No. _____

In The
Supreme Court of the United States

GRAND TRUNK WESTERN RAILROAD COMPANY,

Petitioner,

v.

STEVEN R. LILLY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Michigan

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in a personal injury action brought by a railroad employee against his employer under the Federal Employers Liability Act (FELA), a jury must be instructed about the employee's acknowledged, related preexisting physical condition.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Petitioner is Grand Trunk Western Railroad Company. Respondent is Mr. Steven R. Lilly.

CORPORATE DISCLOSURE STATEMENT

Petitioner, a Michigan corporation, is a wholly owned subsidiary of Grand Trunk Corporation, a Delaware corporation, which in turn is wholly owned by North American Railways, Inc., a Delaware corporation, which is a wholly owned subsidiary of Canadian National Railway Corporation, a publicly traded Canadian corporation.

DIRECTLY RELATED CASES

This matter was tried in the Circuit Court of Wayne County, Michigan before the Hon. David J. Allen in case number 16-001908-NO. Judgment was entered in favor of the Plaintiff by Order entered December 28, 2016. App. 21a. The Michigan Court of Appeals affirmed, in case 33867, in its order of January 17, 2019. App. 1a. The Supreme Court of Michigan, by Order of October 30, 2019 in case number 159155, denied Petitioner's application for leave to appeal. App. 24a.

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The Trial Court Order denying Petitioner's requested instruction is found in the 12/7/16 Trial Transcript at 18. The Final Judgment of the Trial Court is reprinted at App. 32a. The Michigan Court of Appeals opinion affirming the Order on the jury instruction and the Final Judgment is unreported but may be found at *Lilly v. Grand T. W. R.*, 2019 Mich. App. LEXIS 85 (Jan. 17, 2019), and is reprinted at App. 1a. The Order of the Michigan Supreme Court denying Petitioner's Application for Leave to Appeal is reported at *Lilly v. Grand T. W. R.*, 934 N.W.2d 271, 2019 Mich. LEXIS 2085 (Mich. 2019), and is reprinted at App.35a.

JURISDICTION

The Order of the Michigan Supreme Court denying leave to appeal was entered October 30, 2019. App. 35a. This Court has jurisdiction under 28 U.S.C. §1257(a).

STATUTORY PROVISION INVOLVED

This matter involves the Federal Employers Liability Act, 45 U.S.C. §51 (1908), which includes, in pertinent part, the following:

> Every common carrier by railroad while engaging in commerce between any of the several States . . . Shall be liable in damages to any person suffering

injury while he is employed by such carrier in such commerce. . . . For such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . .

INTRODUCTION

This case presents a catch-22 for an FELA defendant: the court of appeals opinion forces a choice between arguing causation and arguing that at least some of a plaintiff's damages result from a preexisting condition. This situation is not founded in the law, is unfair, and should be reversed.

Respondent Steven Lilly sued Petitioner Grand Trunk Western Railroad Company for damages allegedly arising out of his hip osteoarthritis pursuant to the FELA, the Federal Employers Liability Act, 45 U.S.C. §51 *et seq.* Lilly, a longtime employee of the railroad, claimed that his work for Grand Trunk negligently exposed him to "ergonomic risk factors" that caused his osteoarthritis.

Grand Trunk defended the case on alternative grounds. The railroad denied that Lilly could prove causation because there was no evidence his alleged exposure to "ergonomic risk factors" caused his bilateral hip osteoarthritis. Most pertinent to this petition, Grand Trunk raised the defense that Lilly's undisputed preexisting condition – a congenital condition resulting in FAI, or femoral acetabular impingement, in

both of his hips – caused, in whole or in part, his alleged hip osteoarthritis.

Lilly's preexisting FAI is undisputed in the record. His own treating physicians and expert independent examiner both agreed at trial that Lilly has FAI and that FAI contributes to hip osteoarthritis. Lilly's expert testified that Lilly's medical condition resulted in whole or in part from his preexisting congenital deformity resulting in FAI.

Accordingly, Grand Trunk asked the trial court to instruct the jury that if it found that Lilly's preexisting condition contributed to his hip osteoarthritis, it could award Lilly damages only for the portion of his injuries that was an aggravation of the preexisting condition but *not* for the preexisting condition itself.

The trial court denied Grand Trunk's request for the instruction, and the court of appeals affirmed a judgment in favor of Lilly, holding that a defendant who denies causation in a personal-injury case cannot argue, in the alternative, that at least some of the plaintiff's injuries result from a preexisting condition. The Michigan Supreme Court then declined review, placing Michigan's FELA jurisprudence at odds with FELA's requirements and many other decisions around the country. The result is to make Michigan an outlier in FELA preexisting-condition cases, the exact opposite of the national uniformity that Congress intended when it enacted the statutory regime.

This Court has previously recognized the importance of national, uniform jury-instruction practices in

FELA cases by granting certiorari in *CSX Transp., Inc.* v. *Hensley*, 556 U.S. 838 (2009), and correcting a trial court's similarly erroneous refusal to give a FELA-required jury instruction. Grand Trunk respectfully requests that the Court follow the same course here by granting the petition, reversing the court of appeals, and restoring national uniformity to FELA preexisting-conditions cases. Indeed, the court of appeals' legal error is so plain that a summary reversal would be appropriate. Either way, the Court should not allow Congress's intent for national uniformity in this area to be so easily thwarted.

Certiorari is warranted.

STATEMENT

A. Proof of Lilly's preexisting condition

Lilly's preexisting FAI was clear in the medical records and evidence produced during trial. Dr. David Bielema, Lilly's treating physician, testified that Lilly had a preexisting "pistol grip deformity" that arose during Lilly's development in his adolescent years, well before his employment with Grand Trunk. Bielema trial deposition at 58, ll. 8-13.[1] Dr. Bert, Grand

[1] Dr. Bielema's trial deposition testimony does not appear in the transcript prepared by the court reporter, who simply noted in the record that the video of Dr. Bielema was played on December 1. Trial Tr. 12/1/16 at 4, ll. 9-13. The full transcript of Dr. Bielema's testimony can be found at Exhibit D to Grand Trunk's Second Motion for New Trial.

Trunk's expert physician, testified that Lilly's preexisting condition caused his osteoarthritis in his hip. Testimony of Bert, Trial Tr. 12/6/16 at 161, l. 17–167, l. 20 Having reviewed the medical records and films, Dr. Bert testified that Lilly's FAI was "predisposing him to severe arthritis" and was "100% of the cause" of Lilly's hip osteoarthritis. *Id.* at 167, l. 17 and 169, ll. 19-22. Dr. Bert concluded, to a reasonable degree of medical probability, that the preexisting condition "would've caused Mr. Lilly's hip osteoarthritis in the right and the left *even if he never worked at the railroad*." *Id*. at 191, l. 23–192, l. 6. (emphasis added).

Lilly's expert physician, Robert S. Widmeyer, M.D., also acknowledged Lilly's preexisting congenital medical condition, the FAI, and its contribution to his hip arthritis. Widmeyer Testimony, Trial Tr. 11/30/16 at 124, ll. 1-14, 125, ll. 10-23 Even Dr. Bielema agreed that the FAI could be causative to Lilly's ultimate physical condition, Bielema Trial Deposition at 58, l. 19–59, l. 16, necessitating that the jury decide this crucial question of fact.

B. Grand Trunk's requested jury instructions

Petitioner properly requested, both in pretrial submissions and during the court's on-the-record conference during trial, that the jury be instructed that, if it found that Lilly's preexisting condition contributed to his hip osteoarthritis, it could award damages only for the portion of his injuries that was an aggravation of the preexisting condition but not for the preexisting

condition itself. Trial Tr. 12/7/16 at 7, l. 5–12, l. 7 and at 19, l. 24–20, l. 24. Specifically, prior to trial, Grand Trunk proffered Special Instructions 4, 5, and 6, which were specifically designed to guide the jury to account for Lilly's preexisting FAI. Ex. F to Grand Trunk's Second Mot. for New Trial.[2]

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[2] The requested instructions were:

Defendant's Special Jury Instruction No. 4 – Burden of Proof – Plaintiff Must Prove Plaintiff's Medical Condition Caused, In Whole or In Part by The Defendant's Negligence. – Plaintiff Steven Lilly must prove by a preponderance of the evidence that the physical condition he complains of was caused, in whole or in part, by the negligence of the defendant railroad, Grand Trunk. Plaintiff must present evidence that is more than mere speculation or possibility that the physical condition of which Plaintiff complains was caused in whole or in part by the negligence of defendant railroad. If you find that this was not the case, then you shall return a verdict in favor of the defendant railroad. For example, if you find, under the evidence presented here, that plaintiff's bilateral hip arthritis was a result of pre-existing personal medical condition, including malformation of hips and femoral acetabular impingement and/or avascular necrosis and/or overweight body mass index or was the result of factors other than the alleged negligence of the defendant railroad, then you must return a verdict in factor of the defendant railroad.

Defendant's Special Jury Instruction No. 5 – Pre-Existing Medical Condition – Plaintiff has Burden of Proof – A person who has an existing medical condition during the time period of the events and circumstances presented in evidence is not entitled to recover damages for the pre-existing condition itself. However, he is entitled to recover damages for any aggravation of the pre-existing condition. But where a pre-existing medical condition is aggravated in such manner, the damages recoverable by the plaintiff are limited to the additional injury caused by the events and circumstances presented in evidence and the plaintiff cannot recover for any worsening of his condition not caused by the events and circumstances presented in evidence. Therefore,

C. The court of appeals' ruling

The Michigan Court of Appeals, in a lengthy, multipage opinion, App. 1a, dedicated less than half a page to the preexisting condition issue, App. 24a. Focusing on the testimony of Grand Trunk's expert that Lilly's osteoarthritis would have resulted regardless of what he did at work, the court said that Grand Trunk's defense was limited to the argument that its workplace played *no* causative role at all, contrary to Grand Trunk's actual argument and its proffered Special Instruction No. 6, which instructed the jury what to do if it found that Lilly's injury was partially a result of his preexisting condition and partially a result of working for Grand Trunk.

More important, the court of appeals rejected any need for the jury to hear Grand Trunk's requested Special Instructions, holding that the standard causation instruction the jury gave to the jury was adequate. *Id.*

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plaintiff has the burden to prove the extent to which the events and circumstances caused the aggravation to the existing medical condition.

Defendant's Special Jury Instruction No. 6 – Aggravation of a Pre-Existing Medical Condition – If you find that Plaintiff's injury was due in part to a pre-existing medical condition and in part to the Defendant's aggravation of that pre-existing condition, you must determine how much of the Plaintiff's injury is due to his pre-existing condition and how much of his present injury is a result of defendant's aggravation of his pre-existing condition. Defendant can only be held responsible for that portion of Plaintiff's present injury that is the result of Defendant's aggravation of his pre-existing condition.

The court of appeals failed to analyze Grand Trunk's requested Special Instructions, the copious nationwide FELA law on the requirement to give such instructions in the face of evidence of preexisting conditions, or the testimony from several other witnesses who confirmed both the presence of the preexisting FAI and its causative relationship to Lilly's osteoarthritis.

The Michigan Supreme Court denied Grand Trunk leave to appeal. App. 24a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision conflicts with numerous decisions of federal courts of appeal and state supreme and intermediate appellate courts interpreting the FELA in preexisting-conditions cases. This decision has decided an important question of federal law and unsettled the national regulatory regime that Congress intended. This Court should act promptly to restore uniformity.

I. Where there is evidence of a preexisting condition, FELA law requires the trial court to give proper preexisting-condition instructions to the jury when the defendant requests them.

Grand Trunk met its burden of presentation of evidence of a preexisting condition through Lilly's treating physician Dr. Bielema, Grand Trunk's expert Dr. Bert, and Lilly's expert Dr. Widmeyer. All three

testified about the extent of Lilly's preexisting FAI, discussed his medical records showing those conditions over many years, and testified that FAI contributed to some extent – greater or lesser, depending on the witness – to Lilly's osteoarthritis. Given this evidence, Grand Trunk sufficiently raised an issue about the effect of Lilly's preexisting FAI, and the trial court erred by failing to submit Grand Trunk's proposed Special Instructions.

As a general principle of FELA law, a properly instructed jury will be told by the trial court that if it determines that a FELA plaintiff's injury is an aggravation of a preexisting condition, it must award damages only for the aggravation. Examination of federal and state cases across the country demonstrates the overwhelming body of decisions applying FELA damages law to jury instruction practice.

The preeminent federal decision on this issue in a FELA case is the Tenth Circuit's landmark opinion in *Sauer* v. *Burlington N. Ry.*, 106 F.3d 1490, 1494–95 (10th Cir. 1996), which held that apportionment of damages to a preexisting condition is "a question for which juries are well suited." That court continued: "When there is evidence that defendant's negligence aggravated a preexisting condition, but expert testimony does not precisely apportion the injury, apportionment is an issue for the jury. . . ." *Id*. The trial court's instructions in that case, mirroring Petitioner's requests here, were "a correct statement of the law." *Id*., multiple citations omitted.

Similarly, the Texas Court of Appeals recently reiterated the uniformity of FELA law, noting that where the record contains evidence indicating that an injury may have resulted from the aggravation of a preexisting condition, "the jury should be directed to award damages only for the aggravation of the preexisting condition." *BNSF Ry.* v. *Epple*, 2016 Tex. App. LEXIS 12730, at *4 (Tex. App. Nov. 30, 2016). That is, "the award should exclude the proportion of losses that the employee's preexisting condition would inevitably cause, irrespective of the railroad's negligence." *Id*. (citations omitted).

The federal courts of appeals are in accord:

- Plaintiff is entitled to recover damages for any aggravation of the preexisting condition, but those damages are limited to the additional increment caused by the aggravation. The jury was so instructed. *Richardson* v. *Missouri P. R.*, 186 F.3d 1273, 1278 (10th Cir. 1999).

- It is true that as a general matter, when a defendant's negligence aggravates a plaintiff's preexisting health condition, the defendant is liable only for the additional increment caused by the negligence and not for the pain and impairment that the plaintiff would have suffered even if the accident had never occurred. *Stevens* v. *Bangor & Aroostook R.*, 97 F.3d 594, 601 (1st Cir. 1996).

- Varhol first complains that it was error for the district court to submit to the jury the special interrogatories concerning aggravation of his preexisting MS. . . . This [instruction] clearly told the jury that it was to award damages to Varhol for his MS condition only to the extent his condition was aggravated by the derailment; in short, it told the jury to apportion. . . . We think the instructions as a whole fully and fairly informed the jury about Varhol's damages theories. *Varhol* v. *National R. Pass. Corp.*, 909 F.2d 1557, 1564–65 (7th Cir. 1990).

- [T]he damages of the 'eggshell skull' victim must be reduced to reflect the likelihood that he would have been injured anyway, from a nonliable cause, even if the defendant had not injured him. . . . It is desirable in such cases to direct the jury's attention to the issue by a specific instruction. *Lancaster* v. *Norfolk & W. Ry.*, 773 F.2d 807, 822–23 (7th Cir. 1985).

The rule is no different among the federal district courts:

- Under the FELA, courts have held that a plaintiff's damages may be reduced to the extent that his current injuries were the result of a preexisting condition as opposed to the railroad's negligence. *Kelham* v. *CSX Transp. Inc.*, 2015 U.S. Dist. LEXIS 97400, at *3 (N.D. Ind. July 27, 2015.

- The Railroad's position is correct. Under the FELA, a plaintiff [] is entitled to recover for only those injuries that were caused by the defendant's alleged negligence. *Ayers* does not prohibit the Railroad from presenting evidence that all or part of the injuries claimed by the plaintiff were not caused by the acts or omissions being litigated. Provided it presents evidence to support apportionment between Bliss' preexisting injuries and those caused by the Railroad's alleged negligence, the Railroad remains entitled to make that argument. *Bliss* v. *BNSF Ry*., 2013 U.S. Dist. LEXIS 146101, at *40 (D. Neb. Oct. 9, 2013) (citations omitted).

- An injured party is entitled to recover such damages as will reasonably compensate him for the injury and damage sustained as a proximate result of the negligence of others. This includes damages for aggravation of a pre-existing condition He is not, however, entitled to recover for damages which would have resulted from his previous condition without the aggravation. *Holladay* v. *Chicago, B. & Q. R.*, 255 F. Supp. 879, 886 (S.D. Iowa, 1966) (citations omitted).

So too in state supreme courts:

- "[I]t appears well settled that the FELA contemplates apportionment among an employer's negligence and other non-work-related causes. . . . The extent to

which the injury is attributable to other causes need not be proven to a mathematical certainty; the evidence need only be sufficient to permit a rough apportionment. Apportionment can be proved without expert testimony stating the percentage of injury attributable to the different causes." *CSX Transp., Inc.* v. *Miller*, 463 So. 3d 434, 445–46 (Ala. 2010) (citations omitted).

- [I]n [an] FELA case, if sufficient evidence exists to indicate that an injury may have resulted from the aggravation of a preexisting condition, the jury should be instructed that if it finds for the plaintiff on the issue of liability, it should award damages only for the aggravation of the plaintiff's preexisting condition. *Shultz* v. *N.E. Illinois Reg'l Commuter R. Corp.*, 201 Ill. 2d 260, 277; 775 N.E.2d 964 (2002) (emphasis added).

- We have held that the apportionment instruction is appropriate where there is evidence of a preexisting condition but the degree to which that condition may have been aggravated could not be determined. *Gustafson* v. *Burlington N. Ry.*, 252 Neb. 226, 237; 561 N.W.2d 212 (1997) (citation omitted).

- Thus, we hold that an FELA employer whose employee has been injured partially by the employer's negligence and partially by other causes, whether those other causes relate to a pre-existing

> condition or to a concurrent, contemporary cause arising from the circumstance of the injury, must pay damages only for those injuries attributable to its negligence. *Dale* v. *Baltimore & O. R.*, 520 Pa. 96, 106; 552 A.2d 1037 (1989).

And so too in intermediate state courts:

- [A] tortfeasor cannot be held liable for damages that it did not actually cause. Consequently, the aggravation doctrine provides generally that, "notwithstanding the eggshell skull rule," a defendant . . . is liable only for the extent to which the defendant's conduct has resulted in an aggravation of the pre-existing condition, and not for the condition as it was. *McLaughlin* v. *BNSF Ry*., 2012 COA 92, at *38, 300 P.3d 925 (Colo. App. 2012) (ellipsis and internal quotation marks in original, citation omitted).[3]

- Indeed, the legal principle that Union wanted to convey to the jury remained clear and consistent: An employer is not responsible for injuries that are caused

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[3] *See also Nichols* v. *Burlington N. & S.F. Ry*., 148 P.3d 212, 216–17 (Colo. App. 2006), mod. by unpublished opinion of the Colorado Court of Appeals, issued May 25, 2006 (Docket No. 03CA2145), where the court held that "the award of damages against a railroad may exclude the proportion of losses that the employee's pre-existing condition would inevitably cause, regardless of the railroad's negligence. . . . The [preexisting condition] instructions, when taken as a whole, properly informed the jury regarding the applicable law."

by an employee's pre-existing condition, and the jury is entitled to apportion its damage award accordingly. . . . [W]hen a defendant's negligence merely aggravates a FELA plaintiff's pre-existing condition, the defendant is liable only for increased injury caused by its negligence, not for pain and impairment that the plaintiff would have suffered even if the accident had never occurred. . . . Hence, we conclude that while Union carried the burden of producing some evidence to support its proposed apportionment instruction, it was not required to demonstrate an exact percentage representing the likelihood that the degenerative condition caused Mr. Meyer's injury. *Meyer* v. *Union R.*, 2004 Pa. Super. 407, 865 A.2d 857, 862–67 (2004).

- Analyzing this medical testimony, we notice that the accident merely aggravated a pre-existing condition. This, however, does not prevent plaintiff from recovering. An accident which aggravates a preexisting disease may constitute a cause of action for damages. In such a case plaintiff may recover all damages for such aggravation. . . . It is elementary that the assessment of damages is a matter committed to the discretion and sound judgment of the trier of facts. . . . *Matthews* v. *Atchison, T., & S.F. Ry.*, 54 Cal. App. 2d 549, 559–60, 561, 129 P.2d 435 (1942) (citation omitted).

In sum, when a railroad employer presents evidence that a plaintiff suffered from a preexisting condition that would have caused his injuries, even without any alleged railroad negligence, the railroad is entitled to instructions on the preexisting condition that would allow the jury to apportion damages between preexisting injuries and negligence. *Sauer*, 106 F.3d at 1494 ("Although apportionment may be difficult, like comparative negligence it is a question for which juries are well suited."); *Rust* v. *Burlington N. & S.F. Ry.*, 308 F. Supp. 2d 1230, 1231 (D. Colo. 2003) ("Apportionment of damages is best determined by the jury, and is properly addressed by this Court through its instructions to the jury."); *CSX Transp., Inc.* v. *Bickerstaff*, 978 A.2d 760, 799 (Md. App. 2007) ("The jury, as the fact finder, was entitled to determine what portion or percentage of damages was caused by factors other than the negligence of appellant and appellees"). Accord *Evans* v. *Union P. R.*, 2015 U.S. Dist LEXIS 56073, at *8 (D. Colo. Apr. 29, 2015) ("[E]vidence of a FELA plaintiff's preexisting condition is admissible, and apportionment based on such a condition is appropriate where the evidence supports it."); *Bliss*, *supra* at *41. ("Provided it presents evidence to support apportionment between [plaintiff's] preexisting injuries and those caused by the Railroad's alleged negligence, the Railroad remains entitled to make that argument.").

Until this Michigan decision, it was clear that FELA law, as applied by both federal and state courts, addresses the requirement for the required instructions even where exact percentages of aggravation are

not a part of the evidence. E.g., *Sauer*, 106 F.3d at 1494 ("Apportionment can be proved without expert testimony stating the percentage of injury attributable to a different cause."); *Meyer*, 865 A.2d at 866 ("[The railroad] had to provide the jury only with a reasonable basis of apportionment."); *Bickerstaff*, 978 A.2d at 798–800 (testimony regarding plaintiffs' risk factors for injuries warranted submission of apportionment to jury); *Akers* v. *Norfolk & W. Ry.*, 417 F.2d 632 (4th Cir. 1969).

The instructions Grand Trunk requested here follow FELA and are similar to instructions that have been approved in other FELA cases. E.g., *Sauer*, 106 F.3d at 1494; *Bickerstaff*, 978 A.2d at 793–94 n.21; *Meyer*, 865 A.2d at 860. The proffered instructions would have assisted the jury because they accurately informed the jury that it could not award damages for Lilly's preexisting conditions unless those conditions were aggravated by his injuries from his accident (in which case the jury would have known to award damages for the aggravation). They also would have allowed the jury to apportion Lilly's damages between preexisting injuries and injuries resulting from his work. These instructions were necessary because the trial court's charge is completely silent on apportionment and, instead, repeatedly directs the jury to award damages for all injuries caused in whole or in part by Grand Trunk's negligence without regard to whether those injuries preexisted the negligence.

II. The court of appeals' holding erroneously limits jury instructions to the position taken by a single witness rather than considering the evidence as a whole.

In addition to conflicting with every meaningful case on the proper instruction of juries in preexisting-conditions FELA cases, the court of appeals' reasoning is wrong. The decision turns on the court's interpretation of the opinion of Dr. Bert, Grand Trunk's testifying expert, that the FAI was the entire cause of Lilly's injury. The decision ignores the other evidence the jury heard, including that from Dr. Bielema and Dr. Widmeyer. There indisputably was evidence of (1) the preexistence of the FAI before Lilly's work with Grand Trunk, and (2) the contribution of FAI to Lilly's hip osteoarthritis.

Jury instructions must be based on the evidence. Grand Trunk's proposed Special Instructions were supported by both the pleadings and the evidence. Grand Trunk pled preexisting conditions in its original answer and in each subsequent answer to Lilly's amended pleadings. Grand Trunk presented testimony from multiple experts about the effect of the preexisting conditions. Grand Trunk did more before and at trial than FELA requires to justify the giving on the preexisting condition instructions.

A position taken by a witness or even by counsel is irrelevant to whether or not a jury instruction should be given. That question is determined by the pleadings and the totality of the evidence. For example,

in *CSX Transp., Inc.* v. *Hensley*, 556 U.S. 838 (2009), the case in which this Court similarly granted a petition to restore FELA uniformity, this Court held:

> . . . a properly instructed jury could find that a plaintiff's fear is not 'genuine and serious' even where there is legally sufficient evidence for the jury to rule for the plaintiff on the issue. That is why *Ayers* recognized that sufficiency reviews and jury instructions are important and separate protections against imposing unbounded liability. . . . *Jury instructions stating the proper standard* for fear-of-cancer damages were part of that balance, and *courts must give such instructions upon a defendant's request*. [*Id.* at 842 (ellipsis and emphasis added).]

The harm the trial court inflicted on Grand Trunk is compounded by the instructions that the court's charge did submit, which specifically instructed the jury (1) that causation was proved if Lilly established that Grand Trunk's negligence caused or contributed, in whole or in part, to some injury of Lilly, and (2) that damage is said to be caused or contributed to by an act or failure to act when it appears from a preponderance of the evidence in the case that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. Without the preexisting-condition Special Instructions, these boilerplate FELA "in whole or in part" and "no matter how small" causation instructions constituted harmful error.

Applying this Court's prevailing, approved FELA causation instruction,[4] the trial court inadvertently led the jury to find that Lilly's injury was 100% caused by Grand Trunk's negligence. These instructions relating to causation harmed Grand Trunk because, contrary to the FELA, they prohibited the jury from considering Lilly's prior medical condition and what effect it played in his ultimate injuries. To give this part of the FELA instructions without also instructing the jury about pre-existing condition law is a substantial error that unfairly prejudiced Grand Trunk. The instructions as given failed to give Grand Trunk a balanced and fair charge and did not allow the jury to decide the case intelligently, fairly, and impartially. *See*, *e.g.*, *Meyer*, 865 A.2d at 869 ("[S]ince the jury charge did not cover apportionment aside from a reference to comparative negligence and did not even discuss the preexisting condition as a possible cause for the injury, we are constrained to vacate the judgment entered on the verdict and remand for a new trial."); *Bickerstaff*, 978 A.2d at 799 ("The court's error substantially prejudiced appellant's case").

Further, the court of appeals' holding places future defendants like Grand Trunk in a catch-22. Applying this opinion means that a defendant may either contest causation – arguing that its alleged negligence did

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[4] *See CSX Transp., Inc.* v. *McBride*, 564 U.S. 685 (2011) ("Juries in such [FELA] cases are properly instructed that a defendant railroad 'caused or contributed to' a railroad worker's injury 'if [the railroad's] negligence played a part – no matter how small – in bringing about the injury.' " *Id*. at 705 (citation omitted).

not cause a plaintiff's injury – or argue that a plaintiff's preexisting condition contributed to his or her claimed injuries, but a defendant cannot do both in the same case. The court of appeals' decision limits the trial court's instruction to the jury of Grand Trunk's defense theory to a single sentence from its expert witness, notwithstanding other evidence (medical records, treatises and studies upon which the experts relied) the jury saw and other witnesses (Dr. Widmeyer and Dr. Bielema) the jury heard. If this holding stands, then defendants who have evidence of preexisting condition must opt between arguing that evidence and arguing that they are not the cause of a plaintiff's claimed damages. The law has never created that dilemma. Because the effect of the trial court's charge errors was to deny Grand Trunk the right to submit an instruction that the FELA requires, these errors were harmful and should result in reversal and a new trial.

III. This case is an ideal vehicle to clear up the substantial confusion caused by the court of appeals' decision.

The court of appeals' holding requires this Court's immediate intervention, and this case is an ideal vehicle for this Court to address the important question presented.

First, the legal questions presented are unencumbered by factual issues. For purposes of this proceeding, Grand Trunk accepts the truth of all the allegations pled by Lilly.

Second, the court of appeals' holding is undeniably out of step with decisions of the federal and state courts in FELA jury-instruction cases.

Third, the issues are monumentally important. If the court of appeals' opinion is left in place, then the defense of Michigan FELA cases – and FELA cases in other states that look to the court of appeals' opinion for guidance – will be substantially and unfairly hampered. To have a jury receive preexisting condition instructions that are routinely given in FELA cases in both state and federal courts across the country, employers defending FELA cases will have to concede some level of causation. That result is untenable.

That the erroneous opinion comes from a state court of appeals should not deter this Court from granting certiorari. This Court's precedent in addressing instruction errors in state court FELA cases demonstrates that this case is appropriate to be addressed by this Court now. In *Hensley*, this Court considered and reversed a state-court FELA jury instruction decision in almost precisely the same procedural posture as this one. There, the defendant railroad submitted proposed jury instructions to the trial court regarding the plaintiff's fear-of-cancer damages. *Id*. at 839. The trial court denied those requests over the defendant railroad's objections. *Id*. at 840. The state court of appeals affirmed, *id.*, then denied a petition for rehearing. 278 S.W.3d 282 (Tenn. App. 2008). The Tennessee Supreme Court denied review. 2008 Tenn. LEXIS 867 (Nov. 17, 2008). This Court granted the petition and reversed to restore national

uniformity. *CSX Transp., Inc.* v. *Hensley*, 556 U.S. 838 (2009).

As in *Hensley*, this case involves a critical FELA jury instruction as tried in many state and federal courts across the country. As in *Hensley*, this Court should grant certiorari and reverse. Alternatively, the Court should summarily reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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