in that particular case was held to be one for the jury. But in each case the action that led to the employee's injury was *not* the usual or customary practice.

Thus, in *Blair v. Baltimore & Ohio Railroad*, 323 U.S. 600 (1945), where the plaintiff was injured while unloading pipes at the railroad's warehouse, there was evidence that "it was not customary for the railroad to unload pipes of this kind at its warehouse" and that "[i]n the [plaintiff's] four year service this was the first occasion that such heavy pipe had been moved at the warehouse." *Id.* at 602-03. In *Stone v. New York, Chicago, & St. Louis Railroad*, 344 U.S. 407 (1953), where the plaintiff was injured while removing

"stubborn" track ties with one other employee, the evidence was that "more than two men were usually used in these circumstances" and, in particular, that "three or four men would usually be required" to remove such ties. *Id.* at 408-09. And in *Southern Railway v. Welch*, 247 F.2d 340 (6th Cir. 1957) (per curiam), where the plaintiff was injured while pulling rails by himself, it was "not denied" that "circumstances of particular difficulty existed" on the day of the injury and that "[u]nder such circumstances it had been [the railroad's] previous practice to assign an extra man to assist." *Id.* at 341. In this case, by contrast, there is *no* evidence that the action that allegedly led to the plaintiff's injury—carrying a piece of train equipment by himself—was anything other than the usual and customary practice.

In the final decision that Caniff cites, *Ross v. Chesapeake & Ohio Ry.*, 421 F.2d 328 (6th Cir. 1970), the court of appeals reversed a judgment notwithstanding the verdict for the railroad, but it appears that the basis for the district court's grant of JNOV was that the sole cause of the plaintiff's injury, which was sustained while moving an oil drum, was his own contributory negligence. *See id.* at 329-30 (district court held that plaintiff "had no duty or right to move the oil drum," that "he failed to follow the established procedure of notifying the foreman of the need for oil," and that "his efforts to locate the foreman or someone to move the oil drum for him were 'less than exhaustive'"). The sufficiency of the evidence of the *railroad's* negligence does not seem to have been at issue. To the extent that it was, the decision provides no explan-

ation of what the evidence of negligence was, and thus provides no support for a reversal of summary judgment here.*

B. There Is Insufficient Evidence Of Causation

There is a second independent reason why summary judgment was warranted. Even assuming that expert evidence was not required on the standard of care, and even assuming that there was sufficient non-expert evidence that CSXT breached its duty of care (and was therefore negligent) by not providing Caniff with assistance in carrying the knuckle, there is no evidence that the assistance of another employee would have prevented Caniff's fall, and thus no evidence that any failure to provide such assistance was a cause of his injury.

FELA relaxes the standard of causation (*CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630 (2011)), but it does not *eliminate* the requirement. A railroad is liable under FELA only for an injury "resulting in whole or in part" from its negligence. 45 U.S.C. § 51. While common-law proximate causation is not necessary under this language, mere "but for" causation is not sufficient. *See McBride*, 131 S. Ct. at 2641 n.9, 2643. Caniff cannot establish even that.

For a reasonable jury to find that the lack of assistance played a part in bringing about Caniff's injury, there would at minimum have to be evidence

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* Near the end of his brief (at 30), Caniff argues that "CSXT was negligent in maintaining its own facility." But Caniff made "no argument on appeal" regarding his failure-to-maintain claim and thus "abandoned" it in the Court of Appeals. Slip op. 7. Only his failure-to-assist claim was properly before that court, and that is likewise the only one before this Court. It is too late to introduce a new claim, or to reintroduce an abandoned one.

that he fell, at least in part, *because* the knuckle was too heavy or otherwise difficult to carry alone. But there is no such evidence. Caniff testified, instead, that he simply "lost his footing" on a wet piece of ballast. 1st Caniff Dep. 68. Although he complained in general terms that the area around where he fell was muddy (2d Caniff Dep. 10), Caniff "couldn't say" with any certainty what "made [his] foot slip" and ultimately attributed the fall simply to "gravity" (*id.* at 20-21). For his part, Quillen did not witness Caniff's fall and testified that he "ha[d] no clue" what caused the accident. Quillen Dep. 20-21.

There is therefore no way to know whether providing another employee to help Caniff carry the knuckle would have prevented the fall. There is no evidence, in other words, that, but for CSXT's alleged negligence, the injury would not have occurred. Caniff may well have "lost his footing" and been injured even if he had had the benefit of another employee's assistance. In the absence of any evidence that carrying the knuckle without assistance caused Caniff's fall, a jury would be left to speculate about whether the supposed breach of duty played a part in bringing about his injury.

But in a FELA action as in any other, "[s]peculation cannot supply the place of proof." *Moore v. Chesapeake & Ohio Ry.*, 340 U.S. 573, 578 (1951). As this Court's predecessor explained in another FELA case, "speculation and supposition are insufficient to justify a submission of a case to the jury" and "the question should be taken from the jury when the evidence is so unsatisfactory as to require a resort to surmise and speculation as to how an injury occurred." *Chesapeake & Ohio Ry. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951); *see*

also Acosta v. Commonwealth, 391 S.W.3d 809, 820 (Ky. 2013) ("[a] verdict cannot be founded on nothing more than conjecture"). That principle has been frequently applied in FELA cases holding that a railroad was entitled to judgment as a matter of law on the element of causation. *See, e.g., Garza,* 2013 WL 4082215, at *4 ("'It's a possibility' falls short of the standard for but-for causation." (brackets omitted)); *Przybylinski v. CSX Transp., Inc.*, 292 F. App'x 485, 489 (6th Cir. 2008) (plaintiff "cannot put before the jury any actual evidence—beyond the mere speculation offered to us—as to what caused her injury").

This Court should reach the same conclusion here. As in another FELA case in which summary judgment was granted to the railroad, Caniff "fails to explain how having more personnel would have prevented his injury." *LaFreniere v. Ind. Harbor Belt R.R.*, 2001 WL 881367, at *5 (N.D. Ill. 2001).

III. CANIFF IS NOT ENTITLED TO REVERSAL OF SUMMARY JUDGMENT ON THE THEORY THAT FELA RELAXES THE STANDARD OF NEGLIGENCE

As we have explained, FELA relaxes the standard of causation, in that it does not require proof of common-law proximate causation. *McBride,* 131 S. Ct. 2630. Caniff asserts that FELA relaxes the standard of negligence as well. Br. 11-17. That assertion provides no basis for reversal, both because it was not raised below and because it is wrong.

Caniff asks this Court to hold that summary judgment was unjustified because the standard of negligence is lower under FELA than under the common law. "However, a review of [Caniff's] filings in the circuit court and

the Court of Appeals discloses that he did not raise this issue in either of those forums." *Taylor v. Ky. Unemployment Ins. Comm'n*, 382 S.W.3d 826, 835 (Ky. 2012). In both courts Caniff took the position that there was sufficient evidence to withstand summary judgment on the element of negligence, but he did not argue that the standard of negligence is relaxed. *See* RA543-545, RA565-567, RA583-586; C.A. Br. 7-17; C.A. Reply Br. 1-5. Because Caniff is raising this issue for the first time here, in the third court to hear the case, this Court may not "consider th[e] issue." *Taylor*, 382 S.W.3d at 835.

Even if Caniff's "relaxed standard" theory were properly before the Court, it would not provide a basis for reversal, because the theory is wrong. Caniff cites a number of decisions to support his claim (Br. 11-17), and it is true that at least some of them state or suggest, with little or no analysis, that FELA relaxes both the standard of causation and the standard of negligence. *See Ulfik*, 77 F.3d at 58 n.1; *Mullahon v. Union Pac. R.R.*, 64 F.3d 1358, 1364 (9th Cir. 1995); *Harbin,* 921 F.2d at 131; *Hines v. Consol. Rail Corp.*, 926 F.2d 262, 267 (3d Cir. 1991). But both the Sixth Circuit and the Kentucky Court of Appeals have emphatically and repeatedly rejected that view, as have the majority of courts to have squarely considered it.

As the Sixth Circuit has put it: "[While] FELA relaxes a plaintiff's standard of proof regarding causation . . . , the relaxed causation standard under FELA does not affect his obligation to prove that [the railroad] was in fact negligent. FELA does not lessen a plaintiff's burden to prove the elements of negligence." *Van Gorder*, 509 F.3d at 269 (citation and footnote omitted);

accord Garza, 2013 WL 4082215, at *3; *Sapp v. CSX Transp.., Inc.*, 478 F. App'x 961, 964 (6th Cir. 2012). The Kentucky Court of Appeals has likewise held that, "[a]lthough . . . FELA relaxes the standard of proof regarding causation, it does not lessen the burden to prove the elements of negligence." *Adkins* , 2011 WL 2935399, at *4; *accord* slip op. 8 (decision below). Other federal courts of appeals and state courts of last resort have so held as well. *See, e.g., Coffey v. Ne. Ill. Reg'l Commuter R.R.*, 479 F.3d 472, 476 (7th Cir. 2007) (Posner, J.) ("causation and failure to exercise due care are separate inquiries, and the relaxation of common law standards of proof applies to the first rather than to the second"); *Montgomery*, 656 S.E.2d at 27-28 ("there is a relaxed causation standard" but not "a relaxed standard of negligence (*i.e.*, duty/breach) in FELA cases") (emphasis omitted). As explained below, those decisions are undeniably correct.

FELA authorizes an employee to recover for "injury . . . resulting in whole or in part from the negligence" of the railroad. 45 U.S.C. § 51. Under the settled interpretive methodology, the elements of a FELA claim are determined "by reference to the common law," unless there is "express language to the contrary" in the statute. *Sorrell*, 549 U.S. at 165-66. Except in cases where there is some "explicit statutory alteration[]" (*Gottshall*, 512 U.S. at 544), therefore, the U.S. Supreme Court has followed the common law in interpreting FELA. It has held, for example, that a right of action for personal injury is extinguished by the death of the injured party (*Mich. Cent. R.R. v. Vreeland*, 227 U.S. 59, 67-68 (1913)); that a plaintiff may recover for occupa-

tional disease (*Urie v. Thompson*, 337 U.S. 163, 182 (1949)), negligent infliction of emotional distress (*Gottshall*, 512 U.S. at 549-50), and fear of cancer (*Norfolk & W. Ry. v. Ayers*, 538 U.S. 135, 149 (2003)); that a plaintiff may not recover pre-judgment interest (*Monessen Sw. Ry. v. Morgan*, 486 U.S. 330, 337-38 (1988)); that defendants are jointly and severally liable (*Ayers*, 538 U.S. at 163-65); and that the standard of causation is the same for the defendant's negligence and the plaintiff's contributory negligence (*Sorrell*, 549 U.S. at 168).

Express language in FELA does abrogate several "common-law tort defenses" (*Gottshall*, 512 U.S. at 542-43)—namely, the fellow-servant rule, contributory negligence, assumption of risk, and exemption from the statute through contract (*see* 45 U.S.C. §§ 51, 53-55). As the U.S. Supreme Court held in *McBride*, moreover, the statutory language describing the element of causation—"resulting in whole or in part from"—reflects a departure from common-law proximate causation. *McBride*, 131 S. Ct. at 2636, 2639, 2642-43, 2644 & n.14.

But it is impossible to reach the same conclusion with respect to the element of negligence. As the Supreme Court of Louisiana has put it, "[w]hile the language of FELA suggests a reduced standard of causation, nothing in FELA . . . suggests a variation from the ordinary standard of care used in evaluating negligence in ordinary tort cases, namely, reasonable care under the circumstances." *Vendetto v. Sonat Offshore Drilling Co.*, 725 So. 2d 474, 478 (La. 1999). The Fifth Circuit has so held as well: "[N]othing in the text" of

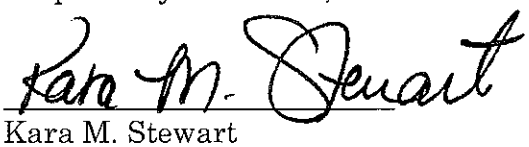
FELA indicates that "the standard of care . . . is anything different than ordinary prudence under the circumstances." *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 338 (5th Cir. 1997) (en banc). On the contrary, FELA provides simply that a railroad is liable for injuries caused by its "negligence" (45 U.S.C. § 51), and "'one must assume that Congress intended its words to mean what they ordinarily are taken to mean—a person is negligent if he or she fails to act as an ordinarily prudent person would act in similar circumstances" (*Gautreaux*, 107 F.3d at 338 (quoting *Fashauer v. N.J. Transit Rail Operations, Inc.*, 57 F.3d 1269, 1283 (3d Cir. 1995))).

The standard of negligence under FELA is therefore that of the common law. As we have explained, Caniff cannot establish negligence under that standard.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,



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