No. 18-

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

MARK A. SUMNER,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

PETITION APPENDIX

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TABLE OF CONTENTS

Page

APPENDIX A: Opinion, *Norfolk S. Ry.* v. *Sumner*, Record No. 180121 (Va. Cir. Ct. Jan. 31, 2019) 1a

APPENDIX B: Final Order, *Sumner* v. *Norfolk S. Ry.*, Case No. CL15000079-00 (Va. Cir. Ct. Oct. 24, 2017) 28a

APPENDIX C: Mandate, *Norfolk S. Ry.* v. *Sumner*, Record No. 180121 and Circuit Court No. CL15000079-00 (Va. Mar. 13, 2019) 33a

APPENDIX D: Trial Transcript Excerpts, *Sumner* v. *Norfolk S. Ry.*, Case No. CL15000079-00 (Va. Cir. Ct. Aug. 8, 2017) 34a

APPENDIX E: Trial Transcript Excerpts, *Sumner* v. *Norfolk S. Ry.*, Case No. CL15000079-00 (Va. Cir. Ct. Aug. 9, 2017) 95a

APPENDIX F: Jury Instructions Transcript Excerpts, *Sumner* v. *Norfolk S. Ry.*, Case No. CL15000079-00 (Va. Cir. Ct. Aug. 9, 2017) 106a

APPENDIX G: Hearing Transcript Excerpts, *Sumner* v. *Norfolk S. Ry.*, Case No. CL15000079-00 (Va. Cir. Ct. Oct. 12, 2017) 114a

APPENDIX H: Defendant's Trial Exhibit No. 5.. 119a

APPENDIX I: Defendant's Trial Exhibit No. 6 ... 121a

APPENDIX J: Defendant's Trial Exhibit No. 7... 123a

APPENDIX

APPENDIX A

FROM THE CIRCUIT COURT
OF THE CITY OF DANVILLE

Record No. 180121

NORFOLK SOUTHERN RAILWAY COMPANY

v.

MARK A. SUMNER

James J. Reynolds, Judge

January 31, 2019

OPINION BY
SENIOR JUSTICE CHARLES S. RUSSELL

PRESENT: Lemons, C.J., Mims, McClanahan, Powell, Kelsey, and McCullough, JJ., and Russell, S.J.

This is an appeal by a railroad corporation from a judgment in favor of one of its employees in an action brought under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 through -59, as amended.

FACTS AND PROCEEDINGS

In accordance with familiar principles of appellate review, the facts will be stated in the light most favorable to the prevailing party at trial. Mark A. Sumner (the plaintiff) was an employee of Norfolk Southern Railway Company (the defendant), a corporation operating a railroad as a common carrier in interstate commerce.

On February 26, 2013, the plaintiff was working as the conductor of a northbound Norfolk Southern freight train running from Greensboro, North Carolina through Danville, Virginia and points north. The temperature was in the 30's and it was cloudy with light mist or rain. The yardmaster at Greensboro warned the train's engineer, Teddy Lester, that some ice might be encountered farther north. The engineer had orders to proceed through the railroad yard at Danville and stop at a point about two miles north of the yard where a side track called the "East Bradley pass track" diverged from the northbound main line. The train crew was directed to make a "cut," a designated series of cars that were to be separated from the train and left on the side track to be picked up by another locomotive later for delivery to a nearby destination. The train's remaining cars were then to be reunited on the main line and continue northbound. The train was stopped on the main line at a point where the last car of the "cut" was just south of the switch to the side track.

As conductor, the plaintiff's duties required him to separate the last car of the "cut" from those to be left on the main line, to board the last car of the "cut," and, using his hand-held radio, to call the engineer to proceed. The locomotive then pulled the "cut" north of the switch to the side track and stopped on the conductor's signal. This part of the operation was performed without incident.

Thereafter, the evidence is entirely circumstantial as to the fall that resulted in the plaintiff's injury. The plaintiff had no memory of the event and there were no eyewitnesses to the fall. The conductor's duties required him to dismount the last car in the "cut" and walk south, away from the locomotive,

turning off an electric timing device on the switch, and continue walking south nearly 200 feet to release the "derail," a protective device to prevent movement of cars on the side track. He would then return north to throw the switch and call the engineer to back the "cut" onto the side track.

After the plaintiff dismounted and began to walk south, the engineer expected a radio call from him but heard nothing. He called the plaintiff but there was no response. Concerned, he dismounted the locomotive and began walking south in the "walk path" that ran east of and parallel to the side track. Close to the east edge of the path was a steep embankment that dropped down a 70-degree slope into a ravine. Looking over the edge of the embankment, the engineer saw movement and recognized the plaintiff lying about 36 feet below. The engineer climbed down to the plaintiff with some difficulty, using one hand to support himself. The plaintiff was lying on his back, with his head uphill. At trial, the engineer testified that the plaintiff was conscious but "very disoriented." The plaintiff said: "What are we doing here? What happened?" He complained of great pain in his shoulder and chest. He had bitten through his tongue. Using the plaintiff's handheld radio, which was lying nearby, the engineer called the Danville Yardmaster who in turn called a team of paramedics to come to the scene. The team tied the plaintiff to a "backboard," placed it inside a fiberglass "sled," and with ropes pulling from above and men pushing from below, hoisted the plaintiff out of the ravine.

The plaintiff was taken to the Danville Medical Center where he was treated for his injuries. At trial, two medical expert witnesses testified by video deposition. Steven Norris, M.D., an orthopedic surgeon,

diagnosed the plaintiff with a displaced fracture of the clavicle (i.e., collarbone) and three fractured ribs. This required surgery on two occasions: the first to realign the fragments of the clavicle, to secure them with a metal pin, and the second to remove the pin when healing was well advanced. David Meyer, M.D., a neurologist, diagnosed a brain concussion. It was his opinion that this had caused the plaintiff to suffer amnesia, which destroyed his memory of the traumatic event itself and for the events during the period of time immediately preceding and following it. In some patients, he said, fragmentary recollections of these events would occur in later years, but others would never recall them. He testified that brain scans showed no condition that would have caused the plaintiff to have a seizure or spontaneous "blackout." The doctors found the plaintiff to be disabled by his injuries but able to return to work eight months after his fall.

The plaintiff brought this action in the Circuit Court of the City of Danville to recover damages under the FELA for his injuries. The case culminated in a three-day jury trial wherein the jury found for the plaintiff and awarded him damages in the amount of $336,293. The court entered judgment on the verdict and we awarded the defendant an appeal.

At trial, the plaintiff testified that he had no memory of any events after he dismounted the train to begin his walk south. He said: "It's like somebody flipped a switch." He had no memory of his hospital stay. He testified that he later had a vague, dream-like recollection of Teddy Lester, the engineer, looking down at him and of being placed on a "backboard." He said that continuous, accurate memory did not begin again until he was in therapy in July,

five months after the accident. As stated above, there were no eyewitnesses to the fall.

The plaintiff called as an expert witness Raymond Duffany as an expert in "railroad engineering practices, including track construction, inspection, maintenance and repair, especially with respect to railroad walkways." There was no objection to his qualifications. He had a degree in Civil Engineering and had been working in the railroad industry since 1975 as a construction engineer, an executive and as a safety consultant. He examined the scene of the accident in 2015, two years after the plaintiff's fall. He went over the scene with Terry Lester, the engineer, and examined depositions of other witnesses and photographs of the scene taken at the time of the accident. He concluded that the conditions he observed were substantially unchanged from those existing at the time of the plaintiff's fall.

The East Bradley pass track ran parallel to, and just east of the Norfolk Southern northbound main line. The terrain on the east side of the pass track sloped downhill at an angle of 20 degrees to the walkway the railroad provided for its employees to walk between the switch to the north and the derail to the south. The walkway ran along the foot of this slope. The eastern edge of the walkway extended to a cliff that dropped at an angle of approximately seventy degrees into a ravine over 30 feet deep. No guardrail or other protection was provided to prevent falls into the ravine. Both tracks, the 20-degree slope down to the walkway, and the walkway itself, were covered with "track ballast." These facts were undisputed at trial and were shown to the jury by photographs admitted into evidence.

Duffany testified that, at the point where the plaintiff had evidently fallen and gone over the edge of the embankment, the walkway was only 15 inches wide. At the north end, beside the switch, it was about 48 inches wide, but rapidly narrowed to 15 inches and remained at that approximate width all the way south to the derail. In his opinion, those conditions did not afford railroad employees a safe place in which to work. He testified that safety standards accepted by railroads throughout the country specify a minimum width of 24 inches for walkways.[1] He said that a walkway 24 inches wide "gives you that extra margin you have to recover from a possible fall or an area [in which] to fall [] other than over the cliff." He said that this is especially important when walking over ballast rock "which moves and tends to roll under foot traffic." A 24-inch walkway "give[s] you an adequate place to walk [and] if you do stumble on the ballast or trip, you have room to recover." The grade of a walkway, he testified, should be relatively flat, not exceeding seven to eight degrees in slope. For that reason, the area west of the walkway was unavailable to foot traffic as it sloped upward at an angle of 20 degrees. This state of affairs confined users of the walkway to a narrow and unprotected passage between the toe of the slope and the edge of the cliff.

Duffany also testified that the walkway was covered with "track ballast," defined as large crushed rock pieces 2 to 2 1/2 inches in diameter used to support and stabilize the main line of the railroad.

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[1] Duffany testified that these standards are specified by safety codes published by railroad safety engineering associations, are specified by safety manuals used by major transcontinental railroads and are codified into law in four states.

This large ballast is unsafe for foot traffic because of its tendency to roll or slide underfoot. Instead, he said that smaller pieces of crushed rock should be used in railroad yards and on walkways. This material, called "yard ballast," was about 3/4 inch in diameter, compacted well, was stable, and made a smooth walking surface.

ANALYSIS

The FELA, 45 U.S.C. § 51, was enacted by Congress in 1908, and has since been amended to serve the humanitarian purpose of imposing on railroads engaged in interstate commerce as common carriers the duty to provide their employees a safe place to work. Railroad employees who suffer injuries or death, to which a breach of that duty contributed, even to the slightest degree, were granted a remedy by way of a civil action for damages against the employer. The federal and state courts were given concurrent jurisdiction to adjudicate such actions. 45 U.S.C. § 56.

What constitutes negligence under the FELA is a federal question and federal decisions govern such cases in state courts. *Norfolk & W. Ry. v. Hodges*, 248 Va. 254, 260 (1994). Because the statute is remedial in nature, it is liberally construed by the courts in favor of railroad workers. *Rodriguez v. Delray Connecting R.R.*, 473 F.2d 819, 820 (6th Cir. 1973).

Under the FELA, a railroad has a non-delegable and continuing duty to use reasonable care to furnish its employees a safe place to work. *Norfolk & W. Ry.*, 248 Va. at 260. The employer must perform inspections to discover dangers in the place where employees are required to work and after discovering the existence of dangers the employer must take precau-

tions for the employees' safety. *Id.* at 260-61 (citing *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 558 (1987), and *Williams v. Atlantic Coast Line R.R.*, 190 F.2d 744, 748 (5th Cir. 1951)). Under the FELA, a breach of these duties constitutes negligence. The FELA also expressly excludes the traditional common-law defenses of contributory negligence and assumption of the risk.[2] Furthermore, a FELA plaintiff may carry that burden by proof that is entirely circumstantial. *Ackley v. Chicago & N. W. Transp. Co.*, 820 F.2d 263, 267 (8th Cir. 1987), *Norfolk & W. Ry. v. Johnson*, 251 Va. 37, 43 (1996); *Norfolk & W. Ry. v. Hodges*, 248 Va. at 260. Indeed, the standard of proof in an FELA action is significantly more lenient than in a common-law tort action. *Norfolk & W. Ry. v. Hughes*, 247 Va. 113, 116 (1994).

The issue of proximate cause is also treated more leniently in FELA cases than in common-law tort actions. In *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500, 506 (1957), the Supreme Court held that an FELA plaintiff need only show, "with reason[,] that the employer's negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought." (Emphasis added.) Ordinarily, the Court stated, that issue should be decided by a jury. *Id. See also Norfolk & W. Ry. v. Chittum*, 251 Va. 408, 415 (1996), *Stover v. Norfolk & W. Ry.*, 249 Va. 192, 199 (1995), *Norfolk & W. Ry.*, 248 Va. at 260.

At the conclusion of the evidence, the defendant moved the court to strike on the ground that the

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[2] An employee's contributory negligence, however, may be considered by the fact-finder in fixing the quantum of damages. 45 U.S.C. § 53.

evidence was insufficient to go to the jury. The court denied the motion.

The court then gave instructions agreed upon by counsel as correct statements of the applicable law, although the defendant preserved its objection to the court's ruling on its motion to strike. Among other things, the instructions told the jurors that there were two issues for them to decide: whether the defendant was negligent and if so, did that negligence play a part, no matter how small, in producing the plaintiff's injury. The jurors were told that they could use their common sense in judging the evidence and could draw all reasonable inferences from it. They were also instructed that the defendant had a continuing duty to afford the plaintiff a reasonably safe place to work and to maintain and keep it in a safe condition. A failure to perform these duties was negligence. As instructions given without objection, these instructions became the law of the case. *Online Res. Corp. v. Lawlor*, 285 Va. 40, 60-61 (2013).

On appeal, the defendant assigns two errors: (1) That the circuit court erred in admitting Duffany's testimony as it exceeded the scope of his expertise, was speculative and not based on facts in evidence "regarding how a wider walk path might have prevented some falls," and (2) That the court erred in failing to grant the defendant's motion to strike and motion to set aside the verdict because the evidence was insufficient to create a jury issue with respect to causation.

The admission of expert testimony rests within the sound discretion of the trial court and will not serve as a cause of reversal in the absence of an abuse of discretion. *Keesee v. Donigan*, 259 Va. 157, 161 (2000). Here, the defendant made no objection when

Duffany was offered as an expert witness. Aside from a bare and conclusory assertion that Duffany's testimony exceeded the scope of his expertise, the defendant makes no argument and cites no authority to that effect on brief. That argument is therefore waived. Rule 5:27(d), *Palmer v. Atlantic Coast Pipeline, LLC*, 293 Va. 573, 580 (2017).

The defendant objected at trial to Duffany's testimony that a railroad walkway should have a minimum width of 24 inches to be safe and that the walkway at the point above which the plaintiff was found was only 15 inches wide and therefore not in compliance with industry safety standards. The court overruled the objection. The defendant's opening brief expressly waives that objection on appeal. The only remaining assertion that Duffany made bearing on causation was the danger of 2 1/2 inch pieces of ballast rock shifting underfoot, leading to stumbling, tripping and possible falling. The defendant makes no challenge to this evidence on appeal. Moreover, to the extent that testimony fell outside the range of expert opinion, it was merely declaratory of matters within the common knowledge and experience of the jury. There is no error in permitting a witness to refer to such matters and the jury was expressly instructed that it could rely on its common sense in considering any testimony. Accordingly, we find no merit in the defendant's first assignment of error.

There were two issues before the jury, negligence and causation. The second assignment of error, like the first, does not address negligence. The jury's finding that the defendant was negligent in failing to provide the plaintiff a safe place to work is, for that reason, not before us. The second assignment of error presents the question whether the evidence was

sufficient to create a jury issue with regard to causation.

In FELA cases, causation may be proved by circumstantial evidence alone and does not require direct evidence. *Norfolk & W. Ry.*, 247 Va. at 116. The defendant's arguments on this question bring us to confront a significant difference between FELA cases and common-law tort actions.

The present case is one of a small but instructive group of FELA cases in which a railroad worker suffered injury or death while performing his duties where there were no eyewitnesses to the event. In *Lavender v. Kurn*, 327 U.S. 645, 648 (1946), a switch tender was found unconscious near a track. He soon died as a result of a fractured skull. *Id.* The injury was determined to have resulted from a blow to the back of his head from a small, round, hard, fast-moving object. *Id.* There were no witnesses to the event. *Id.* In the ensuing FELA action, the plaintiff introduced evidence that the injury was consistent with a blow to the head from a mail hook loosely dangling from the outside of a passing railroad car. *Id.* at 649. Evidence showed that if the decedent had been standing on a mound that was beside the track, the hook would have been in a position to strike his head. *Id.* The defendant railroad advanced the theory that the decedent was murdered by tramps in the area. *Id.* at 649-50. The railroad contended that the evidence showed that the mound was too far from the track to permit the hook to strike the decedent. *Id.* at 650. The jury found for the plaintiff and the trial court entered judgment on the verdict. *Id.* at 646-47. The Supreme Court upheld the judgment, expressly holding that in FELA cases "[i]t is no answer to say that the jury's verdict involved speculation and con-

jecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference." *Id.* at 653. The Court acknowledged that there was evidence in the case sufficient to support the defendant's theory as well as the plaintiff's theory, but that the choice of the proper inference to be drawn was an issue for determination by the jury. *Id.* at 652-53.

An even greater "measure of speculation and conjecture," *id.* at 653, was required in *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108 (1963). There, a railroad employee testified that while working on the railroad's right of way in a wooded, swampy area, he was bitten on the leg by a large insect which he crushed. *Id.* at 109. This occurred near a stagnant pool of putrid water containing dead vermin and birds, a condition that had existed for many years. *Id.* The bite resulted in an infected wound. *Id.* The infection did not respond to medication. It spread throughout his body and finally led to the amputation of both his legs. *Id.* None of his doctors could explain the etiology of his condition, but some of them characterized it as "secondary to an insect bite." *Id.* at 109-10. The jury found for the plaintiff and the trial court entered judgment on the verdict. *Id.* The Ohio Court of Appeals reversed on the ground that the evidence of causation was entirely based on the conjecture that the biting insect had come from the pool on the railroad's property, but it was also possible that it might have originated in any of several other nearby contaminated sources that were not under the railroad's control. *Id.* The Supreme Court reversed and remanded, holding that the evidence

was sufficient to frame an issue for determination by the jury. *Id.* at 116, 122.

Because the evidence of causation in unwitnessed cases is often entirely circumstantial and the result must depend on the inference to be drawn from the circumstantial evidence, the Supreme Court stated that it is not the function of an appellate court to search the record in such cases for conflicting circumstantial evidence "to take the case away from the jury on the theory that the proof gives equal support to inconsistent and uncertain inferences." *Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 35 (1944).

In *Bly v. Southern Ry.*, 183 Va. 162, 175 (1944), we cited *Tennant* in the year it was handed down, applying its holding in a case based on facts strikingly similar to those in the present case. There, a train stopped with its caboose on a railroad bridge. *Id.* at 165. The train's flagman was in the caboose. *Id.* It was his duty to dismount from the caboose and walk back a considerable distance to display a signal to warn any train approaching from behind of the presence of the stopped train on the bridge. *Id.* His body was found under the bridge from which he had fallen to his death. *Id.* at 166. The bridge provided no walkway on either side. *Id.* The only way to dismount from the caboose was by a flight of steps descending from the side of the rear of the caboose. *Id.* The lowest step extended two to three inches beyond the edge of the bridge. *Id.* Workers were expected to back down the steps, holding the left guardrail on the steps, and then to swing their bodies around to the rear of the caboose in order to find a footing. *Id.* The railroad presented expert testimony that the bridge met the safety standards prevailing in the industry.

Id. at 167. The trial court granted the railroad's motion to strike the evidence on the ground the plaintiff's theories of negligence and proximate cause were entirely based on conjecture. *Id.* at 169. Citing *Tennant*, we reversed, holding that the differing inferences that could reasonably be drawn from the evidence created an issue to be decided by the jury. *Id.* at 175-76. We continue to adhere to the construction of FELA that we expressed in *Bly*.

CONCLUSION

Because the issue of the defendant's negligence in failing to furnish its employees a safe place to work is not before us on this appeal, the sole question remaining is whether the evidence was sufficient to create a jury issue on causation. There was evidence to support the inference that the defendant's negligence played a part, however small, in causing the fall which was the source of the plaintiff's injury. The evidence may also have been sufficient to support an inference that the plaintiff's fall resulted from causes unrelated to the defendant's negligence. Under the settled principles governing FELA cases, that juxtaposition created a jury issue as to which inference should be drawn. *See Lavender*, 327 U.S. at 653 ("Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict [it] is free to disregard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."). Thus the present case is unlike *Norfolk & W. Ry.*, 247 Va. at 117,

where we observed that "the record [was] devoid of any facts" to support an inference favorable to the plaintiff on a required issue.

Armed with a jury verdict in his favor, approved by the trial court, the plaintiff is entitled to have the evidence, and all the inferences that may reasonably be drawn from it, viewed in the light most favorable to him, *RGR, LLC v. Settle*, 288 Va. 260, 283 (2014). He "occupies the most favored position known to the law." *Id*.

We find no error in the judgment of the circuit court and accordingly will affirm it.

Affirmed.

JUSTICE McCULLOUGH, with whom JUSTICE McCLANAHAN and JUSTICE KELSEY join, dissenting.

I respectfully dissent because, in my view, the plaintiff's evidence failed to establish the foundational "but for" causation that is required to establish the railroad's liability. Although the FELA has diluted the standard for *proximate* causation, a plaintiff must still prove "but for" causation. The plaintiff's theory was that the railroad was negligent in that it provided only 15 inches of level walkway instead of 24 inches, which, according to the plaintiff's expert, is the industry standard. The plaintiff theorized that the extra nine inches in width would have allowed the plaintiff to recover his step and avoid the fall. No evidence, however, supported this theory. No witness established where the plaintiff was standing or how he fell. There is, therefore, no basis in fact upon which a jury could draw an inference that the extra width would have spared the plaintiff from a fall, and the plaintiff thus failed to establish that "but for" the railroad's negligence, he would not have fallen.

I. THE FELA REQUIRES THE PLAINTIFF TO PROVE "BUT FOR" CAUSATION.

Causation is ordinarily a two-step inquiry. The first step is factual causation. "The requirement of factual causation is often described as the 'but for' or *sine qua non* rule. Generally a person is not liable to another unless[,] but for his negligent act[,] the harm would not have occurred." *Wells v. Whitaker*, 207 Va. 616, 622 (1966) (citing, *inter alia*, William L. Prosser, The Law of Torts 242 (3d ed. 1964)). The second step is proximate causation. "Proximate cause has been described as a shorthand descriptive phrase for the limits the law has placed upon an actor's responsibil-

ity for his conduct." *Id.* (citing Prosser, *supra*, at 240). "But for" cause is a predicate of proximate cause; it does not add to proximate cause. Without "but for" causation, there necessarily can be no proximate causation.

While, as the majority notes, "[t]he issue of proximate cause is also treated more leniently in FELA cases than in common-law tort actions," *ante* at 7, the plaintiff's burden of proving "but for" causation remains intact. In *CSX Transportation, Inc. v. McBride*, 564 U.S. 685 (2011), the majority and dissenting Justices disagreed about the scope of the *proximate* cause standard under FELA. Writing for the majority, Justice Ginsburg stated that it is not accurate to characterize precedent from the United States Supreme Court as eliminating "the concept of proximate cause in FELA cases." *Id.* at 700. Rather, she wrote, "[u]nder FELA, injury 'is proximately caused' by the railroad's negligence if that negligence 'played any part . . . in . . . causing the injury.'" *Id.* In dissent, Chief Justice Roberts pointed out that nothing in the majority's language "requires anything other than 'but for' cause." *Id.* at 710 (Roberts, C.J., dissenting). What neither the majority nor the dissent contested, however, was that, despite a relaxed standard of proximate cause, the FELA retains the requirement that the plaintiff prove "but for" causation – that is, that the plaintiff's harm would not have occurred but for the negligence of the defendant. In fact, the Justices agreed that more than "but for" causation is required to prevail under the FELA. *Compare id.* at 699-700 (majority opinion) (noting that Supreme Court precedent does not allow "juries to impose liability on the basis of 'but for' causation") *with id.* at 706 (Roberts, C.J., dissenting) (noting that "[n]othing in the FELA itself" or the

Court's precedent supports liability based on "but for" causation.).

II. THE PLAINTIFF'S EVIDENCE UTTERLY FAILS TO PROVE "BUT FOR" CAUSATION.

No evidence established "but for" causation. Neither the plaintiff nor any other witness could testify about how the accident occurred. Sumner has no memory about his fall. No other witness was there to observe the fall. The plaintiff's expert opined that the level portion of the walkway was too narrow: it was 15 inches wide when it should have been, at a minimum, 24 inches wide. The plaintiff's expert was unable to provide a causal link between the narrowness of the walkway and Sumner's fall. He was asked the following question:

> Q. You have no idea what role, if any, that that walk path could have played, he could have been looking over his shoulder, he could have been distracted, he could have been not paying attention, you have no idea, all we know is that he was walking south somewhere; isn't that true?
>
> A. Correct. [App. 150]

The plaintiff's theory was that a wider path would have provided an "extra margin . . . to recover from a possible fall." The evidence establishes only that the plaintiff fell. No evidence establishes where the plaintiff was situated when he fell. He could have been walking in the middle of the path, on the edge of the path, or off of the path altogether. No evidence establishes how he fell, or why he fell. From this evidence, a number of possible conclusions emerge:

- The plaintiff slipped, tripped, or stumbled in such a way that he pitched forward and fell with no opportunity to recover;
- The plaintiff fell because he lost consciousness due to some medical episode;
- The plaintiff was walking on the edge of the path such that the hypothetical extra width would not have helped him recover;
- The plaintiff was not walking on the level portion of the path at all; OR
- The plaintiff was positioned in the path *and* slipped, tripped, or stumbled in such a way that the extra inches would, in fact, have helped him recover his step and he would not have fallen.

There is no evidence that justifies a factual finding that this final possibility is the correct one – that but for a few extra inches of width on the level portion of the path, the plaintiff would have recovered and would not have fallen down the embankment.

III. PRECEDENT DOES NOT ABROGATE THE BEDROCK REQUIREMENT THAT A PLAINTIFF PROVE "BUT FOR" CAUSATION.

None of the cases cited by the majority supports a conclusion that juries may base a verdict on sheer speculation. In *Lavender v. Kurn*, 327 U.S. 645 (1946), a railroad employee, responsible for throwing switches in a railyard, was found dead with a fractured skull. *Id.* at 648. No witnesses observed what happened. The medical evidence was inconclusive. The doctor who performed the autopsy opined that the decedent's skull could have been fractured either

from a blow to the head with a pipe or from a small round object. *Id.* at 648-49.

The railroad's theory was that the employee had been attacked by vagrants who were known to ride the rails. *Id.* at 649-50. The railroad pointed to the fact that the employee's unsoiled wallet was found about a block from the place where he had been found, and the wallet had no money in it. *Id.* at 650. However, the employee's diamond ring and watch were still on his person. *Id.* No evidence established that a vagrant, as opposed to someone else at the scene, took the money from the deceased.

The plaintiff's theory was that the decedent employee was struck by the curled end or tip of a mail hook that protruded from the train as the train was backing up. *Id.* at 649. There was conflicting evidence about the position of the decedent's body and the height at which the decedent plausibly might have been standing so as to be struck by the mail hook. The plaintiff presented evidence that, when the mail car swayed or moved around a curve, the mail hook might pivot and the curled end could swing out more than three feet from the rail. The record also indicated that there were mounds of dirt and cinders of varying heights, with conflicting evidence regarding their proximity to the rails. *Id*.

In short, there was conflicting *evidence* from which the jury could draw inferences either in favor of the plaintiff's theory or the railroad's theory. As the Court stated:

> Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty

> it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion.

Id. at 653. This passage does not embrace speculation in any case, FELA or otherwise. Rather, this statement stands as a frank admission that, as Apostle Paul wrote, we see through a glass darkly, and so judges and juries are constrained to draw reasonable inferences as best they can from experience and logic. Indeed, the Court in *Lavender* expressly reiterated the need for "an evidentiary basis for the jury's verdict." *Id. Lavender* does not stand for the proposition that speculative evidence of causation is sufficient to submit a case to a jury. Instead, it stands for the unremarkable proposition that conflicting evidence from which a jury could draw opposite conclusions requires the trial court to submit the case to a jury.

In *Gallick v. Baltimore & Ohio Railroad Company*, 372 U.S. 108, 109 (1963), a railroad employee was bitten by an insect while he was working near a pool that contained dead and decayed rats and pigeons. The railroad was aware of the existence of this stagnant pool. The employee grasped the spot on his leg where he was bitten and crushed a large insect. The bite became infected. The infection worsened and ultimately necessitated the amputation of his legs. *Id.* Some of the doctors diagnosed or characterized the wound as "pyodermagangrenosa, secondary to

insect bite." *Id*. at 110. The jury returned a verdict in favor of the employee. *Id.* at 109. In reversing, the state court found the evidence of a causal link impermissibly speculative to justify a plaintiff's verdict, reasoning that the insect could have come from a nearby polluted river, or from "unsanitary places situated on property not owned or controlled by the railroad." *Id.* at 112. The Supreme Court reversed, citing the following:

> (1) insects were seen on, over and about this stagnant pool;
>
> (2) the employee stood near the pool for about a half a minute; then he started to walk away and was bitten on the leg after he took a few steps, perhaps one or two seconds later;
>
> (3) the employee had at times seen insects of about the same size as that which bit him crawling over the dead rats and pigeons in the stagnant pool;
>
> (4) two medical witnesses testified that stagnant, rat-infested pools breed and attract insects; and
>
> (5) the jury specifically found that the pool accumulated and attracted bugs and vermin. *Id.* at 113. These facts permitted the jury to draw a logical inference that the bug that bit the employee came from the stagnant pool owned by the railroad rather than from elsewhere and, therefore, the case was properly submitted to the jury. *Id.* at 114-15.

Finally, in *Bly v. Southern Railway Co.*, 183 Va. 162 (1944), this Court reviewed the sufficiency of the evidence for a railroad employee who fell to his death. His body was recovered at the base of one of the steel

piers of a bridge, "approximately under the point on the bridge where the caboose rested." *Id.* at 170. As a flagman, the employee was required to "leave the caboose and go back a sufficient distance to flag other trains that may be approaching from the rear." *Id.* at 165. There was no walkway on the bridge, and the deck of the bridge was uncovered. *Id*. at 165-66. To get onto the bridge, the flagman was required to back down the steps of the caboose and "swing around to the back of the cab and step on the deck of ties." *Id*. at 166. The caboose was wider than the bridge, forcing the employee to swing around to gain a footing on the bridge. The accident occurred at night and there were no lights on the bridge. *Id.* at 170.

The railroad argued that the employee could have fallen in any number of ways that did not implicate the absence of a walkway on the bridge. *Id.* at 175. For example, the employee might have attempted to light a cigarette and lost his balance, or may have been looking at his watch while walking. *Id.* Therefore, the railroad argued, the evidence did not prove a causal connection between the alleged negligence - the absence of a walkway on the bridge - and the employee's death. *Id.* at 174-75. Although the jury found in favor of the plaintiff, the trial court set aside the verdict. *Id.* at 164.

We reversed the judgment of the trial court. We observed that "[t]he focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury." *Id.* at 175. We also noted that a "reasonable inference *does not include speculative assumption*." *Id*. at 176 (emphasis added). Given the facts before the Court, "[t]he jury could have found from the testimony and the photographs that were introduced that the bridge here, without

a walkway, was obviously a dangerous place for a flagman to attempt to alight upon from a caboose." *Id.* at 169-70. In addition, the jury "could also have found that the manner of alighting from the caboose which was described by the defendant's expert witness, and not contradicted, was obviously dangerous." *Id.* at 170. The jury could draw a "legitimate inference of want of due care on the part of the defendant." *Id.* at 176.

There are some superficial similarities between the instant case and *Bly*: the plaintiff fell and no one witnessed the accident. The similarities end there. The facts presented in *Bly* permitted the jury to link the negligence of the defendant to the plaintiff's death. The railroad required the plaintiff to perform a dangerous, gymnastic-style maneuver, in the dark, to alight upon a bridge – and plunge to his death if he got it wrong. The plaintiff's body was found approximately under the point on the bridge where the caboose rested. *Id.* at 170. The jury could deduce that the dangerous conditions were the cause in fact of the plaintiff's death. In this case, no evidence permits an inference that extra width on the level portion of the path would have prevented the plaintiff's fall.

When a plaintiff presents sufficient circumstantial evidence that permits a factfinder to draw inferences from that evidence, as in the cases above, it is the reviewing Court's duty to see to it that the jury has the opportunity to weigh the evidence. Conversely, when evidence of causation is absent, a court has a duty to grant a motion to strike. *See Garza v. Norfolk S. Ry. Co.*, 536 Fed. Appx. 517, 521 (6th Cir. 2013) (dismissing FELA claim because no evidence established that a different locomotive design would have prevented a collision and, consequently, the plaintiff's

case was deficient for failing to establish "but for" causation); *Omega Protein, Inc. v. Forrest*, 284 Va. 432, 440-42 (2012) (reversing judgment in a Jones Act case for failure to prove that the allegedly negligent act, the failure to obtain an MRI, bore any causal connection to the plaintiff's injury); *Newton v. Norfolk S. Corp*., Civil Action No. 05-01465, 2008 WL 55997, at *8 (W.D. Pa. Jan. 3, 2008) (unpublished) (finding the plaintiff failed to establish "but for" causation under FELA because "there is no evidence . . . that at the time of the fall [the plaintiff] was on the [allegedly defective] bath mat" and further noting that "[t]he FELA's relaxed causation standard is not so relaxed as to allow the jury to speculate or guess when no evidence of cause in fact has been presented.").

This case bears a striking resemblance to *Fedorczyk v. Caribbean Cruise Lines, Ltd.*, 82 F.3d 69 (3rd Cir. 1996). Although *Fedorczyk* is not a FELA case, the "but for" causation principles at issue are the same. In *Fedorczyk*, the plaintiff fell in the bathtub while she showered and claimed the cruise line was negligent for failing to place adequate abrasive strips in the tub. *Id.* at 72. The plaintiff did not know "whether her feet were on or off the abrasive strips at the time of her fall." *Id.* Fedorczyk introduced expert testimony that the defendant "deviated from an acceptable standard of care in failing adequately to treat or texturize the tub, and that the spacing between the nonslip strips was the direct cause of Fedorczyk's injuries." *Id.* at 72.

The trial court granted summary judgment in favor of the defendant, and the Third Circuit affirmed. *Id.* The Court recognized "that the more stripping there is in the tub, the less likely it is a person would fall

because of inadequate stripping." *Id.* at 75. However, the argument "that inadequate stripping caused Fedorczyk's injuries [was] not based on any direct or circumstantial evidence of where she was standing when she fell." *Id.* at 75. "No evidence presented tends to prove Fedorczyk was standing either on or off the stripping at the time she fell. Without such evidence, the jury is left to speculate whether Royal Cruise's negligence was the cause in fact of her injury." *Id.* at 75.

Here, like in *Fedorczyk*, the record is devoid of any evidence tending to show what caused the plaintiff to fall. It is possible in this case that Sumner fell because the walkway was too narrow, just like it is possible that Fedorczyk fell because of inadequate stripping in the bathtub. But the law requires more. "A mere possibility of causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." *Id.* (quoting Restatement (Second) of Torts §433B (1965)).

IV. SUMMARY AND CONCLUSION.

The FELA holds railroads liable for employees' injuries "*resulting* in whole or in part from [carrier] negligence." 45 U.S.C. § 51 (emphasis added). "Resulting" is a term of causation. "The [FELA] does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in part' *the cause* of the injury." *Ellis v. Union Pac. R.R. Co.*, 329 U.S. 649, 653 (1947) (emphasis added). Sumner's fall, alone, is not evidence that connects the railroad's alleged negligence to his injury and it is not

a justification, by itself, for liability under the FELA. "If a defendant's conduct is not a necessary condition for the plaintiff's harm, it quite simply lacks the essential connection that is the glue for all tort claims." Michael D. Green, *The Federal Employers' Liability Act: Sense and Nonsense about Causation*, 61 DePaul L. Rev. 503, 511 (2012).

As one appellate court observed, some FELA cases have been submitted to juries based upon evidence "scarcely more substantial than pigeon bone broth." *Williams v. Nat'l R.R. Passenger Corp.*, 161 F.3d 1059, 1061 (7th Cir. 1998) (quoting *Harbin v. Burlington N. R.R. Co.*, 921 F.2d 129, 132 (7th Cir. 1990)). Here, the watery broth does not contain even pigeon bones. I would reverse the judgment of the trial court based on the failure to establish cause in fact.

APPENDIX B

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
CITY OF DANVILLE

Case No. CL15000079-00

MARK A. SUMNER,

Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

FINAL ORDER

THIS CAUSE came to be heard on the Complaint of the Plaintiff, together with all other pleadings filed on behalf of the parties herein. A jury trial presided over by the Honorable James J. Reynolds, Presiding Judge, was commenced on August 7, 2017. Following *voir dire* by counsel from both parties, a jury of seven (8) [sic] individuals was selected and sworn. The jury consisted of: Franmayca L. Adams, Susan L. Boulware (Alternate), Joanne M. Cassell, Kathryn H. Craft, Amanda G. Hosmer, Wendy B. Lewis, Brenda L. Pulley, and Carolyn Watkins. Once seated, the jury was sworn and was preliminarily instructed by the Court. Counsel for the parties presented opening statements, and then Plaintiff presented evidence before day one of the trial was concluded.

On August 8, 2017, Plaintiff presented and then concluded his evidence and rested. At the conclusion

of Plaintiff's case-in-chief, Defendant made a motion to strike on the grounds set forth in the record, which said motion was denied and Defendant's objection was duly noted. Defendant then presented evidence before day two of the trial was concluded. Following the Court's adjournment of the jury for the day, it then heard argument from counsel concerning proposed jury instructions.

On August 9, 2017, Defendant presented and then concluded its evidence and rested. Plaintiff then presented his rebuttal evidence and rested. At the appropriate time upon the conclusion of all of the evidence, Defendant then renewed its motion to strike on the grounds set forth in the record, which said motion was denied and Defendant's objection was duly noted.

Having provided counsel with an opportunity to object on the record to the granting or to the refusing of any disputed jury instructions, the Court proceeded to read the instructions to the jury. Counsel for the parties then presented closing arguments, and the Court gave the case to the jury for consideration. At this time, the alternate juror, Susan L. Boulware, was excused and did not participate in the jury's deliberations. The jury did submit one question to the Court, which the Court read to counsel and then submitted an appropriate response to the jury.

Afterwards, the jury returned a unanimous verdict in favor of Plaintiff in the amount of Three Hundred Thirty Six Thousand Two Hundred Ninety Three and 00/100s ($336,293.00). The jury was then polled and each juror audibly stated her agreement with the verdict. At the request of Defendant's counsel, Defendant was given leave of Court to submit any post-trial motions.

On August 24, 2017, Defendant timely filed a motion to set aside the verdict and to enter judgment for Defendant as a matter of law or in the alternative to order a new trial, and the issues were thoroughly briefed by counsel for both parties. Upon consideration of Defendant's motion to set aside the verdict and to enter judgment for Defendant as a matter of law or in the alternative to order a new trial, the memoranda submitted by both parties, and the argument *ore tenus* on October 12, 2017, Defendant's motion to set aside the verdict and to enter judgment for Defendant as a matter of law or in the alternative to order a new trial was DENIED for the reasons stated by the Court on the record at the hearing held on October 12, 2017. Defendant respectfully objects to the Court's stated rulings on the grounds as set forth more particularly in its memoranda filed previously in support and as argued by Defendant's counsel on the record at the October 12, 2017 hearing, which such objections are duly noted and preserved. Further, all objections of counsel for both parties to any of the rulings of the Court made throughout this proceeding, as reflected in the record, are duly noted and preserved.

It is accordingly ADJUDGED and ORDERED that judgment shall be, and it hereby is, entered in favor of the Plaintiff, Mark A. Sumner, against the Defendant, Norfolk Southern Railway Company, in the sum of Three Hundred Thirty Six Thousand Two Hundred Ninety Three and 00/100s ($336,293.00), plus interest on that amount at the judgment rate as set forth in Virginia Code § 6.2-302, as amended, beginning on August 9, 2017, and all taxable costs.

It is further ADJUDGED and ORDERED that, in the event that no appeal is timely filed, the Clerk

of this Court shall be, and hereby is, authorized to destroy or to return to the parties, if requested, all exhibits in this case, whether identified or admitted, forty-five (45) days after this Order becomes final.

And nothing further remaining to be done in this action, the Court does further ORDER that this action shall be, and it hereby is, dismissed with prejudice and stricken from the docket and placed among the ended matters.

The Clerk is directed to furnish forthwith a certified copy of this Order to counsel of record for each party to this action.

Entered this 24th day of October, 2017.

/s/ James J. Reynolds
Judge

SEEN AND AGREED:

/s/ Michael R. Davis
Willard J. Moody, Jr., Esquire (VSB No. 22866)
Michael R. Davis, Esquire (VSB No. 32880)
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Counsel for Plaintiff

SEEN AND OBJECTED TO FOR THE REASONS STATED IN THE RECORD AND IN ALL POST-TRIAL SUBMISSIONS:

/s/ Bryan Grimes Creasy

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Counsel for Defendant

A COPY TESTE:

GERALD A. GIBSON, CLERK

BY /s/ D. Scearce
DEPUTY CLERK

APPENDIX C

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 13th day of March, 2019.

Record No. 180121
Circuit Court No. CL15000079-00

NORFOLK SOUTHERN RAILWAY COMPANY,
Appellant,
against
MARK A. SUMNER,
Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Danville.

For reasons stated in writing and filed with the record, the Court is of opinion that there is no reversible error in the judgment from which the appeal was filed. Accordingly, the judgment is affirmed. The appellant shall pay to the appellee damages according to law.

This order shall be certified to the said circuit court.

Appellee's costs:

Briefs	$ 500.00
Transcripts	673.10

A Copy,
Teste: /s/ DBR
Clerk

APPENDIX D

[1] VIRGINIA

IN THE CIRCUIT COURT
FOR THE CITY OF DANVILLE

———

Case No. CL15000079-00

———

MARK A. SUMNER,

Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
a Virginia Corporation,

Defendant.

———

August 8, 2017
9:00 a.m.

———

HEARD BEFORE:

THE HONORABLE JAMES J. REYNOLDS

———

RAY REPORTING
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ROANOKE, VIRGINIA 24023
Raycourtreporting@gmail.com
Reported by: Kelly D. Hopkins

———

[2] APPEARANCES:

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BY: WILLARD J. MOODY, JR., ESQ.
MICHAEL R. DAVIS, ESQ.

Counsel on behalf of the Plaintiff

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540-767-2000

BY: BRYAN GRIMES CREASY, ESQ.
LORI JONES BENTLEY, ESQ.

Counsel on behalf of the Defendant

INDEX

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
For the Plaintiff:				
Raymond Duffany	9	63	86	94
Natasha Sumner	98	113	–	–
Mark Sumner	116	140	–	–
For the Defendant:				
Charles Blair	174	186	200	–

* * *

[25] repair, especially with respect to railroad walkways.

THE COURT: Mr. Creasy, do you wish to voir dire?

MR. CREASY: No, Your Honor. No objection to his qualifications as stated by counsel.

THE COURT: All right.

BY MR. MOODY:

Q Mr. Duffany, what is a walkway in railroad terminology? what does that mean to us?

A It's an area where employees have to walk in the performance of their duties.

Q Where would that be in the railroad, everywhere or just where?

A It would be areas that would generally be expected to be walked on by employees. You don't want somebody walking in an area that's unsafe.

Q How important is walkway safety to railroad workers?

A It's very important.

Q Why?

A Because railroad employees are generally working out in all kinds of weather. They work in the [26] light, the darkness, and they are working so close to moving equipment. This equipment weighs up in excess of a hundred tons. You can't afford to have somebody slip or stumble while they are doing their job working under those kind of conditions because it can lead to, you know, disaster, falling under the train, or stumbling under the wheels of the train or falling off a cliff or whatever.

Q Are there prevailing practices in the railroad industry regarding walkway design, maintenance, including its width and any slope that it should be or shouldn't be?

A Yes.

Q What distance is generally accepted in the railroad industry as the minimum that is safe for walkway width?

A The minimum width that would be considered safe for a walkway would be 24 inches, which isn't that wide. It's about your shoulder width or less.

Q Okay. Is there also –

A And many of the walkways, that's a minimum. In other words, the wider the better I say.

Q That's a bear [sic] minimum?

[27] A Yes.

Q What slope, if any, is generally regarded within the railroad industry as acceptable for what a walkway can or cannot be constructed or maintained at in order to be reasonably safe?

A Well, you want the walkway area to be relatively flat. You don't want to have irregularities in there. But the most a walkway should slope in any direction would be – and I will use terms of 8 to 1 slope. What that means is that's about – it equates to about seven degrees. If I can just show you like straight up, that would be 90 degrees. Flat would be zero degrees. This way would be 45 degrees. Seven degrees would be down about like that, something that would – you would have to have a trained eye to discern you were even on a slope.

Q Does the location of a switch or a derail where workers have to switch cars have anything to do with whether or not a walkway should be placed in that location and how it should be maintained? Does that have anything to do with it?

A Yes. If they are hand-operated switches, it means people have to walk around them. There has to be some sort of – they get off their [28] train or are out there switching. They have to walk in that area.

In this particular case, there was a switch. And then a couple hundred feet away from the switch, there's a derail. Those two have to be thrown in conjunction with each other. It means you have to walk from one to the other and back or vice versa. That's an area that would be normally expected to be walked on by railroad employees.

Q Have you been out to the East Bradley siding here in Danville, Virginia where this accident happened?

A Yes, sir.

Q Have you reviewed photographs that were taken at the north end of the East Bradley siding between the switch and the derail?

A Yes.

Q Those which were taken at the time of the accident, the very day of the accident?

A Yes.

Q And based on prevailing industry practices, should that area have had a walkway as you have described it for trainmen working there between the switch and the derail?

[29] A Yes.

Q What is a track cross section?

A A cross section, some people might refer to it as a profile. A cross section would be like if you took a loaf of bread and sliced it and then looked at it from the side, you can look at the top view, or you can look at the side view or a cross section.

Q Would a cross section of the track help you explain to the jury the components of a track and the walkway and widths and the slopes that it should or should not be to comply with industry prevailing practices?

A Yes.

MR. MOODY: Your Honor, if I may approach the witness?

THE COURT: Yes.

BY MR. MOODY:

Q Would you step down, sir?

A Sure.

Q Mr. Duffany, I put a poster board up in front of the jury so they can see it. Can you explain to them what we are looking at?

A Sure. This would be what we call a standard track cross section. What you have in this [30] is you have two areas. That would be your rails that the train runs on. This area right beneath the rails would be the railroad tie that it would be sitting on. Then level with the top of the ties out for a certain amount of distance, usually anywhere from six inches to 12 inches is standard on the railroads, is a level – a level slope. That's pretty close to the track, six to 12 inches away from the end of the ties.

From there your ballast slopes down. The industry standard is a 2 to 1 slope, which is about 26 degrees. That would be standard. Down here it would level off. If you have a walkway, either this is extended out level with the top of the ties and the slope goes down there or the ballast slopes down to an area just below the bottom of the ties and levels out for a period of – if it's a walkway, this is going to be at least two feet wide.

Q What type of material is used to build the track on?

A The railroad industry, they call it ballast. That's basically your crushed rock. There are different sizes of ballast depending on the type of track. This is – if this is a main track here, this would be what we call large ballast. It would be [31] two to two and a half inches in diameter.

Q You looked at the photographs. I'm going to show you Exhibit 3 in this case. Have you seen this picture?

A Yes, I have.

Q What type of ballast is used at the East Bradley siding?

A That's what I just referred to as large mainline ballast. That's two, two and a half inch ballast. It's used to support main track.

Q Are there other types of ballast that can be used to construct walkways?

A Yes.

Q What types?

A Generally they use two different types of ballast in the railroad industry. The large mainline ballast and the smaller yard ballast or walkway ballast.

Q Why do you use one or the other? Is there a purpose in using one or the other?

A Yes.

Q Can you explain what that purpose is?

A This ballast, the large ballast only performs functions related to the main track. In [32] other words, it supports the track. It does everything it's supposed to. It provides adequate drainage and everything.

In yards and other areas where you need track support but you also need to accommodate people that are walking there, they designed what they call yard ballast or small ballast. That serves all the functions of supporting the track structure plus it provides a reasonably safe work surface because walking on these large rocks, they tend to move under your feet and they roll, especially when they are on sloped surfaces. It's unstable for walking.

Q Are there any safety issues inherent in using large ballast in a walkway?

A Just that it tends to move under your footing. Your footing is not as good as it would be on smaller ballast.

Q Can large ballast itself present a risk for rolling or tripping or stumbling on?

A Yes.

Q Now, in what we were looking at as the cross section, I'm going to put an arrow to this area here. Is this sloped area part of a walkway?

A No.

[33] Q Is this sloped area, as I've marked with an arrow and a bracket, a proper area to – a safe area to walk on alongside a rail track to perform your work?

A No. As you walk on it because it is on a slope, it would tend to move and your feet would slide on it.

Q In this diagram, could you just draw on here, for the jury, if you would, where a walkway should be and what the minimum width of that walkway should be?

A If you have this configuration where you slope down to below the ties –

Q Let me ask you first, first you said one way to do it is they could continue – in some locations, you could continue it on out flat?

A Right.

Q The purpose is to provide a flat walking area at a minimum of two feet wide to walk?

A Minimum of two feet wide. That's two feet beyond the clearance of the car. In other words, the railroad car would overhang those ties. The railroad car would be like that. So you want to make sure that two feet is beyond that envelope so it's not [34] where he would be struck by a car. In other words, you wouldn't have the walkway right here because if there was a car there he could get struck. You would extend this out a bit and continue your slope.

Q But in a configuration as this cross section has shown, where should the walkway be and how should it be constructed as far as width?

A The walkway, which starts down in this area here, and would go that way at two feet, two feet minimum.

Q Okay. Thank you. You can return to your seat.

Mr. Duffany, what have you done in this case or reviewed in order to arrive at your opinions that you've reached in this case?

A I was asked to conduct a site inspection in June of 2015, which is about two years after this incident occurred. Then after conducting the site inspection, I was asked to review numerous depositions. You want me to read each?

Q No. Have you reviewed numerous depositions of the witnesses in this case?

A Yes, sir, I have.

Q Any other materials? have you reviewed [35] photographs that were taken the day of the accident?

A Yes, I have.

Q Have you reviewed Mr. Sherill's photographs, you know what they are?

A Yes, I have.

Q Have you reviewed other photographs that the railroad took?

A Yes.

Q Did you do a site inspection of the scene along the east side of the East Bradley siding?

A Yes, I did.

Q Did you take measurements when you did that inspection?

A Yes, I did.

Q Now, in doing that, did you compare the conditions that existed at the time of the accident in the photographs and the condition and the description of

those conditions with the conditions that existed when you went out there on that day?

A Yes, I did.

Q Did you arrive at an opinion as to whether or not those conditions were substantially similar or if there had been any material change in that scene as far as the walkway or the slope of the [36] track?

A Right. As part of my investigation, I had to determine whether there had been any substantial changes. In other words, what I was looking at was the similar or the same as what happened two years before. So what I did is I used the photographs that were taken on the day of the incident and I compared them to what I was looking at out there. I'm talking about in the area where he actually fell. I also reviewed testimony of certain individuals.

Q Okay.

A One in particular, I believe his name was Mr. Blair from – I think he was a train master, assistant train master. He stated there had been no changes made to the walkway area from the time of the incident until the time he was deposed, which was, I think, October 2015.

Q Yes, sir. Did you – were there any records – are you aware of any records of any changes, maintenance being done by the railroad in that area between the time of the accident and the time that you measured and inspected the yard?

A I haven't seen any. It is my [37] understanding the Defendant's expert had asked if there were any records –

MR. CREASY: Objection, Your Honor.

THE COURT: I'm going to sustain that objection.

BY MR. MOODY:

Q Are you aware of any records that exists [sic] that would indicate that there's been any maintenance, any construction, or any changes by the railroad's track department to the area where you inspected?

A As far as I know, there were none.

Q At the time you did your inspection, did you make measurements along the walkway beside the east side of the track?

A Yes, sir, I did.

Q The jury has heard some testimony from Mr. Lester. I'm looking at Exhibit 2. Mr. Lester described for the jury where the walkway along – do you recognize this photograph?

A Yes, I do.

Q Is this where you inspected?

A Yes, it is.

Q And took your measurements?

A Yes.

[38] Q Mr. Lester has told this jury that this red line that he drew along here is the walkway. Do you see that?

A Yes, I do.

Q During your inspection, did you determine where the walkway was along the side of the east side of the East Bradley siding?

A Yes, I did.

Q Is the line he's drawn consistent with the area you found to be the walkway?

A Yes.

Q And did you take measurements in this area?

A Yes.

Q Did you take measurements in the area where it was indicated Mr. Sumner had fallen from the walkway?

A Yes.

Q Okay. Let me show you another photograph.

MR. MOODY: Can we have the ELMO, Your Honor?

THE COURT: Do you have the exhibits marked?

[39] BY MR. MOODY:

Q Mr. Duffany, I'm showing you what's been marked Plaintiff's Exhibit No. 7. I will represent to you this is a – the jury has heard the testimony of Mr. Sherill. He's marked on this exhibit – here are his initials – that this was the area that the Plaintiff – he determined that the Plaintiff fell from the walkway down the side of the track, okay?

A Yes.

Q Did you take measurements in the walkway, what was considered the walkway, the flat portion of the area at this location?

A In that area, yes.

Q Can you tell the jury what the measurements showed the flat portion or the walkway was?

A Yes. The ballast slopes from the ties and it slopes down. It's hard to tell in a two-dimensional photograph the slopes and everything. It slopes down

for a period of time. Then it kind of goes into a U shaped trench and then back up.

Well, in that U shape trench is where that arrow is. That's the only area that was relatively level and that measured 15 inches wide. It measured [40] 15 inches wide all the way from the derail, all the way up to a point, I think, 71 feet north of the derail. According to the records, this incident happened – Norfolk Southern measured it at 56 and a half feet.

Q Okay.

A From the derail all the way to 71 feet, it was 15 inches wide. In that includes this area, which was at 56 and a half feet. If you go further north, the walkway gets wider up to the switch where it is in excess of four feet.

Q Did you arrive at an opinion, sir, to a reasonable degree of engineering certainty in the field of railroad engineering whether or not the track walkway in this area complied with industry custom and practice for maintaining a safe walkway?

A Yes, sir.

Q What is that opinion?

A That it was not safe. It was not a safe walkway.

Q Did it comply and comport with the industry standards for maintaining that track?

A No.

Q It was not maintained in compliance with [41] that prevailing practice, sir?

A That's correct.

Q Thank you.

MR. MOODY: Your Honor, please, I'm looking for – there they are.

Would you place that back up?

BY MR. MOODY:

Q I put the same Exhibit 7 back up, Mr. Duffany. I ask you: Is this area considered part of the walkway between the end of the ties and this track that the arrow is at, is that considered the walkway?

A No. It's hard to see in the photograph. The answer is no. The reason for it is because you have a pretty good slope there.

Q Did you examine this slope and inspect it to determine whether or not, in your opinion, it exceeded the 1 to 8, seven degree ratio you told the jury about?

A Yes. That's more like 20 plus degrees on that slope coming down. The standard ballast section is 26 degrees. This was a little bit less than that. As you can see, the ballast is falling away from the ties. It's 20-plus degrees versus what [42] it should be, 8 degrees for a safe walkway.

Q Do you have an opinion with a reasonable degree of engineering certainty as to whether or not the area between these ties and this edge is a safe walkway?

A Yes. It's not a safe walkway.

Q I show you what's been marked as Plaintiff's Exhibit 6. Have you seen this photograph?

A Yes, I have.

Q This is a PowerPoint, I will represent to you, that the railroad put together from their photographs and placed this information on it. Do you agree with

the statement on this picture that the walking path was five feet wide at this location where the accident happened?

A No.

Q Why not?

A Well, because you – most of that five feet is sloped. It's either sloped up to the track or it is sloped down over the bank. If you were walking on the right edge of the bracket there, you would be teetering on that cliff.

Q Over here on the right-hand side?

A The only section that's 15 inches wide [43] is above the M and the A.

Q Thank you. The jury has heard that the minimum is 24 inches. Your measurements were 15 inches. Can you explain to the jury how the additional width of that walkway may have reduced the likelihood of the risk of an accident in this case?

MR. CREASY: Your Honor, that's going to call for speculation on his part. There's not enough facts for him to formulate that opinion. We object on the grounds of speculation.

MR. MOODY: I think he can testify as to why that – what the purpose of that is and why –

MR. CREASY: He would have to lay a foundation as to what facts he can rely upon.

THE COURT: I think some foundation is probably necessary for him to express that specific opinion as to why the difference, what makes 24 inches safer than 15.

BY MR. MOODY:

Q That's the question, Mr. Duffany. Can you explain that to the jury?

A Yes. If you try to walk in a 15-inch [44] wide area, you would have a difficult time trying to do that. In addition to that, 24 inches gives you – and knowing that you are walking on that large ballast, which moves and tends to roll under foot traffic, if you do stumble or trip, it gives you that extra margin you have to recover from a possible fall or an area to fall in other than over the cliff.

MR. CREASY: Your Honor, he's not qualified as an expert in ergonomics or any of that type of mechanical – I mean he's a railroad engineer with regards to walk path. Now he's getting into areas dealing with ergonomics and how the human body works. That exceeds the scope of his expertise.

THE COURT: I don't think it does. I think he's entitled to express that opinion.

BY MR. MOODY:

Q You were explaining a minute ago about the contour of the walkway?

A Yes.

Q Can you describe that again as far as whether it was totally level or not? If you need to use any pictures to show that, if this would help you or if you have any better ones.

[45] A I kind of sketched out the cross section.

Q Did you draw the contour as you found it that would help you explain while [sic] you are testifying about?

A Yes.

MR. MOODY: Your Honor, can I get him down for just a moment?

THE COURT: Yes.

BY MR. MOODY:

Q Could you step down for a second? When you inspected the walkway, can you explain the contour of the walkway and the rocks around it, what you found it to be and how that might affect the safety of that? First, can you draw what you found as far as the contour?

A Sure.

Q You have notes you made?

A Yes. These are my field notes that I made.

Q Did you draw the contour of the walkway on your notes that day?

A Yes, just to give me an idea. When you are looking from the top, you don't see the three [46] dimensions.

Q Can you show that to the jury, what you found as far as the contour of the path in the area of the accident?

A I will start out with the railroad tie, the cross section we looked at before. In this particular case, the walkway area was on the right side.

Q Yes, sir.

A The ballast in this particular case didn't come up level with the top. It started two or three inches down. It kind of was not in a regular slope down. It was very irregular. When you got down here, it kind of

leveled out in that small area there. Then it kind of came up in the air three or four inches, in other words, a berm or a ridge, and then basically went down a steep slope at the bottom of the slope.

The area – in this particular area here, which is the area that I considered flat, relatively flat, that was less than a 70-degree slope. It was 15 inches wide. It was 15 inches wide from the derail all the way 71 feet north of the derail. This accident happened 56 and a half feet. So it was 15 [47] inches consistent in that area. That's generally what it was.

Q Did you take any exception to this contour as far as from a safety standpoint for a walkway?

A Well, if you are walking anywhere outside that 15 inches, you are on some sort of slope. If you step over here on this little ridge there, you are going to – it's going to move on that big rock. That big rock is going to move on you causing you to trip or stumble.

Q Can you put an arrow where you call the ridge?

A Yes. I can show you that on the photo where that is if you would like.

Q Yes, sir.

MR. MOODY: Do we have Exhibit A?

BY MR. MOODY:

Q Would this help you?

A Yes. As I said, the ballast started a couple of inches below the top of the ties. It sloped down here to the walkway area. Then you can see this line right here just to the left side of the red line, that was actually raised up in the air three to four [48] inches to the ridge, which you can't see unless you get down on the ground and look at it.

Q Based on your experience, would this area you've described as the ridge along the left side provide a stable walking area or footing for someone walking?

A No.

Q What problems can be caused by that type of condition?

A Well, if you are trying to stay on that 15-inch wide narrow path, you place a foot or whatever on top of that ridge, that ballast is going to move. It's going to cause you to go one way or the other.

Q If you are walking and put it there, it can go on you?

A It's going to roll when it's on a slope. All this area here – from here down to here is sloped, down to that. From the left of the red line is sloped.

Q If you are walking down –

A Or the drop there.

Q The reason you want the walkway to be wide is if you are walking and you stumble or something rolls, you catch yourself or you fall –

[49] MR. CREASY: Objection to form, Your Honor. It's leading.

THE COURT: Sustained.

BY MR. MOODY:

Q What's the purpose of having the 20-foot minimum or more walkway?

A Twenty-four inch.

Q Twenty-four-inch minimum walkway, what is the purpose?

A To give you an adequate place to walk if you do stumble on the ballast or trip, you have room to recover.

MR. MOODY: Thank you. You can take your seat.

BY MR. MOODY:

Q Mr. Duffany, do you have an opinion on whether or not the conditions along the east side of the East Bradley siding that we have been discussing is something that a reasonable railroad would have knowledge of?

A Yes. They would have to have knowledge of that because they are required to perform in that particular area at least twice – according to the railroad inspection guidelines, at least twice a week [50] there would be a track inspector in that area inspecting the track.

Q So they would have an opportunity to inspect and see these conditions?

A Yes.

Q And correct these conditions?

A Correct.

Q What type of equipment would it take to correct these conditions, how hard is it?

A Not very hard. Just any machine that has cantilevers on the railroad that can grade. Backhoes are frequently used. You run a backhoe down there and level that out.

Q Does the federal government have any standards for railroad track?

A Yes.

Q Who is the agency that does that?

A The primary agency that governs railroads is the Federal Railroad Administration or the FRE.

Q Does [sic] the FRE regulations touch on every aspect of railroad track construction or maintenance?

A No. They only touch on a small fraction. They have what they call the FRE track

* * *

[116] THE COURT: Any objection?

MR. CREASY: No, Your Honor. If she's not going to be recalled, that's fine.

THE COURT: Ms. Sumner, you may have a seat in the courtroom.

Next witness.

MR. DAVIS: We call Mr. Sumner, Your Honor.

MARK SUMNER

was called as a witness, and after having first been duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

Q Good morning.

A Good morning.

Q State your name for the record.

A Mark Anthony Sumner.

Q How old are you, Mark?

A Forty-four.

Q There's been testimony that you work for [117] Norfolk Southern. Do you still work for Norfolk Southern?

A Yes, sir.

Q How long have you worked for them?

A Six years.

Q Have you been a conductor that whole time?

A Yes, sir.

Q Did you work for any other railroads before coming to work for Norfolk Southern?

A Yes, sir.

Q Who was that?

A Yadkin Valley Railroad.

Q What is Yadkin Valley? Is that one of the big railroads like Mr. Duffany was taking about?

A No, sir.

Q Is that a short line?

A Yes, sir.

Q Where are they located?

A Rural Hall, North Carolina.

Q How long did you work for Yadkin Valley?

A Ten years and four months.

Q What kind of work did you do for them?

A They didn't say conductor. It was just [118] brakeman and engineer. Just about everything you can do on the railroad.

Q Was it similar to the work you perform for Norfolk Southern?

A Yes.

Q Why did you leave the Yadkin Valley and go work for Norfolk Southern?

A I was seeking better benefits and better pay.

Q You said that was six years ago. Do you remember when you hired on with NS?

A May 25, 2011.

Q Do you like your job?

A I love it.

Q Did you miss your job during the time you were out?

A Yes.

Q Did you want to get back to work as soon as you could?

A Yes.

Q I'm going to go back to February 26, 2013. There's been plenty of evidence that's the day this accident occurred.

Before that date, had you ever in your whole [119] life fainted?

A No.

Q Had you ever passed out?

A No.

Q Had you ever blacked out?

A No.

Q Had you ever gotten so dizzy you fell down?

A No.

Q There's been evidence in one of the doctors' depositions that you were taking a drug called Wellbutrin at the time of this accident in February of 2013. Were you taking Wellbutrin in 2013?

A Yes.

Q For what were you taking that?

A Stress/anxiety.

Q How long had you been taking Wellbutrin before the day of this accident?

A I was first prescribed that medication in 2006.

Q Had you taken it fairly regularly between 2006 and 2013?

A Yes, sir.

Q Had it ever caused you any side effects [120] such as fainting or dizziness or seizures or anything like that?

A No, sir.

Q You never had any problem with that drug at all?

A No.

Q Since February 26, 2013, as best you can recall, have you ever fainted?

A No.

Q Ever passed out?

A No.

Q Ever blacked out?

A No.

Q Had any problems with dizziness or vertigo or syncope?

A No.

Q Now, the date of the accident, the actual date, February 26, 2013, do you remember portions of that day?

A Yes.

Q What do you remember?

A I remember reporting to work. Specifically?

Q Yes. Where did you report?

[121] A Linwood, North Carolina.

Q About what time would you get to work in the morning?

A It was early morning, 4-5 o'clock.

Q Do you remember who you were working with?

A Teddy Lester.

Q Do you remember the number of your train?

A 36Q.

Q What were you supposed to do with that train?

A We were supposed to take it to Lynchburg, Virginia.

Q From where you were in Linwood?

A Yes, sir.

Q Were you supposed to make any stops that day?

A In Danville.

Q What were you going to do when you stopped in Danville? what was the plan?

A The original plan was to stop and set off what we call the cut, the Danville cut in the Danville Yard.

[122] Q What happened while you were en route?

A As we approached Danville, part of my duties is contact the tower and receive instruction. The normal move would have been to go in the yard, and I asked that. He said no, we are going to divert you to East Bradley because and then he gave me the reasons why.

Q So from that point on you knew you were going to go to the East Bradley pass track?

A Yes.

Q And put your cars there rather than leave them in the yard?

A Yes.

Q You remember that from that morning?

A Yes.

Q What's the last thing you remember from February 26, 2013, before this accident?

A Securing my train on the mainline.

Q Where?

A There at the clear point of East Bradley.

Q These ladies, as much as they've heard in the last couple of days, they probably don't know what that means.

[123] Had you brought your train into the area where the East Bradley pass track is located?

A Yes, I had.

Q When you first came into that area, were you riding on the engine with Mr. Lester?

A Yes.

Q Do you remember being on the engine with Mr. Lester?

A Yes, I do.

Q Now, did there come a time when you needed to get down from that engine?

A Yes, sir.

Q Why were you going to be doing that?

A Upon arrival, we stopped at – and you ladies have seen it demonstrated – at the clear point where the two tracks come together. That would be where I would dismount. And from that point, I would instruct Teddy to pull ahead holding that cut so many cars that belonged to them.

Q Can you see the cars in this photograph that you were going to leave on the mainline track?

A Yes. They are there on the mainline. That's mainline No. 1 right there.

Q Do you remember getting down from the [124] engine so you can cut those cars and secure them?

A Yes.

Q What do you remember after that?

A Nothing. It's like somebody flipped a switch.

Q Have you tried to recall the events of that day?

A I have – sorry. I have searched deep in my soul.

Q Have you asked others if they know what happened?

A Yes. Unfortunately nobody can tell me.

Q Do you have any memory of ever telling anybody that you passed out before this accident and that's what caused you to fall?

A No.

Q Do you have any memory of ever telling anybody you blacked out and that's what caused you to go down that hill?

A No.

Q Any memory of telling anyone you fainted?

A No, sir.

Q That you had blurred vision?

[125] A No, sir.

Q Do you know where any of that information came from or how it got communicated to any of your doctors?

A I do not.

Q This area of the East Bradley pass track, had you ever even worked out there before this day?

A No, sir.

Q Had you brought cars into the Danville Yard before?

A Yes, sir.

Q But never to this East Bradley pass track area?

A No, sir.

Q You never had to walk on this walkway?

A No.

Q You've never had to throw that switch or the derail that we have seen in the photographs?

A No, sir.

Q This was new to you?

A Yes, sir.

Q Do you remember what the weather was that morning when you left Linwood?

[126] A It was overcast, cloudy. It was misting rain, not really raining, but misting pretty heavy.

Q What about when you got in the East Bradley pass track, do you remember what the weather was?

A It was cloudy, cool.

Q Do you remember whether there was any precipitation when you got there?

A No.

Q Do you remember anything about the ground conditions after you got there?

A No, sir.

Q After you fell, once you are at the bottom of the hill, do you have any recollection of those events?

A No, sir.

Q What's the first thing you do remember after getting down from the train to make the cut and secure your cars?

A The first, what I'm going to call a memory at least somewhat, I remember feeling somebody pulling me from the back, like the back of my shirt. I remember feeling pulled, and I remember seeing Teddy. I remember seeing his face. He had such a [127] shocked look on his face. Then it goes black. And then I remember Bo real close to me, Bo Blair. He was like here. I remember him and then black again.

Q Do you know where you were when you saw Mr. Lester or Mr. Blair?

A No, sir.

Q What's the next thing you remember?

A A lot of noise. It was like static, radio static almost, and some crunching, grinding, which I would assume now after hearing testimony is they put me on a sled, a makeshift board.

Q That's what you heard. What is your first full memory after this event?

A First full memory? It's hard to say because it's just like a dream. It's little pieces and snippets. It's tough to say.

Q Had you ever had a concussion before this incident?

A No.

Q Never had any type of closed head injury, any problem with that?

A No, sir.

Q What is the first – certainly you have some memory since February 26, 2013. What's the first [128] thing you really remember after this accident?

A A full, what I would call a full clear day memory being in physical therapy. I remember I got to drive, at least try.

Q Your wife just said that was in July 2013?

A Right.

Q Let's go back a little bit. You were in the hospital from February 26th to February 28th. Do you have any recollection whatsoever of your hospital stay?

A No, sir.

Q Do you remember saying anything to anyone during that time about how this accident happened?

A No, sir.

Q You don't remember anything from that hospital stay?

A No, sir.

Q What about the first surgery you had on your shoulder in March of 2013, March 14th, do you have any memory of that operation?

A Not really.

Q Do you remember snippets of it or some [129] of that event?

A What I thought I remember now seems to me I'm remembering my colon surgery that I had a year prior.

Q You had surgery on your colon in 2012?

A Uh-huh.

Q Is that memory of that more clear than your memory of things that happened during the six months after this accident?

A Yes.

Q Go back to the yard on February 26th – not the yard, but the East Bradley pass area. On February 26, 2013, before you got there or as you arrived in that yard, did you and Mr. Lester have what's called a job briefing?

A Yes.

Q What is the purpose of a job briefing? what is that on the railroad?

A A job briefing is very important between crew members, especially if there's just two of you. Myself and the engineer have to be on the same page as to what we are going to do and how we are going to do it. Even as simple I would say to Teddy when I'm on the ground and I give you direction, I will say pull [130] north or shove south. You even go as far as direction. It's pretty detailed.

Q You talk about the moves you are going to make?

A Yes, sir.

Q Before you make them?

A Right.

Q Before you even got down off the engine to make that cut and secure those cars, did you know what you were going to do once you got into the East Bradley Yard?

A Yes.

Q That's true even though you had never worked in that yard before?

A Yes.

Q Would any of the work that you needed to do that morning in the East Bradley tracks have required you to walk on this path between the switch, which we can't see in this photograph, and this derail in this area on Exhibit 2?

A Yes.

Q Based on your job briefing, why were you going to have to be in that path?

A To operate the switch and derail.

[131] Q Do you have any memory whatsoever of walking on that path?

A No.

Q I'm going to show you Plaintiff's Exhibit 1. Mr. Sherill testified that he saw you cross the track when you got down from this cut of cars on the main. You got down, he testified you crossed this track up here where the switch is –

A Okay.

Q – and that you walked out of his sight and he couldn't see you anymore. Based on your job briefing, was there anything that you were supposed to be doing in the East Bradley pass area that morning that would have had you walking between the mainline and the East Bradley pass track in this area here?

A No.

Q But east of the siding, east of the pass track, was there any work that you intended to do that morning, based on your job briefing, that would have required you to walk over there?

A Yes.

Q That's getting to the switch and derail?

A Yes, sir.

Q Is there a switch timer or timer box at [132] this area?

A Yes, sir.

Q How does that work? why is that there?

A It's to either allow you or prevent you to opening that switch.

Q Did you have to activate that timer before you can throw the switch?

A Yes.

Q Do you have to activate that timer before you can throw the derail?

A Yes.

Q Is it permissible to activate the timer, go get the derail, then come back and throw the switch?

A Yes.

Q Is there anything that would prevent you from doing that?

A No, sir.

Q Is there anything based on your job briefing that you would have done that in that order on the morning of this incident?

A Is there a reason I would have?

Q That you would have done it in that order, get the timer, go get the derail, come back and [133] get the switch?

A Yes.

Q Why was that?

A I now see that I could knock time down, go get the derail, come back and line the switch, and catch up on the car.

Q You were going to be walking back towards the switch anyway to get back on the car you dismounted?

A Yes.

Q Why were you going to do that?

A I was going to ride the shove in.

Q Rather than being on the ground and calling him back on your radio, was it permissible for you to get back on the car and ride back into that siding?

A Yes.

Q Is that, based on your job briefing, what you intended to do?

A Yes. There's a rule that states you have to be at, on, or ahead of the shove group, so considering I was setting or going to set off so many cars over there.

Q How many cars were you going put in this [134] side yard?

A Originally 21, but we changed it to 18.

Q Why was that?

A If I had set the original amount of cars off in the pass track, I would have had what we call a bad head end in on the mainline to continue to Lynchburg. You can't do that.

Q Mr. Lester testified about that yesterday to the jury. Who figured that out, was that you or him?

A I did.

Q Before you ever got to the yard?

A Yes.

Q What injuries are you claiming in this accident?

A Closed head injury, concussion, collarbone, shoulder area, tongue, ribs.

Q What happened to your collarbone?

A I broke it pretty bad.

Q How many surgeries or surgical procedures did you go through in order to get that fixed?

A Two.

Q How many ribs did you break?

[135] A Three.

Q Did you have to have any treatment or surgery or anything for your ribs?

A No, sir.

Q They heal on their own?

A Right. The only reason I would have had to have surgery for the ribs is if they were out of place. They were not.

Q Does that make it any less painful to recover from broken ribs?

A No, sir.

Q Had you ever broken a rib before that you can remember?

A Yeah.

Q You broke three in this incident?

A Yes.

Q We saw pictures of your tongue during your wife's testimony. Is that fully healed?

A No, not completely.

Q Do you still have an area of your tongue that –

A I have a flare-up every now and then.

Q I don't want you to stick your tongue out at the jury, but I do want them to see. Are you [136] able to show them that underside, left side of your tongue? Turn to them and show them what it looks like today?

A I suppose.

THE COURT: If you want to approach the jury box and they can see it more clearly.

THE WITNESS: I don't normally do this. Just with my dental hygienist.

BY MR. DAVIS:

Q Thank you.

A Yes, sir.

Q We have heard testimony of the surgeries that you underwent. Do you have surgical scars from going through those procedures?

A Yes, sir.

Q We have heard mention but not a lot of testimony that you went to physical therapy during the course of your recovery and you just testified about getting your driver's license, being told you could drive about the time you started physical therapy.

How much physical therapy did you do in trying to regain use of your shoulder and collarbone?

A I had 46 physical therapy sessions over a 90-day period.

[137] Q What 90-day period are we talking about?

A From July, August, September.

Q About how many times a week were you going to physical therapy?

A Mondays, Wednesdays, Fridays.

Q Were there periods of time where you went more often than that?

A Yes, sir. Sometimes I went every day.

Q Did you follow your doctor's instructions with respect to going to physical therapy and taking medications and doing everything you needed to do to get better?

A Yes, sir.

Q When did you finally return to work?

A Thanksgiving Day, it was Thanksgiving.

Q Late November of 2013?

A Yes.

Q The railroad has indicated they are willing to stipulate in this case that you lost wages of $36,293, that is after income taxes, while you were out of the work after the accident. Do you agree that figure is accurate for your wage loss?

A Yes.

Q If you went back in November of 2013, [138] you have been back to work more than three years. Do you still have any symptoms or problems that are related to this accident other than what you showed us with your tongue?

A I still write notes to myself.

Q To help you with your memory?

A Yes.

Q Did you do that before this accident, did you write notes to remind yourself of things?

A No, sir.

Q Did you feel like you had a fairly good memory before this accident?

A Yes, sir.

Q Did you have physical issues that still exists [sic] that you relate to this accident?

A Yes. At nighttime, if I don't sleep quite right, I get on my shoulder, it wakes me up during the night.

Q How frequently does that happen?

A At least twice a week.

Q Did you ever have a problem with shoulder pain disrupting your sleep prior to February 26, 2013?

A No, sir.

[139] Q Any other current problems related to your accident?

A No, sir.

Q Mark, what have you lost as a result of this? Apart from the wages and not being able to work for six months, what has this meant to you?

A It's meant a lot. It's hard to explain. It's almost like I'm a totally different person. Especially to hear my wife and children and people I know, they say I'm not who I was prior to the accident. Then you say can you explain that. A lot of times they just say no, you –

MR. CREASY: Your Honor –

BY MR. DAVIS:

Q You can't testify to what they've said. I want to know how you feel different.

A How I feel different? I don't feel like myself.

Q In what way?

A I don't feel as sharp and maybe as responsive. I feel older if you will.

Q In spite of that, you've worked full-time since November 2013 when you were paid to do that?

[140] A Right.

Q Do you feel like in any way that the problems you are describing prevent you or make you less able to perform your job for the railroad safely?

A I can do my job safely.

MR. DAVIS: That's all the questions I have. Thank you.

THE COURT: Mr. Creasy.

MR. CREASY: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. CREASY:

Q Good morning, Mr. Sumner. Going back over your testimony a little bit, after making the cut, which has been described to this jury over the last couple of days, after making that cut, you don't recall anything else?

A No, sir.

Q You don't remember being on the walk path?

A No, sir.

Q You have no independent recollection of where you fell?

[141] A No, sir.

Q You don't know what caused you to fall, do you?

A No, sir.

Q You don't even know if you were on that walk path before landing in that ditch, do you?

A No, sir.

Q You don't even know whether that walk path is what caused you to fall, do you?

A No, sir.

Q You have no knowledge whatsoever of how you ended up in that ditch on that day, do you?

A I would say ravine. No, sir.

Q Ravine, that's fine. You have no knowledge of how you ended up in that location?

A No, sir.

Q You have no idea at all what caused you to end up, using your term, in that ravine?

A No, sir.

Q Now, Mr. Davis mentioned to you about some of the statements that were made to the medical providers that you denied or don't recall making. But with regard to Dr. Sinha, last name S-I-N-H-A, on February 26, 2013, which was the date of your [142] accident, do you recall describing to him a passing out type of episode?

A I don't know who that is, sir.

Q So my question to you is: You don't recall describing to a medical provider in the emergency room at Danville Regional Medical Center about a passing out episode?

A No, sir.

Q With regard to a Dr. Hurtado, February 27, 2013, again, Danville Regional Medical Center, again do you recall describing to him a passing out type of episode?

A No, sir.

Q Going unconscious?

A No, sir.

Q Then again on February 27, 2013, to a Dr. Boro, again at Danville Regional Medical Center, do you recall telling him that you blacked out or you suffered a blacking out type of episode?

A No, sir.

Q So your testimony today is that you don't recall making three separate reports to three separate doctors on three separate occasions about passing out or blacking out as being what caused you [143] to fall?

A No, sir.

Q So is it your testimony today that they just got – all three doctors on all three separate occasions just got it wrong?

A How can I testify to that question?

Q That's certainly the suggestion that you are making is that all three doctors on three separate occasions put in their medical records facts that they received from you that – my question is: Is it your contention they all just got it wrong?

A I suppose.

Q Now, with regard to your right shoulder injury that you described, that has all been – your treatment and care has been completed?

A Yes, sir.

Q You have been discharged from any further care?

A Yes, sir.

Q And with regard to your collarbone injury, same question, treatment there has been completed?

A Yes, sir.

Q You have been discharged from any [144] further care?

A Yes, sir.

Q Treatment for your tongue has likewise been completed I understand?

A Completed but left open.

Q You have been discharged from any further care; is that correct?

A Yes, sir.

Q Same with the concussion, your treatment there has been completed?

A Yes.

Q And you have been discharged from any further care there?

A Yes.

Q You are not on any type of prescription medication with regards to the various injuries you described here today for the jury?

A No, sir.

Q I understand your discussion with Mr. Davis about your sleeping issues with regard to your shoulder. But separate and apart from that, you don't have any other pain issues with your claimed areas of injury?

A No, sir.

[145] Q You returned to work on November 24, 2013?

A Yes, sir.

Q And you returned to work as a conductor?

A Yes, sir.

Q Which was your pre-incident job position?

A Yes, sir.

Q And you were returned to work to full duties with no restrictions?

A Yes, sir.

Q And there have been no restrictions placed on any of your recreational activities or limitations in that area?

A No, sir.

MR. CREASY: Thank you, Mr. Sumner.

MR. DAVIS: Nothing further, Your Honor.

THE COURT: Thank you, sir. You may step down.

MR. DAVIS: Plaintiff rests, Your Honor.

THE COURT: All right. Ladies of the jury, it's not quite time for lunch. What we are going to do is we have some housekeeping matters we need to take care of. If you will [146] step back to the jury room. As soon as the lunch is delivered, we will bring that into to you. Thank you.

(The Jury was excused from the courtroom.)

THE COURT: Mr. Creasy.

MR. CREASY: Thank you, Your Honor. Your Honor, at the close of the Plaintiff's evidence, the Defendant, at this time, would make a motion to strike the evidence and find a ruling in favor of Norfolk Southern.

Your Honor, we had filed a pretrial memorandum on the liability issues in this case. Just to summarize quickly what the points we raised in that memorandum, the liabilities in this case, Your Honor, are whether Norfolk Southern was negligent and whether any such negligence, if proved, resulted in whole or in part Plaintiff's injuries.

Now, FELA, Your Honor, is still a common law negligence case. Now, the Plaintiff's [147] attorneys would tell you – and it is that the causation part or factor of that has been lessened by the Supreme Court, but the actual negligence is still common law. So it still must be proved. Once you establish the negligence, then the at whole or in part statutory language with regard to causation, that's where the standard has been lessened. There is still a requirement that negligence be proven.

Now, in this case, we cited in our brief, Your Honor, Conrail v. Gottshall, 512 US 532, 1994, U.S. Supreme Court case. The Court ruled that the issues related to the creation of a jury issue under FELA, that is whether the evidence is sufficient to establish the existence of a duty and sufficient to show a breach of duty are governed by traditional common law principles rather than the relaxed standard of proof applicable to FELA causation. Gottshall affirmed that the FELA is not a workers' compensation statute. It affirmed that the railroad is not the insurer of the safety of [148] its employees. The bases [sic] of liability is negligence, not the fact that injuries occur. So we are talking principles of common law.

If you are looking at that, the Plaintiff has the burden of proving by the greater weight of the evidence that the Defendant was negligent. The fact that there was an accident and the Plaintiff was injured

does not in and of itself entitle the Plaintiff to recover. Fundamentally to prove liability, Plaintiff must prove how and why this accident occurred. He must also prove that the Defendant's negligence was a causal factor in that accident. It's incumbent on the Plaintiff to show why and how the accident happened. If that is left to conjecture, guess, or random judgment, he cannot recover.

The Supreme Court's most recent analysis of causation under the FELA was in the McBride, case, Your Honor, CSX Transportation, Inc. v. McBride, 564 US 685, 2011 case. In that ruling, the Court expressly rejected the idea that Rogers, [149] which was an earlier case, had eliminated the concept of proximate causation in FELA cases. Instead the Court ruled that Rogers had described the appropriate test for proximate causation in an FELA action. The Court also rejected the idea that the Rogers formulation permitted a jury to impose liability on the basis of mere but for causation, so remote but for causation will not suffice.

Now, when we look at the evidence in this case, Your Honor, no one can put him on that walk path. Nobody knows what happened that day. The Plaintiff doesn't know. Mr. Sherill didn't know. Nobody saw what happened. Nobody knows what role, if any, this walk path played in this. It is all left to conjecture or but for.

Mr. Duffany is here desperately trying to say well, it's 15 inches when I measured; and therefore, there's the breach in duty, there's the negligence. How did that 15 inches cause or contribute to this accident? We don't even know where the Plaintiff was. He doesn't know where he was. Therefore, [150] they cannot show how or why this accident occurred. All we really have is that Mr. Sumner was seen walking south towards the derail. Mr. Sherill couldn't place him on that walk

path. As hard as Mr. Davis was trying to get him on that walk path, Mr. Sherill couldn't confirm that he was on the walk path. The next thing we know, he's down in the ravine.

So what, if any, role, what, if any, cause did this path have? There's no evidence whatsoever to show that. What was the – when the railroad came back to try to investigate post-accident, they are making a lot of assumptions as to where he was or what happened; but there's no factual evidence to support it.

So where this case falls down, Your Honor, is they are trying to put before this Court and this jury that walk path was too narrow. But they can't show how that caused or contributed to the accident because nobody knows if he was even there when he fell. Nobody knows what, if any, role that 15 [151] inches, assuming that's what it was – and I know that's the weight of evidence where we found it to be five feet. Again, in the light most favorable to the non-moving party, there's no evidence to say that that's where he was when he fell or what he was doing or what role, if any. Where they are is just a but for.

Their argument essentially is he was on the job, he fell, he was injured; therefore, he should recover. The U.S. Supreme Court cases said that's just simply not enough. A mere fact of an incident and injuries is not enough to carry their burden in an FELA action even with the relaxed causation standard.

Based on the law and the evidence as we presented and argued within our brief, Your Honor, Defendant's pretrial memorandum on liability issues, we contend that in the light most favorable to the non-moving party, there is not sufficient evidence, even at this stage, to show how or why this incident occurred.

Therefore, the Plaintiff has [152] failed to meet their burden. We would ask the Court to grant the motion to strike and rule in favor of Norfolk Southern Railway Company.

THE COURT: Mr. Moody.

MR. MOODY: If it pleases the Court, I would like to start calling the Court's attention to we filed, also, a pretrial memorandum. One of the reasons we did that was to call the Court's attention to the fact that under the FELA, the Court looks to federal substance of law to control the issues of sufficiency of the evidence as with negligence and with respect to the issue of causation. Federal law controls. Under that federal law, if the Plaintiff can prove anything happened on part of the railroad, he's entitled to recover.

Now the Court has also –

THE COURT: So long as that negligence played a part in causation.

MR. MOODY: The first thing I would like to say is I think there's been sufficient evidence in the record from which the jury [153] could find that the conditions on the railroad – the railroad was negligent with respect to the maintenance of the walkway. Mr. Duffany's testimony in and of itself would be sufficient for the case to go to the jury. He testified that the industry custom and practice was that the walkway here was not wide enough and did not comply with the industry custom and practice, it violated that custom and practice, and he explained the reasons why it did not comply. He also gave the jury evidence of what other railroads do.

When a jury is determining whether or not this railroad acted reasonably, one of the things in deter-

mining whether or not they were negligent is they can compare this railroad's conduct to conduct and practices of other railroads. We heard from the evidence what Mr. Duffany said were the practices on the UP and the practices on the Burlington Northern. This walkway did not comply with those customs and practices.

Also is evidenced of whether or not this [154] railroad acted reasonably and maintained the walkway safely. I believe there was evidence from what states had done when they decided to codify walkway standards that this jury could look to determine whether this railroad complied with those standards or acted reasonably. They can look to that as evidence of whether or not this railroad acted reasonably, whether or not this railroad was negligent. I think there's plenty of evidence on that.

It seems that the real fight here is on the issue of causation. The most recent case was McBride versus CSX. McBride versus CSX clarified the standard that was sent down back in 1957. What it said is if the railroad's negligence played any part, even in the slightest, in whole or in part in causing the accident, the Plaintiff is entitled to have that case go to the jury and can recover based on that evidence.

Another thing that the Supreme Court and the federal courts have said in looking at that standard, they said juries have broad [155] latitude in looking at the evidence in the case and relying on even circumstantial evidence from which they can infer that the negligence of the railroad may, even in the slightest, have caused the accident to occur. Now, in this case, first not only do we have – we have direct evidence that the walkway did play a role and it's in evidence. This is document – I don't have the exact exhibit number. It is the emergency medical technician's record.

THE COURT: It's 12.

MR. MOODY: Exhibit 12 that was offered in evidence by the Plaintiff that states specifically – and it is in evidence before this jury. It states they got there, he stated he was complaining of pain in his right shoulder and right side of his chest. He did state that he got off the train to check something on the train. He was walking on the far right-of-way, which the jury can take to mean this walkway, when he lost his balance – it says "bance," but clearly it means balance – on wet gravel and fell.

[156] Now, that's direct evidence that he lost his balance and fell. The only reasonable interpretation of that evidence and what happened, which a jury can make in this case, is that he fell from the walkway. Surely – and we know Mr. Sherill who marked on another exhibit – are these the exhibits? – exactly along the walkway where the Plaintiff fell. The only way for him to have gotten there is from that walkway. It's theoretically impossible for him to have fallen from the other side of the track over.

We know from the evidence of the Plaintiff himself that their job briefing was that he was going to go to that switch, they were going to go there, put the cars in that track. And to do that, he would have to be on that side of the walkway. That was the plan going in. The jury has heard that. From that, they can infer he was on that walkway when he lost his balance. Any reasonable interpretation of where he was in this case, there's no evidence, direct evidence he was anywhere other than on that [157] walkway when he fell.

Now, if you look at the FELA cases, the Lavender versus Kurn case we submitted to the Court – and I have them here with me if you would like a copy.

Lavender versus Kurn was a case where a brakeman was working in a yard and was supposed to be handling some train movements. Essentially there was a train movement that occurred and then they found the plaintiff dead in the yard with a head injury. Nobody saw the accident happen. Nobody knew how the accident happened. There was a lot of different circumstantial evidence of what could have produced that accident to occur.

One theory was a nail hook on the side of a passenger car may have hit him if he was standing on a mound in an exact position that he may have been in, which there was no evidence he was actually there, or there was evidence that potentially a hobo or someone had knocked him in the head and that's what killed him. They knocked him in the head and robbed him. Those were the two competing [158] theories. Plaintiffs recover.

On appeal, the court reversed it and said that was insufficient evidence to go to the jury. On appeal to United States Supreme Court, the U.S. Supreme Court said that it was not up to the judges in the courts to determine in FELA cases what a jury might infer from those circumstantial facts. In an FELA case, they want these cases to go to juries even based on – they give juries wide breadth on inferences they can base – and circumstantial evidence they can base inferences on. That was the Kurn case –

The Gallick case is a famous case. It is called the "Bug Bite Case" among all the FELA attorneys. In that case, a brakeman was working outside of Cincinnati on the B&O Railroad when he sustained a bug bite and ultimately had an infection. He alleged he had been bitten by a bug. That ultimately ended in an infection that had him lose his leg. He alleged that he was most

likely bitten by a bug from a pool that was left there on the railroad property that had been [159] allowed to be infested with vermin and bugs and the railroad didn't clean it up.

In that case, they said there was no direct evidence that the insect had any connection with the pool of water or evidence. The Supreme Court held that that appellate court had erred taking – reversing that verdict for the plaintiff. It said it erred in either requiring direct evidence that the insect had a connection with the infested pool or more substantial circumstantial evidence that the pool created the condition that furnished an environment that attracted and infested insects.

THE COURT: I don't understand – I mean one of the things I'm having difficulty with is – circumstantial evidence is entitled to be used just as direct evidence is. I've got no problem with that. But if you are relying on circumstantial evidence, doesn't there have to be sort of a chain that follows? I mean can it just be circumstantial evidence, somebody could have, you know, thrown a rock at them from an adjacent highway and he fell [160] down because of that? Where does the proof got to be? Do you have to have any proof or do you just have to say essentially what Mr. Creasy is arguing, you have a but for? Is that basically where you are?

MR. MOODY: I'm not saying it's but for. I think that's an incorrect analysis of the evidence in the case. I think the evidence we presented is that he's testified this is where my job was carrying me that day, this was our plan, this is where I was going. Mr. Sherill says I saw him get down off the car, cross over the track onto the same side as the walkway, and saw him

start walking down that walkway. Mr. Sherill places him that this is where he fell on that walkway.

THE COURT: Okay.

MR. MOODY: All those things, Your Honor, are evidence.

THE COURT: But –

MR. MOODY: Can I finish? The jury can say that's plenty of evidence from which they decide I believe he was on the walkway. They can make that inference based on that [161] evidence. Then the evidence shows that he says, he said I slipped and lost my balance on wet gravel, okay.

THE COURT: So is the railway – if that's the evidence, is the railroad required to have only dry gravel?

MR. MOODY: I'm not saying that. We are saying that this walkway was not in compliance with, like we said, what the industry practice and standard is. And what the jury can decide, they can decide that he equally – even if you believe the Defendant's evidence in this case, this jury can decide that that walkway didn't comply with standards and had it complied, it was less likely that this man would be injured. Even on their evidence, this jury could also decide that the ballast that was provided there, if it was wet, did not provide a stable surface. We have evidence from Mr. Duffany that that ballast, in and of itself, can be a danger and roll and fall from under your feet.

Your Honor, I can't argue with you [162] strongly enough, even if – like I said, the Noyce case, that was a good example of a case that just recently got tried, just this year got tried. The man went out on the walkway, okay, nobody saw him fall, nobody knows why he fell. The train leaves the station. He tells the

brakeman take off. They are doing 15 miles per hour. They take off, head down the road. He says I'm going back to another engine. That's the last time anybody sees him other than on a video. All they see on a video is he's out on the walkway. The video that they had from the engine cameras don't show why he fell, where he fell, what caused him to fall. What ultimately happened is they found him on the side of the road dead somewhere. They knew he had to have fallen from the walkway. That's the last place they saw him.

The Court went through a well reasoned analysis in Lavender and Kurn, McBride, Gallick, all of the cases that talk about the inferences that I think that a jury can make in an FELA case. I know this is one of the [163] first cases I think Your Honor has tried, is that correct, for one of these cases?

THE COURT: Uh-huh.

MR. MOODY: The Court – I mean if you read these cases, if you read the Supreme Court cases over and over and over, the FELA was meant as alternative or substitute for workers' compensation. One of the things we want is for these courts to understand it is a liberal law and it has a humanitary purpose. For that reason, it is the preference of the Supreme Court that these cases be submitted to juries for determination. That's why we have a relaxed standard of causation. That's why we have a wide breadth from which juries can infer evidence and make those determinations and we allow that in these cases. That's what the Court should do in this case.

THE COURT: Okay. Anything further, Mr. Creasy?

MR. CREASY: Yes, Your Honor. A couple of things, Your Honor. Fist of all, Mr. Duffany said on cross that he did not [164] know what role, if any, the walk path

had in causing that fall. I was a little surprised he gave me that, but I asked him that. He said no, I don't know, which I think is critical because that's the whole reason he's in here.

And secondly, no statute, nothing in Virginia that would say – and nobody knows where he was when he went off the walk path. I believe the Court caught where I was going to go in anticipation they were going to use Exhibit 12 as their lifeline. It says he was walking on the far right-of-way – but where? – when he lost his balance on wet gravel and fell. There's no evidence before this jury that wet – as the Court pointed out, is there a duty for Norfolk Southern to keep all of its ballast dry? There's been no – nothing before this jury for which they can say by us – by Norfolk Southern allowing this gavel to be wet, it, therefore, caused – that we breached our duty.

The other thing I was a little surprised – and I thought Mr. Duffany was [165] going to make some comment that 15 inches is too narrow especially if it's wet thinking he was going to try to tie to this exhibit, but he didn't. He made no comment whatsoever about wet. Also with regard to this yard ballast versus mainline ballast, he never rendered an opinion from which the jury could grab to say the mere fact he had road ballast and not yard ballast was a cause for his fall. He just said, well, they could have put road [sic] ballast out there. He didn't go the next step and say because they didn't do that, I believe that contributed. He didn't say that.

All they've got before this jury is a certain section of this walk path was 15 inches wide. But nobody can place him there, no one, not the Plaintiff, not any eyewitnesses, not anybody. So we are – this is exactly, with all due respect to Mr. Moody, this is exactly what

they are asking this Court. This is a but for case. That's all they got because nobody can place him there.

[166] Nobody can say what role, if any – and the Court, I believe, in a question to Mr. Moody, that's exactly where we are going is what role does this play? So it was 15 inches and let's just say that 24 inches was the standard. What role, if any, did that have in causing this accident? Because there still has to be a causal link. Granted it's lesser than what we typically have, but it has to be something. It cannot be left to conjecture. It cannot be left to speculation. It cannot be but for.

With respect to a couple of the cases Mr. Moody cited with regard to the U.S. Supreme Court, one was 1946, one was 1963. They predated Gottshall. They predated McBride. Again, Gottshall was very clear that this is not a workers' compensation statute. The basis of liability is negligence not the fact that injuries occur. They are going to have to show negligence and they are going to have to link it no matter the slightest. I understand the causation is lesser, but they still have to link it. They [167] haven't in this case.

There's no evidence whatsoever that he was right there where that 15 inches was or what role, if any, it played. There is no evidence whatsoever. Their only evidence or theory of liability to this jury is the walk path was too narrow near the derail, but nobody can place him there. Nobody knows even if it was, what role, if any, did it play in it. It's a weak case. I know Mr. Moody is pointing you to all these cases, but –

THE COURT: Let's talk about some of those cases. The rail yard case, the bug bite case, aren't those still good law?

MR. CREASY: The bug bite case, the U.S. Supreme Court, that would be good law, Your Honor. I think it is distinguishable in that case because they built this retention pond or this pond and there were insects and there was evidence that this thing had gotten a little putrid, I believe, was one of the terms.

What we have here is this walk path. [168] Now, we built it, sure. But where's the – there is no evidence that this walk path, that there's been a history of a problem with it, that we have been cited as a problem with it. There's nothing. In fact, the Court correctly ruled on the issue of complaints, but there's no evidence of complaints. There's nothing.

Now with regard to this pond, you build a pond like that and allow insects, mosquitos, and whatnot to just sit there and develop it. I mean you can trace it to that pond.

THE COURT: Okay. And a guy that might or might not have been standing on the mound in the rail yard such that his head would have been impacted by a nail hook.

MR. CREASY: But I think they had in that case, Your Honor, some evidence to show that something went by. We don't have anything. We have nothing. We have nothing of anything that went by. Nobody knows what he was doing. I think in some of those other cases they had enough to show, you know, that [169] things that happened.

The 55 mile an hour case, they saw him out on the locomotive. It had gone from 15 to 55. It was unstable. They could place him in those areas. We can't place Mr. Sumner anywhere. This is one of those unique cases, Your Honor, where truly they – because of Mr. Sumner's inability to recall where he was – I mean he even told

me I have no idea if I was even on that path. I have no idea. Nobody else can put him there either. All Mr. Sherill could say was he was walking south. He couldn't place him on the path.

What Mr. Moody's begging the Court and the jury to do is you are just going to have to assume he was there because he fell from there. There again, it's speculation. It's their burden to show. There's just no evidence, Your Honor, before this Court to sustain it even with the relaxed causation standard.

THE COURT: All right.

MR. CREASY: Thank you, Your Honor.

[170] THE COURT: Well, admittedly, this is my first ride at this rodeo in an FELA case. It's difficult to shift gears on the causation issue, but the first step is negligence. Has the Plaintiff, looking at the evidence in the light most favorable to the Plaintiff, produced evidence of negligence on the part of Norfolk Southern? I think if the evidence is looked at in the light most favorable to the Plaintiff, Mr. Duffany's testimony gets them over that hurdle that the path is not compliant with what industry standards are.

I understand the defense argument. There's no statute. There's no regulation. You have two railroads – I don't know how many railroads there are in the country, but I know there's more than three. But that's the evidence. And if the jury chooses to accept that, that provides evidence of negligence on the part of Norfolk Southern.

Now, the question of causation is whether that negligence played a part, no matter how small, in bringing about the [171] injury. The testimony of Mr. Duffany, I think it's fair – a fairly circumstantial – a draw from

circumstantial evidence is that a wider path gives an individual margin for error.

No, Norfolk Southern is not a guarantor of safety. They are not a guarantor of dry ballast. But it's foreseeable that a worker is going to be walking on wet ballast. And if it's foreseeable that it's more slippery when wet than not, to use Mr. Sherill's testimony from yesterday, then it's foreseeable that somebody could slip on ballast. It's foreseeable that a wider path would prevent them from falling down. So I think there's sufficient grounds to take the case to the jury. I will overrule your motion to strike.

MR. CREASY: If you will note my objection, Your Honor. Thank you.

THE COURT: We will be in recess for lunch. Come back at 1:15.

(A recess was taken. Following the [172] recess, the parties returned to the courtroom and the following took place before the Court.)

THE COURT: Mr. Creasy, are you ready?

MR. CREASY: Yes, Your Honor.

THE COURT: Ready to bring the jury in?

(The Jury returned to the courtroom, after which the following proceedings were had.)

THE COURT: All right, Mr. Creasy, you may proceed.

MR. CREASY: Thank you, Your Honor. To begin the Defendant's evidence, we have a stipulation with counsel as to the authenticity of these three medical records. First one offered would be Defendant's Exhibit No. 5, which would be Danville Regional Medical Center. It's with Dr. Sinha, S-I-N-H-A.

THE COURT: All right.

[173] (Defendant Exhibit 5 was marked for identification and admitted into evidence.)

MR. CREASY: Thank you, Your Honor. Defendant's tendered Exhibit No. 6, also Danville Regional Medical Center. It's a record of Dr. Hurtado, H-U-R-T-A-D-O.

THE COURT: Defendant's Exhibit 6.

(Defendant Exhibit 6 was marked for identification and admitted into evidence.)

MR. CREASY: Thank you, Your Honor. Defendant's Exhibit No. 7 is Danville Regional Medical Center. It's Dr. Boro, B-O-R-O.

THE COURT: Defendant's Exhibit 7.

(Defendant Exhibit 7 was marked for identification and admitted into evidence.)

MR. CREASY: We will call as or [sic] first witness, Bo Blair.

* * *

APPENDIX E

[1] VIRGINIA:

IN THE CIRCUIT COURT FOR THE
CITY OF DANVILLE

Case No. CL15000079-00

MARK A. SUMNER,

Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

August 9, 2017
8:57 a.m.

HEARD BEFORE

THE HONORABLE JAMES J. REYNOLDS

RAY REPORTING
P.O. BOX 12133
ROANOKE, VIRGINIA 24023
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Counsel on behalf of the Defendant

INDEX

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
For the Defendant:				
Robert Lewis	5	17	–	–
Joseph Zebrowsky	33	62	80	–
David Cline	83	105	118	120
The Defendant Rests				
For the Plaintiff:				
Mark Sumner	123	124	–	–
The Plaintiff Rests				

[3] The following cause came to be heard on August 9, 2017 before the Honorable James J. Reynolds, Judge of the City of Danville Circuit Court, sitting at Danville, Virginia, and a jury of seven. The Court Reporter, Francine Rossini, was duly sworn to Court Report the proceedings, and the following took place:

(8:57 a.m.)

THE COURT: Counsel, I have got the jury instructions packets put together. I have got copies for each of you with the instructions that are, I think, all agreed to.

I understand that there are four that are refused that were put on the record and maybe some objections to some of these that we will put on the record.

MR. CREASY: Yes, sir.

THE COURT: Okay. Are we ready to bring the jury in?

MR. CREASY: Yes, Your Honor. Thank [4] you.

MR. MOODY: Yes, Your Honor.

THE COURT: Okay.

(The Jury returned to the courtroom, after which the following proceedings were had.)

THE COURT: Good morning ladies. Counsel, do we waive calling the jury?

MR. CREASY: Yes, Your Honor.

MR. MOODY: Yes, Your Honor.

THE COURT: Jury is present.

Ladies, at this time, we will continue the Defense's presentation of their evidence.

Ms. Bentley?

MS. BENTLEY: Your Honor, Defendant calls Robert Lewis.

THE COURT: Robert Lewis.

ROBERT LEWIS, WITNESS, having first been duly sworn on his oath to tell the truth, the whole truth, and nothing but the truth, testified as follows:

[5] DIRECT EXAMINATION

BY MS. BENTLEY:

Q Good morning, Mr. Lewis.

A Good morning.

Q Could you please tell the jury your name?

A Robert Lewis.

Q And Mr. Lewis, where do you live?

A I live in Flowery Branch, Georgia.

Q Are you employed by Norfolk Southern?

A Yes, ma'am, I am.

Q How long have you worked for Norfolk Southern?

A Twenty-eight years.

Q What is your current job title?

A I am assistant general manager for Richmond.

Q Now, is that a management position, Mr. Lewis?

A Yes, ma'am, it is.

Q Have you always been in management or did you start out as a contract employee?

[6] A I started out a brakeman contract employee in Roanoke, Virginia.

Q And when did you first hire onto Norfolk Southern?

A In April of 1989.

Q And that was as a brakeman?

A Yes, ma'am.

Q When did you move into management?

A In April of 1997.

Q And what position – what was the first management position that you held?

A Assistant trainmaster and master, trainsmaster.

Q You moved up the chain of command from there to your current position?

A Yes, ma'am.

Q Now, at the time of Mr. Sumner's fall in February of 2013, what position did you hold with Norfolk Southern?

A Division superintendent of Piedmont Division.

Q As the division superintendent, was Danville in the territory that you were responsible for?

[7] A Yes, ma'am.

Q And did you have direct supervision over the Danville area, including the East Bradley pass track?

A Yes, ma'am.

Q How did you find out about Mr. Sumner's accident on February 26th?

A I received a call from the chief dispatcher in Greenville, South Carolina that we had EMS dispatched to the area in Danville for a conductor.

Q Did you know Mr. Sumner before this accident?

A Not personally, no, ma'am.

Q Would it be unusual for you not to know him?

A No, ma'am. There is 1,200 people in the Piedmont Division, so there is a lot.

Q Okay. Now, were you familiar with the area where this incident occurred, the East Bradley pass track?

A Yes, ma'am.

Q Are you aware of any injuries that took place in that location prior to Mr. Sumner's [8] incident?

A No, ma'am.

Q Now, when you got the call from the chief dispatcher telling you that there was an incident, what did you do?

A I was on my – in the morning, I received a call. I was on my way to Elon, North Carolina. I was traveling up the interstate and received a call and I continued forward to Danville, Virginia because of the severity of the incident.

Q And where did you go when you got to Danville?

A I think I went straight to the hospital. I had been told where the hospital was, so if I remember correctly, I went straight to the hospital. I visited both the site and the hospital. I believe I went to the hospital first.

Q Why did you go to the hospital?

A Well, we had a fellow railroader in the hospital. We didn't know what happened at the time, didn't know what had occurred, so I wanted to make sure that first and foremost that he is okay and that he is going to be okay, we have him taken care of, and I wanted to make sure that him being in Danville [9] and being from North Carolina, there was no one there other than hospital folks, so I wanted to make sure he had anything he needed.

Q Would that include trying to make arrangements for his family members to get here?

A Yes, ma'am.

Q And did you do that?

MR. MOODY: Objection; leading.

THE COURT: Rephrase.

BY MS. BENTLEY:

Q What did you do to try to assist Mr. Sumner?

A When I arrived at the hospital, I went to the front desk, spoke to the attendant there, told the attendant I was from Southern. Told her why I was there, to help. If there was anything that needed to be done for Mr. Sumner, that I would be there and someone from Southern would be there until his family arrived.

Q When you arrived at the hospital, was there anyone else there from Norfolk Southern besides Mr. Sumner?

A I am not sure. I don't remember anyone being there. I don't remember relieving anybody [10] there. There may have been, but I don't know.

Q After you told the folks at the front desk if there was anything that needed to be done for Mr. Sumner, you were there to take care of it, what happened?

A I sat down and waited just to – I didn't expect anything to happen. I just sat and waited. A few minutes went by. The nurse came out and said that –

MR. MOODY: Objection; hearsay.

THE COURT: Not what the nurse actually said, just what did he do as a result.

MS. BENTLEY: Well, Your Honor, it is not offered for the truth of the matter. It is offered for the truth of what the nurse says. It explained what he did.

BY MS. BENTLEY:

Q What did you do after you talked to the nurse?

A She told me –

MR. MOODY: Objection.

THE COURT: You can't tell us what the nurse said. Just what you did as a result of what she said.

[11] THE WITNESS: I followed her back to Mr. Sumner.

BY MS. BENTLEY:

Q Was it your understanding that Mr. Sumner asked to see you?

MR. MOODY: Object.

THE COURT: I am going to allow that.

THE WITNESS: Yes, ma'am. He asked to see me.

BY MS. BENTLEY:

Q You did not ask anyone to go back and see him?

A No, ma'am.

Q What was Mr. Sumner's demeanor when you saw him?

A He was on a gurney and he had his arm in a type of a sling. I asked him how he felt, how he was doing, and he said that he had better days. And I asked him – asked him if he knew what happened, how things happened. The conversation turned to that. He told me that he wasn't sure, that he was walking along and then he blacked out.

Q When – during the course of this conversation, did he tell you about his physical [12] condition?

A He did tell me that he had bitten his tongue, that he had dislocated his shoulder, and that he had broken his wrist.

Q Did you specifically ask him that information or did he volunteer it to you?

A He – I think he volunteered it to me, if I recall.

Q During the time that you were talking to Mr. Sumner, did he appear to you to be coherent?

A Yes, ma'am.

Q Did he appear lucid?

A Yes, ma'am.

Q Did you believe that he was competent to talk to you?

A Yes, ma'am.

Q Did he say anything out of the ordinary that would make you question his state of mind?

A No, ma'am.

Q Was he slurring his words at all?

A No, ma'am.

Q Did he have any difficulty talking or straying off the topic?

A No, ma'am.

[13] Q Was there anything that you observed that made you think he was not capable of telling you what he remembered?

A No, ma'am.

Q Did he tell you that he had been given any pain medication?

A No, ma'am.

Q Did it appear to you that he was under the influence of any pain medication that would make it impossible for him to tell you what happened?

A No, ma'am.

Q Was there anyone present when you had this conversation with Mr. Sumner?

A There was attendants, nurses, folks in and out of there. They were all around. There wasn't anybody that was there the whole time I was there. There were folks in there.

Q Mr. Sumner's wife was not present?

A No, ma'am.

Q After that conversation, what did you do?

A I told him that we would be there until his family arrived and we would stay there with him and give him whatever he needed and that I would be [14] outside waiting for whatever he wanted.

Q And this jury already heard from Don Taylor who said that you told him to stay until the family arrived in case he needed anything.

Would you have any reason to question that you instructed Mr. Taylor to do that?

A No. We would have stayed there until properly relieved.

Q I want to turn your attention now, Mr. Lewis, to the reports that were written up by Norfolk Southern written about this incident.

Is that part of the procedure that Norfolk Southern does when an incident occurs, that an investigation is done?

A Yes, ma'am, if I recall.

Q Under the policy, then, you also do a write-up of the results of the investigation?

A Yes, ma'am.

Q I am going to show you what has been previously been marked as Plaintiff's Exhibit Number 4 and Plaintiff's Exhibit Number 5.

Do those appear to you to be two different versions of the write-up?

A Yes, ma'am.

* * *

APPENDIX F

[1] VIRGINIA:

IN THE CIRCUIT COURT FOR THE
CITY OF DANVILLE

———

Case No. CL15000079-00

———

MARK A. SUMNER,

Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

———

August 9, 2017
8:57 a.m.

———

HEARD BEFORE

THE HONORABLE JAMES J. REYNOLDS

———

RAY REPORTING
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ROANOKE, VIRGINIA 24023
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raycourtreporting@gmail.com
Reported by: Francine Rossini, CSR

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[2] APPEARANCES:

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540-767-2000
BY: BRYAN GRIMES CREASY, ESQUIRE
LORI JONES BENTLEY, ESQUIRE

Counsel on behalf of the Defendant

[3] The following is an excerpt from the trial heard on August 9, 2017 before the Honorable James J. Reynolds, Judge of the City of Danville Circuit Court, sitting at Danville, Virginia, and a jury of seven. The Court Reporter, Francine Rossini, was duly sworn to Court Report the proceedings, and the following took place:

* * *

THE COURT: Counsel, you may have a seat.

Are you ready to bring the jury in?

MR. CREASY: Yes, Your Honor.

MR. MOODY: Yes.

(Jury enters the courtroom.)

THE COURT: Counsel, you may have a seat. I hope lunch was satisfactory.

At this time, ladies, all of the evidence has been in. We are now at the phase where the Court is going to provide [4] your instructions of law that you are to apply in this case.

For your convenience, these are written instructions, and we are going to provide you with an orignal copy and three additional copies so that you are not all huddled all around one set of instructions, and that way, you have those to review.

I would ask that you pay attention to them as I read them to you at this time.

Instruction number one: The Plaintiff claims damages under the Federal Employers Liability Act, commonly known as FELA, for personal injuries alleged to have been suffered as a result of negligence by the Defendant. Defendant asserts that Plaintiff was not injured as a result of any negligence by the Defendant. It is agreed that at the time and place alleged by Plaintiff, Defendant was a railroad common carrier engaged in interstate commerce. Plaintiff was then an employee of Defendant engaged in such commerce. Plaintiff's right, if any, to recover in this case is governed by the [5] provisions of the Federal Employers Liability Act.

Instruction number two. Your verdict must be based on the facts as you find them and on the law contained in all of these instructions. These are the issues in the case: One, was Norfolk Southern negligent? Two, if Norfolk Southern was negligent, did its negligence play a part, no matter how small, in bringing about Mark Sumner's injuries? Three, if Mark Sumner is entitled to recover, what is the amount of his damages?

On these issues, Mark Sumner has the burden of proof. Your decision on these issues must be governed by the instructions that follow. Your verdict must be unanimous.

Instruction three. You are the judges of the facts, the credibility of the witnesses, and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things [6] about which they testify, their interest in the outcome of the case, their bias, and if any have been shown, their prior inconsistent statements or whether they have knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily discard believable testimony of a witness. However, after you have considered all of the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.

You are entitled to use your common sense in judging any testimony. From these things, and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

Instruction number four. Any fact that may be proved by direct evidence may be proved by circumstantial evidence; that is, you may draw all reasonable and legitimate inferences and deductions from the evidence.

Instruction number five. In [7] considering the weight to be given to the testimony of an expert witness, you should consider the basis for his opinion and the manner by which he arrived at it and the underlying facts and data upon which he relied.

Instruction number six. You must not consider any matter that was rejected or stricken by the Court. It is not evidence and should be disregarded.

Instruction number seven. Any statement of counsel referring to the amount of damages requested is not evidence in this case and you shall not consider it as evidence if your verdict is in favor of Mark Sumner.

Instruction eight. You must not base any verdict in any way upon sympathy, bias, guesswork, or speculation. Your verdict must be based solely upon the evidence and the instructions of the Court.

Instruction number nine. This case should be considered and decided by you as an action between persons of equal standing in [8] the community of equal worth and holding the same or similar stations in life. A corporation is entitled to the same fair trial as a private individual. All persons, including corporations, partnerships, unincorporated associations, and other organizations stand equal before the law and are to be treated as equals.

Instruction number ten. You shall find your verdict for Mark Sumner if he has proved by the greater weight of the evidence that one, Norfolk Southern was negligent; and two, that Norfolk Southern's negligence played a part, no matter how small, in bringing about Mark Sumner's accident and injuries.

If Mark Sumner fails to prove either or both of the two limits above, then you shall find your verdict for Norfolk Southern.

Instruction eleven. The greater weight of all of the evidence is sometimes called the preponderance of the evidence. It is that evidence which you find more

persuasive. The testimony of one witness whom you believe can be the greater weight of the evidence.

[9] Instruction number twelve. Negligence is the failure to use ordinary care. Ordinary care is the care a reasonable person would have used under the circumstances of this case.

Instruction thirteen. A railroad has caused or contributed to the employee's injury if the railroad's negligence played a part, no matter how small, in bringing about the injury.

The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence.

Instruction fourteen. It was the continuing duty of Norfolk Southern as an employer at the time and place in question to use ordinary care under the circumstances in furnishing Mark Sumner with a reasonably safe place in which to work and to use ordinary care under the circumstances to maintain and keep such place of work in a reasonably safe condition.

This does not mean, of course, that Norfolk Southern is a guarantor or insurer of [10] the safety of place of work. Norfolk Southern is not required to furnish a place to work that is absolutely safe. The extent of Norfolk Southern'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 the case.

Instruction number fifteen. A railroad has a duty to use ordinary care to provide its employees with reasonably safe walkways upon which to perform

their job duties. If a railroad fails to perform this duty, then it is negligent.

Instruction sixteen. The fact that there was an accident and that Mark Sumner was injured does not of itself entitle him to recover.

Instruction seventeen. Mark Sumner has the burden of proving by the greater weight of evidence that Norfolk Southern was negligent and that its negligence played a part, no matter how small, in bringing about [11] Mark Sumner's injuries.

Instruction eighteen. Norfolk Southern is not required to have anticipated or foreseen the precise injury that occurred, but it is sufficient that a reasonably prudent person would have anticipated or foreseen that some injury might probably result from the negligent act.

Instruction nineteen. If you find your verdict for Mark Sumner, then in determining the damages to which he is entitled, you shall consider any of the following which you believe by the greater weight of the evidence was caused by the negligence of Norfolk Southern: Number one, any bodily injuries he sustained and their effect on his health according to their degree and probable duration; two, any physical pain and mental anguish he suffered in the past and any that may reasonably – may be reasonably expected to suffer in the future; three, any disfigurement or deformity and any associated humiliation or embarrassment; four, any inconvenience caused in the past and any that [12] probably will be caused in the future; and five, any earnings he lost because he was unable to work at his calling.

Your verdict shall be for such sum as will fully and fairly compensate Mark Sumner for the damages sustained as a result of Norfolk Southern's negligence.

Instruction twenty. The burden is on Mark Sumner to prove by the greater weight of the evidence each item of damage he claims and to prove that each item was caused by Norfolk Southern's negligence. He is not required to prove the exact amount of his damages, but he must show sufficient facts and circumstances to permit you to make a reasonable estimate of each item. If Mark Sumner fails to do so, then he cannot recover for that item.

Instruction number 21. If you should find that Mark Sumner is entitled to a verdict, your award to him will not be subject to either Federal or State income taxes, and therefore, you should not consider such taxes in fixing the amount of your award [13] if you make any such award.

Instruction number 22. The life expectancy of a 44-year-old male is 33.6 years. You should consider that figure along with any other evidence relating to the health, constitution, and habits of Mark Sumner in determining his life expectancy.

Ladies of the jury, those are your instructions of law in this case. You will now hear closing arguments from counsel. The Plaintiff bears the burden of proof so they are entitled to argue first and last and have elected to do so.

Mr. Davis?

MR. DAVIS: Thank you, Your Honor. May it please the Court, good afternoon, ladies of the jury.

Based on all of the instructions that the judge just read to you, you may be feeling like your job as jury seems fairly complicated, but it is really not. Essentially, you are here to answer three questions.

This is from the instruction number two

* * *

APPENDIX G

[1] VIRGINIA:

IN THE CIRCUIT COURT FOR THE
CITY OF DANVILLE

Case No. CL15000079-00

MARK A. SUMNER,

Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

October 12, 2017
1:52 p.m.

HEARD BEFORE

THE HONORABLE JAMES J. REYNOLDS

RAY REPORTING
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Reported by: Francine Rossini, CSR

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* * *

[30] MR. CREASY: Thank you, Your Honor.

THE COURT: Well, there are obviously two issues before the Court, and I am going to take them in the order that the Plaintiff addressed, first dealing with the untruthfulness of testimony of Mr. Sumner.

It is conceded that the testimony with respect to whether or not he owned a truck was untruthful. The question becomes whether that statement conceding the untruthfulness is material and whether or not that undermines confidence in the verdict.

Now, the way I look at this, the testimony of Mr. Sumner is what we have to focus on. Not what is argued by the lawyers. The jury is instructed that what the lawyers say is not evidence and they are to consider the evidence.

Now, how different would it have been had he said, "Yes, I owned a 2001 Mitsubishi Mighty Max pick-up truck"? Which, the comment was made to me, some people might question whether that is really a truck. But is that material? I don't think that it is.

[31] The issue here was the reliability of the Plaintiff's statements in the ER to Mr. Lewis, and the thrust of the Plaintiff's case was that the statements made really at every point past the EMS were unreliable, that you couldn't subscribe any credibility to anything that he might have said, which is their attack on the doctors' records, which was their attack on Mr. Lewis's testimony essentially based on the Plaintiff's testimony that he had been concussed which was established by medical evidence and that he had no memory.

I don't believe that that one statement in isolation undermines confidence in the verdict.

I am going to deny the motion to set aside the verdict based upon the untruthfulness of the testimony.

I agree that it is not cumulative. I agree that it is after discovered evidence that could not have been discoverable with due diligence, so that is the only prong I am relying on, is the materiality.

[32] With respect to the testimony of Mr. Duffany and the evidence as a whole, whether or not there was sufficient evidence to get to the jury, I acknowledge that the defense raised that motion to strike. They argued that Mr. Duffany's testimony was unreliable and insufficient as a matter of law to raise the issue of negligence and that Plaintiff's case as a whole failed to establish negligence as established at common law.

I think as I told each of you, this is my first FELA case, and I was not overly comfortable with the change on the issue of proximate cause, but I recognize that that is the only issue that changes, proximate cause and not negligence.

But the testimony of Mr. Duffany, which I think was properly admitted and before the jury was that his opinion, his expert opinion on the custom and practice in the industry was that a walk path of 24 inches with a relatively flat slope of 7 degrees or less was necessary to ensure a proper safe walk [33] path.

The defense did, in my opinion, a very good job of attacking that through cross examination, but if the jury accepted it, it establishes that that is the custom and practice, and failure to comply with that custom and practice would constitute negligence on the part of the Norfolk Southern.

The question of would the nine inches makes a difference on – again, I don't think Duncan controls here. I think the testimony of an expert witness in a products liability case, the Courts recognize there does have to be a degree of scientific analysis and study that we are not talking about in a situation like this.

These are its custom and practice, but really, the principle behind a wider, flatter walking surface is not that difficult to grasp why that is important.

I don't think there are empirical studies necessary to establish that, and so the Court believes that the testimony of [34] Mr. Duffany was properly admitted and the case was properly submitted to the jury.

It is not for this Court to substitute its opinion for what the jury should have come back with whether in liability or in damages. They were properly, in the Court's opinion, instructed as to the law. They had before them appropriate admissible evidence from which they could draw the conclusion that the Defendant was negligent and that that negligence was, at least to some degree, a cause of the Plaintiff's injury, and I think that the verdict should stand on those.

I will note your exception.

MR. CREASY: Thank you, Your Honor.

THE COURT: And do we have a final order?

MR. MOODY: I did not bring one today. We will submit one with Mr. Creasy's endorsement.

THE COURT: That's fine. We will – I will give you until, say, the 26th.

MR. MOODY: That's more than sufficient.

[35] MR. CREASY: Thank you, Your Honor.

THE COURT: Thank you.

(Hearing concluded: 2:25 p.m.)

APPENDIX H

DANVILLE REGIONAL MEDICAL CENTER
142 South Main Street
Danville, VA 24541
Telephone (434) 799-2100

DICTATED: 02/26/13 1511
TRANSCRIBED: 02/26/13 1637

PATIENT NAME: SUMNER, MARK
ADMITTED: 02/26/13
DISCHARGED: 02/28/13
ATTENDING MD: SINHA, TUSHAR

UNIT/MR#: DM00753702
ACCOUNT #:
PT DOB:
PT LOCATION: DM, 2A
PT STATUS: DIS INo

HISTORY AND PHYSICAL

DICTATING PROVIDER: Tushar Sinha, MD

CHIEF COMPLAINT:

HISTORY OF PRESENT ILLNESS: This is a 40-year-old male with no particular past medical history

He was at work where he a train conductor.

He states that he felt "funny" but denied particular dizziness, headache, blurring of his vision. No amaurosis. Denied any weakness, asymmetrically. Reports that he had palpitations prior to this, no sweating, no flushing. He had no nausea preceding this. No abdominal pain dysuria or diarrhea, in the last few days. He reports that he woke up fairly early this morning, but not out of the normal for him, given his work schedule. He states that he has not noted any previous episodes like this.

remembers waking up at the bottom of the embankment when 1 of the engineers with him was trying to wake him up. He states that he did not lose control of his bowels or bladder during this episode. He states that he ate some snacks while he was on the train but did not have a full breakfast this morning.

REDACTED

He states that when he came to, he remembers the rescue squad, and feels that he came to fairly quickly once he was awakened.

REDACTED

APPENDIX I

DANVILLE REGIONAL MEDICAL CENTER
142 South Main Street
Danville, VA 24541
Telephone (434) 799-2100

DICTATED: 02/27/13 0858
TRANSCRIBED: 02/27/13 1044

PATIENT NAME: SUMNER, MARK
ADMITTED: 02/26/13
DISCHARGED:
ATTENDING MD: SINHA, TUSHAR

UNIT/MR#: DM00753702
ACCOUNT #:
PT DOB:
PT LOCATION: DM, 2A
PT STATUS: ADM INo

Consultation

DICTATING PROVIDER: Rafael V Hurtado, MD

DATE OF CONSULTATION: February 27, 2013

HISTORY OF PRESENT ILLNESS:

REDACTED

This gentleman, who works as a conductor or [sic] a train was yesterday working about 8:30 or so, and while fixing the brake of the trains, he was a standing and started to feel funny in the whole body, and kind of heavy in his head and neck. The next thing he knows is that he knows is that [sic] he woke up down in embankment where he fell probably 30 feet down, and woke up with his engineer trying to waking him up. He said that he recognized him when he woke up.

REDACTED

He has no recollection of anything else. This is the first episode of this type in the life of this patient.

REDACTED

APPENDIX J

DANVILLE REGIONAL MEDICAL CENTER
142 South Main Street
Danville, VA 24541
Telephone (434) 799-2100

DICTATED: 02/27/13 1807
TRANSCRIBED: 02/27/13 2053

PATIENT NAME: SUMNER, MARK
ADMITTED: 02/26/13
DISCHARGED: 02/28/13
ATTENDING MD: SINHA, TUSHAR

UNIT/MR#: DM00753702
ACCOUNT #:
PT DOB:
PT LOCATION: DM, 2A
PT STATUS: DIS INo

Consultation

DICTATING PROVIDER: Thomas J Boro, MD

DATE OF CONSULTATION: February 27, 2013

REDACTED

HISTORY OF PRESENT ILLNESS:

The patient is a conductor for a local railroad company. The patient states he essentially had some blurred vision and then blacked out and woke up at the bottom of the railroad embankment. His fellow employees relate a story that implies he had a syncopal episode prior to falling.

REDACTED

he states that he felt funny prior to blacking out, and although in various places he has or has not had

some blurring of his vision, he states to as he did have some blurring of his vision.

REDACTED