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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

REPLY BRIEF FOR APPELLANT
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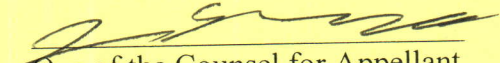
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ARGUMENT

A. The Jury Should Have Been Instructed On Proximate Causation

As our opening brief explained, FELA requires injured rail workers to prove proximate causation for two related reasons. First, proximate cause is the common-law rule and no statutory language rebuts the presumption that FELA incorporates it. *See* Appellant’s Br. 12–14. Second, both the Supreme Court and this Court’s predecessor have unequivocally held that FELA requires proof of proximate cause. *See* Appellant’s Br. 14–23. Begley offers no persuasive response to either point.

1. Begley does not dispute that FELA is deemed to incorporate common-law principles unless it explicitly provides otherwise, and he does not deny that proximate cause is a bedrock principle of common-law negligence. His contention is that “[t]he language of the statute clearly indicates a departure from the proximate cause standard.” Appellee’s Br. 6. That contention is wrong.

Begley relies on the provision of FELA that a plaintiff may recover for injuries “resulting in whole or in part” from the railroad’s negligence. 45 U.S.C. § 51. That language means just what it says—that a plaintiff may recover when the railroad’s negligence is the “whole” cause or a “part[ial]” cause of his injury, not that he may recover when it is a “direct” cause or an “indirect” cause. The language concerns, not *proximate* causation, but *multiple* causation. It “make[s] clear that there could be recovery against the railroad even if it were only partially negligent,” *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 170 (2007), as in cases in which there is also “negligence [on the part] of the employee,” *Ky. & Ind. Terminal R.R. v. Martin*, 437 S.W.2d 944, 948 (Ky. Ct. App. 1969).

2. Begley does not deny that, before *Rogers v. Missouri Pacific Railroad*,

352 U.S. 500 (1957), both the U.S. Supreme Court and this Court's predecessor repeatedly held that FELA plaintiffs must prove proximate causation, and he does not challenge our characterization of any of those decisions (save one). His response is that "CSXT's reliance on pre-*Rogers* authority * * * is misplaced," because "it ignores the fact that *Rogers* held that a relaxed causation standard is to be applied in FELA cases." Appellee's Br. 11. Begley's position thus reduces to the claim that *Rogers* not only overruled at least 15 prior decisions of the U.S. Supreme Court, but overruled them without saying (or even suggesting) that it was doing so—and, indeed, that it overruled the decisions even as it was citing a number of them with approval.¹

Such an understanding of *Rogers* is highly implausible, to put it mildly. An overruling by implication, like a repeal by implication, is disfavored. *E.g.*, *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 507 (6th Cir. 2004). That is especially true when, as in this case, the precedent is long-settled, has been repeatedly reaffirmed, and involves an issue of statutory interpretation, where *stare decisis* considerations are strongest. *See, e.g.*, *IBP, Inc. v. Alvarez*, 546 U.S. 21, 32 (2005). If at all possible, therefore, a court should adopt an interpretation of *Rogers* that is consistent with the Supreme Court's prior decisions. There is particular reason for a lower court to do so, because it is obligated to "follow the [Supreme Court] case[s] which directly control[]," even if the cases "appear[] to rest on reasons rejected in some other line of decisions," and to "leav[e] to [the

¹ In one of the decisions cited in *Rogers*—*Coray v. Southern Pacific Co.*, 335 U.S. 520 (1949)—the Court stated that a FELA plaintiff may recover for injury of which the railroad's negligence was "the sole or a contributory proximate cause." *Id.* at 523. Begley acknowledges that statement, but contends that *Coray* "understood that the traditional definition [of proximate cause] did not apply." Appellee's Br. 11. Begley is mistaken. The Court disapproved of the "dialectical subtleties" employed by the Utah Supreme Court in finding insufficient evidence of proximate causation, *Coray*, 335 U.S. at 524, but it left no doubt that proximate cause must be proved. That much is clear, not only from the Court's statement of the applicable standard, but also from its conclusion that the jury could have found the railroad liable because the negligence and the injury were "inseparably related to one another in time and space." *Id.*

Supreme] Court the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

An interpretation of *Rogers* that is consistent with the Court’s prior decisions on proximate cause is not only possible but correct. Nor has proximate cause been abandoned in any post-*Rogers* decision of the U.S. Supreme Court, of this Court, or of this Court’s predecessor. Begley’s arguments to the contrary lack merit.

a. In arguing that *Rogers* rejected proximate cause, Begley quotes the Court’s statement that a plaintiff may recover as long as the railroad’s negligence “played any part, even the slightest, in producing the injury.” Appellee’s Br. 7 (quoting *Rogers*, 352 U.S. at 506). But that statement merely interpreted the phrase “in part” in FELA to mean “[in] any part.” It thus concerns multiple, not proximate, causation, *see Sorrell*, 549 U.S. at 175 (Souter, J., concurring), a fact confirmed by the sentence that immediately follows: “It does not matter that * * * the jury may also * * * attribute the result to *other causes*, including the employee’s contributory negligence.” *Rogers*, 352 U.S. at 506 (emphasis added).

Begley also quotes *Rogers*’ rejection of the Missouri Supreme Court’s standard of “proximate causation which makes a jury question dependent upon whether the jury may find that the defendant’s negligence was the sole, efficient, producing cause of injury.” Appellee’s Br. 7 (quoting *Rogers*, 352 U.S. at 506). But we are not advocating a standard of “sole” proximate causation. Consistent with the common law and the statutory language, our position is the same as the U.S. Supreme Court’s: that the railroad’s negligence must have been “the proximate cause in whole or in part” of the plaintiff’s injury. *Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944).

b. Begley notes that we “did not point to one post-*Rogers* decision where the U.S. Supreme Court holds that proximate causation is the standard * * * under the FELA.” Appellee’s Br. 9. It is true that there is no such decision, but it is equally true that there is no post-*Rogers* decision of the U.S. Supreme Court holding that proximate cause is *not* the standard under FELA. The only Supreme Court cases that squarely address the issue were decided before *Rogers*. And they all concluded that proximate cause is required.

Begley nevertheless insists (Appellee’s Br. 9) that the Supreme Court held to the contrary in *Crane v. Cedar Rapids & Iowa City Railway*, 395 U.S. 164 (1969). As we have already explained (Appellant’s Br. 21-22), the statement in that case—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—is dictum and in any event is properly understood to mean only that FELA does not embody the concept of *sole* proximate causation. Begley offers no response to either point.

Begley does contend that “caselaw from almost every federal circuit” supports his position. Appellee’s Br. 10; *see id.* at 10 n.1 (citing cases). But that contention is wildly off the mark. As Justice Souter observed in his *Sorrell* concurrence, lower courts are divided on whether *Rogers* “smuggled proximate cause out of * * * FELA.” 549 U.S. at 173 n.*. Post-*Rogers*, five circuits and three state courts of last resort have either held or stated that a FELA plaintiff need not prove proximate cause.² At the same time, at least

² *See Marchica v. Long Island R.R.*, 31 F.3d 1197, 1207 (2d Cir. 1994); *Page v. St. Louis Sw. Ry.*, 312 F.2d 84, 89 (5th Cir. 1963); *Churchwell v. Bluegrass Marine, Inc.*, 444 F.3d 898, 907 (6th Cir. 2006); *Ogelsby v. S. Pac. Transp. Co.*, 6 F.3d 603, 609 (9th Cir. 1993); *Summers v. Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997); *Glass v. Birmingham S. R.R.*, 905 So. 2d 789, 796 (Ala. 2004); *McCalley v. Seaboard Coast Line R.R.*, 265 So. 2d 11, 15 (Fla. 1972); *Dutton v. S. Pac. Transp.*, 576 S.W.2d 782, 785 (Tex. 1978).

one circuit and six state courts of last resort have reached the opposite conclusion.³ The division is thus a relatively even one. Begley is flatly wrong in asserting that five other circuits—the First, Third, Fourth, Seventh, and Eighth—have rejected the proximate-cause requirement in FELA cases. The decisions that he cites simply quoted (or paraphrased) *Rogers*' "any part, even the slightest" language, which concerns multiple causation; they did not address proximate cause.⁴

In deciding which side of the conflict has it right, this Court should be guided by the three-Justice concurrence in *Sorrell*. That comprehensive opinion makes clear that proximate cause is required both by the settled interpretive methodology and by the holdings of the U.S. Supreme Court, and that *Rogers* did not hold to the contrary.

B. The Jury Should Have Been Instructed On Foreseeability

As our opening brief explained (at pages 25-27), the Circuit Court's duty-of-care instruction did not ensure a jury finding that Begley's injury was foreseeable in the legally relevant sense, because foreseeability under FELA means foreseeability of *injury* and the court charged the jury only that CSXT had a duty to guard against general "risks or dangers" of which it should have been aware. Begley's principal defense of the instruction is that "Kentucky favors the 'bare bones' approach to jury instructions as opposed to instructing the jury in great detail about every nuance of the law." Appellee's Br. 14. But CSXT did not ask the Circuit Court to instruct the jury in "great detail" about "every nuance of the law." It asked only that the jury be told that it is a risk or danger of

³ See *Boston & Me. R.R. v. Talbert*, 360 F.2d 286, 288 (1st Cir. 1966) ("the plaintiff has the burden of proving negligence and proximate cause"); Appellant's Br. 23 n.7 (citing decisions of six state courts of last resort).

⁴ See *Moody v. Me. Cent. R.R.*, 823 F.2d 693, 695 (1st Cir. 1987); *Hines v. Consol. Rail Corp.*, 926 F.2d 262, 267 (3d Cir. 1991); *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 436 (4th Cir. 1999); *Holbrook v. Norfolk S. Ry.*, 414 F.3d 739, 742 (7th Cir. 2005); *Fletcher v. Union Pac. R.R.*, 621 F.2d 902, 909 (8th Cir. 1980).

injury, not merely a “risk” or “danger” in the abstract, that must be foreseeable. CSXT’s proposed charge (App. to Appellant’s Br. 33a) was fully compliant both with Kentucky’s “bare bones” approach to instructions and with federal law. The same cannot be said of the charge that was delivered.

Begley also relies on decisions holding that a jury charge need not include the term “foreseeability” (Appellee’s Br. 14-15), but in doing so he misses the point. Our position is that the Circuit Court’s instruction was erroneous, not because it omitted the term “foreseeable,” but because it informed the jury that a railroad has a duty to protect against a general “risk” or “danger”—as opposed to *injury*—of which it should have been aware. Both of the cases on which Begley relies recognize that it is “foreseeability of *injury*” that FELA requires. *Merando v. Atchison, Topeka & Santa Fe Ry.*, 656 P.2d 154, 162 (Kan. 1982) (emphasis added); *Louisville & Nashville R.R.*, 314 So. 2d 867, 870 (Ala. 1975) (same).

Begley also quotes the statement in *Gallick v. Baltimore & Ohio Railroad*, 372 U.S. 108, 120 (1963), that a defendant “need not foresee the particular consequences of his negligent acts.” Appellee’s Br. 15. Here, too, Begley misses the point. Our complaint is not that the Circuit Court’s instruction left the jury with the impression that CSXT need not have foreseen the particular consequences of its negligence, but that the instruction left the jury with the impression that CSXT need not have foreseen an *injury*. *Gallick* itself makes clear that FELA requires a “reasonable foreseeability of *harm*.” 372 U.S. at 117 (emphasis added).

Finally, Begley cites a Second Circuit decision for the proposition that there is a “relaxed test for foreseeability” under FELA. Appellee’s Br. 15 (citing *Syverson v.*

Consolidated Rail Corp., 19 F.3d 824 (2d Cir. 1994)). But the Second Circuit is virtually alone in applying such a test; the Sixth Circuit, among other courts, has rejected it. *E.g.*, *Van Gorder v. Grand Trunk W. R.R., Inc.*, 509 F.3d 265, 269 (6th Cir. 2007), *cert. denied*, 129 S. Ct. 489 (2008). That is because FELA incorporates the common law unless the Act expressly provides otherwise, *Sorrell*, 549 U.S. at 166, and there is “nothing in the text” of FELA that relaxes foreseeability (or any other component of negligence), *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 338 (5th Cir. 1997) (*en banc*). Even if a railroad *were* potentially liable for more remote risks under FELA than under the common law, however, what it would be potentially liable for is the failure to protect against more remote risks of *injury*. That essential requirement of Begley’s negligence case was missing from the jury charge.

C. The Jury Should Have Been Instructed To Discount Any Damages Awarded For Future Pain And Suffering

As our opening brief explained (at pages 29-37), there is no logical basis for requiring juries to discount to present value awards for future lost earnings but not awards for future pain and suffering. Begley responds by pointing out that (1) the U.S. Supreme Court has never specifically addressed the issue (Appellee’s Br. 18-19) and (2) a number of lower courts have rejected our position (*id.* at 19-21). He then asserts that the Circuit Court’s refusal to give a present-value instruction was correct “[b]ased upon the above authority.” *Id.* at 21. That is the sum and substance of his analysis.

Begley barely acknowledges the contrary decisions of other courts discussed in our opening brief, particularly the comprehensive decisions of the Second Circuit. Nor does he address a single one of our arguments for treating pain-and-suffering damages the same as any other future damages—namely, that the earning power of the present use

of money is the same regardless of the particular future benefit claimed to be lost; that all future damages awards are in some respects uncertain; that the use of “per diem” arguments like the one employed by Begley enhances the need for discounting; and that an award that is not discounted will overcompensate a plaintiff. One can only assume that Begley does not provide answers to these arguments because he does not have any.

In the alternative, Begley contends that the failure to give a present-value instruction was harmless, because “the jury did not increase the award, but actually awarded half of the requested amount.” Appellee’s Br. 22. But that is hardly a basis for finding the error harmless. It is well recognized that a plaintiff’s request for a specific amount of non-economic damages has the purpose and effect of skewing upward the jury’s frame of reference.⁵ Hence, there is no reason to assume that, in giving Begley half of what he asked for, the jury had already discounted his future damages to present value. And because the jury was not instructed to discount the damages it considered adequate compensation for future pain and suffering, there is a substantial probability that a properly instructed jury would have made a smaller award. The error was therefore prejudicial.

D. The Circuit Court’s Refusal To Instruct The Jury On The Non-Taxability Of Damages Was Not Harmless Error

As our opening brief explained (at pages 40-44), the Circuit Court’s failure to

⁵ See, e.g., *National R.R. Passenger Corp. v. Ahmed*, 653 So. 2d 1055, 1059 (Fla. Dist. Ct. App. 1995) (noting that it is common practice for attorneys to suggest damages well in excess of the amount that could be sustained under the facts in the case); *Gresham v. Courson*, 177 So. 2d 33, 39 (Fla. Dist. Ct. App. 1965) (“we would be exceedingly naive should we fail to recognize that as a matter of practice the advocate usually suggests to the jury a figure for damages substantially in excess of the amount that is clearly supportable by the evidence and likewise in excess of the amount which he deems to be supportable in point of law should the jury happen to return a verdict approaching the amount he suggested”); *Purpura v. Pub. Serv. Elec. & Gas Co.*, 147 A.2d 591, 594 (N.J. Super. Ct. App. Div. 1959) (“In cases where the damages are unliquidated and incapable of measurement by a mathematical standard, statements by plaintiffs’ counsel as to the amount claimed or expected ... tend to instill in the minds of the jury impressions not founded upon the evidence.”) (internal quotation marks omitted).

give a non-taxability instruction was either reversible *per se* or reversible on the facts of this case. Begley offers no persuasive response to either point.

As to the first, Begley contends that *Norfolk & Western Railway v. Liepelt*, 444 U.S. 490 (1980), does not support our position that failure to give a non-taxability instruction is reversible *per se*. According to Begley, the Court found that there was reversible error in *Liepelt* because of the “large discrepancy” between the damages estimated by the plaintiff’s expert (\$302,000) and the damages awarded by the jury (\$775,000). Appellee’s Br. 23. As we pointed out in our opening brief (at page 40), however, while the Court said that “[i]t is surely not fanciful to suppose” that the jury “improperly inflated the recovery” because it “erroneously believed that a large portion of the award would be payable * * * in taxes,” the Court found that reversal was necessary “[w]hether or not this speculation is accurate.” *Liepelt*, 444 U.S. at 497-98 (emphasis added). As we also pointed out (Appellant’s Br. 41), the Fifth Circuit has relied on the italicized language in holding that “*Liepelt* did not require the demonstration of an erroneously inflated award in order to find reversible error.” *O’Byrne v. St. Louis S.W. Ry.*, 632 F.2d 1285, 1287 (5th Cir. Unit A Dec. 1980) (per curiam). Begley makes no attempt to explain why this language does *not* support that conclusion. Nor does *Flanigan v. Burlington Northern Inc.*, 632 F.2d 880, 889-90 (8th Cir. 1980), the decision on which he principally relies. And *Flanigan* is unpersuasive for the additional reason that the rule it applied—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,” *id.* at 890—would impermissibly place the burden of proving prejudice on the appellant (rather than requiring the appellee to

prove harmless). *See* Appellant's Br. 44.

As to the second point (that the acknowledged instructional error is reversible in this case even if it is not reversible in every case), Begley relies on the difference between the damages sought (\$500,000) and the damages awarded (\$250,000) and argues that the error here "was not so prejudicial as to merit a new trial since the jury did not inflate the damages." Appellee's Br. 25. As our opening brief pointed out (at page 42), however, the jury was free to place a lower value on Begley's damages than the amount requested and to find that he would be adequately compensated by a lesser amount, particularly inasmuch as the damages were for pain and suffering. Begley offers no response to that argument either. In the end, he offers only speculation that the award would have been the same if the jury had been properly instructed on non-taxability. But speculation cannot overcome the presumption that an instructional error is prejudicial.

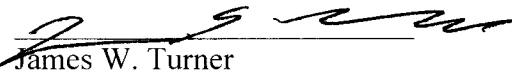
CONCLUSION

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

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