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SUPREME COURT OF KENTUCKY
No. 2008-SC-000643-D

CSX TRANSPORTATION, INC., APPELLANT,

v.

JOHN X. BEGLEY, APPELLEE.

APPEAL FROM COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
No. 2007-CA-001380-MR

BRIEF FOR APPELLANT CSX TRANSPORTATION, INC.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of April, 2009, copies of this Brief for Appellant were served by U.S. Express Mail, postage prepaid, on: Alva A. Hollon, Jr., Sams & Hollon, P.A., 9424 Baymeadows Road, Suite 160, Jacksonville, Florida 32256, counsel for appellee; Thomas I. Eckert, P.O. Box 7272, Hazard, Kentucky 41702, co-counsel for appellee; and Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

One of the Counsel for Appellant

I. INTRODUCTION

This case involves the Federal Employers' Liability Act ("FELA" or "Act"), 45 U.S.C. §§ 51-60, the federal statute that governs claims by railroad employees against their employers for workplace injuries. The railroad is challenging the Court of Appeals' conclusion that the Circuit Court did not commit reversible error by refusing to instruct the jury on four issues: proximate causation; foreseeability; reduction of future damages to present value; and non-taxability of damages.

II. STATEMENT CONCERNING ORAL ARGUMENT

Appellant CSX Transportation, Inc. ("CSXT") desires oral argument. The case presents several important and recurring issues of federal law that this Court has not recently addressed and that have divided other courts. Oral argument will assist the Court in resolving the issues.

III. STATEMENT OF POINTS AND AUTHORITIES

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IV. STATEMENT OF THE CASE

A. Statutory Background

Enacted in 1908, FELA establishes a compensation scheme for injuries sustained by railroad employees in the workplace. The Act provides for concurrent jurisdiction of state and federal courts. 45 U.S.C. § 56. Substantively, however, FELA actions are governed by federal law, both as to liability, *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 165-66 (2007), and as to damages, *Monessen Sw. Ry. Co v. Morgan*, 486 U.S. 330, 335 (1988). State-law remedies are preempted. *Sorrell*, 549 U.S. at 165.

Unlike workers' compensation laws, which typically provide relief without regard to fault, FELA requires an injured railroad employee to prove negligence. Section 1 of FELA 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 two basic elements of a FELA cause of action are thus "(1) negligence, i.e., [breach of the duty] of care, and (2) causation, i.e., the relation of the negligence to the injury." *Sorrell*, 549 U.S. at 169 (quoting *Page v. St. Louis Sw. Ry. Co.*, 349 F.2d 820, 823 (5th Cir. 1965)). An "essential ingredient" of negligence, in turn, is foreseeability. *Gallick v. Balt. & O. R.R. Co.*, 372 U.S. 108, 117 (1963). In a FELA case, a plaintiff must therefore prove "duty, breach, foreseeability, and causation." *Booth v. CSX*

Transp., Inc., 211 S.W.3d 81, 83-84 (Ky. App. 2006) (quoting *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 258 (6th Cir. 2001)).[1]

FELA adopts a regime of comparative negligence. Under Section 1 of the Act, a railroad is liable even if the employee's injury resulted only "in part" from the railroad's negligence. 45 U.S.C. § 51. And under Section 3, "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53.

B. Factual Background

1. Appellee John X. Begley, a 66-year-old retired trainman, began his career with CSXT in 1970. During the approximately 28 years that he was employed by the railroad, Begley primarily worked as a brakeman on trains that hauled coal. Until 1990, this position required him to step off a slow-moving train as it reached a coal mine, connect or disconnect a number of coal cars, and then step back onto the train as it rolled through the mine. According to Begley, he would complete this process between five and twenty times per day, each time mounting and dismounting the train as it traveled at approximately five (but occasionally up to 10 or 12) miles per hour. 4/9/07 Tr. 190-96, 198-202.

During the period in which it employed this method of loading and unloading coal cars, which was common in the industry, CSXT had a number of well-developed safety procedures in place, including training, reporting requirements, and the use of protective boots and handrails. Employees were never required to dismount a train, moreover, if

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[1] A FELA plaintiff need not prove negligence, and need only prove causation, when the defendant is shown to have violated a particular railroad-safety statute (*e.g.*, the Safety Appliance Act, 49 U.S.C. §§ 20301-20306). *See, e.g., Norfolk & W. Ry. Co. v. Hiles*, 516 U.S. 400, 409 (1996).

they believed it was traveling at a speed that would make such an action unsafe. Begley himself never once fell or otherwise injured himself acutely in the process of mounting or dismounting a moving train, and he never once got on or off a train that he felt was traveling at an unsafe speed. 4/9/07 Tr. 250-66; 4/11/07 Tr. 133-76.

In 1990, CSXT decided to end the long-standing industry practice of mounting and dismounting moving trains. That decision was based in part on concerns about the risk of falls, ankle injuries, and other acute injuries that employees might sustain while stepping on and off moving equipment. The railroad's primary objective, however, was to send a signal to the organization that it took employee safety seriously. 4/11/07 Tr. 166-69.

2. In the mid-1990s, Begley began experiencing pain in his knees and hips, which was later diagnosed as degenerative arthritis (also known as osteoarthritis). He continued working at the railroad until 1998, when he retired, at least in part, because of this pain. 4/9/07 Tr. 221, 266-68, 270.

In early 2003, nearly five years after his retirement, Begley spoke with a union leader, who suggested that Begley ask his doctor for a note stating that his arthritis was connected to his work on the railroad. Begley followed this advice and approached his primary-care physician, Dr. James "Ace" Chaney, who wrote a brief note stating that, in his opinion, Begley's arthritis had been caused by mounting and dismounting moving trains. 4/9/07 Tr. 276-78.

In March 2003, Begley filed this action against CSXT in Perry Circuit Court, asserting a claim under FELA. Begley alleged that CSXT had been negligent in requiring him to mount and dismount moving equipment during the early part of his

career as a brakeman; that, as a result of this practice, he had been exposed to repetitive microtraumas to his lower extremities; and that this repetitive stress had been a cause, at least in part, of his degenerative arthritis. Compl. 2-4; *see also* Am. Compl. 2-4.

C. The Trial

In April 2007, the Circuit Court conducted a four-day jury trial on Begley's claim.

1. Begley's Case

Begley testified at trial about mounting and dismounting trains, and called other railroad employees who corroborated the practice. Begley also called Tyler Kress, an engineering expert, who provided his opinion on the ergonomic risks associated with mounting and dismounting moving equipment. 4/9/07 Tr. 196-202, 250-66; 4/10/07 Tr. 7-80, 185-98.

As evidence of causation, Begley offered the testimony of his primary-care physician, Dr. Chaney, who had written the note suggesting that Begley's osteoarthritis was connected to his work at the railroad. 4/10/07 Tr. 95-97. On cross-examination, however, it became clear that Dr. Chaney's opinion was based on the assumption that Begley had continued mounting and dismounting moving equipment for the entirety of his career. *Id.* at 118-19. When confronted with the fact that this practice had ended in 1990, Dr. Chaney retracted his opinion, agreeing that, "now that [he] understand[s] that mounting and dismounting moving equipment was eliminated in 1990," he could no longer "make this causation relationship." *Id.* at 121. On re-direct examination, Dr. Chaney reaffirmed his belief that Begley's condition could have been work-related, at least in part, *id.* at 136-37, but he admitted that the osteoarthritis was primarily due to Begley's advanced age and obesity, *id.* at 127-28, 140-42.

On the issue of damages, Begley declined to submit any evidence of lost wages, diminished benefits, or medical expenses. He requested compensation only for his past and future pain and suffering, in the amount of $500,000—a sum that his counsel suggested in summation constituted "less than five dollars an hour" when aggregated over the 15 years of Begley's remaining life expectancy. 4/16/07 Tr. 256-57.

2. CSXT's Case

CSXT did not dispute that Begley had osteoarthritis or that he experienced pain and suffering. Its defense focused on the issues of negligence and causation.

CSXT first offered evidence that the common practice of requiring employees to mount and dismount slow-moving trains had not been negligent. Albert R. Fritts, an expert in the field of railroad safety and former head of safety for the company, detailed the numerous precautions that CSXT had taken to prevent its employees from sustaining injuries. He expressed the opinion that mounting and dismounting moving equipment had been conducted safely while it was allowed, and he noted that CSXT had jumped ahead of the rest of the industry when it decided to prohibit the mounting and dismounting of moving equipment in 1990. 4/11/07 Tr. 133-80, 193-96.

CSXT also offered evidence that the practice had not caused Begley's osteoarthritis. Dr. Thomas Robert Love, an experienced orthopedic specialist who had twice examined Begley, testified that his condition was not an injury but a disease, directly caused by the natural deterioration of the joints and cartilage that comes with age, and perhaps by an autoimmune condition called anklosingspondylitis. In Dr. Love's opinion, Begley's osteoarthritis was not caused by repetition or overuse, as Begley's witnesses had suggested, and it was not work-related. 4/16/07 Tr. 37-76, 118-22.

3. Jury Instructions

CSXT requested a jury charge that it could not be found liable unless Begley proved that its negligence, if any, "contributed proximately, in whole or in part, to [the] plaintiff's injury," and that it was not enough that CSXT's negligence "was an indirect or remote cause of his injury." App., *infra*, 32a (Instr. No. 6). Begley opposed the requested instruction, citing the Court of Appeals' decision in *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272 (Ky. App. 2006), which held that juries in FELA cases should not be instructed on proximate cause. 4/16/07 Tr. 176-77. The Circuit Court refused to give the charge. *Id.* at 177.

CSXT also requested an instruction that it could not be found liable unless "the claimed injuries to the [p]laintiff" were "reasonably foreseeable by the railroad." App., *infra*, 33a (Instr. No. 7). Begley opposed the requested charge, arguing that there was no need for an instruction on foreseeability and that his own proposed instructions were "going to take care" of the issue. 4/16/07 Tr. 172. The Circuit Court refused to give this charge as well. *Id.*

As relevant here, CSXT also requested two instructions on damages. The first was that, if the jury decided to make an award for future pain and suffering, it "must take into account the fact that the money awarded * * * is being received all at one time instead of over a period of time extending into the future"; that the plaintiff would therefore "have the use of this money in a lump sum"; and that the jury accordingly should "determine the present value or present worth of the money which you award for such future pain and suffering." App., *infra*, 35a (Instr. No. 27). The second tendered instruction on damages was that "any award made to plaintiff as damages" is "not subject to federal or state income taxes" and that the jury therefore "should not consider such

taxes in fixing the amount of an award." *Id.* at 34a (Instr. No. 26). The Circuit Court refused to give the instructions, on the stated ground that neither was explicitly required by FELA's text. 4/16/07 Tr. 181-83.

The Circuit Court then instructed the jury. On the issue of liability, the court charged as follows:

> It was the continuing duty of CSX[T], as an employer, at the time and place in question, to use ordinary care under the circumstances, in furnishing Plaintiff with a reasonably safe place in which to work, and to use ordinary care under the circumstances to maintain and keep such a place of work in a reasonably safe condition. The extent of the employer's duty is to exercise ordinary care, under the circumstances, to see that the place in which the work is to be performed is reasonably safe, under the circumstances shown by the evidence in this case.
>
> This duty included the duty to guard against the risks or dangers of which it knew, or by the exercise of ordinary care should have known.
>
> "Ordinary Care" as used herein means the care an ordinarily prudent railroad acting under the same or similar circumstances would exercise under the facts presented in this case.
>
> Do you believe from the evidence that CSX[T] failed to exercise the care required of it, and that failure was a factor, no matter how slight, in contributing in whole or in part to the development of osteoarthritis in the Plaintiff's knees and hips[?]

App., *infra*, 22a (Instr. No. 5); *see* 4/16/07 Tr. 196-97.

On the issue of damages, the Circuit Court instructed the jury simply to "award [p]laintiff such of the following damages, if any, you believe he has sustained as a result of mounting and dismounting equipment": "[p]ast and future pain and suffering not to exceed $500,000.00." App., *infra*, 27a (Instr. No. 9); *see* 4/16/07 Tr. 199.

4. Verdict

The jury returned a verdict for Begley, but found him 50 percent at fault. It awarded $250,000 in damages. The Circuit Court accordingly entered judgment in favor of Begley in the amount of $125,000. App., *infra*, 13a-17a.

CSXT then filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The Circuit Court denied the motion. App., *infra*, 12a.

D. The Court Of Appeals' Decision

CSXT appealed. As relevant here, it argued that the Circuit Court committed reversible error by refusing to instruct the jury on (1) proximate cause; (2) foreseeability; (3) present value; and (4) non-taxability. The Court of Appeals rejected each of these contentions and affirmed. App., *infra*, 1a-11a.

As to proximate cause, the Court of Appeals deemed itself bound by its prior decision in *Hamilton*, which held that FELA does not require proof of proximate causation. App., *infra*, 5a-6a. As to foreseeability, the Court of Appeals recognized that it is "a necessary component of any negligence case," but concluded that the Circuit Court's instruction on duty of care—which informed the jury that a railroad has a duty to guard against "risks or dangers" of which it knew or should have known—"sufficiently advised the jury as to foreseeability of harm." *Id.* at 6a-7a. As to present value, the Court of Appeals acknowledged the general rule that future damages must be reduced to present value, but held that that rule does not apply to awards for future *pain and suffering*, because such awards cannot be "quantified with any degree of certainty." *Id.* at 9a-11a (internal quotation marks omitted). Finally, as to non-taxability, the Court of Appeals agreed with CSXT that the Circuit Court had erred in refusing to instruct the jury that damages awards are not taxed—a conclusion compelled by the U.S. Supreme Court's

decision in *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490 (1980)—but determined that the error was harmless, because the jury awarded less than Begley had sought and the record "fails to reveal evidence that the jury inflated the award of damages to compensate for income taxes." App., *infra*, 7a-8a.

V. ARGUMENT

In affirming the Circuit Court's refusal to give CSXT's tendered instructions on liability, the Court of Appeals erred in two independent respects. First, because proximate causation is an established element of common-law negligence and nothing in FELA dispenses with it, and because both the U.S. Supreme Court and this Court's predecessor have repeatedly held that FELA requires proximate cause, the jury should have been instructed that Begley could not recover unless it found that CSXT's negligence proximately caused his injury. *See infra* Point A. Second, because foreseeability means foreseeability of *injury*, the general duty-of-care instruction, which alluded only to general "risks" or "dangers," did not accurately describe the essential element of foreseeability. *See infra* Point B.

In affirming the Circuit Court's refusal to give CSXT's tendered instructions on damages, the Court of Appeals erred in two additional respects. First, because the earning power of a present lump-sum award is the same regardless of the particular future injury for which it is intended to compensate, the jury should have been instructed that a damages award for future pain and suffering, like any other award for an injury yet to occur, must be reduced to present value. *See infra* Point C. Second, because courts are obligated to give a non-taxability instruction in FELA cases, and because it is impossible

to determine the effect of the Circuit Court's refusal to give such an instruction here, the failure to do so was reversible error. *See infra* Point D.[2]

A. The Circuit Court Committed Reversible Error By Refusing To Instruct The Jury On Proximate Causation

FELA authorizes a railroad employee to recover for a workplace injury "resulting in whole or in part from the negligence" of the railroad, 45 U.S.C. § 51, with the damages reduced in proportion to any contributory negligence by the employee, 45 U.S.C. § 53. In the lower courts, as in this Court, CSXT took the position that FELA incorporates the established common-law prerequisite to recovery that the defendant's negligence was the proximate cause of the plaintiff's injury. The lower courts rejected that position. In holding that the Circuit Court "properly denied CSX[T]'s requested instruction on proximate causation," App., *infra*, 6a, the Court of Appeals followed its 2006 decision in *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 278-79 (Ky. App. 2006), which understood the U.S. Supreme Court's decision in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), to hold that FELA does not require proximate causation.

Two months after the Court of Appeals decided *Hamilton*, the U.S. Supreme Court decided *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158 (2007). The question in *Sorrell* was whether a defendant's negligence and a plaintiff's contributory negligence are governed by the same causation standard under FELA. The Court applied the settled interpretive principle that the elements of a FELA claim are determined by reference to the common law unless there is express statutory language to the contrary, *id.* at 165-66, and it held, consistent with the common law, that the causation standard is the same for both parties, *id.* at 166-71.

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[2] "Appellate review of jury instructions is a matter of law and, thus, *de novo*." *Reece v. Dixie Warehouse & Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006).

The petitioner in *Sorrell* also asked the Court to decide what the standard of causation is, and to hold that both the plaintiff and the defendant must establish proximate causation. The Court itself did not address the standard of causation, 549 U.S. at 163-65, but two concurring opinions in *Sorrell* did. In one, Justice Souter, joined by Justices Scalia and Alito, noted that there was a conflict among lower courts as to whether FELA requires a showing of proximate causation. 549 U.S. at 173 & n.* (Souter, J., concurring). The concurrence went on to explain that proximate causation was the common-law rule before FELA's enactment; that FELA did not abrogate it; that the U.S. Supreme Court consistently applied the rule in FELA cases for half a century after passage of the Act; and that, contrary to the view of some lower courts, the Court's decision in *Rogers* did not adopt a different rule. *Id.* at 173-77 (Souter, J., concurring). As Justice Souter put it, "*Rogers* did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm." *Id.* at 173 (concurring opinion). Instead, "the case merely instructed courts how to proceed when there are multiple cognizable causes of an injury." *Id.*

The question whether FELA requires a finding of proximate causation is the primary issue in this appeal. As we explain below, the Court should hold that it does and direct that the case be retried before a properly instructed jury.[3]

1. FELA Requires a Plaintiff to Prove Proximate Causation

FELA requires proximate causation—a "direct relation between the injury asserted and the injurious conduct alleged," *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S.

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[3] CSXT preserved this issue for the Court of Appeals' review by tendering a proximate-cause instruction to the Circuit Court and objecting to the causation instruction given by the Circuit Court. App., *infra*, 32a (Instr. No. 6); 4/16/07 Tr. 138-39, 176, 185. The issue has been preserved for this Court's review because it was both pressed and passed upon in the Court of Appeals. CSXT C.A. Br. 11-17; App., *infra*, 5a-6a.

258, 268 (1992)—for two related reasons. *First*, as the U.S. Supreme Court's decision in *Sorrell* confirms, FELA is deemed to incorporate common-law principles unless it expressly provides otherwise. Proximate cause is a bedrock principle of common-law negligence, and there is nothing in FELA that abrogates it. *Second*, both the U.S. Supreme Court and this Court's predecessor have repeatedly held that proximate cause is an element of a FELA claim. As the three-Justice concurrence in *Sorrell* explained, moreover, *Rogers* did not hold otherwise. Nor has any post-*Rogers* decision of the U.S. Supreme Court, of this Court, or of this Court's predecessor.

a. Proximate causation is required under the established methodology for interpreting FELA

Under long-settled precedent of the U.S. Supreme Court, the elements of a FELA claim, and the defenses to such a claim, are determined "by reference to the common law," unless the Act includes "express language to the contrary." *Sorrell*, 549 U.S. at 165-66; *accord, e.g.*, *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 145 (2003); *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543-44 (1994). Express language in FELA abrogates several "common-law tort defenses that had effectively barred recovery by injured workers," *Gottshall*, 512 U.S. at 542-43—namely, the fellow-servant rule, contributory negligence, assumption of risk, and exemption from the Act through contract, 45 U.S.C. §§ 51, 53-55.[4] Otherwise, however, FELA is "founded on common-law concepts." *Urie v. Thompson*, 337 U.S. 163, 182 (1949). Thus, finding no clear contrary indication in the statutory text, the U.S. Supreme Court has followed the common law in holding that a right of action for personal injury is extinguished by the

[4] *See also* S. Rep. No. 60-460, at 1 (1908) ("[T]he proposed measure * * * revises the law as now administered in the courts of the United States in four important particulars[.]"); H.R. Rep. No. 60-1386, at 1 (1908) ("The purpose of this bill is to change the common-law liability [in four respects].").

death of the injured party, *Mich. Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 67-68 (1913); that FELA authorizes recovery of certain types of damages for occupational disease, *Urie*, 337 U.S. at 182, negligent infliction of emotional distress, *Gottshall*, 512 U.S. at 549-50, and a genuine and serious fear of developing cancer, *Ayers*, 538 U.S. at 149; that FELA does not authorize awards of prejudgment interest, *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 337-38 (1988); that FELA provides for joint and several liability, *Ayers*, 538 U.S. at 163-65; and that FELA applies the same causation standard to the defendant's negligence and the plaintiff's contributory negligence, *Sorrell*, 549 U.S. at 165-72.

As Justice Souter noted in his *Sorrell* concurrence, "[p]rior to FELA, it was clear common law that a plaintiff had to prove that a defendant's negligence caused his injury proximately, not indirectly or remotely." 549 U.S. at 173; *see, e.g.,* 3 John D. Lawson, *Rights, Remedies & Practice* § 1028, at 1740 (1890); 1 Thomas G. Shearman & Amasa A. Redfield, *A Treatise on the Law of Negligence* § 26, at 26 (4th ed. 1888). That, of course, remains the rule today. See, *e.g.,* 1 Dan B. Dobbs, *The Law of Torts* § 180, at 443 (2001); W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 41, at 263 (5th ed. 1984). The requirement of proximate causation—that the plaintiff's injury was "a natural and probable consequence of the negligent act," *Ohio Cas. Ins. Co. v. Commonwealth Dep't of Highways*, 479 S.W.2d 603, 605 (Ky. 1972)—reflects the recognition that, "[i]n a philosophical sense, * * * the causes of an event go back to the dawn of human events, and beyond"; that "any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts"; and that a "boundary must [therefore] be set to liability for the consequences of any act," Keeton, *supra*, § 41, at 264.

There is no language in FELA, much less any *express* language, that dispenses with the common-law requirement of proximate causation. On the contrary, "FELA sa[ys] nothing * * * about the familiar proximate cause standard." *Sorrell*, 549 U.S. at 174 (Souter, J., concurring). As far as causation is concerned, the Act provides only that an employee may recover for an injury "resulting in whole or in part" from the railroad's negligence. 45 U.S.C. § 51. That language authorizes recovery when the railroad's negligence is merely *one of the causes* of the plaintiff's injury, but it says nothing about the requisite *directness* of any particular cause. As the U.S. Supreme Court explained in *Sorrell*, the "in whole or in part" language was included "to make clear that there could be recovery against the railroad even if it were only partially negligent." 549 U.S. at 170. This Court's predecessor read the language the same way, pointing out that the "reasonable interpretation" of "in whole or in part" is that an employee may recover under the Act if "negligence on the part of the railroad contributed in any degree to cause the injury," even if there was also "negligence [on the part] of the employee" or some other party. *Ky. & Ind. Term. R.R. Co. v. Martin*, 437 S.W.2d 944, 948 (Ky. 1969).

b. Proximate causation is required under the decisions of the U.S. Supreme Court and this Court's predecessor

Consistent with the settled interpretive methodology, both the U.S. Supreme Court and this Court's predecessor repeatedly held, for half a century after FELA's enactment, that an employee may not recover unless he proves that the railroad's negligence was a proximate cause of his injury. Contrary to the Court of Appeals' conclusion in *Hamilton*, moreover, the U.S. Supreme Court did not abandon that requirement in *Rogers*, and neither this Court nor its predecessor has ever interpreted *Rogers* to have done so. Nor has any of those courts held in any case decided after

Rogers that FELA abrogated the proximate-cause requirement. The decisions requiring proof of proximate causation therefore control.

(1) *Pre-*Rogers *decisions*

In the period "between FELA's enactment and the decision in *Rogers*," the U.S. Supreme Court "consistently recognized and applied proximate cause as the proper standard in FELA suits." *Sorrell*, 549 U.S. at 174 (Souter, J., concurring). The Court not only recognized and applied the standard, but stated it in the clearest possible terms. "In order to recover under [FELA]," the Court said, "it [i]s incumbent upon [the plaintiff] to prove that [the defendant] was negligent and that such negligence was the proximate cause in whole or in part of the * * * accident." *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 32 (1944). The Court made clear that "but for" causation was insufficient, explicitly contrasting negligence that is the "proximate cause" of an injury with negligence that "merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury." *Davis v. Wolfe*, 263 U.S. 239, 243 (1923). Altogether, the Court applied the proximate-cause standard in more than fifteen FELA cases through the middle of the twentieth century.[5]

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[5] In addition to the cases cited in the text, see *Norfolk & W. Ry. Co. v. Earnest*, 229 U.S. 114, 118-19 (1913) (jury was "rightly" instructed that, "if the said engineer did not exercise * * * reasonable care and caution, and his failure so to do was the proximate cause of the accident, then [you] must find for the plaintiff"); *St. Louis, Iron Mountain & S. Ry. Co. v. McWhirter*, 229 U.S. 265, 280 (1913) ("it must be shown that the alleged negligence was the proximate cause of the damage"); *Lang v. N.Y. Cent. R.R. Co.*, 255 U.S. 455, 461 (1921) (jury's verdict must be reversed because "the collision was not the proximate result of the defect"); *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Goneau*, 269 U.S. 406, 410-11 (1926) ("As there was substantial evidence tending to show that the defective coupler was a proximate cause of the accident * * *, the case was rightly submitted to the jury * * *."); *St. Louis-S.F. Ry. Co. v. Mills*, 271 U.S. 344, 347 (1926) ("Nor is there evidence from which the jury might infer that petitioner's [negligence] was the proximate cause of decedent's death."); *N.Y. Cent. R.R. Co. v. Ambrose*, 280 U.S. 486, 489 (1930) (plaintiff "failed to prove that the accident was proximately due to the negligence of the company"); *Nw. Pac. R.R. Co. v. Bobo*, 290 U.S. 499, 503 (1934) ("If petitioner was negligent * * *, there is nothing whatsoever to show that this was the proximate cause of the unfortunate death."); *Swinson v. Chi., St. Paul, Minneapolis & Omaha Ry. Co.*, 294 U.S. 529, 531 (1935) ("The Safety Appliance Act * * * give[s] a right of recovery [under FELA] for every injury the proximate cause of which was a failure to comply with a

During the same period, in case after case, this Court's predecessor likewise recognized and applied proximate causation as the proper standard under FELA. Like the U.S. Supreme Court, moreover, it did so in no uncertain terms, stating, for example, that "there can be no recovery for negligence unless the injury complained of was the proximate result of the negligence." *Cincinnati, N. Orleans & Tex. Pac. Ry. Co. v. Perkins Adm'r*, 177 Ky. 88, 197 S.W. 526, 529 (1917). There are more than a dozen other decisions by this Court's predecessor to the same effect.[6]

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requirement of the act."); *Tiller v. Atl. Coast Line R.R. Co.*, 318 U.S. 54, 67 (1943) (FELA "leave[s] for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury"); *Brady v. S. Ry. Co.*, 320 U.S. 476, 483 (1943) ("evidence of the unsuitability of the rail for ordinary use * * * would justify a finding for [the plaintiffs], if the defective rail was the proximate cause of the derailment"); *Coray v. S. Pac. Co.*, 335 U.S. 520, 523 (1949) (plaintiff "was entitled to recover if this defective equipment was the sole or a contributory proximate cause of the decedent employee's death"); *Urie*, 337 U.S. at 177 (complaint stated claim under FELA because "[a]ll the usual elements [we]re comprehended, including want of due or ordinary care, proximate causation of the injury, and injury"); *O'Donnell v. Elgin, Joliet & E. Ry. Co.*, 338 U.S. 384, 390 (1949) ("a failure of equipment to perform as required by the Safety Appliance Act is * * * an actionable wrong, * * * for the proximate results of which there is liability [under FELA]"); and *Carter v. Atlanta & St. Andrew's Bay Ry. Co.*, 338 U.S. 430, 435 (1949) ("if the jury determines that the defendant's breach is 'a contributory proximate cause' of injury, it may find for the plaintiff").

[6] *See De Atley v. Chesapeake & Ohio Ry. Co.*, 147 Ky. 315, 144 S.W. 95, 96 (1912) ("[FELA] makes the company liable for the negligence of the engineer that caused or produced the injury to [the plaintiff], and, if the negligent act of the engineer was the proximate cause of [the] injury, then he had a right to institute this action"); *Helm v. Cincinnati, N. Orleans & Tex. Pac. Ry. Co.*, 156 Ky. 240, 160 S.W. 945, 949 (1913) (affirming directed verdict for defendant because "the proximate cause of [the plaintiff's] injury" was not "the failure of any duty which the [defendant] owed him"); *Louisville & Nashville R.R. Co. v. Stewart's Adm'x*, 163 Ky. 823, 828, 174 S.W. 744, 746 (1915) ("there was sufficient evidence to show that [the defendant's negligence] was the proximate cause of [the plaintiff's] death"); *Young v. Norfolk & W. Ry. Co.*, 171 Ky. 510, 188 S.W. 621, 623 (1916) ("Under repeated decisions of this and other courts, as well as the teaching of text-writers, the negligence charged to the master must be the proximate cause of the injury complained of."); *Ill. Cent. R.R. Co. v. Skinner's Adm'x*, 177 Ky. 62, 197 S.W. 552, 555 (1917) (affirming jury verdict for plaintiff because "the negligence of the defendant * * * was one of the proximate causes that resulted in the death of the plaintiff's intestate"); *Louisville & Nashville R.R. Co. v. Payne's Adm'r*, 177 Ky. 462, 197 S.W. 928, 929 (1917) ("it was for the jury to say whether the company's negligence was the proximate cause of decedent's death"); *Siemer v. Chesapeake & Ohio Ry. Co.*, 180 Ky. 111, 201 S.W. 469, 471 (1918) ("a statement of this evidence is sufficient to show that it falls short of meeting the requirements of the law that an injury for which an action will lie must be * * * the direct and proximate result of the negligence"); *Pruitt v. Norfolk W. Ry. Co.*, 188 Ky. 204, 221 S.W. 552, 555 (1920) ("the common-law principle [is] that a master is not liable for an injury to his servant, unless the negligence of the master was a proximate cause of the injury, and this doctrine holds good under the federal Employers' Liability Act"); *Gregory's Adm'x v. Dir. Gen. of R.Rs.*, 195 Ky. 289, 242 S.W. 373, 374 (1922) ("this court, following the general rule upon the subject, has consistently held that in order to sustain an action for damages in this character of case * * * the damage sued for must be the proximate result of the negligence producing the injury"); *Davis v. Burns Adm'x*, 207 Ky. 703, 269 S.W. 763, 765 (1925) ("the

(2) Rogers

In eliminating proximate causation, the Court of Appeals in *Hamilton* relied on the U.S. Supreme Court's decision in *Rogers*. *See, e.g., Hamilton*, 208 S.W.3d at 278 ("*Rogers* depart[s] from traditional common-law tests of proximate causation"). Indeed, virtually every court that has rejected proximate cause in FELA cases has done so in reliance on *Rogers*. *See, e.g., Sorrell*, 549 U.S. at 173 n.* (Souter, J., concurring). As the three-Justice concurrence in *Sorrell* explained, however, "*Rogers* did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm." *Id.* at 173 (Souter, J., concurring). There is thus no basis to conclude—as the Court of Appeals effectively did—that *Rogers* overruled the more than fifteen decisions of the U.S. Supreme Court holding that FELA requires proximate cause, much less that it did so *sub silentio*.

(a) At common law, a plaintiff's contributory negligence "operated as an absolute bar to relief." *Sorrell*, 549 U.S. at 166. FELA abolished that defense, replacing it with the doctrine of comparative negligence. *Gottshall*, 512 U.S. at 542. Under Section 1 of the Act, a defendant is liable for an injury to the plaintiff "resulting in whole *or in part*" from the defendant's negligence, 45 U.S.C. § 51 (emphasis added), and under

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rule uniformly adhered to by this court [is] that it is incumbent upon one seeking to recover damages for an injury alleged to have resulted from negligence to establish * * * that the negligence was the proximate cause of the injury"); *Chesapeake & Ohio Ry. Co. v. Dixon*, 212 Ky. 738, 280 S.W. 93, 95 (1926) (railroad is liable for negligence "if the jury, under proper instructions from the court, should conclude that [the plaintiff's] injury is the direct and proximate result of such negligence"); *W. Ky. Coal Co. v. Parker's Adm'r*, 229 Ky. 685, 17 S.W.2d 753, 755 (1929) ("The evidence fails to disclose any proximate causal dereliction upon the part of [the defendant]."); *Smith's Adm'rs v. Louisville & Nashville R.R. Co.*, 236 Ky. 174, 32 S.W.2d 1003, 1006 (1930) ("It is incumbent on one seeking to recover for injuries to establish * * * that the negligence was the proximate cause of the injury * * *."); *Louisville & Nashville R.R. Co. v. Stephens*, 298 Ky. 328, 182 S.W.2d 447, 453 (1944) (while a violation of the Boiler Inspection Act "per se constitutes negligence, it must be found to be a proximate contributing cause of an employee's injury").

Section 3 the plaintiff's damages are reduced "in proportion to the amount of negligence attributable to [the plaintiff]," 45 U.S.C. § 53.

Rogers concerned those principles, and multiple causation more generally. The Court "granted certiorari in *Rogers* to establish the test for submitting a case to a jury when the evidence would permit a finding that an injury had multiple causes." *Sorrell*, 549 U.S. at 174-75 (Souter, J., concurring). Quoting Sections 1 and 3 of FELA, the Court explained that a railroad is liable if its negligence "played any part, even the slightest," in producing the employee's injury, regardless of whether the injury also had "other causes, including the employee's contributory negligence." *Rogers*, 352 U.S. at 506 & n.12, 507 & n.14. The Court ultimately held that the evidence in the case before it was sufficient to support a finding that the defendant's negligence "played a part" in the plaintiff's injury. *Id.* at 503.

As Justice Souter observed in *Sorrell*, *Rogers* thus addressed only "the occasional multiplicity of causations," 549 U.S. at 175—the question of "how to proceed when there are multiple cognizable causes of an injury," *id.* at 173. It did not address "the necessary directness of cognizable causation." *Id.* The two concepts are distinct. "[A] given proximate cause need not be, and frequently is not, the exclusive proximate cause of harm." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004). "[T]wo causes [can] combine to produce an injury * * *, both of which are in their nature proximate." *Ill. Cent. R.R. Co. v. Skinner's Adm'x*, 177 Ky. 62, 197 S.W. 552, 555 (1917) (quoting Shearman & Redfield, *supra*, § 346). That the railroad's negligence need not be the *sole* cause of an employee's injury under FELA, therefore, does not mean that it need not be a *proximate* cause.

The statutory "in whole or in part" language construed in *Rogers* had always been part of FELA, and both the U.S. Supreme Court and this Court's predecessor had consistently interpreted the Act to require proximate causation. Indeed, the U.S. Supreme Court explicitly stated that FELA requires proof that the defendant's negligence was the "proximate cause in whole or in part" of the plaintiff's injury, *Tennant*, 321 U.S. at 32, thereby confirming that directness of causation ("proximate cause") and multiplicity of causation ("in whole or in part") are distinct. Similarly, this Court's predecessor equated railroad negligence that caused an employee's injury "in whole or in part" with negligence that was at least "*a* proximate cause" of the injury. *Pruitt v. Norfolk W. Ry. Co.*, 188 Ky. 204, 221 S.W. 552, 555 (1920) (emphasis added). *Rogers* merely clarified that "in part" means "any part." 352 U.S. at 506.

Consistent with the view of the three-Justice concurrence in *Sorrell*, this Court's predecessor correctly understood the "any part" language in *Rogers* to mean that an employee may recover under the Act as long as "negligence on the part of the railroad contributed in any degree to cause the injury," even if there was also "negligence [on the part] of the employee" or some other party. *Martin*, 437 S.W.2d at 948. Likewise, in the same decision in which the Supreme Court of Montana stated that a FELA plaintiff "has the burden of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's [death]," *Marazzato v. Burlington N. R.R. Co.*, 817 P.2d 672, 675 (Mont. 1991) (alteration in original) (quoting *Barilla v. Atchison, Topeka & Santa Fe Ry.*, 635 F. Supp. 1057, 1059 (D. Ariz. 1986)), that court correctly observed that *Rogers* "address[ed] the [distinct] issues of multiple causes and contributory negligence," *id.* at 674.

(b) Far from having rejected proximate causation, the Court in *Rogers* assumed that proximate cause is an element of a FELA claim. For example, the jury instructions in the case required a determination that the defendant's negligence was the "proximate cause" of the plaintiff's injuries. *Rogers*, 352 U.S. at 505 n.9. That aspect of the instruction was "free of controversy" and one with which the Court "took no issue." *Sorrell*, 549 U.S. at 176 (Souter, J., concurring). Indeed, in sustaining the jury's finding of liability, the Court assumed that "the verdict was obedient to the trial judge's charge." *Rogers*, 352 U.S. at 505.

"The absence of any intent to water down the common law requirement of proximate cause is [also] evident from the prior cases on which *Rogers* relied." *Sorrell*, 549 U.S. at 175 (Souter, J., concurring). Those cases require proof that the railroad's negligence was a proximate cause—though not necessarily the *sole* proximate cause—of a FELA plaintiff's injury. Thus, for the proposition that the test under the Act is whether the defendant's negligence "played any part" in producing the plaintiff's injury, *Rogers*, 352 U.S. at 506, the Court cited *Coray v. Southern Pacific Co.*, 335 U.S. 520, 523 (1949), which holds that a FELA plaintiff may recover if the defendant's negligence was "the sole or a contributory proximate cause" of the injury. *See Rogers*, 352 U.S. at 506 n.11. And for the proposition that the question in a FELA case is whether a jury may reasonably conclude that the defendant's negligence "played any part at all" in the plaintiff's injury, *id.* at 507, the Court cited *Carter v. Atlanta & St. Andrews Bay Railway Co.*, 338 U.S. 430, 435 (1949), which holds that a jury may find for a FELA plaintiff if it determines that the defendant's negligence is "a contributory proximate cause" of the injury. *See Rogers*, 352 U.S. at 507 n.13.

Rogers is thus "no authority for anything less than proximate causation in an action under FELA." *Sorrell*, 549 U.S. at 177 (Souter, J., concurring). Consistent with common-law principles as qualified by the statutory language, the holding of the case is not that a FELA defendant's negligence need not be a proximate cause of the injury, but that it need not be the *sole* proximate cause.

(3) *Post*-Rogers *decisions*

It has been suggested that, regardless of whether the U.S. Supreme Court eliminated the proximate-cause requirement in *Rogers*, it did so in two subsequent cases. *See Sorrell*, 549 U.S. at 177-78, 180 n.1 (Ginsburg, J., concurring in the judgment) (citing *Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 314 (1969), and *Gottshall*, 512 U.S. 532). In fact, neither decision holds that FELA abrogates the proximate-cause requirement.

In *Crane*, the U.S. Supreme Court cited *Rogers* for the proposition that a FELA plaintiff "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's [negligence]." 395 U.S. at 166 (quoting 45 U.S.C. § 51). That statement was dictum, because the suit against the railroad in *Crane* was filed by a *non*employee, and thus the issue of causation was governed by state law rather than FELA. *Id.* at 167. In any event, the statement is properly understood to mean only that FELA does not embody the concept of *sole* proximate causation, as the Court's quotation of the Act's "in whole or in part" language confirms. If the dictum was intended to mean something more, however, it was simply incorrect, because it conflated the question of how direct a cause of an injury must be with the question of whether a plaintiff may recover when the injury has multiple causes. Certainly the dictum cannot be thought to have overruled the long line of decisions

explicitly *holding* that proximate causation is required by FELA, particularly in light of the U.S. Supreme Court's recent reaffirmation of the principle that, "[a]bsent express language to the contrary, the elements of a FELA claim are determined by reference to the common law." *Sorrell*, 549 U.S. at 165-66.

In *Gottshall*, the U.S. Supreme Court cited *Rogers* for the proposition that "a relaxed standard of causation applies under FELA." *Gottshall*, 512 U.S. at 543. That statement, too, was dictum, because *Gottshall* involved an issue—the standard for negligent infliction of emotional distress—that did not require the Court to take a position on FELA causation generally. In any event, the illustrative quotation from *Rogers* that immediately followed the statement—the "any part, even the slightest" language, *id.* (quoting 352 U.S. at 506)—is entirely consistent with the view that *Rogers* addressed only the issue of multiple causes. *Gottshall*'s dictum concerning the "relaxed standard of causation"—which does not mention proximate cause—therefore appears to be a reference to *Rogers*' holding that FELA allows a plaintiff to recover even when the railroad bears only a small proportion of the responsibility for the injury.

There is thus no post-*Rogers* decision of the U.S. Supreme Court that abandoned the requirement of proximate causation in FELA cases. And while neither this Court nor its predecessor has directly spoken to the issue since *Rogers*, "several [other] State Supreme Courts have explicitly or implicitly [rejected] the view" that "*Rogers* smuggled proximate cause out of the concept of defendant liability under FELA." *Sorrell*, 549 U.S. at 173 n.* (Souter, J., concurring). Indeed, the highest courts of at least six States—Iowa, Minnesota, Montana, Nebraska, Ohio, and West Virginia—have concluded, post-*Rogers*,

that a FELA plaintiff must prove proximate cause.[7] So, too, have numerous other state and federal courts.[8] Those decisions are consistent with the settled methodology for interpreting FELA and with the square holdings of the U.S. Supreme Court and this Court's predecessor. This Court should join its counterparts and hold that proximate causation remains a requirement of FELA post-*Rogers*.

2. The Circuit Court's Causation Instruction was Both Erroneous and Prejudicial

A jury instruction "must properly and intelligibly state the law." *Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981). The jury charge proffered by CSXT in this case, but rejected by the lower courts, properly and intelligibly stated the law of causation under FELA. It would have informed the jury that "[t]he Plaintiff must * * * prove that [the Defendant's] negligence, if any, contributed proximately, in whole or in part, to [P]laintiff's injury" and that "[i]t is not enough for the Plaintiff to show that the Defendant's negligence, if any, was an indirect or remote cause of his injury." App.,

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[7] *See Snipes v. Chicago, Cent. & Pac. R.R. Co.*, 484 N.W.2d 162, 164 (Iowa 1992) ("Recovery under the FELA requires an injured employee to prove that the defendant employer was negligent and that the negligence proximately caused, in whole or in part, the accident."); *Brabeck v. Chicago & Nw Ry. Co.*, 117 N.W.2d 921, 923 (Minn. 1962) ("violation of an operating rule may impose liability on an employer if it is the proximate cause of the accident"); *Marazzato v. Burlington N. R.R. Co.*, 817 P.2d 672, 675 (Mont. 1991) ("The plaintiff [in a FELA case] has the burden of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's [death]."); *Chapman v. Union Pac. R.R.*, 467 N.W.2d 388, 395 (Neb. 1991) ("To recover under the [FELA], an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury."); *Reed v. Pennsylvania Rd. Co.*, 171 N.E.2d 718, 721 n.3 (Ohio 1961) ("In order to support recovery [under FELA] for an injury claimed to have been caused by a violation of the Federal Safety Appliance Act, such violation must amount to *a* proximate cause of such injury, although it need not be *the* proximate cause thereof."); *Gardner v. CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997) ("[T]o prevail on a claim under [FELA], a plaintiff employee must establish that the defendant employer acted negligently and that such negligence contributed proximately, in whole or in part, to plaintiff's injury.").

[8] *See, e.g., Moore v. Chesapeake & Ohio Ry. Co.*, 493 F. Supp. 1252, 1265 (S.D. W. Va. 1980), *aff'd*, 649 F.2d 1004 (4th Cir. 1981); *Lynch v. Decker*, No. CIV. L-91-1864, 1994 WL 902363 at *3 (D. Md. Aug. 19, 1994), *aff'd*, 86 F.3d 1151, 1996 WL 293317 (4th Cir. 1996); *Wier v. Soo Line R.R. Co.*, No. 96 C 2094, 1997 WL 733909 at *2 (N.D. Ill. Nov. 18, 1997); *Dickerson v. Staten Trucking, Inc.*, 428 F. Supp. 2d 909, 915 (E.D. Ark. 2006); *Brooks v. Brennan*, 625 N.E.2d 1188, 1193 (Ill. App. 5th Dist. 1994); *Lehman v. Nat'l R.R. Passenger Corp.*, 661 A.2d 17, 19 (Pa. Super. 1995); *Kelson v. Cent. of Ga. R.R. Co.*, 505 S.E.2d 803, 808 (Ga. App. 1998). *But see Sorrell*, 549 U.S. at 173 n.* (Souter, J., concurring) (citing contrary authority).

infra, 32a (Instr. No. 6). Unlike CSXT's proffered instruction, which would have charged the jury on both *proximate* causation and *multiple* causation, the instruction delivered by the Circuit Court charged the jury only on *multiple* causation. The court instructed the jury that it should find for Begley if CSXT's negligence "was a factor, no matter how slight, in contributing in whole or in part" to Begley's injury. App., *infra*, 22a (Instr. No. 5); *see* 4/16/07 Tr. 197. The concept of proximate causation is entirely absent from the charge—as, indeed, the Court of Appeals mistakenly held that it should be.

This Court recently reiterated that "erroneous jury instructions are presumed to be prejudicial" and that a party claiming otherwise "bears a steep burden." *Harp v. Commonwealth*, 266 S.W.3d 813, 818 (Ky. 2008) (quoting *McKinney v. Heisel*, 947 S.W.2d 32, 35 (Ky. 1997)). "It is only in a case which is clear and free of all doubt on the point that an instruction which is erroneous can be said * * * to have been without prejudicial effect." *Se. Greyhound Lines v. Buckles*, 298 Ky. 681, 183 S.W.2d 965, 966 (1944). "[W]here there is a substantial likelihood that the jury was * * * misled by the instructions, reversal is required." *City of Middlesboro v. Brown*, 63 S.W.3d 179, 182 (Ky. 2001) (quoting *McKinney*, 947 S.W.2d at 35-36). That is surely the case here, where causation was hotly disputed, *see supra* pp. 4, 5, Begley's own evidence on the issue was internally inconsistent, *see supra* p. 4, and there was no reference to proximate causation (or an equivalent concept) in any of the Circuit Court's instructions, *see* App., *infra*, 18a-31a. Under these circumstances, it was particularly necessary to give an accurate causation instruction, and the Circuit Court's refusal to do so was especially prejudicial. CSXT is therefore entitled to a new trial before a properly instructed jury.

Cf. Travis v. Hay, 352 S.W.2d 209 (Ky. 1961) (holding that failure to instruct on proximate cause was reversible error).

B. The Circuit Court Committed Reversible Error By Refusing To Instruct The Jury On Foreseeability

CSXT's requested instruction on foreseeability would have informed the jury that Begley could not recover if "the claimed injuries to the [p]laintiff" were "not reasonably foreseeable by the railroad." App., *infra*, 33a (Instr. No. 7). The Court of Appeals held that the Circuit Court permissibly refused the instruction—not because foreseeability is not required under FELA (the Court of Appeals recognized that it is, App., *infra*, 6a-7a), and not because there was anything wrong with the requested charge, but because, in the Court of Appeals' view, the Circuit Court's charge on duty of care "sufficiently advised" the jury of Begley's burden to prove foreseeability. *Id.* at 7. As we explain below, that conclusion is mistaken. Under FELA, as under the common law, forseeability means foreseeability of *injury*, and the Circuit Court's duty-of-care instruction informed the jury only that CSXT had a duty to guard against general "risks or dangers" of which it was or should have been aware. App., *infra*, 22a (Instr. No. 5); *see* 4/16/07 Tr.196. The duty-of-care instruction thus did not ensure a jury finding that Begley's injury was foreseeable in the legally relevant sense.[9]

1. Under the common law, foreseeability is concerned, not with "risks" or "dangers" in the abstract, but with the risk or danger of compensable *injury*. As this Court has explained, "[t]he rule is that every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable *injury*." *Grayson Fraternal*

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[9] CSXT preserved this issue for the Court of Appeals' review by tendering a foreseeability instruction to the Circuit Court. App., *infra*, 33a (Instr. No. 7); 4/16/07 Tr. 171-72. The issue has been preserved for this Court's review because it was both pressed and passed upon in the Court of Appeals. CSXT C.A. Br. 17-19; App., *infra*, 6a-7a.

Order of Eagles, Aerie No. 3738, Inc. v. Claywell, 736 S.W.2d 328, 332 (Ky. 1987) (emphasis added); *accord M & T Chems., Inc.* v. *Westrick*, 525 S.W.2d 740, 741 (Ky. 1974). A defendant can thus be found liable for a breach of a duty of care "only if the *injury* is foreseeable." *Isaacs v. Smith*, 5 S.W.3d 500, 502 (Ky. 1999) (emphasis added). Because that is the rule under the common law, and because there is nothing in the Act to the contrary, it is also the rule under FELA. *See, e.g., Sorrell*, 549 U.S. at 165-66. As the Eighth Circuit has explained, a FELA plaintiff "must prove that the railroad, with the exercise of due care, could have reasonably foreseen that a particular condition would cause *injury*." *Davis v. Burlington N., Inc.*, 541 F.2d 182, 185 (8th Cir. 1976) (emphasis added).

Of course, "it is not required that the particular, precise *form* of injury be foreseeable." *Isaacs*, 5 S.W.3d at 502 (emphasis added). The maxim that a tortfeasor takes the plaintiff as he finds him is equally applicable in FELA cases, and a railroad need not foresee the specific form of the harm sustained by the employee to be held liable. As the U.S. Supreme Court has made clear, "for a [FELA] defendant to be liable for consequential damages he need not foresee the *particular* consequences of his negligent acts: assuming the existence of a threshold tort against the person, then whatever damages flow from it are recoverable." *Gallick v. Balt. & O. R.R. Co.*, 372 U.S. 108, 120 (1963) (emphasis added). It *is* necessary, however, that "the probability of the *injury of some kind* to persons *within the natural range of effect* of the alleged negligent act could be foreseen." *Isaacs*, 5 S.W.3d at 502. As the Supreme Court of Illinois has put it, "[t]he relevant inquiry" is "whether the injury is of a *type* that a reasonable person would see as a likely result of his or her conduct." *First Springfield*

Bank & Trust v. Galman, 720 N.E.2d 1068, 1072 (Ill. 1999) (emphasis added); *see also* 1 Dan B. Dobbs, *The Law of Torts* § 180, at 444 (2001) ("a negligent defendant is liable for all the general kinds of harms he foreseeably risked by his negligent conduct * * * and not liable for injuries that were unforeseeable").

The distinction between risks in general and compensable injuries in particular is not an academic one. Without a proper instruction on foreseeability, a jury could well find liability under FELA based on a conclusion that the activity in question was generally risky, without determining whether the defendant should have been aware that its risky conduct was also potentially injurious in the relevant sense.

Recognizing this possibility, the Supreme Court of Texas has held that FELA juries must be charged separately on the issue of foreseeability when it is contested. *See Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162, 169 (Tex. 2002). The court reasoned that, while there may be "no serious dispute" that a particular activity "could be potentially hazardous in a general sense," "something more than a generalized threat is necessary to show foreseeability as it relates to the railroad's duty." *Id.* Instead, the court held, "the question is whether [the defendant] knew or should have known that [the activity] created a likelihood that [the plaintiff] would suffer the type of injury he did." *Id.* In affirming the Circuit Court's refusal to instruct the jury to decide that question here, the Court of Appeals erred.

2. The Circuit Court's failure to instruct on foreseeability was not only erroneous but prejudicial. It therefore requires reversal.

There are at least two types of potential injuries at issue in this case—acute injuries, such as broken ankles caused by trips and falls, and non-acute injuries, such as

those allegedly sustained by Begley. The jury might have concluded that the general danger inherent in mounting and dismounting moving equipment was foreseeable. Indeed, Begley emphasized at trial that CSXT had taken a number of precautions to guard against the possibility of traumatic or acute injuries that occurred in connection with this practice, and that it had ended the practice in 1990 in part to avoid acute injuries associated with slips and falls. *See, e.g.*, 4/16/07 Tr. 242. Begley did not claim, however, that he had suffered any such injury. Whether the railroad should have foreseen that its practice could cause *non*-acute ergonomic injuries—of which there was a different risk, and which would therefore have necessitated a different set of precautionary measures—is, at the very least, unclear from the record. A properly instructed jury could therefore have concluded that the injuries of the type Begley allegedly sustained were *not* reasonably foreseeable to CSXT. For that reason, the Circuit Court's refusal to charge the jury that it must find that the *injury* Begley claimed to have sustained was foreseeable necessitates a new trial before a properly instructed jury.

C. The Circuit Court Committed Reversible Error By Refusing To Instruct The Jury To Reduce Any Award For Future Pain And Suffering To Present Value

At trial, Begley sought damages only for past and future pain and suffering. In connection with his request for *future* damages, CSXT proffered a jury instruction that closely tracked the one approved by the U.S. Supreme Court in *St. Louis Southwestern Railway Co. v. Dickerson*, 470 U.S. 409, 410 (1985) (per curiam):

> If you find in favor of the Plaintiff and decide to make an award for pain and suffering in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that Plaintiff will have the use of this money in a lump sum. You must, therefore,

> determine the present value or present worth of the money which you award for such future pain and suffering.

App., *infra*, 35a (Instr. No. 27).

The Circuit Court refused to give the requested charge, or any other charge on present value, believing that it had no obligation to give an instruction not specifically required by FELA's text. 4/16/07 Tr. 183. The Court of Appeals affirmed the Circuit Court's refusal to charge on present value, but on a different ground: that the rule requiring juries to discount future damages to present value does not apply to awards for *pain and suffering*, because such awards cannot be quantified with certainty. App., *infra*, 9a-11a. Although the Court of Appeals did not endorse the Circuit Court's mistaken assertion that a jury instruction need not be given unless explicitly mandated by the statutory text, its decision is erroneous nonetheless. As we explain below, there is no persuasive justification for excluding future damages for pain and suffering from the general rule requiring a reduction of future damages to present value.[10]

1. The General Rule is That an Award of Damages to Compensate a Plaintiff for Future Events Must be Reduced to Present Value

The rule in FELA actions has been firmly established by a line of decisions of the U.S. Supreme Court that span the better part of the twentieth century: an award of damages to compensate a plaintiff for future events must be reduced to its present value. *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 339 (1988); *Dickerson*, 470 U.S. at 411; *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 491 (1916); *see also Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 536-37 (1983) (same rule under different

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[10] CSXT preserved this issue for the Court of Appeals' review by tendering a present-value instruction to the Circuit Court. App., *infra*, 35a (Instr. No. 27); 4/16/07 Tr. 183. The issue has been preserved for this Court's review because it was both pressed and passed upon in the Court of Appeals. CSXT C.A. Br. 23-25; App., *infra*, 9a-11a.

federal statute). Cases involving an award for anticipated future damages necessitate a present-value reduction because, "where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded," *Pfeifer*, 462 U.S. at 537 (quoting *Kelly*, 241 U.S. at 490), any immediate lump sum not so discounted will greatly overcompensate the plaintiff. The reasoning behind the rule is simple: "a given sum of money in hand is worth more than the like sum of money payable in the future." *Dickerson*, 470 U.S. at 412 (quoting *Kelly*, 241 U.S. at 489). And while the precise method for calculating the reduction may vary, one basic point is clear: "an utter failure to instruct the jury that present value is the proper measure of a damages award is error." *Id.*

Nearly a century ago, the U.S. Supreme Court described the two basic principles that compel the reduction of awards based on future damages. *See Kelly*, 241 U.S. at 489-91. The first is that "a person seeking to recover damages for the wrongful act of another must do that which a reasonable man would do under the circumstances to limit the amount of the damages" and that such mitigation necessarily includes "the putting out of money at interest." *Id.* at 489-90. The second principle is that compensatory damages are meant to do just that—compensate the victim, not provide him with a profit—and that "limiting the recovery to compensation requires that adequate allowances be made * * * for the earning power of money." *Id.* at 491. The Court therefore concluded that, "*as a rule*, and *in all cases* where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award." *Id.* at 490 (emphasis added).

2. The General Rule Should Apply to Awards for Future Pain and Suffering

a. Despite the clear general rule, courts have divided on the question whether awards for a subset of anticipated damages—future pain and suffering—must be discounted to present value. Although compensation for future pain and suffering by definition is made in advance of the compensable harm, some courts hold that such an award should not be reduced to its present worth. Relying, as the Court of Appeals did here, *see* App., *infra*, 10a-11a, on assumptions first articulated by the Eighth Circuit in *Chicago & Northwestern Railway Co. v. Candler*, 283 F. 881, 885 (8th Cir. 1922), these courts reason that, because pain-and-suffering damages are inherently indeterminate, calculating the present value of such an award would be an essentially artificial and arbitrary exercise. *See, e.g.*, *Taylor v. Denver & Rio Grande W. R.R. Co.*, 438 F.2d 351, 352-53 (10th Cir. 1971); *Hanson v. Reiss Steamship Co.*, 184 F. Supp. 545, 553 (D. Del. 1960); *Borzea v. Anselmi*, 258 P.2d 796, 373 (Wyo. 1953).

Other courts, in contrast, have correctly concluded that any indeterminacy inherent in pain-and-suffering awards is not a sufficient reason to depart from the general rule. The Second Circuit, for example, in the most carefully reasoned decision on the subject, determined that both the "history of damages for pain and suffering" and the "[s]trong policies expressed in decisional law[]" support the practice of reducing awards for future pain and suffering to present value, because "the goal is to achieve a fair and reasonable allocation of loss" and "[t]he earning power of the present use of money is the same[] regardless of the particular future benefit claimed to be lost." *Metz v. United Techs. Corp.*, 754 F.2d 63, 67 (2d Cir. 1985). Responding to the stated rationale for the

contrary rule, the Second Circuit also emphasized the "practical reasons" for a present-value reduction:

> All future damage awards are somewhat artificial. Simply awarding a lump-sum for future benefits is highly uncertain and speculative. At the very least, discounting such benefits to present value introduces a principled consistency that takes into account the time value of money. Jurors deliberating on damages for future losses obviously consider—as the word "future" itself implies—a time factor. One reason is that trial judges generally inform the jury of the plaintiff's life expectancy when charging it on future damages, thereby directly focusing attention on the fact that the damages for this kind of loss cover a period of time. Jurors are well able to distinguish between an award that involves a time factor and a present lump sum award such as one for punitive damages.

Id. Employing the same reasoning, the Second Circuit has held in at least three other cases, including one brought under FELA, that damages for future pain and suffering must be discounted to present value.[11] Other courts, including the Supreme Courts of Michigan, Missouri, and Nebraska, have reached the same conclusion.[12]

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[11] *See DeChico v. Metro-North Commuter R.R.*, 758 F.2d 856, 860 (2d Cir. 1985) ("A lump-sum award for future pain and suffering, like an award for lost future wages, must be reduced to its present value because irrespective of the type of injury involved, the advantage of the present use of money is the same and should be taken into account in arriving at the proper amount of damages."); *Gretchen v. United States*, 618 F.2d 177, 181 (2d Cir. 1980) ("[B]ecause appellee will have the award for future pain and suffering in a lump sum for present use, there should be applied to it a factor for discounting it to present value, the rate of discount to be adjusted for inflation."); *Chiarello v. Domenico Bus Serv., Inc.*, 542 F.2d 883, 887 (2d Cir. 1976) ("Awards for future pain and suffering or for future loss of consortium, like awards for future loss of earnings, result in a lump-sum award for damages that accrue in the future. Irrespective of the type of injury involved, the advantage of the present use of money is the same and should be taken into account in arriving at the proper amount of damages."); *see also In re Delmarine, Inc.*, 535 F. Supp. 2d 318, 320-22 (E.D.N.Y. 2008); *Powers v. Connecticut*, 589 F. Supp. 1084, 1107 (D.Conn. 1984).

[12] *See Abbott v. Northwestern Bell Tel. Co.*, 246 N.W.2d 647, 650 (Neb. 1976) ("approv[ing] the procedure of instructing the jury to reduce damages for future pain and suffering to present value"); *Campbell v. Haughton Elevator & Mach. Co.*, 209 N.W. 49, 49 (Mich. 1926) (trial judge erred when he "failed to instruct the jury that they should find the present worth of plaintiff's * * * future pain and suffering"); *Rigley v. Pryor*, 233 S.W. 828, 832 (Mo. 1921) ("compensation for pain and suffering[] when it is continuing" should be "measured by present cash value"); *see also Sweeney v. Car/Puter Intern. Corp.*, 521 F. Supp. 276, 287-88 (D.S.C. 1981).

That any uncertainty in compensating a plaintiff for future damages is not unique to pain and suffering is confirmed by the fact that, when a jury must estimate the lost future earning potential of a *child*, courts do not hesitate to give a present-value instruction if the plaintiff will receive an immediate lump sum. *See, e.g., Paducah Area Pub. Library v. Terry*, 655 S.W.2d 19, 24 (Ky. App. 1983) (12-year-old girl). Any attempt to estimate the lifetime earning capacity of a child, who has neither a work history nor demonstrated prior earnings, entails at least as much speculation and indeterminacy as an award for pain and suffering. Indeed, if damages for future pain and suffering are thought to be inherently arbitrary, that is a reason not to allow such damages *at all*; it is not a reason to compound the problem by refusing to discount the award to present value. Once the jury has gone through the exercise of attaching a monetary value to the amount of future damages of any sort, that amount can and should be reduced to present value regardless of how difficult the task of monetizing it in the first place may have been.

b. Courts that refuse to improve the accuracy of an award for future pain and suffering by requiring that it be reduced to present value assume that jurors cannot tie such damages to any particular future benefits and, instead, will simply "allow a reasonable sum as compensation, * * * guided by their observation, experience and sense of fairness and right." *Candler*, 283 F. at 885. The suggestion that jurors do little more than pull a lump sum out of thin air without regard to time or future benefits of which the plaintiff is being deprived, however, is both unfounded and entirely contrary to the practice in numerous jurisdictions, including Kentucky.

As in many other States, plaintiffs in Kentucky are permitted to make a "per diem" argument to assist the jury in calculating pain-and-suffering damages. *See Louisville & Nashville R.R. Co. v. Mattingly*, 339 S.W.2d 155, 161 (Ky. 1960); *Southard v. Hancock*, 689 S.W.2d 616, 618 (Ky. App. 1985). *See generally* Joseph H. King, Jr., *Counting Angels & Weighing Anchors: Per Diem Arguments for Noneconomic Personal Injury Tort Damages*, 71 TENN. L. REV. 1, 14-16 & nn. 65-66 (2003) (discussing the conflict in authority on the permissibility of such an argument); James O. Pearson, Jr., *Per Diem or Similar Mathematical Basis for Fixing Damages for Pain and Suffering*, 3 A.L.R. 4TH 940, §§ 2[a], 4[a]-7 (1981) (same). For example, counsel's summation might emphasize the difficulty in arriving at a single lump sum that adequately compensates the plaintiff for the pain and suffering he will endure for the rest of his life. Counsel might then suggest that the jury instead contemplate the damages in more manageable increments—perhaps a "mere" 120 dollars per day, or a "paltry" five dollars an hour. Aggregated over the course of a plaintiff's remaining life expectancy, such seemingly small sums can quickly add up to a significant award.

Some courts and scholars have criticized the "per diem" argument, on the grounds, among others, that it "lend[s] a false air of certainty to an area where none exists" and tends to artificially inflate damages awards. *See, e.g.*, Pearson, *supra*, §§ 2[a], 5; King, *supra*, at 27-33, 45-49; Note, Martin V. Totaro, *Modernizing the Critique of Per Diem Pain and Suffering Damages*, 92 VA. L. REV. 289, 300-03 (2006). Yet the "per diem" argument remains a common practice in Kentucky and many other jurisdictions. Indeed, Begley's counsel made such an argument in this very case, in an attempt to quantify his client's pain and suffering. *See* 4/16/07 Tr. 256-57 (suggesting that the

requested $500,000 in damages, divided over Begley's remaining life expectancy of 15 years, was "less than $5 an hour that he has to suffer").

A plaintiff's use of a "per diem" argument to quantify pain and suffering, which explicitly ties future damages to a daily or yearly sum, magnifies the importance of an instruction that such an award must be discounted to present value. Judge Posner has cogently explained why that is so:

> [T]he plaintiffs' counsel suggested to the jury that $10 a day would not be unreasonable compensation for Mr. Abernathy's pain and suffering. No figure was suggested for Mrs. Abernathy's loss of consortium but it could not be so great, and suppose it was $5 a day. Then the maximum verdict the jury could have awarded the Abernathys on their counsel's own theory would have been $219,000. But even this would be too much. In gauging the reasonableness of an award of damages for a future loss, the court must consider the present discounted value of that loss. If $15 a day would compensate the [plaintiffs] for the damage (apart from medical expenses) that they can expect to suffer over the next 40 years, and they are awarded $15 today for each day of future suffering, then assuming as we must that they will invest the money, however conservatively, they will have more than $15 when each of those future days rolls round—dramatically more, for the last days.

Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963, 973-74 (7th Cir. 1983) (citations omitted). The widespread practice of seeking damages for future pain and suffering on a "per diem" basis refutes the principal argument against a present-value instruction (and the argument that the Court of Appeals endorsed here)—namely, that awards for future pain and suffering are inherently speculative and uncertain.

c. As the above discussion demonstrates, the principles underlying the general rule that awards for future damages must be reduced to present value are fully applicable when the future damages sought are for pain and suffering. Such awards are

compensatory in nature.[13] But a lump-sum award today, if invested in a safe, interest-bearing account, is worth *more* than if the same sum had been distributed in future periodic payments—whether the award is for future medical expenses, lost wages, or pain and suffering. If a jury concludes that $125,000 is sufficient to compensate the plaintiff for the pain and suffering he will endure in the future, then an immediate lump-sum award in that amount, if not reduced to present value, will necessarily overcompensate him. As the Second Circuit has succinctly explained, "[t]he earning power of the present use of money is the same, regardless of the particular future benefit claimed to be lost." *Metz*, 754 F.2d at 67. The Court of Appeals thus erred in holding that awards for future pain and suffering are exempted from the general rule that future damages must be discounted to present value.

We acknowledge that the former Court of Appeals appears to have endorsed the opposite view in a short decision issued 85 years ago, *Louisville & Nashville R.R. Co. v. Gayle*, 204 Ky. 142, 263 S.W. 763, 763 (1924). Prior to the passing reference to it in the Court of Appeals' decision in this case, however, *see* App., *infra*, 10a, *Gayle* had been cited for that proposition in a published decision only once, *see Paducah Area Pub. Library*, 655 S.W.2d at 24, and it was not a decision of this Court or its predecessor. Since *Gayle* was decided, moreover, other courts have adopted the contrary rule, with the Second Circuit, in particular, providing a carefully reasoned justification for it. And during the intervening years, this Court has affirmatively embraced "per diem" arguments, thereby increasing the need for discounting future pain-and-suffering awards

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[13] *See, e.g., Wright v. General Elec. Co.*, 242 S.W.3d 674, 682 (Ky. 2007) (FELA authorizes recovery for "compensatory damages," which include pain and suffering); *Wall v. Van Meter*, 311 Ky. 198, 223 S.W.2d 734, 736 (1949) (purpose of damages award for pain and suffering is to "compensate" plaintiff); *Paducah Area Pub. Library*, 655 S.W.2d at 23 ("[i]f freedom from pain is lost through tortious injury, the law provides full compensation," but it does not "provide a profit").

to present value. More fundamentally, the view that such awards need not be reduced to present value rests on faulty reasoning and is simply incorrect.

Accordingly, insofar as *Gayle* would otherwise have *stare decisis* effect, that aspect of the decision should be reconsidered and disavowed. As this Court has repeatedly observed, "respect for precedent *demands* proper reconsideration when [the Court] find[s] sound legal reasons to question the correctness of [the] prior analysis." *Matheney v. Commonwealth*, 191 S.W.3d 599, 604 (Ky. 2006) (quoting *Morrow v. Commonwealth*, 77 S.W.3d 558, 559 (Ky. 2002)). Indeed, just last year, this Court declined to follow three of its own recent decisions because it "question[ed] the soundness of the line of reasoning these prior opinions espoused." *Chestnut v. Commonwealth*, 250 S.W.3d 288, 295 (Ky. 2008). As we have explained, *Gayle*, too, relied on reasoning that is highly questionable.

3. The Circuit's Court's Failure to Give A Present-Value Instruction was Prejudicial

The refusal to instruct on present value was particularly prejudicial in this case. To begin with, because Begley sought damages only for past and future pain and suffering, it is virtually certain that the jury's award included an amount for future pain and suffering. As we have already explained, moreover, Begley's counsel suggested in summation that the jury calculate his client's future pain-and-suffering award using small, constant, time-bound increments. *See* 4/16/07 Tr. 256-57. This appeal to the time value of suffering, while ignoring the time value of money, was likely to result in an inflated award. For these reasons, the Circuit Court's refusal to give a present-value instruction was not only error but reversible error.

D. The Circuit Court Committed Reversible Error By Refusing To Instruct The Jury That Damages Are Not Taxable

In *Norfolk Western Railway v. Liepelt*, 444 U.S. 490 (1980), a FELA case, the defendant had asked the trial judge to instruct the jury that any damages award "will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." *Id.* at 492. The U.S. Supreme Court held that "it was error to refuse the requested instruction." *Id.* at 498. In this case, CSXT proffered an instruction that closely tracked the one in *Liepelt*:

> You are charged that any award made to plaintiff as damages in this case, if any award is made, is not subject to federal or state income taxes, and you should not consider such taxes in fixing the amount of an award made to plaintiff, if you make any.

App., *infra*, 34a (Instr. No. 26).

The Circuit Court refused to give the requested charge, or any other charge on non-taxability, for the same reason it refused to instruct the jury on present value: it believed that it had no obligation to give an instruction not specifically required by FELA's text. 4/16/07 Tr. 181-82. The Court of Appeals recognized that the relevant question is not whether the instruction is mandated by the statutory text in particular, but whether it is required by the law in general, and that the Circuit Court obviously had no authority to disregard a square holding of the U.S. Supreme Court. The Court of Appeals therefore held, correctly, that the Circuit Court's refusal to give the instruction was error. App., *infra*, 7a-8a.

The Court of Appeals went on to hold, however, that the error was harmless, reasoning that the jury awarded less than Begley had sought, and, more generally, that the record "fails to reveal evidence that the jury inflated the award of damages to compensate

for income taxes." App., *infra*, 8a. As we explain below, that holding reflects a fundamental misapplication of harmless-error analysis. A failure to give a non-taxability instruction is always reversible; and even if it is not, the error was not harmless here.[14]

1. A Jury in a FELA Case Must be Instructed That Damages are not Taxable

Under the Internal Revenue Code, the amount of any damages awarded in litigation as compensation for personal injuries is excluded from taxable income. 26 U.S.C. § 104(a)(2); *see also* KRS § 141.010(9) (adopting federal definition of "gross income" for state income taxes). Although "the law is perfectly clear" to those intimately familiar with the Code, the U.S. Supreme Court has identified a significant risk that a jury "may assume that a plaintiff's recovery in a case of this kind will be subject to federal taxation, and that the award should be increased substantially in order to be sure that the injured party is fully compensated." *Liepelt*, 444 U.S. at 496. To reduce that risk, the Court held in *Liepelt* that a FELA defendant is entitled to an instruction that damages awards are not subject to taxation and that taxes therefore should not be considered in fixing the amount of any award. *Id.* at 498. The Court believed that such a charge would prevent a "tax-conscious" jury from intentionally inflating damages in a misguided attempt to prevent the plaintiff from being undercompensated after income taxes are taken into account. *Id.* at 497-98. Whether or not the jury actually manifests confusion on the subject, the Court observed, informing the jury that its award will not be reduced through taxation is necessary to "eliminate an area of doubt or speculation that might have an improper impact on the computation of the amount of damages." *Id.* at 498.

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[14] CSXT preserved this issue for the Court of Appeals' review by tendering a non-taxability instruction to the Circuit Court. App., *infra*, 34a (Instr. No. 26); 4/16/07 Tr. 181-82. The issue has been preserved for this Court's review because it was both pressed and passed upon in the Court of Appeals. CSXT C.A. Br. 19-21; App., *infra*, 7a-8a.

2. The Failure to Give a Non-taxability Instruction is Reversible *per se*

In holding that the Circuit Court's erroneous failure to give the charge in this case was harmless, the Court of Appeals stated that "the prejudicial effect of a failure to give a nontaxability instruction should be decided on the existence of evidence that the jury did, in fact, operate under a false impression of the tax laws." App., *infra*, 8a (quoting *Flanigan v. Burlington N. Inc.*, 632 F.2d 880, 890 (8th Cir. 1980)). *Liepelt* itself makes clear, however, that the failure to give such an instruction is reversible error regardless of whether there is evidence that the jury in fact inflated the award to avoid the effect of taxes.

The plaintiff's expert in *Liepelt* had provided a damages estimate of $302,000 in pecuniary losses, plus the indeterminate value of the care and training the decedent would have provided to his children. 444 U.S. at 497. After the defendant requested—and was refused—a non-taxability instruction, the jury awarded damages of $775,000. *Id.* Noting the discrepancy between the estimate and the award, the Court stated that it was "not fanciful" to think that "the jury erroneously believed that a large portion of the award would be payable to the Federal Government, and that therefore it improperly inflated the recovery." *Id.* The Court acknowledged, however, that this was merely "speculation" and concluded that the trial court's failure to give the instruction was reversible error "[*w*]*hether or not* this speculation is accurate." *Id* at 497-98 (emphasis added); *see also id.* at 503 (Blackmun, J., dissenting) (noting that it was "surmise" that the award was inflated to account for income taxes and that it was "entirely possible" that there were other bases for the award, including factors on which experts could not place a precise dollar value).

As the Fifth Circuit has correctly recognized, therefore, "*Liepelt* did not require the demonstration of an erroneously inflated award in order to find reversible error in the denial of the requested instruction." *O'Byrne v. St. Louis S.W. Ry.*, 632 F.2d 1285, 1287 (5th Cir. 1980) (per curiam). At least one other court has likewise held that "the Supreme Court did not require proof of an inflated award before reversing for failure to give the tax instruction." *Watson v. Norfolk & W. Ry. Co.*, 507 N.E.2d 468, 471 (Ohio Ct. App. 1987). Consistent with that understanding of *Liepelt*, numerous other courts have concluded that a failure to give a non-taxability instruction is reversible error without engaging in harmless-error analysis. *See Allred v. Maersk Line, Ltd.*, 35 F.3d 139, 141-42 (4th Cir. 1994); *Fulton v. St Louis-S.F. Ry.*, 675 F.2d 1130, 1134-35 (10th Cir. 1982); *Sheff v. Conoco, Inc.*, 311 S.E.2d 14, 18-19 (N.C. Ct. App. 1984); *Onion v. Chi. & Ill. Midland Ry. Co.*, 547 N.E.2d 721, 722-24 (Ill. App. Ct. 1989).

3. Even if not Reversible *per se*, the Failure to Give a Non-Taxability Instruction was not Harmless Here

Even if *Liepelt* does not require reversal in every case in which the trial court fails to instruct on non-taxability, straightforward application of harmless-error analysis requires reversal in this case.

a. In applying the harmless-error rule, CR 61.01, courts must assess whether "the result would have been the same" if the error had not occurred. *Holt v. Peoples Bank of Mt. Washington*, 814 S.W.2d 568, 571 (Ky. 1991). If it would have, the error is harmless. In the typical case of instructional error, the trial record gives the reviewing court a basis on which to make that assessment. When the instructions omit an element of the claim, for example, the reviewing court can consider whether the evidence

establishes the omitted element. *See, e.g.*, *Risen v. Pierce*, 807 S.W.2d 945, 946-48 (Ky. 1991). But no such determination is possible here.

The danger against which the non-taxability instruction protects is that the jury will inflate its damages award beyond the plaintiff's actual loss to compensate for non-existent taxes. *See Liepelt*, 444 U.S. at 497. When the instruction is erroneously refused, therefore, ordinary harmless-error principles require the reviewing court to determine whether any such inflation occurred. That, in turn, requires an assessment of the proper measure of the plaintiff's loss. At least in this case, however, there is no basis for the reviewing court to make that assessment.

b. Although Begley requested damages of $500,000, the jury awarded him $250,000. The Court of Appeals relied on this discrepancy in holding that the instructional error was harmless. App., *infra*, 8a. Accepting such an argument, however, would mean that an erroneous failure to give a non-taxability charge would effectively be insulated from appellate review whenever the damages award was less than the amount sought by the plaintiff. That cannot be the law. The amount sought by the plaintiff may already be inflated, and indeed may be entirely arbitrary. In any event, a jury is perfectly entitled to place a lower value on a plaintiff's damages than the amount requested and to find that he will be adequately compensated by a lesser amount, particularly when the damages sought are for pain and suffering, which are not easily quantified. The mere assertion that an award was less than the amount requested, therefore, cannot establish that a failure to give a non-taxability instruction was harmless error.

Begley's counsel argued in summation that the jury should award $5 for every hour of Begley's remaining 15-year life expectancy—a total of $500,000—as

compensation for pain and suffering. The jury declined to do so. Loosened from this $5-per-hour mooring, the precise amount the jury believed was sufficient to compensate Begley is unclear. It is certainly possible that the jury concluded that a sum of $250,000 was necessary to compensate Begley for his hard-to-quantify pain and suffering. It is equally possible, however, that the jury actually found Begley entitled to $200,000 (perhaps because it believed that he would not experience pain every hour of every day for the rest of his life or perhaps because it believed that the degree of pain was not severe enough to warrant more than $200,000), but—ignorant of the rule exempting damages awards from income taxes—then inflated the award to compensate him for the presumed effects of taxation. Indeed, the jury's verdict was rendered on April 16, a day on which the effects of taxation are unlikely to be far from jurors' minds. App., *infra*, 2a.

c. In the end, one can only speculate about whether the damages award in this case was based on a mistaken assumption that it would be taxable; the record does not permit a conclusion that it likely was or likely was not. For that very reason, the acknowledged instructional error necessarily cannot be considered harmless, because erroneous instructions "are presumed to be prejudicial," and the party asserting harmlessness "bears the burden of showing affirmatively that no prejudice resulted from the error." *Harp v. Commonwealth*, 266 S.W.3d 813, 818 (Ky. 2008). When the evidence does not support a conclusion one way or the other, the party with the burden loses. *See, e.g., Green River Coal Mining Co. v. Brown*, 140 Ky. 332, 131 S.W. 13, 15 (1910) ("if the evidence should be in equipoise—that is to say, not so convincing either way but that the mind is left in grave doubt concerning the fact—he who has the burden

fails"). Here, that is Begley, who, at least on this record, cannot demonstrate that the instructional error had no likely effect on the verdict.

In this connection, it bears emphasis that the Court of Appeals got things exactly backwards when it found the error harmless because "[t]he record in this case fails to reveal evidence that the jury inflated the award of damages to compensate for income taxes." App., *infra*, 8a. The relevant question is not whether the record shows that the jury inflated the award, but whether it shows that the jury did *not* inflate the award. If it were otherwise, the law would be that an instructional error is presumed to be harmless and that the party that established the error bore the burden of showing that it was *not* harmless. In fact, however, it is "a rule of longstanding and frequent repetition" that an instructional error is presumed *not* to be harmless and that the party defending the judgment bears the burden of showing that it was. *Harp*, 266 S.W.3d at 818. Because Begley cannot sustain that burden, the Circuit Court's failure to give a non-taxability instruction was reversible error.

VI. CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded for a new trial before a properly instructed jury.

Respectfully submitted,

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