No. 19-960

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

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads, many smaller freight railroads, Amtrak, and some commuter authorities. AAR members account for the vast majority of the rail industry's line haul mileage, freight revenues, and employment. In matters of significant interest to its members, AAR frequently appears on behalf of the railroad industry before Congress, the courts and administrative agencies. AAR participates as *amicus curiae* to represent the views of its members when a case raises an issue of importance to the railroad industry as a whole.

This case, which arises under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, presents such an issue. FELA is a negligence statute that provides a remedy to railroad workers who are injured on the job. Because FELA differs fundamentally from the no-fault workers' compensation systems that today cover virtually all other U.S. employers, it presents unique challenges for railroads. FELA claims that cannot be settled quickly usually result in lawsuits, often leaving railroads embroiled in litigation with their employees in which questions related to negligence, causation and damages are tried before a jury.

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[1]As required by Rule 37.2(a), counsel for AAR has timely notified the parties of AAR's intent to file this brief. Both parties have consented to AAR's filing of an *amicus* brief. Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

The proper measure of damages is an issue that frequently arises in FELA cases. In this case, the trial court refused to instruct the jury that it may not award damages that are attributable to the plaintiff's preexisting medical condition. That ruling was affirmed by the state appellate court even though the law is clear that juries must be instructed to apportion damages between losses caused by the defendant's negligence and losses caused by a preexisting condition.

AAR works closely with its members to ensure consistent and correct application of FELA around the country. In its brief, AAR will urge this Court to grant certiorari in order to clarify that proper instructions on apportionment of damages must be given if requested by the defendant.

SUMMARY OF THE ARGUMENT

The trial court erred when it refused to instruct the jury to apportion damages between losses attributable to the defendant's negligence and losses attributable to the plaintiff's preexisting medical condition. Under FELA, railroads are liable only for damages caused in whole or in part by their negligence. The law is clear that juries should not award damages that the plaintiff would have suffered regardless of the defendant's negligence, including damages attributable a preexisting medical condition. When evidence supporting such an apportionment has been introduced, as it was here, the trial court is required to instruct the jury accordingly.

In other FELA cases where the court has failed to instruct the jury in accordance with the law with respect to the proper assessment of damages, this Court has granted the petition for certiorari and summarily

reversed the court below. The Court should follow the same course here.

ARGUMENT

THIS COURT SHOULD GRANT THE PETITION AND SUMMARILY REVERSE THE DECISION BELOW AS IT HAS DONE IN THE PAST WHEN A TRIAL COURT HAS REFUSED TO PROPERLY INSTRUCT A JURY ON DAMAGES IN A FELA CASE.

Under FELA, a railroad employer is liable only for damages caused by its negligence. In this case, the trial court made a fundamental error, which was affirmed by the Michigan Court of Appeals, when it refused petitioner Grand Trunk Western Railway's request to instruct the jury that it should not award damages that were attributable to the plaintiff's preexisting medical condition that was unrelated to petitioner's alleged negligence. This Court should promptly address the error below by granting certiorari and summarily reversing the lower court, as it has done in other FELA cases where a court has refused to issue a damages instruction required under FELA. *See CSX Transp., Inc. v. Hensley*, 556 U.S. 838 (2009); *St. L. SW Ry. Co. v. Dickerson*, 470 U.S. 409 (1985).

A. FELA Defendants are Liable Only for Damages Caused By Their Negligence.

FELA provides railroad workers who are injured on the job their exclusive remedy against their employer. *Erie R.R. v. Winfield,* 244 U.S. 170, 172 (1917). FELA differs fundamentally from the workers' compensation systems that cover virtually all other American workers (and, in fact, workers throughout the world), which typically provide benefits under a no-fault insurance

model. *See generally* Transportation Research Board, *Compensating Injured Railroad Workers Under the Federal Employers' Liability Act* (1994).[2] In some ways FELA provides a more expansive, generous remedy than workers' compensation laws; in other ways FELA is more restrictive. For example, FELA awards are not capped, while workers' compensation benefits typically are. On the other hand, unlike employees covered by no-fault systems injured railroad workers are entitled to compensation only if their injury was caused in whole or in part by their employer's negligence. 45 U.S.C. §51.

With respect to employer liability, railroads are treated differently than other employers for historical reasons. At the turn of the twentieth century railroads were the nation's dominant industry other than agriculture. The work could be hazardous, and state law remedies for workplace injuries often were inadequate. *See Johnson v. Southern Pac. Co*. 196 U.S. 1, 19-20 (1904) (describing the hazards of certain aspects of railroad work); *Nordgren v. Burlington N. R.R*., 101 F.3d 1246, 1248 (8th Cir. 1996) ("Around the turn of the [twentieth] century, there was great concern that railroad employees who were injured in the course of their employment had no adequate remedy for their injuries.").[3] In 1908, before the concept of no-fault

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[2] Other than railroads, and the maritime industry, to which the substance of FELA applies by virtue of the Jones Act, 46 U.S.C. §30104, all industries in the United States are covered by either state or federal no-fault workers' compensation systems. Price V. Fishback and Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States*, 41 J.L & Econ. 305, 319-20 (1998). No-fault workers' compensation is the prevailing model worldwide today. PETER M. LENCSIS, WORKERS' COMPENSATION: A REFERENCE AND GUIDE 14 (1998).

[3] In the year ending June 30, 1907, 4,534 rail workers were killed on the job and 87,644 were injured. Interstate Commerce

workers' compensation had gained a foothold in the United States, Congress enacted FELA to provide a uniform tort-based remedy to railroad employees injured on the job. Act of April 22, 1908, c. 149, 35 Stat. 65 (1908).

From the standpoint of railroad employees, FELA was a significant improvement over the prevailing common law. At the time, common law rules on the negligence of fellow servants, assumption of the risk and contributory negligence often made it difficult to recover for workplace injuries. When the negligence of a "fellow servant"—which typically was not attributable to the employer—caused the injury, the employer was absolved of liability. *Ryan v. Cumberland Valley R.R.*, 23 Pa. 384, 386 (Pa. 1854). In addition, when the employee "entered the employment of the defendant he assumed the usual risks and perils of the service" and "he could not call upon the defendant to make alterations to secure greater safety." *Gibson v. Erie Ry. Co.*, 63 N.Y. 449, 452 (N.Y. App. 1875). In the majority of states, any contributory negligence by the plaintiff barred recovery even if the defendant also was at fault. *See Louisville, Nashville & Great S. R.R. v. Fleming*, 82 Tenn. 128, 135 (Tenn. 1884).

To facilitate recovery, FELA addressed these obstacles. The fellow servant doctrine was eliminated "by placing the negligence of a coemployee upon the same basis as the negligence of the employer." *Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916). The assumption of the risk doctrine also was removed from FELA cases. 45 U.S.C. §54; S. Rep. No. 460, at 2 (1908) (FELA set aside the "law which presumes that a

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Commission, *Statistics of Railways in the United States* 1908 41, 99 (1909).

workman have notice [sic] of and assume the risks incident to all dangers of his employment and defects in the machinery"). In addition, FELA was an early example of a comparative fault statute, under which damages are reduced only in proportion to the employee's negligence, rather than being barred entirely, if the employee's negligence contributed to the injury. 45 U.S.C. §53; *see* H.R. Rep. No. 1386, at 4-5 (1908).

While FELA ameliorated some of the harsher aspects of early twentieth century common law, it retained what at the time was the universal compensation model in the United States: the law of negligence. *See New Orleans & N. E. R.R. v. Harris,* 247 U.S. 367, 371 (1918) ("negligence is essential to recovery"). The rights and obligations under FELA depend upon "applicable principles of common law. . . . Negligence by the railway company is essential to a recovery." *Southern Ry. Co. v. Gray*, 241 U.S. 333, 339 (1916). *See also, Urie v. Thompson*, 337 U.S. 163, 182 (1949); *Adams v. CSX Transp., Inc*., 899 F.2d 536, 539 (6th Cir. 1990). FELA incorporates ordinary negligence as the standard of care. *CSX Transp., Inc, v. McBride,* 564 U.S. 685, 703 (2011). In order to recover damages under FELA, the plaintiff must prove all elements of a negligence case. *Van Gorder v. Grand Trunk W. R.R.*, 509 F.3d 265, 269 (6th Cir. 2007). Thus, under FELA, where there is no employer fault, there is no obligation to provide compensation even if the injury was clearly sustained on the job. In contrast, under workers' compensation employees who are hurt on the job are entitled to compensation, at levels prescribed by statute, regardless of whether the employer was at fault or the employee's negligence contributed to the injury; at the same time, workers' compensation employers generally are immune from negligence suits by injured employees.

Compensating Injured Railroad Workers Under the Federal Employers' Liability Act, at 18-19, 85.[4]

When a FELA claim cannot be resolved between the railroad and its employee, the employee must bring a lawsuit, which may be filed in either state or federal court, 45 U.S.C. §56, with a jury determining all questions related to negligence, causation, and damages. *Bailey v. Cent. Vermont Ry.,* 319 U.S, 350, 354 (1943) (describing the right to a jury determination of the facts as "part and parcel of the [FELA] remedy"). In FELA cases, the caps and limitations on recovery that characterize workers' compensation do not apply, and injured workers may seek both economic and non-economic damages. *Frazier v. Norfolk & W. Ry. Co.,* 996 F.2d 922, 925 (7th Cir. 1993). Juries typically are given wide discretion to make determinations of fact, including questions about the extent of damages suffered. *Grunenthal v. Long Island R.R.,* 393 U.S. 156, 160-61 (1968); *Lavender v. Kurn,* 327 U.S. 645, 653 (1946).

Jury discretion notwithstanding, damages may be awarded only for losses that can be shown to have been caused by the employer's negligence. *Consol. Rail Corp. v. Gottshall,* 512 U.S. 532, 543 (1994) ("FELA does not make the employer the insurer of the safety

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[4] Under workers' compensation, benefits typically consist of a percentage (commonly, two-thirds) of lost wages, capped at a prescribed amount. *Compensating Injured Railroad Workers Under the Federal Employers' Liability Act,* at 87. Injured workers also are entitled to medical expenses incurred as a result of the injury. *Id.* at 86. Most workers' compensation laws also include a schedule of benefits, payable for the loss, or loss of use, of certain body parts or functions. *Id.* at 92. Beyond that, however, noneconomic (pain and suffering) losses generally are not compensable. *Id.* at 3. Disputes arising under workers' compensation generally are handled through an administrative process. *Id.* at 104.

of his employees while they are on duty." (internal quotation marks omitted)). The FELA "is not a workers' compensations act. The only injuries compensable under the statute are those resulting in whole or in part from the *negligence* of" the employing railroad. *Harris v. Illinois Cent. R.R.,* 58 F.3d 1140, 1143 (6th Cir. 1995) (internal quotation marks omitted) (emphasis in the original); *O'Hara v. Long Island R.R.*, 665 F.2d 8, 9 (2d Cir. 1981) ("FELA is not an insurance program. Claimants must at least offer some evidence that would support a finding of negligence.").

While state courts have concurrent jurisdiction to hear FELA cases, all substantive aspects of the statue are governed by uniform federal law. *Urie*, 337 U.S. at 174 ("What constitutes negligence for the statute's purpose is a federal question.") *New York Cent. R.R. v. Winfield,* 244 U.S. 147, 150 (1917) (FELA "was intended to be very comprehensive, to withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws, and to apply to them a national law having a uniform operation throughout all the states."); *South Buffalo Ry. Co. v. Ahern,* 344 U.S. 367, 371-72 (1953); *Brady v. Southern Ry. Co.,* 320 U.S. 476, 479 (1943).

B. FELA Defendants are Not Liable for Damages Attributable to a Plaintiff's Preexisting Medical Condition and Courts Must Instruct Juries Accordingly When There is Evidence Supporting Such Apportionment of Damages.

Questions related to FELA damages are considered substantive and therefore are governed solely by federal law. *Norfolk and W. Ry. Co. v. Liepelt,* 444 U.S. 490, 493 (1980). This Court has made clear that even where employer negligence can be proved, FELA damages

are not unbounded, but instead are subject to a number of limitations on their nature and scope. For example, FELA plaintiffs may recover damages for negligent infliction of emotional distress, but only when the plaintiff was in the "zone of danger" of the defendant's negligent conduct. *Gottshall,* 512 U.S. at 554 (emphasizing the policy of reining in "unlimited and unpredictable liability" *id*. at 557). *See also Norfolk & W. Ry. Co. v. Ayers,* 538 U.S. 135, 157 (2003) (employees who are exposed to asbestos on the job may recover for fear of contracting cancer as an element of pain and suffering damages, but only when the fear is "genuine and serious"); *Liepelt,* 444 U.S. at 493-94 (when an employee seeks damages for lost wages, railroads are entitled to introduce evidence of, and have the jury instructed on, the impact of federal income taxes on the employee's wages to enable the jury to properly calculate the employee's actual loss); *Chesapeake & Ohio Ry. Co. v. Kelly,* 241 U.S. 485, 491 (1916) (FELA damage awards, which typically are made as a lump sum, must be reduced to present value to account for the time value of money); *cf. Monessen SW Ry. Co. v. Morgan*, 486 U.S. 330 (1988) (prejudgment interest is not available under FELA). Lower courts also have placed limits on FELA damages. *E.g., Anderson v. Burlington N., Inc*., 469 F.2d 288 (10th Cir. 1972) (loss of consortium damages not available under FELA); *Kozar v. Chesapeake & Ohio Ry. Co.,* 449 F.2d 1238 (6th Cir. 1971) (punitive damages not available under FELA).

To assure that railroad liability is limited to the consequences of the railroad's negligence, with near universality courts have held that while FELA plaintiffs are "entitled to recover damages for any aggravation of [a] preexisting condition [caused by the defendant's negligence], those damages are limited to the additional

increment caused by the aggravation . . . [and plaintiffs] may not recover for pain or impairment that would have been experienced even if the accident never occurred." *Richardson v. Missouri Pac. R.R.,* 186 F.3d 1273, 1278 (10th Cir. 1999) (citation omitted); *Holladay v. Chicago, Burlington & Quincy R.R.,* 255 F. Supp. 879, 886 (S. D. Iowa 1966) ("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 incudes 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."); *CSX Transp., Inc. v. Bickerstaff*, 978 A.2d 760, 796 (Md. App. 2009) ("FELA permits apportionment of damages for non-negligent causes of the employee's injuries."); *Nichols v. Burlington N. & Santa Fe Ry. Co*., 148 P.3d 212, 216 (Col. App. 2006) (A FELA "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."). Where the alleged injury is the aggravation of a pre-existing condition, a FELA plaintiff "can recover only such damages as result from the aggravation; not those which would have been caused by the previous condition without the aggravation. And [the plaintiff] has the burden of proving with reasonable certainty that his future disability for which he claims damages will be the result of the aggravation rather than the natural development of the previous condition." *Matthews v. Atchison, Topeka & Santa Fe Ry. Co.,* 129 P.2d 435, 443 (Cal. App. 1942); *See also* Pet. at 9-16.

If an employee has "health problems" that "arise independently of the [work-related] accident, [the] defendant is entitled to adduce evidence of such

problems in an effort to reduce a potential damages award." *Stevens v. Bangor and Aroostook R.R.,* 97 F.3d 594, 599 (1st Cir. 1996); *Bliss v. BNSF Ry. Co*., 2013 U.S. Dist. LEXIS 146101, at *42 (D. Neb. 2013) (railroad entitled to introduce evidence supporting apportionment of damages to a preexisting condition). Courts have made it clear that there need only be sufficient evidence to enable the jury to make a rough apportionment between the damages caused by the employer's negligence and the damages caused by the preexisting condition. *Bickerstaff*, 978 A.2d at 797. However, there is no need for expert witness testimony to be introduced, nor is there a need to prove "[t]he extent to which an injury is attributable to a preexisting condition or prior accident" [ ] "with mathematical precision or great exactitude." *Sauer v. Burlington N. R.R.,* 106 F.3d 1490, 1494 (10th Cir. 1997); *Kelham v. CSX Transp., Inc*., 2015 U.S. Dist. LEXIS 97400, at *4-5 (N.D. Ind. 2015); *Meyer v. Union R.R.,* 865 A.2d 857, 866-67 (Pa. Super. 2004) (the railroad "had to provide the jury only with a reasonable basis of apportionment . . . [but] was not required to demonstrate an exact percentage representing the likelihood that the degenerative condition caused [the plaintiff's] injury").

Courts have emphasized the important role played by juries in apportioning damages in appropriate cases, and have made it clear that properly instructing the jury is essential to that process. *Rust v. Burlington N. & Santa Fe Ry. Co.,* 308 F.Supp.2d 1230, 1231 (D. Col. 2003) ("Apportionment of damages is best determined by the jury, and is properly addressed by [the court's] instructions to the jury."). When there is an evidentiary basis for doing so, juries must be instructed that they should apportion between the damages caused by the defendant's negligence and the damages attributable to a preexisting condition, with

the defendant liable only for the additional increment caused by the negligence. *BNSF Ry. Co. v. Epple*, 2016 Tex. App. LEXIS 12730, at *3 (Tex. App. 2016); *Gustafson v. Burlington N. R.R.*, 561 N.W.2d 212, 237 (Neb. 1997). In *Meyer,* 865 A.2d at 868, the court held that where evidence offered by the railroad supported its proposed apportionment instruction, the trial court committed error "in refusing to charge the jury relating to the apportionment principle." In *Schultz v. N.E. Ill. Reg'l Commuter R.R.*, 775 N.E.2d 964, 976 (Ill. 2002), the court rejected as misleading a jury instruction that did "not clearly inform the jury that damages should be awarded *only* for the aggravation of a preexisting condition." (emphasis in the original).

In other contexts, this Court has highlighted the jury's role in properly assessing damages. For example, in *Henderson v. United States,* 328 F.2d 502, 504 (5th Cir. 1964), a case arising under the Federal Tort Claims Act, the Court held that "[t]he trier of fact must [ ] determine whether or not the pre-existing condition was bound to worsen, in which event an appropriate discount should be made for the damages that would have been suffered even in the absence of the defendant's negligence." In particular, this Court has stressed the importance of proper jury instructions in guiding damage awards. *Phillip Morris USA v. Williams*, 549 U.S. 436, 357 (2007) ("a court, upon request, must protect against [the] risk" that a jury will misunderstand the law); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 433 (1994) (a "proper jury instruction[ ] is a well-established and, of course, important check against excessive awards").

C. In Other FELA Cases Where the Trial Court Refused to Instruct the Jury on Damages This Court Has Granted the Petition and Summarily Reversed the Decision Below.

In this case, the court below undermined the jury's role in assessing damages. Against the overwhelming weight of precedent, the trial court refused to instruct the jury that it is required to award damages only for losses caused by the defendant's negligence but not for losses that are attributable to a preexisting medical condition, a ruling that was upheld by the Michigan Court of Appeals. In similar situations in FELA cases, this Court has seen fit to summarily reverse such an error. In *CSX Transp., Inc. v. Hensley*, 556 U.S. 838 (2009), the Tennessee Court of Appeals upheld the trial court's refusal to instruct a jury that, as this Court held in *Ayers*, damages could be awarded for fear of cancer only if the fear was genuine and serious. This Court held that ruling to be "clear error," *id*. at 840, explaining that "[g]iving the instruction on this point is particularly important in the FELA context." *Id*. at 841. The Court granted the petition for certiorari and summarily reversed the decision of the state court of appeals. *Id*. at 843.

In *St. L. SW Ry. Co. v. Dickerson*, 470 U.S. 409 (1985), the propriety of jury instructions concerning the measure of damages also was at issue. The trial court refused to instruct the jury that in FELA cases a damages award should reflect the present value of any future losses the plaintiff would sustain. As in this case, the state court of appeals affirmed the trial court. Citing to *Kelly*, this Court explained that "existing law provides a clear answer" by entitling a FELA defendant to have the jury instructed that damage awards

must be reduced to present value. *Id*. at 411. Here too, the Court granted the petition for certiorari and summarily reversed the court below.

This case presents a similar situation to *Hensley* and *Dickerson*. The trial court refused to provide an instruction that correctly explained the law and was essential to the jury's determination of damages. That ruling was upheld by the state court of appeals. As in those cases, the substantive law is clear in this case. And as in *Hensley*, the Court of Appeals' reason for affirming the refusal to give the requested instruction "do[es] not withstand scrutiny." 556 U.S. at 841. *See* Pet. at 19-20. Therefore, like this Court did in *Hensely* (and *Dickerson*), this Court should grant the petition and summarily reverse the decision below.

CONCLUSION

For the foregoing reasons, this Court should grant the petition and reverse the decision below.

Respectfully submitted,

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