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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 APPELLEE
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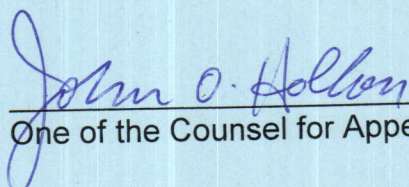
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I. STATEMENT CONCERNING ORAL ARGUMENT

Appellee, John X. Begley (“Begley”) desires oral argument. Oral argument will assist the Court in resolving the issues raised in this appeal.

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III. COUNTERSTATEMENT OF THE CASE

This case was filed pursuant to the Federal Employers' Liability Act, 45 U.S.C. §51-60 (hereinafter referred to as "FELA"), wherein the Plaintiff/Appellee, JOHN X. BEGLEY (hereinafter referred to as "Mr. Begley") seeks damages for injuries that occurred while working in the course and scope of his employment for Defendant/Appellant, CSX TRANSPORTATION, INC. (hereinafter referred to as "CSXT"). (Record on Appeal, "RA", Cp. 1-9). More specifically, Mr. Begley alleged that his job duties required him to mount and dismount moving rail equipment causing injuries to his knees and hips. (*Id.*)

A. **Statutory Background**

The FELA was enacted by Congress in 1908. Section 1 of the FELA provides that a railroad will 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 (emphasis added). It is important to note that the FELA contains significant features including the creation of liability for any injury "resulting in whole or in part" from the employer's negligence. 45 U.S.C. §51. This reflected the goal of Congress to shift part of the "human overhead" of conducting business from railroad workers to the railroad. See Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135, 145 (2003); Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 542 (1994).

In 1939, the next significant changes to FELA included the expansion of the class of covered employees, eliminating the defense of assumption of the risk, and penalizing the intimidation of workers who provide information about accidents. See 45 U.S.C. §51, 54, 60. In the intervening decades, it has been consistently recognized that Congress'

avowedly beneficial purpose in enacting the FELA required a policy of liberal construction so as to accomplish that purpose. See Urie v. Thompson, 337 U.S. 163, 180 (1949); see also Gottshall, 512 U.S. at 543.

B. Factual Background

A jury trial was conducted on April 9, 2007 through April 16, 2007. During the trial, Mr. Begley, who is now 67 years old, testified that he began his railroad career in 1970 as a brakeman in the Hazard Yards in Hazard, Kentucky. He eventually became a conductor and retired in April, 1998. He testified that from 1970 to 1990 his job was primarily serving coal mines. (Trial record, "TR", 4/9/07, p. 208, line 9). In order to perform his job duties, he was required to mount and to dismount moving rail equipment thousands of times. (TR, 4/9/07, p. 208, line 6). When he mounted or dismounted the train, it was typically traveling 5 to 6 miles per hour, but as fast as 10 miles per hour and possibly 12 miles per hour. (TR, 4/9/07, p. 202, lines 11-16). The terrain adjacent to the track is primarily ballast (i.e., gravel) and the main line ballast used outside the train yard was as big as 2 1/2 inches. (TR, 4/9/07, p. 206, line 12-18 and p. 207, lines 8-14).

Mr. Begley acknowledged that in 1990 he was no longer required to mount and to dismount moving trains. However, he believes that the thousands of times he was required to mount and/or dismount trains typically traveling 5 to 6 miles per hour, but occasionally as fast as 10 to 12 miles per hour, onto a surface consisting of large ballast contributed to his problems. (TR, 4/9/07, p. 228, line 16).

Dr. James Chaney is a family care physician who practices in Hazard, Kentucky. He examined and treated Mr. Begley for various ailments, including osteoarthritis in his hip and knees which were the focus of the trial. During the trial, Dr. Chaney testified that Mr.

Begley has diffuse arthritis, i.e., osteoarthritis, in his knees and hips. (TR, 4/10/07, p. 87, lines 21-22). Dr. Chaney testified that osteoarthritis is a degenerative process that occurs with aging and that certain things can accelerate the degenerative process. (TR, 4/10/07, p. 88, lines 6-12). Dr. Chaney testified that stepping off of a moving train hundreds of times contributed to the development of Mr. Begley's osteoarthritis. (TR, 4/10/07, p. 97, lines 11-21). Dr. Chaney added that it is "a culmination of repetitive micro trauma." (Id.) He testified that the "cartilage wears so thin you have basically bone on bone and it just accelerates the process." (TR, 4/10/07, p. 98, lines 1-3). He added that as one ages, one will develop some arthritis but that repetitive trauma will accelerate the process of developing osteoarthritis. (Id.). He opined that the requirement of mounting and dismounting trains traveling 5 to 6 miles per hour was a significant contributory factor in the development of Mr. Begley's osteoarthritis. (TR, 4/10/07, p. 96, lines 12-22 and p. 97, lines 1-10).

On cross-examination, Dr. Chaney testified that he could not make the causation relationship because he was not aware that the practice of mounting and dismounting trains stopped in 1990. (TR, 4/10/07, p. 121, lines 9-17). However, on re-direct, Dr. Chaney testified that even though the practice of mounting and dismounting moving trains ceased in 1990, the development of osteoarthritis is a "progressive degenerative process" in that "once it starts there is not an ending point." (TR, 4/10/07, p. 136, lines 11-17.) Dr. Chaney testified that "like I've said many times, it was a contributing factor to his osteoarthritis." (TR, 4/10/07, p. 137, lines 11-12).

Tyler Kress, PhD, who is an engineer specializing in engineering safety, testified on behalf of Mr. Begley. (TR, 4/10/07, p. 166, lines 21-22). Dr. Kress described his

educational background as including a Masters of Science degree in Engineering Science Mechanics with a major in Bio-Medical Engineering. (TR, 4/10/07, p. 167, lines 4-9). He also obtained his PhD where his dissertation was in "Impact Biomechanics of the Human Body." (TR, 4/10/07, p. 168, lines 3-16).

Dr. Kress testified at trial that it was a "poor job practice" to require workers such as Mr. Begley to get on and off moving equipment when the terrain is mud or ballast. (TR, 4/10/07, pp. 185-186). Dr. Kress added that:

Okay. Basically when it comes to overuse or wear and tear injuries, there are things called biomechanical or biomedical or ergonomic risk factors, and it's exposure to these risk factors that relate to wear and tear and damage to the biological tissues such that there's microtraumas.

And then they get damaged to the point where they don't repair themselves, and those risk factors are force, postures, repetition or frequency, how often you do it, and cold and vibration. There's five plain ones, and it's exposure to these things that can cause eventual damage to the biological tissues.

(TR, 4/10/07, p. 191, lines 10-21).

CSXT presented the testimony of Dr. Robert T. Love, who is an orthopedic surgeon practicing in Ashland, Kentucky. Dr. Love conducted two separate independent medical examinations on Mr. Begley on behalf of CSXT. (TR, 4/16/07, p. 7, line 7 and p. 30, lines 19-20). Dr. Love testified that Mr. Begley has end stage arthritis of his hips but does not know the cause, and that he also has arthritis in his knees. (TR, 4/16/07, p. 62, lines 1-5 and p. 64, line 11). Dr. Love expressed the opinion that mounting and dismounting moving trains did not cause the end stage arthritis of his hips because "getting on and off a train using handrails puts less stress on your hips and knees than it does stepping over the first

step to get into the jury box without a rail just because of the mechanics.” (TR, 4/16/07, p. 63, line 17-20). Dr. Love even went so far as to testify that if Mr. Begley never worked a day for the railroad and sat in a lounge chair for his entire life, his hips and knees would be in the same condition as they are today. (TR, 4/16/07, p. 72, line 3-4).

Dr. Love described Mr. Begley’s hip arthritis as severe and stated “if I had his hips, I would trouble walking a block.” (TR, 4/16/07, p. 85, lines 7-8 and p. 88, line 15). He also testified that at some point in the future Mr. Begley would need to be considered for hip and knee replacements. (TR, 4/16/07, p. 89, lines 2-4).

At the close of the case, CSXT tendered several jury instructions as to liability and damages that the Perry Circuit court properly rejected. First, the trial court correctly rejected CSXT’s proposed jury instruction regarding causation as it did not properly set forth the causation standard under FELA. Second, the trial court properly rejected CSXT’s proposed instruction on foreseeability as the concept of foreseeability was already included in the jury instruction on general negligence. Third, even if it was an error not to instruct the jury that the damages award would not be subjected to taxation, it was a harmless error. Fourth, the trial court properly refused to instruct that jury that non-economic damages are to be reduced to present value.

The jury returned a verdict in favor of Mr. Begley in the amount of \$250,000 for pain and suffering even though Mr. Begley asked for \$500,000. The jury then apportioned 50% fault to CSXT and 50% fault to Mr. Begley. Accordingly, the jury award was reduced to \$125,000. (Brief for Appellant, tab C, pp. 13a-17a-Trial Order and Judgment).

The Court of Appeals, in reaching its unanimous decision, properly affirmed the trial court’s rulings with regard to CSXT’s tendered instructions. Moreover, the Court of

Appeals properly interpreted Hamilton v. CSX Transportation, 208 S.W.3d 272 (Ky. App. 2006). (Brief for Appellant, tab A, pp. 1a-11a-Opinion Affirming).

IV. ARGUMENT

A. **THE JURY WAS PROPERLY INSTRUCTED ON THE RELAXED CAUSATION STANDARD IN FELA CASES.**

Section 1 of the Federal Employers' Liability Act ("FELA") provides that a railroad employer will 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 USC § 51 (emphasis added). The language of the statute clearly indicates a departure from the proximate cause standard used in non-FELA cases. However, CSXT now wants this court to alter a longstanding interpretation of the FELA and require proximate causation in determining if a railroad employer is liable for a work-related injury to its employee.

In the case at hand, both the trial court and the Court of Appeals properly relied on Hamilton v. CSX Transportation, Inc., 208 S.W.3d 272 (Ky. App. 2006) regarding the relaxed standard of causation to be applied in FELA cases. In Hamilton, the Court of Appeals reversed a jury verdict in favor of CSX on the grounds that the jury instructions erroneously stated the law as to the proper standard of causation to be used in FELA cases. In reaching its unanimous decision, the court stated:

It is well-established that FELA plaintiffs have a lower standard of proof than plaintiffs in ordinary negligence cases. See Harbin v. Burlington Northern R. Co., 921 F.2d 129, 131 (7th Cir. 1990). A key difference between a statutory FELA action and a common law negligence action is that in order to satisfy the causation element in a FELA action, a plaintiff need only show that the employer "in whole or in part" caused his or her injury. Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 507,

77 S.Ct. 443, 449, 1 L.Ed. 2d 493 (1957).

Id. at 275. The court also noted that “FELA actions are ‘significantly different’ from the ordinary negligence claim.” Id.

Perhaps the most important element of a FELA case that sets it apart from an ordinary negligence case is the relaxed rule of causation. In setting forth the burden of proof that an employee must offer in order to submit a case to the jury, the United States Supreme Court held that

The Missouri court’s opinion implies its view that this is the governing standard by saying that the proofs must show that “the injury would not have occurred but for the negligence” of his employer, and that “the test of whether there is causal connection is that, absent the negligent act the injury would not have occurred.” That is language 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.

Under this statute [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee’s contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due “in whole or **in part**” to its negligence.

Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500, 506-507, 77 S.Ct. 443, 1 L.Ed. 2d 493

(1957)(emphasis original)(footnotes omitted). In rejecting the attempt of the Missouri Supreme Court to impose common law principles of proximate causation in a FELA case, the U.S. Supreme Court noted that it does not matter if there are other causes of the injury including the plaintiff employee's contributory negligence. *Id.*, 352 U.S. at 506.

Holding that the proximate cause standard was inapplicable in FELA cases, the U.S. Supreme Court noted the "congressional intention to leave to the fact-finding function of the jury the decision of the primary question raised in these cases - - whether employer fault played **any part** in the employee's mishap." *Id.*, 352 U.S. at 509. (emphasis added). As such, the court made it clear that "the inquiry in these [FELA] cases . . . rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit." *Id.*, 352 U.S. at 508.

In Page v. St. Louis Southwestern Ry. Co., 349 F.2d 820 (5th Cir. 1965), the Court reversed a judgment entered in favor of the railroad. The Court noted one of the issues on appeal is "whether there is a double standard of proximate causation, one as to the Employee's affirmative case and another as to the Railroad's defense of contributory negligence." *Id.* at 820. The Court stated that "for a system of comparative fault to work, the basis of comparison has to be the same." *Id.* at 824. Moreover, this is evident "when this matter is approached freed of the artificial terminology of 'proximate cause.'" *Id.* In its discussion, the Court stated "the fact remains that on the Rogers thesis which we follow, there is really no place for 'proximate cause' as such." *Id.* The Court concluded by stating that

We ought to avoid those practices which "distract the jury's attention from the simple issues of whether the carrier was negligent and whether that negligence was the cause, in whole

or in part, of the plaintiff's injury." 312 F.2d 84, 93. All of the issues, affirmative and defensive, by way of attack and by way of defense can be simply inquired into a simple way (see note 12, supra). When done in this fashion, with suitable accompanying general instruction which *F.R.Civ.P. 49(a)* calls for, there is no need any longer for putting this in the labored terms of "proximate cause" or "sole proximate cause" or "contributory negligence."

Id. at 827. In the case at hand, CSXT's attempt to engraft proximate causation onto this FELA case will only "distract the jury's attention from the simple issues of whether the carrier [CSXT] was negligent and whether that negligence was the cause, in whole or in part, of the plaintiff's [Mr. Begley's] injury." Id.

CSX did not point to one post-Rogers decision where the U.S. Supreme Court holds that proximate causation is the standard for railroad liability under the FELA. The U.S. Supreme Court reiterated the teachings of Rogers when it held that an injured employee "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's violation of the Act" Crane v. Cedar Rapids & I. C. R. Co., 395 U.S. 164, 166 (1969). Also, the U.S. Court of Appeals for the 6th Circuit followed the teachings of Rogers in Hausrath v. New York Central R. Co., 401 F.2d 634 (6th Cir. 1968). The railroad employer appealed an adverse jury verdict on the grounds that the jury was improperly instructed on proximate causation. In reversing the decision, the Hausrath court held that

The proceeding currently under review, however, is brought under a federal statute wherein Congress deliberately adopted a negligence standard different from that of the common law. The phrase "resulting in whole or in part" was obviously designed to make even more explicit that negligence of an employer did not have to be the sole cause or "*the proximate cause*" of the injury in order to justify recovery.

Id. at 637 (emphasis original).

In Kentucky, it is equally clear that the use of the proximate cause standard in a FELA case is improper. As previously noted, the Kentucky Court of Appeals has criticized the use of traditional proximate cause negligence instructions in a FELA case. Hamilton v. CSX Transportation, Inc., 208 S.W.3d 272, 278 (Ky. App. 2006). Also, in Davis v. CSX Transportation, Inc., 2005 U.S. Dist. LEXIS 16335, *2 (W.D. Ky. 2005), the court denied CSXT's motion for summary judgment and stated that "the burden of proof of causation under FELA is relaxed compared to ordinary negligence actions."

CSXT's request that this Court alter a longstanding interpretation of FELA and require proximate causation in determining if a railroad employer is liable for an injury to one of its workers ignores not only Rogers and its progeny of cases including Hamilton v. CSX Transportation, Inc., 208 S.W.3d 272 (Ky. App. 2006), but also caselaw from almost every federal circuit in this country.¹

¹
Rogers v. Missouri Pacific R. Co., 352 U.S. 500 (1957); Moody v. Maine Central R. Co., 823 F.2d 693, 695 (1st Cir. 1987) ("We recognize the considerably relaxed standard of proof in FELA cases."); Syverson v. Consolidated Rail Corp., 19 F.3d 824, 826 (2nd Cir. 1994) ("Under FELA, however, the ordinary standards for negligence are relaxed so that an employer subject to this statute is potentially responsible for risks that would be too remote to support liability under common law."); Williams v. Long Island R. Co., 196 F.3d 402, 406 (2nd Cir. 1999) ("The Supreme Court has said, based on the explicit language of the statute, that with respect to causation, a relaxed standard applies in FELA cases"); Hines v. CONRAIL, 926 F.2d 262, 268 (3rd Cir. 1991) ("The concept of causation under FELA is also broadly interpreted. For example, the injury need not be an immediate result of an accident."); Hernandez v. Trawler Miss Vertie Mae, Inc., 187 F.3d 432, 437 (4th Cir. 1999) (" . . . the element of causation is relaxed . . . "); Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331, 335 (5th Cir. 1997) (" . . . the Supreme Court used the term 'slightest' to describe the reduced standard of causation between the employer's negligence and the employee's injury in FELA § 51 cases."); Richards v. Consolidated Rail Corp., 330 F.3d 428, 433 (6th Cir. 2003) ("[T]he Supreme Court announced a relaxed test for establishing causation in FELA cases in its landmark decision, Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 1 L.E.d 2d 493, 77 S.Ct. 443 (1957)."); Holbrook v. Norfolk Southern Ry. Co., 414 F.3d 739, 742 (7th Cir. 2005) ("[A] railroad will be held liable where 'employer negligence played any part, even the slightest, in producing the injury.'" (quoting Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500, 506 (1957))); Fletcher v. Union Pacific R. Co., 621 F.2d 902, 909 (8th Cir. 1980) ("The test of causation under the FELA is whether the railroad's negligence played any part, however small, in the injury which is the subject of the suit."); Oglesby v. Southern Pacific Transp. Co., 6 F.3d 603, 607 (9th Cir. 1993) (" . . . the Supreme Court indicated that the standard of causation required under the FELA differs from common-law proximate cause."); Summers v. Missouri Pacific R.R. Sys., 132 F.3d 599, 606 (10th Cir. 1997) ("During the first half of this century, it was customary for courts to analyze liability under the FELA in terms of proximate causation. However, the Supreme Court definitively abandoned this approach in Rogers v. Missouri Pacific R.R.") (internal citation omitted).

CSXT's reliance on pre-Rogers authority regarding the appropriate causation standard to be applied in FELA cases is misplaced as it ignores the fact that Rogers held that a relaxed causation standard is to be applied in FELA cases. Also, in Coray v. Southern Pacific Co., 335 U.S. 520, 69 S.Ct. 275, 93 L.Ed. 208 (1949), the U.S. Supreme Court held that it was error to direct a verdict for the railroad at the trial court level. While the court used the term proximate cause, it understood that the traditional definition did not apply. The Court noted the Utah Supreme Court discussed the distinctions between proximate cause, which was sufficient to impose liability, and cause in the philosophic sense, which is not sufficient to impose liability. The Utah Supreme Court held that the stopping of the train was a cause of decedent's death in a philosophic sense but was not sufficient to impose liability.

In reversing the Utah Supreme Court, the U.S. Supreme Court noted that "the language selected by Congress to fix liability in cases of this kind is simple and direct." Id., 335 U.S. at 524. The statute states "that railroads shall be responsible for their employees' deaths **'resulting in whole or in part'** from defective appliances such as were here maintained." Id. (emphasis added). The Court clearly stated that "Congress has thus for its own reasons imposed extraordinary safety obligations upon railroads and has commanded that **if a breach of these obligations contributes in part to an employee's death, the railroad must pay damages.**" Id. (emphasis added).

Also, in another pre-Rogers case, the 7th Circuit understood that the use of the term "proximate cause" in early FELA cases deviated from its traditional definition. In Eglsaer v. Scandrett, 151 F.2d 562, 565-66 (7th Cir. 1945), the 7th Circuit explained:

Perhaps the reconciliation of the earlier acceptance,

sometimes called the old-fashioned idea, of 'proximate cause' as the direct or efficient cause of the accident . . . in cases where [FELA] applies, and the conception of proximate cause which now obtains, is to be found in the enlarging phrase of the statute. It provides that if the railroad's negligence 'in part' results in injuries or death, liability arises. Under the old concept of proximate cause, that cause must have been direct, a complete, responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. **Now, if the negligence of the railroad has 'causal relation,' -- if the injury or death results in 'in part' from defendant's negligence, there is liability.** The words 'in part' have enlarged field or scope of proximate causes in these railroad injury cases.

Id. at 565-566 (emphasis added). As such, the court recognized that prior to the Rogers decision the traditional understanding of proximate causation was inconsistent with the FELA.

CSXT's reliance upon Norfolk Southern Ry Co. v. Sorrell, 127 S.Ct. 799 (2007) for support is clearly misplaced. The opinion of the Court in Sorrell written by Chief Justice Roberts, makes it clear that the "question presented in this case is a narrow one . . ." and involved simply the type of causation standard that applies to both railroad negligence and employee contributory negligence. Id. at 809. CSXT gives far too much weight to the concurring opinion of three justices, which is not the holding in the case. The Court of Appeals already considered CSXT's argument that Sorrell requires a different outcome and stated that "we are not persuaded by CSX's reliance on the concurring opinion in Sorrell." Opinion affirming p.6. (Brief for Appellant, tab A, pp. 1a-11a).

There is yet another concurring opinion in Sorrell by Justice Ginsberg who noted that the majority opinion did not change the causation standard that a FELA plaintiff must overcome in order to submit a case to the jury. In her concurring opinion, she wrote:

. . . the Court has several times stated what a plaintiff must prove to warrant submission of a FELA case to a jury. That question is long settled, we have no cause to reexamine it, and I do not read the Court's decision to cast a shadow of doubt on the matter.

Id. at 812.

Justice Ginsberg also wrote that “[t]oday’s opinion leaves in place precedent solidly establishing that the causation standard in FELA actions is more ‘relaxed’ than in tort litigation generally.” Id. at 812. Indeed, Justice Ginsberg even referred to jury instructions cited in the Court’s opinion consisting of model Federal charges which contain the following language on causation: “In other words, did such negligence play any part, even the slightest, in bringing about an injury to the plaintiff?” Id. at 814. Accordingly, there is no question that the concurring opinion in Sorrell relied upon by CSXT does not alter the relaxed causation standard first announced in Rogers.

Based on the overwhelming authority that FELA requires a relaxed causation standard, the unanimous decision of the Court of Appeals was proper. Moreover, the Court of Appeals properly relied on and interpreted the unanimous decision announced in Hamilton v. CSX Transportation, Inc., 208 S.W.3d 272 (Ky. App. 2006).

B. THE JURY WAS PROPERLY INSTRUCTED ON THE ISSUE OF FORESEEABILITY

It is clear that the manner in which the substantive law to be applied in a FELA case is presented to the jury is as much a matter of state law as it is a procedural matter. Pryor v. National R.R. Passenger Corp., 703 N.E.2d 997 (Ill. App. Ct. 5th Dist. 1998). In Kentucky, “. . . it is clear that Kentucky law mandates the use of ‘bare bones’ jury instructions in all civil cases.” Olifice, Inc. v. Wilkey, 173 S.W.3d 226, 229 (Ky. 2005). Moreover, it has been stated that “[o]ur approach to instructions is that they should provide

only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire.” Cox v. Cooper, 510 S.W. 2d 530, 535 (Ky. App. 1974).

Working within the “bare bones” framework, the trial court properly rejected CSXT’s proposed instruction on foreseeability. As noted in Hamilton v. CSX Transportation, Inc., 208 S.W.3d 272 (Ky. App. 2006), “[i]f the statements of law contained in the instructions are substantially correct, they will not be condemned as prejudicial unless they are calculated to mislead the jury.” Id. at 275. In the case at hand, the jury was instructed in Instruction No. 5 on general negligence. The trial court included in that instruction the following language: “This duty included the duty to guard against risks or dangers of which it knew, or by the exercise of ordinary care should have known.” Kentucky favors the “bare bones” approach to jury instructions as opposed to instructing the jury in great detail about every nuance of the law. As such, it is proper to instruct the jury on negligence in terms of duty and the counsel can flesh out nuances of the law not contained in the instruction. Olface, Inc. v. Wiley, 173 S.W. 3d 226, 228-230 (Ky. 2005); Young v. J.B. Hunt Transp., Inc., 781 S.W.2d 503, 506-507 (Ky. 1989).

While the trial court did not specifically use the word foreseeability, the above cited language from Instruction No. 5 encompasses the concept of foreseeability. In Merando v. Atchison, Topeka & Santa Fe Rwy Co., 656 P. 2d 154 (Kan. 1982), the court did not require the use of the term “foreseeability” when the concept was included in the instruction. Also, in Louisville & Nashville R.R. Company v. Dollar, 294 Ala. 276, 280, 314 So. 2d 867, 870 (1975), the Supreme Court of Alabama rejected the railroad’s argument that the jury should have been instructed that the verdict must be for the railroad “if it was not reasonably foreseeable that Dollar would be injured.” It is proper to look at the “duty

of the defendant in terms of acts or omissions of the reasonably prudent person under like circumstances.” *Id.* Since Kentucky follows the “bare bones” approach in all civil cases, CSXT had the opportunity to flesh out during closing arguments the legal nuances of foreseeability. As such, CSXT’s desire to have multiple instructions on the issue of foreseeability does not comply with the bare bones approach.

In Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 117 (1963), the seminal FELA case on foreseeability, the U.S. Supreme Court pointed out that “reasonable foreseeability of harm is an essential ingredient of Federal Employers’ Liability Act negligence.” However, it is not necessary that the defendant reasonably foresee a specific injury. The court stated:

It is widely held that for a 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. And we have no doubt that under a statute where the tortfeasor is liable for death or injuries in producing which his “negligence played any part, even the slightest” (Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 506) **such a tortfeasor must compensate his victim for even the improbable or unexpectedly severe consequences of his wrongful act.**

Id. at 120-121 (emphasis added)(internal citation omitted).

An illustration of the relaxed test for foreseeability in a FELA case is found in Syverson v. Consolidated Rail Corp., 19 F.3d 824 (2d Cir. 1994). Here, a Conrail employee was sitting in his car in a rail yard doing paperwork close to a stand of trees which produced shade. “As he was doing the paperwork in his car, he noticed a stranger standing at his open driver’s door window. After a brief conversation, the stranger turned to walk away, and Syverson resumed his paperwork. Moments later the stranger

reappeared and, without warning or provocation, began to stab Syverson with a knife. Syverson suffered numerous stab wounds and at least one bite wound. Eventually, Syverson managed to escape his attacker and ran to the trailers yelling for help, while the assailant took the opportunity to leave the scene. The Framingham Police later arrested a local man, who was tried and convicted for the assault." Id. at 825.

Conrail filed a motion for summary judgment based upon a lack of foreseeability of the criminal assault. The district court agreed with Conrail and dismissed the complaint. On appeal, the Second Circuit reviewed the facts in Gallick, supra, and reversed the trial court. In doing so, the court discussed the facts in Gallick at some length.

The Supreme Court in Gallick framed the question that a court must ask in deciding whether a FELA case should go to a jury: whether there is "enough [evidence] to justify a jury's determination that employer negligence had played *any* role in producing the harm." 372 U.S. at 116. Conrail vigorously argues that the trespasser who attacked Syverson was traversing the property and may have had no connection with the people living and loitering in the weeds area, and that in any event no one could have foreseen the violence and harm that the trespasser inflicted. Despite Conrail's contentions, Gallick offers some instructive analytical parallels and illustrates how little suffices under this statute. In that case, the railroad had permitted a fetid pool of water to exist on its grounds. The pool of water attracted a variety of vermin and insects. An employee bitten by an insect in the vicinity of this pool suffered a reaction so severe as to require the amputation of his leg. Foreseeability was in issue because there was no evidence that the insect that stung this employee was hatched from the stagnant pool or was attracted there by it, and because the medical consequence was highly unusual. The trial court awarded damages, but the state appeals court reversed, finding an insufficient causal connection to permit a jury verdict. The Supreme Court reversed and remanded, holding that the jury verdict was sustainable under prior cases construing FELA. Since the railroad "knew that the accumulation of the pool of water would attract bugs and vermin to the area - - it is clear that the jury concluded that

respondent should have realized the increased likelihood of an insect's biting petitioner while he was working in the vicinity of the pool." 372 U.S. at 118-119. The plaintiff in Gallick was therefore not required to demonstrate specifically that the agent of harm issued from the untended condition on the railroad's property, or that the untended condition could be expected to result in so terrible a harm. Conrail can fare no better on this appeal by urging that the trespasser did not come from the weeds area and that no one could reasonably foresee that a trespasser could turn homicidal.

Id. at 827.

Based upon the foregoing, the trial court properly instructed the jury of CSXT's "duty to guard against risks or dangers of which it knew, or by the exercise of ordinary care should have known," (Brief for Appellant, tab D, p. 22a, Instruction 5). Moreover, the issue was properly submitted to the jury. Mr. Begley alleged that CSXT's now-discontinued practice of requiring brakemen and conductors to get off and on moving railcars at various speeds thousands of times contributed to the development of osteoarthritis in his knees. This clearly was a jury issue. Gallick, supra.

The Court of Appeals in its unanimous decision properly affirmed the trial court in its rejection of CSXT's proposed instruction on foreseeability as it did not comply with the "bare bones" approach followed in Kentucky. Moreover, CSXT had an opportunity during closing argument to flesh out any nuances of foreseeability as stated in the instructions (knew or should have known). Finally, the statements of law contained in the instructions given to the jury are substantially correct, and they cannot be condemned as prejudicial since they are not calculated to mislead the jury. See Hamilton, supra.

C. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY TO REDUCE ANY AWARD FOR FUTURE PAIN AND SUFFERING TO PRESENT VALUE

Mr. Begley agrees that any award for loss of future wages must be reduced to present value. However, at trial, Mr. Begley did not seek damages for past or future lost wages, nor did he seek damages for past or future medical expenses. Rather, he only sought damages for his pain and suffering.

The cases relied upon by CSXT to support its argument that the jury should have been instructed that any damages awarded for future benefits is to be reduced to present value are easily distinguished from the case at hand. In Jones & Laughlin Steel Corp. v. Pfeiffer, 462 U.S. 523, 536 (1983), the United States Supreme Court noted that “. . . the first stage in calculating an appropriate award for **lost earnings** involves an estimate of what the lost stream of income would have been.” (emphasis added). Moreover, the Court did not believe that it was necessary “to select one of the many rules that have been proposed and establish it for all time as the exclusive method in all federal trials for calculating an award for **lost earnings** in an inflationary economy.” Id. at 546 (emphasis added). In reversing the award, the Court held “. . . that whatever rate the District Court may choose to discount the **estimated stream of future earnings**, it must make a deliberate choice . . .” Id. at 552-553 (emphasis added).

As such, CSXT’s reliance on Pfeiffer is misplaced. While Pfeiffer focused on the trial court’s refusal to discount an award of future earnings to present value, Mr. Begley did not request any economic damages at trial. He simply sought damages for non-economic damages in the form of past and future pain and suffering. Since Mr. Begley did not have a claim for economic damages, the Pfeiffer analysis for calculating an appropriate award for **lost earnings** is inapplicable to the case at hand.

Additionally, CSXT’s reliance on Monessen Southwestern Ry. Co. v. Morgan, 486

U.S. 330, 108 S.Ct. 1837, 100 L.Ed. 2d 349 (1988) is also misplaced. As in Pfeiffer, the plaintiff specifically sought damages for loss of future earnings. Id. at 332. At trial, the trial court "refused to instruct the jury that any damages award for loss of future earnings would have to be reduced to present value." Id. The U.S. Supreme Court clearly stated that "we turn now to the question whether the trial court acted consistently with federal law in instructing the jury not to discount appellee's **future lost earnings to present value.**" Id. at 339 (emphasis added). The U.S. Supreme Court ruled that it was an error not to instruct the jury to reduce the claim for loss of future wages to present value. Once again, Mr. Begley did not seek damages for future lost wages or future medical expenses.

Also, in St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409, 105 S.Ct. 1347, 84 L.Ed. 2d 303 (1985), the plaintiff presented evidence at his trial that his future wage losses resulting from his injuries were approximately one million dollars. Id. at 410. As in Morgan, the trial judge refused to submit the railroad's proposed instruction regarding the reduction of lost future earnings to present value. Id. The U.S. Supreme Court reversed the jury verdict in favor of the plaintiff on the grounds that the trial court refused to provide such an instruction.

While Pfeiffer, Morgan and Dickerson deal with claims for future lost earnings, Mr. Begley only sought damages for non-economic damages in the form of past and future pain and suffering. Therefore, CSXT's reliance on these cases is misplaced.

In Paducah Area Public Library v. Terry, 655 S.W. 2d 19 (Ky. App. 1983), the court held that the trial court properly refused to instruct the jury that any award of future damages must be reduced to present value. The court stated that it was "aware of the rule, almost universally applied, in Federal Employers' Liability cases . . . that awards for

future loss of income must be reduced to their present worth.” *Id.* at 24. However, the court made it clear that “**the present worth rule does not apply to any award for pain and suffering.** See, Louisville & Nashville Railroad Company v. Gayle, 204 Ky. 142, 263 S.W. 763 (1924), and Chesapeake & Ohio Railroad Company v. Kelly, 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117 (1916).” *Id.* at 24 (emphasis added).

Other courts have also stated that the present worth rule does not apply to awards for pain and suffering. See, O’Byrne v. St. Louis Southwestern Ry. Co., 632 F.2d 1285, 1286 (5th Cir. 1980) (“The railway does complain of the court’s instruction to the jury about reduction to present value of various items of damages, mainly that of future pain and suffering. For over twenty years, our rule has been that while awards for future earnings and medical expenses should be reduced to present value, damages for future pain and suffering should not.”) Also, in Chicago & N.W.Ry. Co. v. Candler, 283 F. 881 (8th Cir. 1922), the court rejected an attempt to apply the present worth rule to an award for future pain and suffering as “[t]he arbitrariness and artificiality of such a method is so apparent that to require a jury to apply it would, we think, be an absurdity.” *Id.* at 885.

In Melin v. Burlington Northern R.R. Co., 401 N.W. 2d 418, 419 (Minn. App. 1987), the court was faced with the issue of whether damages for pain and suffering are to be discounted to present value. In answering that such damages are not discounted to present value, the court noted that while damages for loss of future earnings are discounted to present value “the Supreme Court has not ruled on whether damages for pain and suffering must be discounted.” *Id.* The court acknowledged and rejected the Second Circuit’s decision to discount to present value an award for future damages. In rejecting this approach, the court followed the Fifth, Eighth and Tenth Circuits in not

discounting such awards. Id. See also, Taylor v. Denver & Rio Grand Western R. Co., 438 F.2d 351, 353 (10th Cir. 1971) (the present value rule “is not feasible in computing damages for future pain and suffering.”); Flanigan v. Burlington Northern, Inc., 632 F.2d 880, 886 (8th Cir. 1980) (the trial court properly rejected the defendant railroad’s proposed instruction on reducing the pain and suffering award to present value.); Blankenship v. Union Pacific R.R. Co., 742 P.2d 680, 682 (Ore. App. 1987) (the railroad acknowledged “that the majority view among the United States Circuit Courts of Appeals is contrary to its view and is that damages for future pain and suffering should not be computed on a present value basis.”); Iler v. CSX Transportation, Inc., 434 S.E. 2d 499 (Ga. App. 1993) (“The trial court erred by instructing the jury to reduce any award for future pain and suffering to present values.”); Restatement of the Law 2nd Torts, § 913A, comment A (“an award for future pain and suffering or for emotional distress is not discounted in this fashion.”).

Also, in Pennsylvania R.R. Co. v. McKinley, 288 F.2d 262 (6th Cir. 1961), the defendant railroad sought reversal of a judgment in favor of its employee. The court reviewed the following instruction: “the jury will determine the money value which will fully, fairly, and justly compensate the plaintiff **for all such loss of past, present and future earning capacity** as you find he has suffered or will suffer as a result of this collision.” Id. at 265 (emphasis added). The court found that the instruction was sufficient.

Based upon the above authority, it is clear that in the case at bar the Court of Appeals, in reaching its unanimous decision, properly affirmed the Trial Court’s refusal to instruct the jury to reduce any award for future pain and suffering to present value. Additionally, even if we assume that it was improper not to instruct the jury to reduce Mr.

Begley's claim for future pain and suffering, it was a harmless error. In the case at hand, the jury did not increase the award, but actually awarded half of the requested amount of \$500,000 (TR, 4/10/07, p. 257, line 7) before that amount was reduced by 50% based on comparative fault. There is no evidence in the record to support any argument that the jury inflated the award or acted improperly.

D. THE REFUSAL TO INSTRUCT ON THE NON-TAXABILITY OF NON-ECONOMIC DAMAGES WAS HARMLESS ERROR.

In Hamilton v. CSX Transportation, Inc., 208 S.W.3d 272, 275 (Ky. App. 2006) the court stated that "alleged errors regarding jury instructions are considered questions of law that we examine under a de novo standard of review." If it is determined that an error was made then the inquiry continues as "the question becomes whether the error here is of such a prejudicial nature that it merits a new trial." Id. at 276. See also Hyman & Armstrong, P.S.C. v. Gunderson, 279 S.W.3d 93, 112 (Ky. 2008) ("... the burden is upon an appellee claiming harmless error to show affirmatively from the record that no prejudice resulted from the error.")

Accordingly, in the case at hand, a two step analysis must be followed. That is, was it an error for the trial court not to instruct the jury that a damages award is not subject to taxation? The Court of Appeals answered this questions in the affirmative. The Court of Appeals then properly continued the analysis by addressing the question of "whether the error . . . is of such prejudicial nature that it merits a new trial." Id. The court properly concluded that the error was harmless. CSX now wants this court to rule that the trial court's decision not to instruct the jury is reversible per se and ignore the harmless error inquiry. This is completely improper as it would circumvent CR 61.01.

In Norfolk & Western Railway v. Liepelt, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed. 2d 689 (1980), the U. S. Supreme Court addressed two questions on appeal. First, the Supreme Court held that in calculating the plaintiff's lost wages one must look at the after tax income rather than the gross income since it is the after tax income that is the realistic measure of plaintiff's ability to support his family. Id., 55 U.S. at 493-494. Second, the court held that it was an error not to instruct the jury that the damages award was not subject to taxation. Id., 444 U.S. at 498. Based on the combination of both errors, the Supreme Court reversed the judgment.

Moreover, with regards to the question regarding the trial court's decision not to instruct the jury that the damages award is not subject to taxation, the Supreme Court took special notice that while the plaintiff's expert computed the pecuniary loss at \$302,000 the jury returned a verdict of \$775,000. Id., 444 U.S. at 497. The large discrepancy between the plaintiff's proof and the amount awarded by the jury certainly caused the Supreme Court great concern.

As noted in Hamilton, if it is determined that an error was made concerning the jury instructions, the question that must be answered is "whether the error . . . is of such a prejudicial nature that it merits a new trial." Hamilton, 208 S.W.3d at 276. In this case, the Court of Appeals properly answered the question in the negative.

In Flanigan v. Burlington Northern Inc., 632 F. 2d 880 (8th Cir. 1980), the court held that it was harmless error not to instruct the jury that the damages award was not subject to taxes. In reaching its decision, it considered the Liepelt case. The court noted that in Liepelt a new trial was ordered because the Supreme Court found not only that it was an error to provide such an instruction but also that it was an error to not allow the railroad to

establish projected net earnings after taxes. Id. at 889. As such, a new trial was ordered in Liepelt because of the combination of errors. Id.

The Flanigan court also noted that the Supreme Court in Liepelt was greatly concerned as to whether the jury inflated the award since plaintiff's own economist testified to lost earnings of \$302,000 and the jury awarded \$775,000. In reaching its decision that it was harmless not to instruct the jury that the award was not subject to taxation, the court held that "before an appellate court should hold that failure to give such a cautionary instruction was reversible error, there ought to be evidence either that juries in general increase recoveries on this account or that the particular jury did so." Id. at 889-890 (citing McWeeney v. New York New Haven & Hartford Railroad, 282 F.2d 34, 39 (2d Cir. 1960)).

In Marlow v. Atchison, Topeka & Santa Fe Ry. Co., 671 P.2d 438 (Colo. App. 1983), the railroad appealed a jury verdict in favor of its employee on several grounds. One of the issues relevant to the case at hand was the trial court's decision not to instruct the jury that the damages award was not taxable. Id. at 441. In affirming the verdict, the court stated "that the failure to give the non-taxability instruction is harmless error unless there is a showing that the verdict is excessive." Id. at 442. As in Marlow, there is nothing in the record to even suggest that the jury inflated Mr. Begley's award on the erroneous belief that the award was subject to taxes.

Also, in Dallas v. Burlington Northern, Inc., 689 P.2d 273 (Mont. 1984), the Supreme Court of Montana affirmed a jury verdict in favor of the plaintiff employee. One of the issues raised on appeal was whether it was error for the trial court to refuse to instruct the jury that the damages award was not subject to taxation. Id. at 277. The court held it was harmless error not to instruct the jury that any damages award is not taxed. Id. at 278.

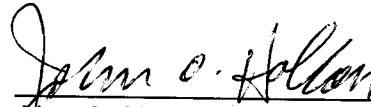
The jury awarded \$477,000, which was the exact amount projected by plaintiff's economist for his economic damages. Id. The court noted that the Supreme Court in Liepelt was greatly concerned by the vast discrepancy between the plaintiff's own evidence and what the jury actually awarded. Id. As in Dallas, there is not such concern in the case at hand.

In the case at hand, counsel for Mr. Begley asked in closing arguments that the jury award \$500,000 for past and future pain and suffering. (TR, 4/16/07, p. 257, line 7). The jury awarded \$250,000 for past and future pain and suffering which was then reduced to \$125,000 to reflect the apportionment of fault. The rationale behind the proposed instruction is to prevent the jury from inflating an award to take into account taxes. The jury did not inflate Mr. Begley's award since it was actually reduced. In Liepelt, the court was greatly concerned about the vast discrepancy between plaintiff's evidence of \$302,000 in lost earnings and the jury award of \$775,000. There is nothing in the record to support the idea or even suggest that the jury inflated the award to compensate for taxes. As such, the alleged error was not so prejudicial as to merit a new trial since the jury did not inflate the damages sought by Mr. Begley.

V. CONCLUSION

Appellee, John X. Begley, requests that this Court affirm the unanimous opinion of the Court of Appeals affirming the judgment of the Perry Circuit Court.

Respectfully submitted,



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