No. _____

In the
Supreme Court of the United States

SHAQUERE MYLESHIA GRAY, Co-Administratrix of the Estate of Gregory Tremaine Miller; HANNAH LASHA HOZE, Co-Administratrix of the Estate of Gregory Tremaine Miller,

Petitioners,
v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether the Court of Appeals for the 5th Circuit has deviated from established Supreme Court precedent under the Federal Employers Liability Act ("FELA"), most recently in *CSX Transportation, Inc. v. McBride*, 131 S. Ct. 2630 (2011)?

RELATED CASES STATEMENT

- Shaquere Myleshia Gray, Co-Administratrix of the Estate of Gregory Tremaine Miller; Hannah Lasha Hoze, Co-Administratrix of the Estate of Gregory Tremaine Miller, Case No. 17-60817, United States Court of Appeals for the Fifth Circuit, judgment entered May 28, 2020, rehearing denied July 16, 2020.

- Shaquere Gray and Hannah Hoze, appearing as co-personal representatives on behalf of the Estate of Gregory Tremaine Miller, Civil Action No. 2:16-cv-25, judgment entered November 17, 2017.

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INTRODUCTION

Since this Court's decision in *McBride v. CSX,* 131 S. Ct. 2630 (2011), there has been a concentrated effort to limit the scope of this Court's affirmation of the significantly lower standard of proof required in a FELA case for submission to a jury. As recognized by at least one of the judges of the United States Court of Appeals for the Fifth Circuit, the Fifth circuit in particular has failed:

> to account for the special features of FELA's negligence action that make it significantly different from the ordinary common-law negligence action, contributes to the steady erosion and undermining of the right to a jury trial under FELA in this Circuit. *See also Huffman v. Union Pac. R.R.,* 675 F.3d 412, 426, 433 (5th Cir. 2012) (Dennis, J., dissenting) ("The evidence in this case is manifestly sufficient to meet the test of a jury case under the FELA, which is simply whether employer negligence played any part, even the slightest, in producing the injury.").

Gray v. Ala. Great S. R.R. Co., 960 F.3d 212, 223 (5th Cir. 2020) (Dennis, J., dissenting). As has been noted by this Court for over 100 years, in enacting the FELA, Congress intended to shift the burden of life and limb from the employee to the employer. Allowing railroads and courts to continue to cut away at the FELA's intended remedial effect is contrary to this Court's precedent as well as Congress' intent.

OPINIONS BELOW

In the United States Court of Appeals for the Fifth Circuit this case was docket numbered 17-60817, captioned *Gray v. Ala. Great S. R.R. Co.* The date of entry of judgment was May 28, 2020. The Court's opinion is reproduced in the Appendix at 5a-27a and reported at 960 F.3d 212 (5th Cir. 2020). Rehearing was denied on July 16, 2020, reproduced at 1a-2a.

In the United States District Court for the Southern District of Mississippi this case was docket numbered 2:12-cv-25, captioned *Gray v. The Ala. Great S. R.R. Co.* The date of entry of judgment was November 17, 2017. The Court's opinion has not been reported but is reproduced in the Appendix at 30a-37a.

JURISDICTION

The United States Circuit Court for the Fifth Circuit entered judgment sought to be reviewed on May 28, 2020 with rehearing denied on July 16, 2020. This Court has jurisdiction to review this judgment on a writ of certiorari under 28 United States Code § 1257(a), Supreme Court Rule 10(a) and this Court's March 19, 2020 COVID 19 order.

STATUTORY PROVISIONS INVOLVED

This case concerns 45 U.S.C. §§ 51-57, which are reproduced in the appendix at 38a-41a.

STATEMENT OF THE CASE

1. Factual background.

Gregory Tremaine Miller, a 20-year-old conductor-trainee (C-T) had been employed by AGS for 45 days. App. 19a. He had no previous railroad experience. He had completed Phase I of his training, which consisted of 19 days of classroom and field training at the AGS Training Center in McDonough, Georgia. App. 19a. Mr. Miller then returned to Mississippi for on-the-job training.

On August 12th, 2015, Mr. Miller was assigned to a train crew consisting of a conductor, M.A. Sillimon; a brakeman, J.D. Henderson; and an engineer, A.C. Clearman. App. 6a. The crew was assigned to work Dragon Yard, which consisted of a number of liquified gas plants and a small AGS yard. This was Mr. Miller's first time to work in Dragon Yard.

Each day as the shift started it was the duty of the employees to hold a briefing on the upcoming job. The conductors, per the Conductor's Training Workbook, are required to make sure that their job briefings take place at the start of the shift and every time the job changes.

Mr. Sillimon recalled that he announced, "Watch for any live equipment, watch for any footing area, and also beware because we are working at night." Mr. Sillimon further stated at that job briefing that he told Mr. Miller to be aware of live equipment and

to stay close by. Mr. Miller was assigned to Conductor Sillimon since Sillimon was the senior conductor. However, according to Mr. Sillimon, AGS also allowed C-Ts to work under the brakeman. On this particular night, Mr. Miller's senior man, Sillimon, left him to be supervised by the far less experienced brakeman Jerrell Henderson. App. 24a.

Mr. Henderson went to work for AGS in August 2014 and became a qualified conductor on December 12th, 2014. Thus, at the time of the accident, Mr. Henderson had been a qualified conductor for eight months. During 2015 and up to 2016, Mr. Henderson was cited with five incidences of discipline for rules violations. App. 24a. Mr. Sillimon, the Conductor, went through the same training as Mr. Miller at McDonough, then through field training at Meridian working different industries. Mr. Sillimon said that the conductors were in charge of his training at Meridian.

On the night of the accident, once the crew reached the Lone Star Gas facility, Mr. Sillimon, the conductor, left the crew and performed an inspection on the two tracks which the remainder of the crew would enter to work after he gave the OK. After this inspection Mr. Sillimon would be on the south end of the track and the crew would be on the north end. At this point, Sillimon could no longer see Miller and had passed his duty to oversee Miller on to Henderson. On this particular night, the crew was to pick up a set of cars. These particular cars were spotted individually, with approximately 10 feet between each.

At this point, Sillimon was located on the other end of the track, at least eleven car lengths away and testified that he could not visualize Miller or Henderson. Due to the location of Sillimon and Henderson, Henderson now became the employee in charge of the movement because Sillimon could no longer visualize the point of the shoving movement as required by 49 C.F.R. § 218.99.

Mr. Henderson then stated, "Everybody let me get a big half to a bunch." During deposition, he explained that this terminology meant to perform a "rolling couple." He then explained that a rolling coupling meant that once a coupling takes place, you keep the engine moving and continue to couple all the cars without stopping. App. 22a.

When asked about where the term "bunch" came from, he stated that he could not recall. When asked if this was something that he had studied at the McDonough Training Center in Georgia, he replied, "I can't recall." App. 22a. Mr. Sillimon stated that the word "bunch" means that you keep going. When asked if the term is from the AGS Safety Rules he said that he did not know. He said that he first learned of this term while working in Meridian in field training. He also said that a rolling coupling was not taught to him at McDonough Training Center. App. 22a. This fact is confirmed by the National Transportation Board Finding of Facts concerning this accident on Page 5 of the Accident Report:

> "The training coordinator further explained that the training center does not teach rolling couples. The classroom training teaches trainees another method which has them couple, turn on the air, check the rail car, and then go to the next rail car to make that coupling." He stated that, "although the practice of rolling couples was probably in place for a long time, there was nothing written in the rules or guidelines that explains a rolling couple."

Thus, Mr. Miller at this point in time was presented with terms that he was not trained to understand such as "bunch." Further, the method used by this crew, which was neither explained to him in job briefings or at his training at McDonough, was totally unknown to him. The **only** method of coupling he had ever used was to bring the engine to a stop, make the first coupling, stop again and pull the locomotive in the opposite direction to stretch the train and ensure a solid coupling, stop the locomotive again, and then continue backward to make the next coupling; not to just keep plowing down the track.

When asked about the earlier job briefing, Mr. Henderson said that there was nothing said to Mr. Miller about Miller's lack of experience and what he needed to do that day. He also agreed that identifying and explaining a bunch was something that you would normally do for a conductor-trainee when he is first assigned a new job.

In a shoving operation where the engineer pushes cars hooked to him, the man on the point, in this case Mr. Henderson, is supposed to count the engineer down to the coupling. Then he is to walk along with the cars and watch each coupling being made ensuring that he can see the coupling occurring as well as observe track between each coupling that is to be made to ensure that it is clear of any obstructions or persons.

Mr. Henderson stated that Mr. Miller was a half of a car away from him before the coupling started. Mr. Miller was South of Mr. Henderson in the direction the train was travelling. Mr. Henderson did not walk along and watch each coupling as the AGS Rule and the code of federal regulations requires but stood where the first coupling was to be made.

Mr. Henderson stated that his whole body was facing north because he had his full attention on the engine coming down, instead of protecting the point of the shove and observing the couplings and ensuring there was nothing on the tracks or problems that would interfere with the coupling, as required by 49 C.F.R. § 218.99. As he turned toward the South after the first coupling was made, he made the statement that he thought he saw a flash but did not know what the flash was. Mr. Henderson said that he told his engineer to stop. Mr. Henderson started walking south down the track and found Mr. Miller trapped between the coupling of the cars.

Mr. Henderson admitted that when Mr. Miller was fatally injured, Miller was under his

supervision, but he did not remember discussing at the job briefing that he was to supervise Mr. Miller. When asked if he had any idea what Mr. Miller was doing when Miller was pinned between the cars, Henderson's answer was, "No, sir." The reason Henderson did not know was because he had his back to Mr. Miller, did not know what task Mr. Miller was performing, and had not communicated with Mr. Miller regarding the fact that the crew was performing a rolling shove, when he was supposed to be watching out for him, keeping him in sight, and making sure that his C-T was not in danger. Henderson, Sillimon and Clearman failed to follow AGS and federal protocol, rules and regulations. They chose to perform a rolling shove because it was quicker. It is undisputed that a rolling shove is not taught at AGS's conductor school and it is undisputed that Henderson could not and did not visualize the coupling that was made that ultimately killed Mr. Miller. This is a clear violation of 49 C.F.R. § 218.99.

2. Trial court proceedings.

On September 24, 2015, a FELA claim was filed by Mona Shea Miller, decedent's mother, for personal injuries and wrongful death arising from an incident that occurred near Petal, MS in which Gregory Miller was crushed and killed between two rail cars. Along with a standard FELA negligence claim, a claim for absolute liability was made for violations of the code of federal regulations.

On November 22, 2016, the disrict court approved the substitution of Shaquere Myleshia Gray and Hannah Lasha Hoze for Mona Shea Miller.

The co-administratrixes alleged that Alabama Great Southern failed to supply Miller with a reasonably safe place to work, failed to provide safe working conditions, failed to provide proper assistance, failed to to exercise due care and caution commensurate with the surrounding circumstances, and violated regulations enacted for the safety of railroad workers found in title 49 of the Code of Federal Regulations. Discovery insued. Alabama Great Southern filed a motion for summary judgment on September 29, 2017. The motion was briefed by both sides. On November 17, 2017, the district court issued its order in favor of Alabama Great Southern and dismissing the complaint.

In its order, the district court hinged its opinion solely on the issue of 3-step protection. The district court explained that Miller had been taught 3-step protection during his training and that he had demonstrated on at least one other occasion that he was aware of how to use it to cross between cars. 3-step protection is the process taught to operating craft employees where before crossing between moving equipment, they are to radio the engineer and ensure that no movement will take place. The district court found that Miller was the sole casue of his own injuries because he failed to use 3-step protection at the time of his injury. The court also found that it was not foreseeable that Miller would attempt to go between cars.

The district court did not address any of the issues raised by the Plaintiff's regarding inproper job briefing, failure to properly oversee and mentor Miller, failure to comply with 49 C.F.R. § 218.99,or failure to train Miller on the concept of a "bunch."

3. United States Court of Appeals for the Fifth Circuit.

On December 8, 2017, Plaintiffs filed a timely notice of appeal to the United Stated Court of Appeals for the Fifth Circuit. Briefs were filed by both parties and oral argument was heard. The Court issued its order on May 28, 2020 affirming the summary judgment, with one judge dissenting.

The Court of Appeals entered into a much more detailed discussion of the facts and addressed the various arguments of both parties. The Court started with the plaintiffs' argument that Henderson was negligent in his supervision of his conductor-trainee, Miller. In holding that there was no evidence Henderson was negligent, the Court found that Henderson was a certified conductor and that there was no written policy stating a mentor can "never stop looking at a conductor-trainee." The Court stated the the plaintiffs agreed that Henderson was to observe the couplings. However, once again there is no discussion of Alabama Great Southern's rule or 49 C.F.R. § 218.99, which both require that Henderson be in a position to see whether there was anything fouling the track at the point of the coupling. Had he been in a position to do so, he would

have had Miller in his site. There was no discussion of the interplay between railroad safety regulations and absolute liability. This fact was wholly ignored. The Court stated that the only evidence as to the rules for coupling was "testimony vaguely describing a conductor and brakeman's duty of 'observing a coupling.'" Again, the Court ignored testimony from Plaintiffs' expert witness stating that Henderson was required under the Federal Railroad Administration rules and regulations to be in a position to see any obstructions that could foul the track, including people.

Next, the Court turned to Plaintiffs' argument that it was negligent for Alabama Great Southern and its other employees to not train Miller on a "bunch" or "rolling coupling" prior to the movement on the night in question. The Court admits that a "failure of others to explain what was occuring could have left him unaware of just how dangerous his actions would be." The Court then notes that the **only** evidence of a source for Miller's knowledge was not identified by the railroad until oral argument. The majority opinion reads into a qoute from Sillimon's deposition regarding the procedure for a running coupling that Miller had experienced this move earlier in the evening. However, the only qoute ever identified by either the railroad or the Court never says that this procedure had been used previously with Miller at all, much less earlier that evening. The Court quoted Sillimon's deposition stating:

Q: All right. And how many cars

did y'all work that night [at the second location]? Do you know?

A: It was 20 -- it was 20 in, 20 out.

Q. Okay. And y'all have to spot all 20 of them?

A. That's correct.

Q. And how do y'all go about spotting these cars? How do y'all handle that?

A. You spot each car up one at a time.

Q. Okay. And take me through what you would do as the conductor, what the brakeman would do, and what the engineer would do in spotting these cars.

A. As far as the brakeman and the conductor, it can go either or.

Q. Okay.

A. I can walk down and do a C-100 [which he would later describe as checking each car prior to starting the coupling] and check everything, make sure the hoses are -- make sure there's no one in the tracks, make sure the hoses are down, make sure any chocks or anything that we couple up to -- so it won't derail anything. Or the brakeman can walk down and do a C-100. And after we do a C-100, I'll be in position at the bottom. The brakeman be in position at the top. He will make the first coupling, and the rest of the couplings be run-in coupling.

> Q. And you refer to that as a running couple?
>
> A. That's correct.
>
> Q. And what -- what is a running couple?
>
> A. When you couple up to the -- you got to make sure you coupled up to the first car. Once you coupled up to the first car, you bunch to the next car. Then you bunch and then you bunch until you get to the last two cars. You stop the move. You couple up to that second to the last car, and then you couple up to the next car.

As can be seen from the above quote, there is no mention of a previous use of a running coupling. Just as telling, Judge Dennis wrote in his decent that he did not see any evidence in Sillimon's deposition to show that Miller had ever been exposed to this term or movement prior to his injury.

Finally, the Court turned to the plaintiffs' argument that it was foreseeable that Miller could go between the cars. The Court noted that "in some circumstances it of course is foreseeable that railroad employees will get between cars. In the circumstances here, stepping between cars was prohibited and the reason for the prohibition" would have been that this was continuous coupling and Miller had just witnessed this process earlier that night. Here again, the Court relies on the testimony highlighted from Sillimon's deposition which does not state anywhere that this procedure had just been done earlier that evening, or that Miller had

witnessed it. The Court's reasoning was flawed and it read into the evidence facts that simply were not there.

Based on the above analysis, the Court affirmed summary judgment in favor of Alabama Great Southern finding "though there is a lack of clarity as to exactly what happened, Miller, unfortunately, negligently went between the two cars" making him the sole cause of his own injuries.

Judge Dennis vehemently dissented from the majority stating that:

> Submission of a FELA case to the jury is required "in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." Rogers v. Missouri Pac. R.R., 352 U.S. 500, 510 (1957). This case is clearly not one of those rare cases in which every reasonable juror must conclude that the employer's negligence played no part - not even the slightest – in the employee's injury and death. *See id.; McBride,* 564 U.S. at 692. The majority opinion, in failing to account for the special features of FELA's negligence action that make it significantly different from the ordinary common-law negligence action, contributes to the steady

> erosion and undermining of the right to a jury trial under FELA in this Circuit. *See also Huffman v. Union Pac. R.R.,* 675 F.3d 412, 426, 433 (5th Cir. 2012) (Dennis, J., dissenting) ("The evidence in this case is manifestly sufficient to meet the test of a jury case under the FELA, which is simply whether employer negligence played any part, even the slightest, in producing the injury.").

On July 16, 2020, the Court issued a per curium order denying Plaintiffs' petition for rehearing. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

1. The Circuit Court of Appeals for the Fifth Circuit has deviated from established Supreme Court precedent.

The Supreme Court has made clear that the FELA represents, "an avowed departure from the rules of common law." *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 329 (1958). The FELA is a "humanitarian" statute. *Metro-North Commuter Rail co. v Buckley*, 521 U.S. 424, 438 (1997). Recognizing the "special need" to protect railroaders from the inherently dangerous nature of their work, Congress enacted the FELA to "shift part of the human overhead of doing business" from the employees to the employers. *Consolidated Rail Corporation v. Gotshall*, 512 U.S. 532, 542 (1994). Elsewhere, this Court has written that, "We have recognized

generally that the FELA is a broad remedial statute and have adopted 'a standard of liberal construction in order to accomplish [Congress'] objects.'" *Atchinson, Topeka &Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987).

The Act strips employers of their common law defenses of assumption of risk and contributory negligence as a bar to recovery, *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957), and abandons general concepts of proximate cause. *Green v. River Term. Ry.*, 585 F. Supp. 1019, 1024 (N.D.Ohio 1984), *aff'd* 763 F.2d 805 (6th Cir. 1985). The Third Circuit has stated, "The FELA represented a *radical change from the common law* in an attempt to assure workers a more sure recovery by abolishing many traditional defenses." *Poleto v Conrail*, 827 F.2d 1270, 1278 (3d Cir. 1987) (emphasis added).

Consistent with the humanitarian purpose of the FELA, the standard for submitting a FELA case to the jury is significantly less stringent than in the ordinary negligence action. *Rogers*, 352 U.S. at 506; *Mendoza v. Southern Pacific Trans. Co.*, 733 F.2d 631, 633 (9thCir. 1984). Under the FELA, "the test of a jury case is whether the proofs justify with reason the conclusion that employer negligence *played any part, no matter how slight*, in producing the injury or death for which damages are sought." *CSX Transportation, Inc. v. McBride*, 131 S. Ct. 2630 (2011)(emphasis added). *See also Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957). As a result, as the Third Circuit Court of Appeals has held:

> [A] trial court is justified in withdrawing such issues from the jury's consideration only in those

> ***extremely rare instances*** where there is a ***zero probability*** either of employer negligence or that any such negligence contributed to the injury of an employee.

Pehowic v. Erie Lackawana. Railroad Co., 430 F.2d 697, 699-700 (3rd Cir. 1970) (emphasis added). *See also, Mendoza v. Southern Pacific Transp. Co.*, 733 F. 2d 631 (9th Cir. 1984); *Hines v. Consolidated Rail Corp.*, 926 F.2d 262 (3rd Cir. 1991); *Eckert v. Aliquippa & Southern R. Co.*, 828 F.2d 183, 187 (3rd. Cir. 1987) (*citing Pehowic's* "zero probability" test); *Gans v. Mundy*, 762 F.2d 338, 343-44 (3rd Cir. 1985) (*citing Pehowic*).

The burden of proof necessary to present a case to a jury is "significantly lighter under FELA than . . . in an ordinary negligence case." *Smith v. Soo. Line R.R. Co.*, 617 N.W.2d 437, 439 (Minn. Ct. App. 2000) (citing *Habrin v. Burlington Northern Ry. Co.*, 921 F.2d 129, 132 (7th Cir. 1990)). The quantum of proof required to present a jury issue is described as a "scintilla" of evidence. *Id.* (citing *Hauser v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 346 N.W.2d 650, 653 (Minn. 1985)); *see also Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506 (1957) ("the test of a [FELA] jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought")(emphasis added).

The Second Circuit Court of Appeals has stated that, "[u]nder the FELA, 'the case must not be dismissed at the summary judgment phase unless there **is absolutely no reasonable basis** for a jury to find for the plaintiff.'" *Gadsden v. Port Authority TransHudson Corp.*, 140 F.3d 207 (2d Cir. 1998), *quoting Syverson v. Consolidated Rail Corporation*, 19 F.3d 824, 828 (2d Cir. 1994). As put more colorfully by the Seventh Circuit Court of Appeals, numerous cases have affirmed submission of FELA claims to juries based on evidence "scarcely more substantial than *pigeon bone broth*." *Green v. CSX Trans. Co.*, 414 F.3d 758, 766 (7th Cir. 2005), *quoting Habin v. Burlington Northern Railroad Co.*, 921 F.2d 129, 132 (7th Cir. 1990).

The corollary of these principles is that juries play a significantly greater role in FELA cases than at common law. *Eggert v. Norfolk & Western Railway Co.*, 538 F.2d 509 (2nd Cir. 1976), *citing, inter alia, Rogers*, *supra*; *Eaton v. Long Island R. Co.*, 398 F.2d 738, 741 (2d Cir. 1968) (under FELA, juries' right to pass upon issues of fault and causality "must be most liberally viewed."). This is because Congress *intended the FELA to be remedial legislation and under the Act*, and **"trial by jury is part of the remedy**." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360, *reh. denied,* 369 U.S. 882 (1962), *quoted in Eggert*, 538F.2d at 511; *Boeing Co. v. Shipman*, 411 F.2d 365, 371 (5th Cir. 1969) ("**trial by jury is part of the remedy"**) (*quoting Atlantic & Gulf Stevedores, Inc.*, *supra*); *Baily v. Central Vermont Ry.*, 319 U.S. 350, 354 (1943) (right to a **jury trial is** "**part and parcel of the remedy**

afforded" under the FELA). To deprive FELA plaintiffs of the benefit of a jury trial in "close or doubtful cases" is to "take away a goodly portion of the relief … Congress has afforded them." *Baily*, 319 U.S. at 345.

This Court's emphasis on the paramount importance of jury determinations in FELA cases emerges from a review of FELA cases reaching back to the 1940's. In *Bailey v. Central Vermont Railroad,* 319 U.S. 350 (1943), the plaintiff's decedent was killed at work. At the close of all the evidence, the railroad moved for a directed verdict. The trial court denied the railroad's motion and submitted the case to the jury, which returned a verdict for the plaintiff. The railroad appealed, and the Supreme Court of Vermont reversed, holding that the trial court should have granted the motion for a directed verdict. 319 U.S. at 351-352. This Court granted certiorari and reviewed the job performed by plaintiff's decedent, "the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guardrail . . ." and then stated ". . . all these were facts and circumstances for the jury to weigh and appraise in determining whether [the railroad] in furnishing [plaintiff's decedent] with that particular place in which to perform the task was negligent." *Bailey,* 319 U.S. at 354. The Court emphasized the importance of jury determinations in FELA cases:

> **It [the right to trial by jury] is part and parcel of the remedy afforded railroad workers under**

> **the Employers' Liability Act**. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. . . . **To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.**

Bailey, 319 U.S. at 354 (emphasis added).

The Court underscored the paramount importance of jury determinations in FELA cases in *Tennant v. Peoria and Pekin Union Railway Co.,* 321 U.S. 29 (1944). In *Tennant,* the plaintiff's decedent was killed working in a railroad yard. There was no direct evidence as to the decedent's precise location when he was killed. While there was evidence of railroad negligence, there was no direct proof that the railroad's negligence proximately caused the decedent's death. The case was submitted to a jury, which returned a verdict in favor of the plaintiff. The railroad appealed, and the appellate court reversed this judgment, finding that there was no substantial proof the railroad's negligence proximately caused the plaintiff's death. This Court wrote, "We granted *certiorari* [citation omitted] because of important problems as to **petitioner's right to a jury's determination of the issue of causation."** 321 U.S. at 29-30. As to the facts:

> Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. . . If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. No court is then justified in substituting its conclusion for those of the twelve jurors**.**

321 U.S. at 32-33 (emphasis added).

Three years later in *Lavender v. Kurn,* 327 U.S. 645 (1946), this Court once again reversed a FELA case where a reviewing court had set aside a plaintiff's verdict. In *Lavender*, the plaintiff's decedent was killed at work. The railroad's evidence suggested that the plaintiff's decedent had been murdered or that the accident could not have happened as the plaintiff's decedent claimed. The jury returned a plaintiff's verdict, the railroad appealed, and the Supreme Court of Missouri reversed the judgment ". . . holding that there was no substantial evidence of negligence to support the submission of the case to the jury." *327* U.S. at 647.

Once again, this Court reviewed the trial court record and admonished the lower court for permitting a railroad defendant to re-litigate the underlying factual dispute on appeal. The Court wrote:

> But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances **it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. . . .** 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.** 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.

327 U.S. at 652, 653 (emphasis added).

In 1963 the Court once more granted *certiorari* in a FELA case to reverse an appellate court that had improperly usurped the jury's fact-finding function. In *Gallick v. Baltimore and Ohio Railroad Co.,* 372 U.S. 108 (1963), a bug bit a railroad worker who was working near a stagnant pool of water on a railroad's right of way. The wound became infected and eventually the worker's legs were amputated. The railroad worker's doctors characterized the plaintiff's condition as "secondary to insect bite." The railroad moved for a directed verdict, which the trial judge denied. The jury found for the railroad worker.

On appeal, the Ohio Court of Appeals deemed the evidence nothing but "a series of guesses and speculations . . . a chain of causation too tenuous to support a conclusion of liability" and reversed the trial court's judgment. 372 U.S. at 112-113. The Supreme Court began its review with a pointed chastisement of the appellate court:

> We think that **the Court of Appeals improperly invaded the function and province of the jury in this Federal Employers' Liability Act Case. . .** We hold that the record shows sufficient evidence to warrant the jury's conclusion that petitioner's injuries were caused by the acts or omissions of respondent.

372 U.S. at 113 (emphasis added).

The Court used *Gallick* to again admonish trial and appellate courts tempted to disregard jury determinations in FELA cases. The Court began its review by examining *Tennant v. Peoria, supra,* which the Court labeled as, "one of the leading cases" regarding a railroad worker's right to a jury determination on the issue of causation. 372 U.S. at 114. The Supreme Court then re-affirmed *Tennant's* central holding:

> **It is the jury, not the court, which is the fact-finding body.** It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusions as to the facts . . . That conclusion, whether it relates to negligence, causation or any other factual matter**,** cannot be ignored. Courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

372 U.S. at 115, *citing Tennant,* 321 U.S. at 35. After reviewing other similar holdings, the Supreme Court found the court of appeals to have, "erred in depriving petitioner of the judgment entered upon the special verdict of the jury." 372 U.S. at 122.

From *Tennant* to *Bailey* to *Lavender* to *Gallick*, this Court has steadfastly proclaimed the paramount importance of jury determinations in FELA cases. The jury – not the trial judge, and not an appellate court – is to be the fact-finding body.

Here, the trial court overstepped its authority and failed to follow this Court's precedent. By ignoring all evidence of wrongdoing, including evidence that Miller had never been taught this procedure for coupling, the trial court impermissibly invaded the province of the jury. The trial court failed to take into account the significantly lower standards set out by this Court and erred in granting summary judgment based solely on Miller's failure to use 3-step protection. While this may have been evidence of contributory negligence, it did not rise to the incredibly high burden necessary to remove a FELA case from the determination of a jury.

Although more completely rationalized, the Court of Appeals for the Fifth Circuit made the same fatal error as the district court when it failed to take into account this Court's previous opinions in FELA cases and utilize the lower causation standards required by FELA cases. In particular, the Fifth Circuit inserted its own interpretation of a single section of Sillimon's deposition to read facts into the record that simply did not exist. No where in the deposition excerpt cited by the court did Sillimon say or indicate that Miller had engaged in this coupling procedure earlier in the evening on the night of his injury. Without that testimony, the court's reasoning lays contrary to *Tennant*, *Bailey*, *Lavender, and Gallick*.

By its own opinion, "failure of others to explain what was occurring could have left him unaware of just how dangerous his actions would be." This is made even more clear when comparing with Judge Dennis' dissent where he found no evidence that Miller had been exposed to this procedure and that "[a] jury could infer that Miller, because of his inexperience and lack of schooling, instruction and training, would have expected the next coupling to be a single-car coupling as well, after which the train would stop moving."

Here, the facts are undisputed that there were several acts that lead to the tragic event that caused the death of Gregory Miller. It is undisputed that Mr. Miller was a trainee of less than 50 days with no prior railroad experience. It is undisputed that Mr. Miller had **only** been trained by the railroad on one way to conduct a shoving and coupling movement. It is undisputed that the railroad trained Mr. Miller and only provided him written materials for the procedure for coupling a single railcar at a time. It is undisputed that prior to the night of Mr. Miller's death, he had not been taught the term "bunch" or rolling coupling. Instead, the only process that Mr. Miller was taught was for the engineer to couple to the first railcar, stop the movement, and the crew members **go between the cars** to finalize the coupling. It is undisputed that Sillimon, Henderson, and Clearman failed to conduct a job briefing that informed Mr. Miller that they intended to conduct a rolling couple and failed to explain what the term "bunch" meant. It is undisputed that at the time of the movement, neither Sillimon, Henderson, nor

Clearman had visual contact of Mr. Miller or knew exactly where he was. It is undisputed that Henderson could not see the coupling that was made that killed Miller. This evidence in and of itself is evidence that Henderson, and by extension Alabama Great Southern violated not only its own operating rules, but more importantly, violated the Federal Railroad Safety Act 49 C.F.R. § 218.99 which provides standards for railroad operating practices for shoving or pushing movements. Specifically, 49 CFR § 218.99 (b)(3) states in part that "… point protection shall be provided by a crewmember or other qualified employee by: (i) visually determining that the track is clear." No point protection was present in this case. It is uncontested that Henderson admitted that he could not see the coupling where Miller was killed. He stated that he turned south and saw a flash and that he had to walk down the cars to the position of the coupling, where he saw Miller trapped between the cars. This is a clear violation of 49 C.F.R. § 218.99 as he could not "visually determine that the track was clear" at the point of the coupling.

The FELA is a pure comparative fault statute where an employee's contributory negligence does not bar recovery, but only reduces damages by the percentage of their fault. *Caillouette v. Baltimore & Ohio Chicago Terminal R.R. Co.*, 705 F2d 243, 246 (7th Cir. 1983) (citing 45 U.S.C. § 53). Even if the plaintiff is 99% at fault for his own injuries and the railroad 1%, the FELA requires that a case go to a jury and the plaintiff be awarded 1% of the damages awarded by the jury. But to prevail as a matter of

law, the evidence, and all inferences, weighed against Alabama Great Southern must establish that Miller's alleged negligent conduct *did not combine* with Alabama Great Southern's negligent conduct. *See McCarthy v. Pennsylvania R.R. Co.*, 156 F.2d 877, 881 (7th Cir. 1946) (holding sole cause not established where the employee's "acts were all concurring acts with the act of the defendant in violation of the statute"). Along with a pure comparative fault system, the Supreme Court has long recognized that in FELA death cases, when the plaintiff has no opportunity to explain his side of the facts, there is a presumption that a deceased plaintiff exercised due care for his own safety in the performance of his duties. *Tennant v. Peoria P.U. Ry. Co*, 321 U.S. 29, 34 (1944); *A., T. S.F. Ry. Co. v. Toops*, 281 U.S. 351, 356 (1930); *Bailey*, 319 U.S. 350; *Gallick,* 372 U.S. 108 (1963).

Whether any of the multitude of negligent acts or omissions on the part of Alabama Great Southern caused Miller's injury is a question reserved for the jury under the FELA. *See Padgett v. Southern Ry. Co.*, 396 F.2d 303, 307 (6th Cir. 1968) (even if some minds might conclude that it was the sole factor, the jury may consider evidence that employer negligence played some part in producing the injury.) This Court has made it clear that any negligence, even the slightest, is enough to send a case to the jury. The district court erred in deciding a question of fact reserved for the jury, and the Circuit Court failed to utilize these standards and improperly affirmed summary judgment in this case. The Panel impermissibly inserted its own understanding and

factual determination of meaning of Sillimon's deposition testimony and in so doing, weighed the evidence in favor of Alabama Great Southern, which is contrary to the court's role. *See e.g., Thrasher v. B&B Chem. Co., Inc.*, 2 F.3d 995, 97 (10th Cir. 1993) (noting that [i]t is not "the court's function . . . to weigh the evidence and determine the truth, but to determine whether there is a genuine issue for trial") (citation omitted).

This Court has stated with unequivocal certainty that under FELA, whenever a railroad employee is injured in the course of duty and there is *any* evidentiary basis upon which reasonable minds could believe that reasonable care might have required additional safety measures which were not taken, and which contributed in whole or in part, however slight, to cause the injury, the case should be tried to a jury. *Tiller* v. *Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610 (1943); *Lavender* v. *Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946); and see the case of *Jacob* v. *City of New York*, 315 U.S. 752, 62 S.Ct. 854, 86 L.Ed. 1166 (1942), wherein Mr. Justice Murphy speaking for the court stated: "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

To allow this case to stand would bring instability and confusion into long standing FELA precedent.

This Court has been clear that FELA cases are to be decided by a jury and only in the most unusual of circumstances should a FELA case be taken away from that jury.

Respectfully submitted,

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APPENDIX

Appendix A

APPENDIX A – ORDER DENYING PETITION FOR REHEARING EN BANC – FILED JULY 16, 2020

IN THE UNITED STATES COUR OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-60817

D. C. Docket No. 2:16-CV-25

SHAQUERE MYLESHIA GRAY, Co-Administratrix of the Estate of Gregory Tramaine Miller; HANNAH LASHA HOZE, Co-Administratrix of the Estate of Gregory Tramaine Miller,

Plaintiffs - Appellants

v.

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY,

Defendant – Appellee

Appeal from the United States District Court for the Southern District of Mississippi

ON PETITION FOR REHEARING EN BANC

(Opinion 05/28/2020. 5 Cir. 960 F.3d 212)

Appendix A

Before OWEN, Chief Judge, and Dennis and Southwick, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that he court by polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is Denied.

ENTERED FOR THE COURT:

/s/ Leslie H. Southwick
UNITED STATES CIRCUIT JUDGE

Appendix B

APPENDIX B – JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT – FILED MAY 28, 2020

IN THE UNITED STATES COUR OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-60817

D. C. Docket No. 2:16-CV-25

SHAQUERE MYLESHIA GRAY, Co-Administratrix of the Estate of Gregory Tramaine Miller; HANNAH LASHA HOZE, Co-Administratrix of the Estate of Gregory Tramaine Miller,

Plaintiffs - Appellants

v.

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY,

Defendant – Appellee

Appeal from the United States District Court for the Southern District of Mississippi

Before OWEN, Chief Judge, and DENNIS and SOUTHWICK, Circuit Judges.

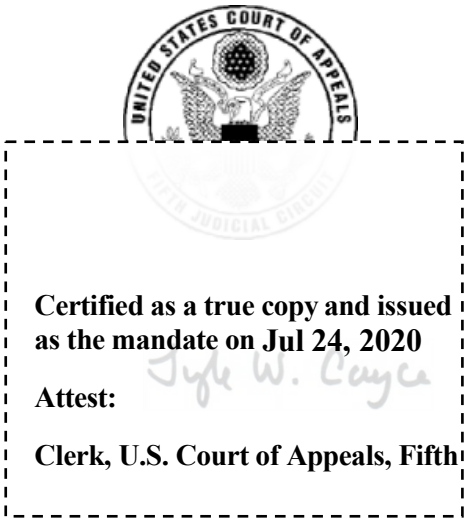
Appendix B

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellants pay to appellee the costs on appeal to be taxed by the Clerk of this Court.



Appendix C

APPENDIX C – MEMORANDUM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT; FILED MAY 28, 2020

IN THE UNITED STATES COUR OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-60817

D. C. Docket No. 2:16-CV-25

SHAQUERE MYLESHIA GRAY, Co-Administratrix of the Estate of Gregory Tramaine Miller; HANNAH LASHA HOZE, Co-Administratrix of the Estate of Gregory Tramaine Miller,

Plaintiffs - Appellants

v.

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY,

Defendant – Appellee

Appeal from the United States District Court for the Southern District of Mississippi

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Before OWEN, Chief Judge, and DENNIS and SOUTHWICK, Circuit Judges. LESLIE H. SOUTHWICK, Circuit Judge:

Appendix C

Gregory Tramaine Miller was crushed to death between the couplers of two rail cars while working as a conductor trainee with Alabama Great Southern Railroad Company. Summary judgment dismissing all claims was granted on the basis that there was no evidence to support imposing any liability on the railroad. The administrators of Miller's estate argue on appeal that there was evidence to create a jury issue. We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

On August 12, 2015, Gregory Miller was assigned to an Alabama Great Southern train crew consisting of a conductor, M.A. Sillimon; a brakeman, J.D. Henderson; and an engineer, A.C. Clearman. Miller rode the train to a facility in Petal, Mississippi, in order to couple empty rail cars that would then be taken to a different facility. Miller rode on one side of the train to the Petal facility. Upon arrival, he safely crossed over the tracks on foot to the other side of the train, using a safety procedure called "3-Step Protection" for crossing between standing rail cars.

The Alabama Great Southern is a wholly owned subsidiary of the Norfolk Southern Railway Company. Each company uses the same Operating Rules and Safety & General Conduct Rules. Operating Rule 22 prohibits an employee from going between standing equipment on the tracks for any reason unless 3-Step Protection is first established. Going between moving equipment on the tracks is never permitted. To establish 3-Step Protection, an employee must

first orally request passage between cars from the engineer. If the request is made via radio, the employee must provide his or her occupation, job symbol, and engine number. Once such a request is made, the second step is for the engineer to take the following action: "apply the independent brake"; next, "[p]lace the reverser lever in neutral position"; and finally, "[o]pen the generator field switch." Third, before the employee is permitted to go between equipment on the tracks, the engineer "must acknowledge to each requesting employee that '3-Step Protection' is established."

After Miller successfully established 3-Step Protection and crossed the tracks to the other side of the train, the train crew began to couple 11 rail cars. At the start, each rail car was approximately ten feet from the next one. The crew's train coupled the first uncoupled car waiting on the switch track, and the train was brought to a safety stop to ensure that coupling was successful.

After the first coupling, Henderson was positioned at the north end of the line of cars and Sillimon was at the south end. Miller was about one-half of a car length south of Henderson, who was supervising Miller that night. Henderson, while facing north toward the train coupled to the engine and away from Miller, radioed the crew, "Everybody let me get big half to a bunch," meaning that the engineer should begin a "rolling coupling" of the remaining ten rail cars by slowly shoving the train south at a speed never exceeding two miles per hour, impacting and

coupling each car, one right after the other, without stopping.

As the train approached, Henderson walked backward while facing north toward the train to give "full attention on the engine coming down," then started to turn south to observe the couplings. At this time, for reasons unknown and without 3-Step Protection, Miller went between two rail cars during the rolling coupling. Henderson testified that as he was turning to the south, he noticed a "flash" and told Clearman to cease coupling by radioing, "That will do." Henderson could not see Miller, so he began walking south and found Miller fatally injured, caught in the coupling between two rail cars, the second of three couplings made during the shove.

As co-administrators of Miller's estate, Shaquere Myleshia Gray and Hannah Lasha Hoze filed suit against the Alabama Great Southern Railroad Company. They claimed the railroad was negligent in failing to train, instruct, and supervise Miller, that the railroad also was negligent in failing to provide a safe place to work for Miller, and that it was foreseeable that Miller would go between rail cars, which was the cause of his death.

In granting summary judgment for the railroad, the district court concluded that Miller's failure to establish 3-Step Protection before going between rail cars was the sole cause of his death, that his going between moving rail cars was unforeseeable, and that the plaintiffs failed to

produce evidence of any negligent acts by the railroad attributable to causing Miller's death. This timely appeal followed.

DISCUSSION

The suit was brought under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51. The FELA provides the exclusive remedy for a railroad employee engaged in interstate commerce whose injury resulted from the negligence of the railroad. *Rivera v. Union Pac. R.R. Co.*, 378 F.3d 502, 507 (5th Cir. 2004). The FELA allows an injured railroad employee to recover damages for "injury or death resulting in whole or in part from the negligence" of the railroad. § 51. "Under FELA the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *CSX Transp., Inc., v. McBride,* 564 U.S. 685,692 (2011). This standard leaves in place, though, the plaintiff's burden to provide evidence of "all the same elements as are found in a common law negligence action." *Armstrong v. Kansas City S. Ry.* Co., 752 F.2d 1110, 1113 (5th Cir. 1985). Indeed, "foreseeability is an essential ingredient of negligence under the Act." *Id.*

The FELA eliminated a variety of traditional defenses, such as the fellow-servant rule, the assumption-of-the-risk defense, and the doctrine of contributory negligence. *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 542-43 (1994); 45 U.S.C. §§ 51, 53-55. Even so, if a plaintiff's

negligence is the sole cause of the injury, a defendant has no liability under the Act. *Southern Ry*. Co. *v*. *Youngblood,* 286 U.S. 313, 317 (1932).

We review a grant of summary judgment *de novo,* meaning this court considers the evidence and law in the same manner as the district court was required to do. *Ibarra v. UPS,* 695 F.3d 354, 355 (5th Cir. 2012). Summary judgment is appropriate if the movant demonstrates "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Under the FELA, awarding summary judgment to the defendant railroad is appropriate "[o]nly when there is a complete absence of probative facts" to support a jury verdict in the plaintiff's favor. *See Lavender v. Kurn,* 327 U.S. 645, 653 (1946). "This standard is highly favorable to the plaintiff and recognizes that the FELA is protective of the plaintiffs right to a jury trial." *Wooden v. Mo. Pac. R.R. Co.,* 862 F.2d 560, 561 (5th Cir. 1989) (punctuation edited).

The plaintiffs argue that Miller's failure to establish 3-Step Protection was not the sole cause of his death because the railroad's negligence must also have had a role in the accident. They contend that there was "overwhelming evidence" of at least some negligence by the railroad. Among their arguments is that Henderson negligently supervised Miller. There was evidence that the railroad used a supervisor/trainee system for on-the-job training.

On the night of the accident, Henderson was Miller's supervisor. Although Henderson was working as a brakeman that night, he was a certified conductor, making it appropriate for him to supervise a conductor trainee. The plaintiffs say that Henderson was negligent because "a mentor should know where his mentee is at all times as he is in charge of ensuring the mentee's safety." At the time of the incident, though, "Henderson had his back to Mr. Miller, did not know where he was, and did not know what Mr. Miller was doing at any point while the shoving movement was occurring." The plaintiffs also argue that Henderson violated the railroad's procedure by failing "to observe the coupling that was occurring when Mr. Miller was injured."

There is no record evidence of any policy requiring that a supervisor never stop looking at a conductor-trainee. Plaintiffs say such evidence does exist, as Silliman in his deposition testified that a trainee should always be "within eyesight" of the supervisor. We do not interpret that testimony as supporting that the supervisor cannot as necessary look a different direction than the trainee during performance of the job. Instead, the supervisor must always be in a position to "keep an eye" on the trainee, meaning no obstruction to the view, even though at times the supervisor must concentrate on other tasks. The plaintiffs agree that Henderson was required to observe the couplings, which means he would have had to take his eyes off Miller during the first coupling, apparently just before Miller went between the second set of rail cars.

The only evidence as to rules for coupling is testimony vaguely describing a conductor and brakeman's duty of "observing a coupling." We know from the record that Henderson was in the process of turning to observe a coupling when he saw a "flash," which was Miller's going between the rail cars. Henderson radioed Clearman to stop the train. Having considered plaintiffs' contentions to the contrary, we conclude there was no evidence that Henderson violated any procedure that played a part in Miller's death.

The plaintiffs also contend that the railroad negligently trained Miller because he "was never trained on the procedures of a rolling couple and the only evidence in the record suggests that he had never heard of such a move." The plaintiffs also argue the failure of Miller's crew members to "adequately job brief this procedure ... played a central role in bringing about this injury." Thus, according to the plaintiffs, "[t]here is no evidence in the record to show that Mr. Miller had any reason to believe that the cars would continue to move or that he would be in danger if he needed to get between cars."

The plaintiffs' point is that if Miller had not been made aware of rolling couplings, then his undisputed knowledge of the procedures to be followed prior to going between cars would, at the time of his fatal violation of those procedures, have been joined by his ignorance that the cars would keep moving after the initial coupling. Certainly, it was negligent for Miller to have gone between

the cars, but a failure of others to explain what was occurring could have left him unaware of just how dangerous his actions would be. The only evidence of a source for Miller's knowledge was not identified by the railroad until oral argument in this court. We may, but are not required, to consider this evidence despite its late identification because we may affirm a judgment on any ground that appears in the record. *S&W Enters., L.L.C. v. SouthTrust Bank of Ala., NA,* 315 F.3d 533, 537 (5th Cir. 2003). We discuss the evidence.

The evidence comes from Sillimon's deposition. The dissent does not see that testimony in quite the same way we do, viewing it as a possibly generic description of how the work should be done as opposed to what was done that night. We will summarize the immediately preceding testimony, then quote at some length the relevant statements. Sillimon was asked about the coupling that had been completed by this same crew at other locations earlier on the night of Miller's death. He mentioned the first location but did not explicitly describe any rolling coupling there. The railroad's counsel then asked Sillimon to describe what happened at the second location, which still was not the job site where Miller was fatally injured that same day:

Q: All right. And how many cars did y'all work that night [at the second location]? Do you know?

A: It was 20 -- it was 20 in, 20 out.

Q. Okay. And y'all have to spot all 20 of them?

A. That's correct.

Q. And how do y'all go about spotting these cars? How do y'all handle that?

A. You spot each car up one at a time.

Q. Okay. And take me through what you would do as the conductor, what the brakeman would do, and what the engineer would do in spotting these cars.

A. As far as the brakeman and the conductor, it can go either or.

Q. Okay.

A. I can walk down and do a C-100 [which he would later describe as checking each car prior to starting the coupling] and check everything, make sure the hoses are -- make sure there's no one in the tracks, make sure the hoses are down, make sure any chocks or anything that we couple up to -- so it won't derail anything. Or the brakeman can walk down and do a C-100. And after we do a C-100, I'll be in position at the bottom. The brakeman be in position at the top. He will make the first coupling, and the rest of the couplings be run-in coupling.

Q. And you refer to that as a running couple?

A. That's correct.

Q. And what -- what is a running couple?

A. When you couple up to the -- you got to make sure you coupled up to the first car. Once you coupled up to the first car, you bunch to the next car. Then you bunch and then you bunch until you get to the last two cars. You stop the move. You couple up to that second to the last car, and then you couple up to the next car.

In summary, Silliman started by saying it was necessary to "spot all 20" cars at the earlier location. He then asked how the crew would accomplish that spotting. Certainly, some of his lengthy answer could

be taken as a general description of how the tasks are done, particularly in stating that either the brakeman or the conductor could perform certain of the functions. The key to us, though, is that Sillimon testified that a series of rolling couplings had to be made at the job site preceding the one where Miller was fatally injured. Perhaps there were shortcomings in initial training or otherwise in making Miller aware of the dangers of a rolling coupling, specifically that the train keeps moving as the closely spaced but not yet coupled cars are sequentially linked. Regardless of that possibility, Silliman testified that Miller had just experienced that sort of coupling.

The plaintiffs also argue that it is a fact dispute whether Miller requested 3-Step Protection. They discuss evidence that requesting over the radio is not always heard. There is a protection for that built into the three steps, though, *i.e.,* the requesting employee must wait for the engineer to "acknowledge to each requesting employee that '3-Step Protection' is established." It is undisputed that Sillimon did not acknowledge 3-Step Protection to any employee during the time Miller went between the rail cars and suffered his fatal injuries.

Last, the plaintiffs contend that "[i]t is wholly foreseeable that an employee will get between cars during the course of his work, especially when as here he is expecting the movement to stop for some period of time." They rely on a Supreme Court decision in which the decedent stepped between standing rail cars to detach a damaged car. *Chicago Great W. R.R. v. Schendel,* 267 U.S.

287, 289 (1925). There, the rail cars sat on a downward grade and gravity caused the rail car to slide into the decedent, fatally injuring him. *Id.* The Court held that although the decedent was partially negligent, the railroad was liable because there was evidence that the damaged rail car did not meet the statutory requirements to protect him, and that damage was the reason he had stepped between the cars. *Id.* at 292. Unlike in *Schendel,* though, Miller was killed during continuous coupling of cars, a process he had just witnessed elsewhere, and during a time in which he knew not to cross between cars without following the described protocols. In some circumstances it of course is foreseeable that railroad employees will get between cars. In the circumstances here, stepping between cars was prohibited and the reasons for the prohibition would have been clear.

Finally, we consider whether plaintiffs are correct that the district court improperly relied at least in part on a finding that Miller assumed the risk of injury by stepping between the cars. As we stated, the FELA abolished assumption of the risk and similar defenses. *See Gottshall,* 512 U.S. at 542-
43. According to the plaintiffs, the district court's reliance on the fact that Miller knew how to utilize 3-Step Protection based on training and experience means that it concluded that Miller assumed the risk of ignoring that protocol. We see no application of this discarded defense by the district court. Though the district court mentioned that Miller was trained and tested on

the safety procedure before he went to field training, the court was merely explaining Miller's negligence. The district court stated that the plaintiffs "ha[d] not produced evidence of any negligent acts attributable to [the railroad] that caused the accident." *Gray,* 2017 WL 6805046, at *3. That is a reference to a lack of evidence, not to an assumption of risk.

"If the employee's negligence was the sole proximate cause of his injury, he cannot recover." *Atlantic Coast Line R. Co. v. Dixon,* 189 F.2d 525, 527 (5th Cir. 1951). Though there is a lack of clarity as to exactly what happened, Miller, unfortunately, negligently went between the two cars. In the absence of any evidence to support a jury finding that some negligence on the part of the railroad contributed to the accident, summary judgment was proper.

AFFIRMED.

JAMES L. DENNIS, Circuit Judge, dissenting.

I respectfully dissent. In my view, the record contains evidence from which a reasonable jury could find that Miller's death resulted at least in part from AGS's negligence: Miller was a new hire of about forty-five days with no prior railroad experience, and he had not been schooled, trained, or instructed in the multi-car rolling coupling procedure that resulted in his death. Miller, therefore, may not have understood that more than a single car would be coupled, and Henderson, the

brakeman responsible for Miller's supervision, failed to keep Miller close to him and within his eyesight during the rolling coupling. A reasonable jury could thus infer that the railroad's negligence played a part, *even the slightest,* in producing the injury or death for which damages are sought, such that this case should proceed to a jury trial.

I.

FELA prescribes that:

> Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death *resulting in whole or in part* from the negligence of any of the officers, agents, or employees of such earner ....

45 U.S.C. § 51 (emphasis added). Congress enacted FELA in response to the dangers inherent in working on the railroad, and its language on causation "is as broad as could be framed." *Urie v. Thompson,* 337 U.S. 163, 181 (1949); *see Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 542-43 (1994). The Supreme Court has recognized that "in comparison to tort litigation at common law, 'a relaxed standard of causation applies under FELA.'" *CSX Transportation, Inc., v. McBride,* 564 U.S. 685, 692 (2011) (quoting *Gottshall,* 512 U.S. at 542-43). "Under FELA the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest,* in producing the injury or death for which damages are sought." *Id.* (emphasis added) (quoting *Rogers v. Missouri Pac. R.* Co., 352 U.S. 500, 506 (1957)).

We review a district court's grant of summary judgment for the railroad de novo, and "we must resolve all ambiguities, permissible inferences, and material issues of fact in favor of the non-moving parties." *Total E & P USA Inc. v. Kerr-McGee Oil & Gas Corp.,* 719 F.3d 424, 429 (5th Cir. 2013). In a FELA case, it is the province of the jury to weigh many factors, including the nature of the task and the hazards it entails, in determining whether employer fault "played any part, even the slightest," in the employee's injury. *McBride,* 564 U.S. at 692; *see Bailey v. Central Vt. Ry.,* 319 U.S. 350, 353-54 (1943).

The majority concludes that Plaintiffs have not produced evidence of any negligent acts attributable to AGS that caused the accident and that Miller's negligence in going between the moving rail cars was not foreseeable. I disagree. Plaintiffs point to several acts or omissions by AGS and its employees that a reasonable jury could find were negligent and "played [a] part, even the slightest, in producing" Miller's death. *McBride,* 564 U.S. at 692.

First, the record reveals that Miller had been employed in railroad work only forty-five days at the time of his death, and though he attended a classroom training center in Georgia for nineteen days, the center did not instruct conductor trainees like Miller on rolling couplings, the procedure the crew employed at the time Miller was killed. The written rules and guidance provided to Miller as a conductor trainee also did

not describe the rolling coupling procedure. In the classroom, trainees were taught a different procedure for coupling a single railcar-the engineer slowly drives the train until it makes the connection with the car being coupled, the engineer stops the train, and the crew members go between the cars to finalize the coupling. Crew members then walk to the next rail car on the track to prepare for the next coupling. In practice, however, AGS employees also used a "rolling coupling" procedure to couple more than a single rail car at a time, the procedure that the crew utilized at the time Miller was killed. When executing a rolling coupling, the engineer stops once after the first standing car is coupled to the train, then, when signaled, he shoves the train at walking speed, impacting and coupling each remaining uncoupled car, one right after the other, without stopping until the next to last standing uncoupled car is coupled. Once the second to last rail car is coupled, the train stops briefly, then the engineer drives the train into the last car until it is coupled. Then the crew makes sure that all couplings are secure, connects the air hoses between the cars, and cuts the air in to the now-coupled cars.

Though the trainees were taught the rules prohibiting employees from going between moving railcars and that they must request 3-Step Protection before moving between standing cars on a track,[1] they were not specifically

[1] Another rule explains that employees must not cross tracks "between standing separated cars or locomotives unless the

trained or given any written or oral instruction on how the rules applied to rolling couplings of a "bunch" of cars or the additional dangers inherent in the rolling coupling of as many as nine to ten cars without stopping between individual couplings. A reasonable jury could conclude that the railroad was negligent in failing to provide Miller with basic training in rolling couplings before he was required to participate in such a dangerous procedure in his work.

Second, a reasonable jury could find that, as in his classroom training, Miller was not instructed during his on-the-job training as to how to participate in a rolling coupling, nor was he provided notice that the crew was going to perform a rolling coupling prior to the crew activating that dangerous procedure in which he was killed. For the on-the-job stage of their training, conductor trainees like Miller were assigned to a variety of jobs for a little over three months, with different crews and conductors in charge of each job. During the job briefing on the night of the accident, Sillimon, the senior conductor and leader of the crew, did not provide Miller with any information or instruction about rolling couplings or tell him that the crew would use a rolling coupling at any location, and no one mentioned Miller's lack of experience or instructed him as to what he was expected to do or was responsible for during a rolling coupling. As noted in

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equipment is separated by at least 50 feet and the employee maintains at least 10 feet of separation between themselves and the nearest equipment." Three-step protection is required where, as here, "a locomotive is coupled to standing equipment or is on the same track in a position to couple to the equipment."

AGS's expert's report, at the worksite where Miller was killed, the crew first used a single car coupling to connect the first uncoupled standing car on the track to the rest of the train--once the first car was connected, the train stopped. A jury could infer that Miller, because of his inexperience and lack of schooling, instruction and training, would have expected the next coupling to be a single-car coupling as well, after which the train would stop moving. However, Henderson called for a rolling coupling, saying, "Everybody let me get a big half to a bunch," a phrase that would inform only knowledgeable workers-those familiar with a rolling coupling and the terminology used to call for one--that Henderson was calling for a rolling coupling of as many as ten cars. It is undisputed that this jargon was not taught in the rulebook or classroom training and is instead something that employees must pick up on from their work in the field. From the facts in the record, a jury could find that Miller, who had been out of the classroom for less than a month, did not know what Henderson's instruction meant, and therefore had no reason to understand that the train would not stop after another coupling, but would continue rolling, impacting and coupling cars up to the point where he was killed. A jury could conclude these failures by the railroad and by Miller's supervisors were also negligent.

Moreover, Plaintiffs have consistently contended that Miller did not know what a rolling coupling was, had not been informed that the maneuver would be used at the work site, and was only familiar with the standard single- car coupling procedure. AGS did not dispute any of these facts in the district court or in its brief to this court. At oral argument before this court, however, counsel for AGS cited to Sillimon's

deposition and contended that it showed Miller had been exposed to a rolling coupling earlier on the night that hewas killed.

I disagree with the defense counsel's oral argument and the majority's contention that Sillimon's deposition testimony provides conclusive evidence that Miller had previously witnesses a rolling coupling earlier on the night he was killed. Maj. Op. at 7-9. At the start of the relevant portion of the deposition, Sillimon was answering questions about a job the crew worked the night of the accident. He was then asked: "And how do y'all go about spotting these cars? How do y'all handle that?" After an explanation of what the brakeman and conductors typically do, Sillimon concluded: "He will make the first coupling, and the rest of the couplings be run-in coupling." Sillimon then explained in general the process of a running or rolling coupling.

The pretrial deposition does not specify that Sillimon, in speaking of rolling couplings, was describing the process employed by the crew at a different facility earlier on the night of the accident instead of simply describing the process of a rolling coupling generally. Given the ambiguity of the testimony and our obligation to resolve such ambiguity in Miller's favor, I would conclude that there is at least a genuine issue of material fact as to whether Miller had seen a rolling coupling earlier in the evening on the night of the accident. *See Total E & P USA Inc.,* 719 F.3d at 429 ("[l]n reviewing the summary judgment de novo, we must resolve all ambiguities, permissible

inferences, and material issues of fact in favor of the non-moving parties ....").

Finally, Plaintiffs have presented evidence in opposition to AGS's motion for summary judgment that AGS employees failed to reasonably mentor or supervise Miller. Though Sillimon was the senior conductor and Henderson had only eight months of experience as a conductor, Silliman put Henderson in charge of mentoring and supervising Miller at the time of the accident. Henderson had been cited five times for rules violations in 2015 and 2016. On the night of the accident, when Henderson instructed the engineer to start the rolling coupling, Henderson had his back turned toward Miller who was half a car length away from Henderson. Henderson then walked backward, still facing away from Miller, as the engineer proceeded to couple up three railroad cars, all with Miller being out of Henderson's eyesight. As Henderson turned to face the south, he noticed a "flash" in his *peripheral* vision, providing further evidence that Miller was out of Henderson's sight and close supervision. Together, these facts would support a reasonable jury in finding that Henderson, for whose acts and omissions AGS is vicariously responsible, was an inattentive and careless supervisor whose failure to mentor and supervise Miller contributed to the accident that caused his death.

The majority claims that "[t]here is no record evidence of any policy for which a conductor-trainee must always be within view of their supervisor." However, Darren Gooch, a

trainmaster who worked for AGS, testified that the "rule" when supervising conductor trainees was to keep them "within sight distance and close," and Sillimon acknowledged in his deposition that when he was a conductor-trainee, the brakeman or conductor kept him "within eyesight." This is an issue for the jury, who could reasonably conclude that AGS was responsible for Henderson's failure to mentor, closely supervise, and watch Miller during the dangerous rolling coupling procedure.

II.

Though Miller may have been negligent in assuming only a single car was to be coupled and in moving between the railcars without requesting 3- Step Protection, it is well-established in FELA law that the railroad can still be liable if its negligence contributed in part to the danger even when the employee's negligence was the more direct cause of the injury. *McBride,* 564 U.S. at 695 (rejecting the argument that "the railroad's part ... was too indirect" a cause when compared to the employee's negligence). When executing a single car coupling that Miller was taught in the classroom, the engineer would stop after each coupling, and employees would go between each of the newly coupled cars to turn on the air and check the connection for the cars. A reasonable jury could conclude, then, that due to his lack of supervision, training, and experience, Miller went between the cars because he did not understand that the crew was executing a rolling coupling and that the

impacts and movements of the rail cars would not stop after a single car had been coupled.

Though no case presents identical facts, the Supreme Court has required the submission of FELA cases to juries based on even slighter proof of negligence and causation. *See Lavender v. Kurn,* 327 U.S. 645, 648-49, 652 (1946) (circumstantial evidence that worker killed by skull fracture was struck on head by mail hook swinging from side of railway company's mail car was sufficient for jury); *Gallick v. Baltimore* & *Ohio* ***R.R.*** Co., 372 U.S. 108, 109-10, 122 (1963) (upholding a jury verdict for a plaintiff who lost both his legs as a result of an infected insect bite because railroad was negligent in maintaining a stagnant pool of water attractive to vermin and insects).

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The Supreme Court has instructed that "the test of a jury case [under FELA] is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers,* 352 U.S. at 506. "The burden of the employee is met ... when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference." *Id.* at 508. It is irrelevant that "the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence." *Id.* at 506.

Submission of a FELA case to the jury is required "in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." *Id.* at 510. This case is clearly not one of those rare cases in which every reasonable juror must conclude that the employer's negligence played no part - not even the slightest – in the employee's injury and death. *See id.; McBride,* 564 U.S. at 692. The majority opinion, in failing to account for the special features of FELA's negligence action that make it significantly different from the ordinary common-law negligence action, contributes to the steady erosion and undermining of the right to a jury trial under FELA in this Circuit. *See also Huffman v. Union Pac. R.R.,* 675 F.3d 412, 426, 433 (5th Cir. 2012) (Dennis, J., dissenting) ("The evidence in this case is manifestly sufficient to meet the test of a jury case under the FELA, which is simply whether employer negligence played any part, even the slightest, in producing the injury."). For the foregoing reasons, I dissent.

APPENDIX D – JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI EASTERN DIVISION; FILED NOVEMBER 17, 2017

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI EASTERN DIVISION

SHAQUERE GRAY and HANNAH HOZE, appearing as co-personal representatives on behalf of the Estate of Gregory Tremaine Miller

PLAINTIFFS

v. CIVIL ACTION NO. 2:16-CV-25-KS-MTP

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY

DEFENDANT

JUDGMENT

For the reasons stated in the Court's previous Order and in accordance with Federal Rule of Civil Procedure 58, the Court enters this Final Judgment in favor of Defendant. Plaintiff's claims are dismissed with prejudice. This case is closed.

SO ORDERED AND ADJUDGED this the 17th day of November, 2017.

s/Keith Starrett

Appendix D

KEITH STARRETT
UNITED STATES DISTRICT JUDGE

APPENDIX E – MEMORANDUM OPINOIN OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI EASTERN DIVISION; FILED NOVEMBER 17, 2017

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI
EASTERN DIVISION**

SHAQUERE GRAY and HANNAH HOZE, appearing as co-personal representatives on behalf of the Estate of Gregory Tremaine Miller

PLAINTIFFS

v. CIVIL ACTION NO. 2:16-CV-25-KS-MTP

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY

DEFENDANT

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Motion for Summary Judgment [132] and various Motions to Exclude [134][136][138] filed by Defendant Alabama Great Southern Railroad Company. After reviewing the submissions of the parties, the record, and the applicable law, the Court finds that the Motion for Summary Judgment [132] is well taken and should be granted. The Court further finds that the Motions to Exclude [134][136][138] should be denied as moot.

Appendix E

I. INTRODUCTION

This is a negligence action under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51, *et seq*., brought by Plaintiffs Shaquere Myleshia Gray and Hannah Lasha Hoze ("Plaintiffs") against Defendant Alabama Great Southern Railroad Company ("Defendant") on behalf of the estate of Gregory Tramaine Miller ("Miller").

This action is centered around an incident which occurred on August 12, 2015, while Miller was working for Defendant as a conductor trainee. The Train on which Miller was working pulled into a facility in Petal, Mississippi. Miller had ridden to the facility on the west side of the train and crossed over to the east side of the train upon arrival, utilizing what is known as "3-Step protection" in the process.

3-Step protection is a safety procedure utilized by Defendant when employees cross between equipment on the railway tracks. Employees are to verbally request and obtain 3-Step protection whenever crossing between standing cars. (*See* NS Operating Rule 22 [132-5].) Employees are never to cross between moving rail cars for any reason. (*See id*.) When 3-Step protection includes taking the following three actions:

a. Fully apply the independent brake; and when air is coupled in, make a brake pipe reduction to sufficient hold equipment . . .
b. Place the reverser lever in neutral position.
c. Open the generator field swich.

(*Id.)*

After Miller crossed over to the east side of the train, the train crew began what is referred to as a "bunch" coupling, which is the coupling of multiple train cars together by "shoving" them together. During this time, the train speed never exceeded two miles an hour.[1] For unknown reasons, Miller stepped between two rail cars while this bunch coupling was being done. Crew members later found Miller between two coupled cars. He died from his injuries shortly thereafter.

II. MOTION FOR SUMMARY JUDGMENT [132]

A. Standard of Review

Federal Rule of Civil Procedure 56 provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Where the burden of production at trial ultimately rests on the nonmovant, the movant must merely demonstrate an absence of evidentiary support in the record for the nonmovant's case." *Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808, 812 (5th Cir. 2010) (citation and internal quotation marks omitted). The nonmovant must then "come forward with specific facts showing that there is a genuine issue for trial." *Id.* "An issue is material if its resolution could affect the outcome of the action." *Sierra Club, Inc. v. Sandy Creek Energy Assocs., L.P.*, 627 F.3d 134, 138 (5th Cir. 2010) (quoting *Daniels v. City of Arlington, Tex.*, 246

[1] The only evidence before the Court as to the speed of the train comes from Defendant's expert Foster J. Peterson. (*See* Peterson Affidavit [132-5] at ¶ 9.)

F.3d 500, 502 (5th Cir. 2001)). "An issue is 'genuine' if the evidence is sufficient for a reasonable [fact-finder] to return a verdict for the nonmoving party." *Cuadra*, 626 F.3d at 812 (citation omitted).

The Court is not permitted to make credibility determinations or weigh the evidence. *Deville v. Marcantel*, 567 F.3d 156, 164 (5th Cir. 2009) (citing *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007)). When deciding whether a genuine fact issue exists, "the court must view the facts and the inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Sierra Club*, 627 F.3d at 138. However, "[c]onclusional allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial." *Oliver v. Scott*, 276 F.3d 736, 744 (5th Cir. 2002) (citation omitted). Summary judgment is mandatory "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Brown v. Offshore Specialty Fabricators, Inc.*, 663 F.3d 759, 766 (5th Cir. 2011) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

B. FELA

Although the employee "has a less demanding burden of proving causal relationship" in a negligence action under the FELA, he is not excused from establishing "all the same elements as are found in a common law negligence action." *Armstrong v. Kan. City S. Ry. Co.*, 752 F.2d 1110, 1113 (5th Cir. 1985).

Plaintiffs must therefore establish that Defendant, "with the exercise of due care, could have reasonably foreseen that a particular condition could cause injury; [sic] foreseeability is 'an essential ingredient' of negligence under the [FELA]." *Id.* (quoting *Nivens v. St. Louis Sw. Ry. Co.*, 425 F.2d 114, 118 (5th Cir. 1970)). Furthermore, "[w]here the employee is guilty of negligence and his negligence is the sole cause of the accident, the railroad may not be held liable." *Seymour v. Ill. Cent. R. Co.*, 25 F.Supp.2d 734, 738 (S.D. Miss. 1997). "Failure to anticipate negligence on the part of the plaintiff is not actionable negligence on the part of the railroad." *Id.* Therefore, "[w]here an employee fails to exercise reasonable care to follow instructions of his employer, and such negligence is the sole cause of his injuries and damages, he may not recover under the FELA." *Id.*

Plaintiffs glibly admit that, had Miller utilized 3-Step protection, this incident would not have occurred.[2] Plaintiffs' own expert testified that he "would like to think" that 3-Step protection would have prevented Miller's accident.[3] (Rangel Depo. [132-18] at 90:5-8.) There is no evidence before the Court to suggest that this accident could have occurred had Miller verbally requested 3- Step protection as

[2] Plaintiffs attempt to characterize this argument as a "straw-man argument" akin to the argument that "if Miller had not come to work that day, he would not have been killed." (Response [145] at pp. 15-16.) However, as one of the safety procedures Defendant required and expected Miller to follow, the fact that his failure to follow this procedure led to his injuries and ultimate death is far from a "straw-man argument."

[3] Plaintiffs argue that these statements were taken out of context, but they make no attempt to put them into a different context for the Court.

required before stepping "between or immediately in front of standing cars or locomotives." (NS Operating Rule 22 [132-5].) Though Plaintiffs attempt to blame improper coupling methods for the accident, it is indisputable that, had 3-Step protection been requested and given, the coupling would have been stopped as the rail cars would not have been moving because the independent brake would have been fully applied, the reverser lever would be in the neutral position, and the generator field switch would have been opened.[4] (*See id.*)

Similarly, there is also no genuine issue as to whether Miller understood and knew how to utilize 3-Step protection, as he had verbally requested it and obtained it earlier that night.[5] (*See* Peterson Affidavit [132-3] at ¶ 6.) During training, Miller achieved a perfect score on the 3-Step protection quiz, and scored 97% on the basic railroad safety quiz, demonstrating that he had an understanding of the procedure. (*See* Miller's Test Scores [132-7].) Though Plaintiffs argue that Miller was negligently supervised, "[f]ailure to anticipate negligence," such as Miller's negligence in not requesting 3-Step protection, "is not actionable negligence on the part of the railroad." *Seymour*, 25 F.Supp.2d at 738.

Finally, though Plaintiffs argue that it is "laughable" to suggest that Defendant would not

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[4] There is no evidence that these safeguards would have failed had Miller requested and obtained 3-Step protection.

[5] Though Plaintiffs repeatedly argue that Miller was not trained to understand what a "bunch" coupling was, they never argue that his training as to the safety procedures in Operating Rule 22 was somehow deficient.

foresee its employees getting between the rail cars, (Response [145] at p. 18), they wholly ignore the actual argument made by Defendant, which is that it was unforeseeable that Miller would go between *moving* cars. The Operating Rules expressly forbid employees from stepping between moving cars "for any reason." (NS Operating Rule 22 [132-5].) It was not foreseeable that Miller would disregard the safety procedures and dart between moving rail cars, particularly when Miller had demonstrated his ability to follow the same safety procedures earlier that night.

Therefore, because Plaintiffs have not produced evidence of any negligent acts attributable to Defendant that caused the accident and because Miller's negligence in moving between the moving rail cars was not foreseeable, the Court finds that the Motion for Summary Judgment [132] should be **granted**, and Plaintiffs' claims shall be **dismissed with prejudice**.

III. MOTIONS TO EXCLUDE [134][136][138]

Because the Court finds that Defendant is entitled to summary judgment, the pending Motions to Exclude [134][136][138] need not be addressed. They will therefore be **denied as moot**.

IV. CONCLUSION

IT IS THEREFORE ORDERED AND ADJUDGED that the Motion for Summary Judgment [132] is **granted**. This case is hereby **dismissed with prejudice**.

IT IS FURTHER ORDERED AND ADJUDGED that the Motions to Exclude [134][136][138] are **denied as moot**.

SO ORDERED AND ADJUDGED, on this, the 17th day of November, 2017.

s/Keith Starrett
KEITH STARRETT
UNITED STATES DISTRICT JUDGE

APPENDIX F — RELEVANT STATUTORY PROVISIONS

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, 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, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an

Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908) [45 USCS §§ 51 *et seq.*] as the same has been or may hereafter be amended.

45 U. S.C. § 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, 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, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 53. Contributory negligence; diminution of damages

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act [45 USCS §§ 51 *et seq.*] to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact

that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. § 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this Act [45 USCS §§ 51 *et seq.*] to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. § 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act [45 USCS §§ 51 *et seq.*], shall to that extent be void:

Appendix F

Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act [45 USCS §§ 51 *et seq.*], such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

45 U. S.C. § 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this act [45 USCS §§ 51 *et seq.*] unless commenced within three years from the day the cause of action accrued.

Under this act [45 USCS §§ 51 *et seq.*] an action may be brought in a circuit [district] court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act [45 USCS §§ 51 *et seq.*] shall be concurrent with that of the courts of the several States.

45 U.S.C. § 57. Who included in term "common carrier"

The term "common carrier" as used in this act [45 USCS §§ 51 *et seq.*] shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.