No. 18-1367

IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

MARK A. SUMNER,
Respondent.

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

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTION PRESENTED

Whether in this Federal Employers' Liability Act case the evidence was sufficient for the jury to draw reasonable inferences to determine that petitioner's negligence contributed to cause Mr. Sumner's injuries.

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INTRODUCTION

This case involves the straightforward application of this Court's precedents in Federal Employers' Liability Act ("FELA") cases governing whether the evidence is sufficient for the jury to draw reasonable inferences on causation. While working as a conductor, respondent Mark Sumner suffered a concussion and other injuries when he fell from petitioner's walk path down a steep embankment. Sumner does not remember the accident, and no eyewitnesses saw the fall. There was conflicting circumstantial evidence. Nevertheless, as the Virginia Supreme Court concluded, "[t]here was evidence to support the inference that the defendant's negligence played a part, however small, in causing the fall which was the source of the plaintiff's injuries." App. 14a. The Virginia court upheld the jury verdict based on "settled principles governing FELA cases." *Id.*

Petitioner boldly asserts (at 2) that the decision below "eliminat[es] the plaintiff's duty to prove even but-for causation." The decision does nothing of the sort. Petitioner omits key facts supporting the decision below. And the Virginia court relied on this Court's decision in *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29 (1944), which makes clear the Virginia court understood that juries can draw the "ultimate inference" that a death or injury would not have occurred "but for" the railroad's negligence. *Id.* at 34. Petitioner's entire argument hinges on one sentence in the Virginia court's decision about the "standard of proof" in FELA actions, App. 8a, but petitioner reads that portion out of context. Petitioner also fails to identify any split of authority on the sufficiency of evidence in FELA cases since this Court's decision in *CSX Transportation, Inc. v. McBride*, 564 U.S. 685 (2011). And review is particularly unwar-

ranted because petitioner never raised the argument below about but-for causation and, by failing to object to the jury instructions given, waived the argument here.

Contrary to petitioner's contention (at 3), there is nothing "bizarre" about the Virginia court's decision. The case presented conflicting circumstantial evidence about the cause of Sumner's fall. "'But where, as here, there is an evidentiary basis for the jury's verdict[,] [the jury] is free to disregard or disbelieve whatever facts are inconsistent with its conclusion.'" App. 14a (quoting *Lavender v. Kurn*, 327 U.S. 645, 653 (1946)). Congress entrusted this FELA jury to weigh the facts and use its common sense and experience in determining that petitioner's negligence played a part in causing Sumner's injuries. "Under the ruling cases in this Court the evidence present was sufficient to raise an issue for the jury's determination," and therefore petitioner's effort to "improperly invade[] the jury's function" should be rejected. *Gallick v. Baltimore & O.R.R. Co.*, 372 U.S. 108, 109, 114 (1963).

STATEMENT

I. FACTUAL HISTORY

The accident occurred on February 26, 2013, at approximately 8:30 a.m. Sumner was working as a conductor for petitioner on a freight train heading north from Linwood, North Carolina, through Danville, Virginia. It was cold, "misting rain . . . pretty heavy," and the conditions were wet and muddy. App. 63a; *see* Resp. App. 2a-4a. The yardmaster in Greensboro had warned the engineer about ice farther north on ballast (rocks under and along the train tracks). App. 2a; Resp. App. 2a. After passing the Danville yard, the train stopped south of a

switch so the crew could leave a set of cars called a "cut" on a side track. The switch separated the main line from the side track.

As planned, Sumner made the "cut" of cars from the main line, boarded the last car of the "cut," and rode north past the switch. Sumner used a hand-held radio to instruct the engineer to pull the cut of cars forward and stop. A state inspector was at the scene that day and saw Sumner dismount from the "cut," cross over to the east edge of the side track, and walk south until he was out of sight. Resp. App. 12a-13a. Sumner was not stumbling, and he did not appear to be confused, unstable, or in any distress. *Id.* at 13a-14a, 20a.

Sumner's duties required him to walk south to the switch to turn off an electric timing device, and continue walking south to the "derail" to release that safety device used to prevent cars from moving on the side track. Using the walkway provided by the railroad for its employees between the derail and the switch, his task was to then walk back north to throw the switch and radio the engineer to back the "cut" onto the side track. App. 2a-3a, 5a, 66a-68a.

However, the next thing the state inspector heard was "a lot of commotion" over the radio. Resp. App. 14a. He got out of his car, walked toward the main line, and saw Sumner at the bottom of the ravine to the east of the side track. *Id.* at 15a. At trial, the state inspector identified the walk path and the location where Sumner fell on a scene photograph the inspector took on the date of the accident. Using Plaintiff's Exhibit 7, *id.* at 59a, he testified that "[t]he arrow at the bottom depicts the path that is normally taken by employees to approach the derail," and the circle shows where he concluded "Sumner

went over the edge of the walkway" based on disturbed dirt and ballast he saw at the scene. *Id.* at 15a-17a. Petitioner's investigation of the accident determined that, based on "disturbed" earth and Sumner's "positioning at the bottom of the embankment," "the point at which [Sumner] went over the side of the embankment was 58.5 feet north of the derail." *Id.* at 6a-7a; *see id.* at 58a (excerpt from Plaintiff's Exhibit 6: track diagram from petitioner's investigation of the accident). At that location, the embankment was approximately 35 feet high and sloped 70 degrees down. *Id.* at 56a. "No guardrail or other protection was provided to prevent falls into the ravine." App. 5a.

Sumner's expert, Raymond Duffany, took measurements of the walkway along the edge of the embankment in the area depicted in Plaintiff's Exhibit 7 at the point above where plaintiff was found, and the relatively flat portion of the walkway measured only 15 inches wide from the derail, extending 71 feet north. App. 47a. Duffany testified that the "minimum width that would be considered safe for a walkway would be 24 inches," which is "about your shoulder width or less." App. 37a. Duffany concluded to "a reasonable degree of engineering certainty" that the walkway at that location did not comport with industry practice and was not safe. App. 47a-48a.

Sumner reported to the EMT who tended him at the scene that "he was walking on the f[ar] right [of] [w]ay, when he lost his ba[la]nce on the wet gravel and fell." Resp. App. 61a. Duffany testified that a walkway with a minimum of 24 inches, as opposed to only 15 inches, "gives you that extra margin you have to recover from a possible fall or an area to fall in other than over the cliff." App. 49a-50a. This is especially important when walking on track ballast,

which is crushed rock "two to two and a half inches in diameter" that "moves and tends to roll under foot traffic." App. 40a, 49a-50a. A 24-inch minimum walkway "give[s] you an adequate place to walk [and] if you do stumble on the ballast or trip, you have room to recover." App. 53a-54a.

Sumner has no recollection of his hospital stay from February 26-28, 2013, and cannot remember saying anything to anyone during that time. App. 62a, 64a-65a. Two medical reports indicate he felt "funny," but he "denied particular dizziness, headache, [or] blurring of his vision." App. 119a, 121a. A later hospital report suggests that he "had some blurred vision and then blacked out" and that "[h]is fellow employees relate a story that implies he had a syncopal episode prior to falling." App. 123a. Norfolk Southern's superintendent visited Sumner at the hospital and testified that Sumner appeared "lucid" and "told me that he wasn't sure [what happened], that he was walking along and then blacked out." Resp. App. 35a-36a. After visiting the hospital, the superintendent altered Norfolk Southern's report of the accident to reflect that attributed statement. *Id.* at 38a-39a, 48a; *see id.* at 56a. Sumner's wife arrived at the hospital shortly after 11 a.m. and never left Sumner's side. *Id.* at 25a-27a. She did not hear Sumner give an account to any of the doctors of what happened to cause his fall and never heard him tell anyone he had fainted or blacked out, *id.* at 27a; she said that Sumner was in and out of consciousness and could not carry on a conversation even when conscious, *id.* at 26a. Before and after the accident, Sumner has never passed out, blacked out, or fainted, even during periods when he took medication. App. 57a-58a; Resp. App. 27a-28a. Dr. David Meyer, a neurologist, diagnosed a concussion, causing Sumner's

amnesia, and testified that brain scans showed no signs of a condition that would have caused Sumner to suffer a seizure or blackout. App. 4a. During his recovery, Sumner was "heavily medicated." Resp. App. 29a. As a result of the fall, he bit through his tongue and suffered a displaced fracture of his collarbone and three fractured ribs, requiring two surgeries. App. 3a-4a.

II. PROCEDURAL HISTORY

Sumner sued petitioner in a Virginia state court under FELA to recover for his injuries. The case was tried to a jury over three days. At the close of plaintiff's evidence, petitioner moved to strike and for a directed verdict on the ground that there was insufficient evidence to go to the jury. App. 78a. The court denied the motion. The court concluded that Sumner adduced sufficient evidence to establish the walk path was unsafe and that petitioner was negligent. App. 92a. The court explained "the question of causation is whether [petitioner's] negligence played a part, no matter how small, in bringing about the injury." *Id.* The court noted "it's foreseeable that a worker is going to be walking on wet ballast" and "slip on ballast" and that "a wider path would prevent [him] from falling down." App. 93a. The court determined that the jury could draw "fair" inferences from "circumstantial evidence" and that there were "sufficient grounds to take the case to the jury." App. 92a-93a.

"The court then gave instructions agreed upon by counsel as correct statements of the applicable law, although [petitioner] preserved its objection to the court's ruling on its motion to strike." App. 9a. In particular, the court instructed the jury that Sumner had the burden to prove by the preponderance of the evidence that petitioner was negligent and that

such negligence caused his injuries. App. 110a. The court further instructed: "A railroad has caused or contributed to the employee's injury if the railroad's negligence played a part, no matter how small, in bringing about the injury. The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence." App. 111a. The court also explained to the jury "that they could use their common sense in judging the evidence and could draw all reasonable inferences from it." App. 9a; *see also* App. 109a ("Any fact that may be proved by direct evidence may be proved by circumstantial evidence.").

Petitioner did not object to any specific jury instructions. *See* Resp. App. 53a (trial court: noting "the Defendant's right to object to specific instructions" but that "I think we have agreed that the instructions that the Court has prepared and presented to counsel are correct and accurate statements of the law and are the appropriate instructions given the Court's rulings"; defense counsel: responding, "Correct. Yes, Your Honor."). "As instructions given without objection, these instructions became the law of the case." App. 9a.

After the jury awarded Sumner $336,293 in damages, petitioner filed a post-trial motion to set aside the verdict or in the alternative to order a new trial. App. 30a. The court denied the motion because the jury members had before them "appropriate admissible evidence from which they could draw the conclusion that the Defendant was negligent and that that negligence was, at least to some degree, a cause of the Plaintiff's injury." App. 117a. The court emphasized: "It is not for this Court to substitute its opinion for what the jury should have come back with whether in liability or in damages." *Id.*

The Virginia Supreme Court affirmed. The court first rejected Norfolk Southern's argument that the trial court erred in admitting Sumner's expert's testimony. App. 9a-10a. Petitioner does not challenge that ruling here. Before the Virginia court, petitioner argued that the "evidence must show that the railroad's negligence in fact played a part in causing the plaintiff's injuries" and that "[s]peculation cannot fill that gap." Appellant Br. 27 (Va. June 11, 2018) ("Appellant Va. Br."). The court responded to "defendant's arguments on this question [of causation]." App. 11a. It explained that "the evidence is entirely circumstantial as to the fall that resulted in the plaintiff's injury," App. 2a, and that, "[i]n FELA cases, causation may be proved by circumstantial evidence alone and does not require direct evidence," App. 11a.

In reaching that conclusion, the court below relied on three of this Court's FELA decisions, *Tennant*, *Lavender*, and *Gallick*. As the Virginia court explained, those cases involved unwitnessed railroad accidents; and this Court held that, when the evidence made available different reasonable inferences, Congress entrusted the jury to decide liability. Applying "the settled principles governing FELA cases," the Virginia court held that "[t]here was evidence to support the inference that the defendant's negligence played a part, however small, in causing the fall which was the source of [Sumner's] injury." App. 14a.

The dissent took a different view. Although the parties did not brief the issue, and although the majority did not address it, the dissent opined that Sumner had failed to present sufficient evidence that his injuries would not have occurred "but for" petitioner's negligence. App. 16a. The dissent emphasized that Sumner's expert declined to definitively

attribute Sumner's fall to the narrowness of the walkway. App. 18a. Without citing, let alone discussing, any other evidence on causation—including the EMT report, the state inspector's testimony placing Sumner on the path, and petitioner's own investigation of where Sumner fell—the dissent declared that "[n]o evidence establishes where the plaintiff was situated when he fell[,] . . . how he fell, or why he fell." *Id.* The dissent, however, recognized the "unremarkable proposition that conflicting evidence from which a jury could draw opposite conclusions requires the trial court to submit the case to a jury." App. 21a.

REASONS FOR DENYING THE PETITION

I. THE VIRGINIA SUPREME COURT'S DECISION WAS CORRECT

A. The Decision Below Was Factually Supported and Consistent with This Court's Precedents

1. Ample Evidence Supports the Decision Below

The Virginia Supreme Court concluded that "[t]here was evidence to support the inference that the defendant's negligence played a part, however small, in causing the fall which was the source of the plaintiff's injury." App. 14a. On the day of the accident, the conditions were wet, muddy, and misting rain. Sumner's duties required him to walk from the switch to the derail on a walkway made of track ballast, which rolls under foot. Just before the accident, the state inspector placed Sumner on the walkway walking south toward the derail on the edge of the track siding. Sumner was found in the ravine directly below a section of the walkway that petitioner concedes was negligently narrow. App. 10a;

Pet. 2, 26. Petitioner's own investigation concluded, based on disturbed earth and Sumner's positioning at the bottom of the embankment, that Sumner went over the edge of the embankment 58.5 feet north of the derail. *See supra* p. 4. At that point, the walkway was only 15 inches wide. App. 47a. The emergency medical technician's record states that, upon finding Sumner, "he did state that he got off the train to check something . . . [and] was walking on the f[ar] right [of] [w]ay, when he lost his ba[la]nce on the wet gravel and fell." Resp. App. 61a. Duffany, Sumner's liability expert, testified that a wider pathway would have provided an extra margin to recover one's footing or fall in an area other than over the precipice, as Sumner did. *See supra* pp. 4-5. A reasonable interpretation of that evidence is that Sumner was on the narrow walkway, lost his balance on the wet ballast, and fell. Thus, there was evidence from which the jury could find that petitioner's negligence in failing to maintain a safe walkway played a part, "'even the slightest,'" in producing Sumner's injuries. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 703 (2011) (quoting *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506 (1957)).

2. The Virginia Court Faithfully Applied This Court's Precedents

In analyzing causation, the Virginia court correctly relied on three of this Court's "FELA cases in which a railroad worker suffered injury or death while performing his duties where there were no eyewitnesses to the event." App. 11a. Each of those cases demonstrates that the evidence presented here was sufficient to support the jury's verdict.

In *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29 (1944), a railroad switchman was killed

during an operation to couple and remove freight cars from a railyard. The switchman was last seen alive when he walked from the west side of the engine to the north or rear end of the locomotive. *Id.* at 31. "There was no direct evidence as to Tennant's precise location at the moment he was killed." *Id.* However, "his duty as a switchman" was "to stay ahead of the engine as it moved back," "protect it from other train movements, and attend to the switches." *Id.* The engineer backed the engine and cars northward without first ringing a warning bell. *Id.* at 32. This Court concluded that there was sufficient proof on causation to go to the jury. *Id.* at 33-34. The Court emphasized that "absence of eye witnesses was not decisive" and that there was testimony that the switchman's "duties" placed him "near the north or rear end of the engine." *Id.* Moreover, "[t]he location of his severed hand, cap, lantern and the pool of blood was strong evidence that he was killed approximately at the point where the engine began [its] backward movement and where he might have been located in the performance of his duties." *Id.* at 34. The Court concluded that "[t]he ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable." *Id.* The Court found that the "ringing of the bell might well have saved his life" and that the "jury could thus find that [the railroad] was liable." *Id.*

So, too, here. Although there were no eye witnesses to Sumner's fall, this was "not decisive." *Id.* at 33. The state inspector last saw him walking south on the walk path between the side track and the edge of the embankment, and his "duties" as conductor placed him there. Sumner was found at the bottom of the embankment below an area that was negligently narrow, and he reported to the EMT

that he lost his balance on the wet gravel and fell, all of which is "strong evidence" that he fell from the narrow path. *Id.* at 34. Just as in *Tennant*, the "ultimate inference" that Sumner would not have fallen but for the negligently narrow walkway "is therefore supportable." *Id.* A wider path might well have prevented Sumner's injuries, and "[t]he jury could thus find that [petitioner] was liable." *Id.*

In applying *Tennant*, the Virginia Supreme Court stated: "Because the evidence of causation in unwitnessed cases is often entirely circumstantial and the result must depend on the inference to be drawn from the circumstantial evidence, the Supreme Court stated that it is not the function of an appellate court to search the record in such cases for conflicting circumstantial evidence 'to take the case away from the jury on the theory that the proof gives equal support to inconsistent and uncertain inferences.'" App. 13a (quoting *Tennant*, 321 U.S. at 35).

The Virginia Supreme Court also relied on *Lavender v. Kurn*, 327 U.S. 645 (1946), where this Court reached a similar conclusion. There, a switchtender was found unconscious near the track and died soon after as a result of a fractured skull. *Id.* at 648. An autopsy showed he was hit by a fast moving small round object. *Id.* at 648-49. The plaintiff's theory was that the switchtender was struck by the end of a mail hook hanging loosely on the outside of a mail car on a backing train. *Id.* at 649. The railroad contended that the switchman was murdered. There was conflicting circumstantial evidence. The plaintiff introduced evidence that the mail hook could have hit the decedent if he were standing on a mound of dirt, but other evidence tended to show that it was "physically and mathematically impossible" for the hook to strike him. *Id.* at 652. There was evidence

supporting the inference that he was murdered, but no signs of a struggle or fight; and his gold watch and diamond ring were still on his person. *Id.* at 649-51. In affirming the jury verdict, this Court concluded that there was "an evidentiary basis for the jury's verdict" and thus "the inference that [decedent] was killed by the hook cannot be said to be unsupported by probative facts or to be so unreasonable as to warrant taking the case from the jury." *Id.* at 652-53.

In summarizing, the Virginia Supreme Court noted that, when there is conflicting circumstantial evidence sufficient to support plaintiff's or defendant's theory, "the choice of the proper inference to be drawn [i]s an issue for determination by the jury." App. 12a. The court below acknowledged that the evidence "may also have been sufficient to support an inference that the plaintiff's fall resulted from causes unrelated to the defendant's negligence." App. 14a. Indeed, the jury could have concluded that Sumner fell because he fainted. One of the medical records indicated Sumner's "fellow employees relate[d] a story that implies he had a syncopal episode prior to falling." App. 123a. And Norfolk Southern's superintendent said that in the hospital Sumner stated he "blacked out," and the superintendent altered the accident report to add this attributed statement. Resp. App. 38a-39a, 48a.[1] "'But where, as here,

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[1] Other facts undermined that theory, however. For example, before and after the accident, Sumner had never blacked out, and his wife, who was by his side at the hospital, never heard him say anything to the doctors or anyone else suggesting he had blacked out at the time of the accident. *See* App. 57a-58a; Resp. App. 26a-28a. In addition, Sumner's counsel impeached the superintendent with deposition testimony. *See* Resp. App. 41a-50a. The jury was entitled to discredit the super-

there is an evidentiary basis for the jury's verdict[,] [the jury] is free to disregard or disbelieve whatever facts are inconsistent with its conclusion.'" App. 14a (quoting *Lavender*, 327 U.S. at 653). The court below thus recognized that this case presented conflicting evidence but that, "[u]nder the settled principles governing FELA cases, that juxtaposition created a jury issue as to which inference should be drawn." *Id.*[2]

The Virginia court also relied on *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963), which this Court reaffirmed in *McBride*, *see* 564 U.S. at 697. Gallick was working along the railroad's right of way when he was bitten by an insect. The wound became infected and resulted in amputation of both of his legs. Doctors could not explain the etiology of his condition, though some characterized it as secondary to an insect bite. 372 U.S. at 109-10. Gallick filed suit under FELA, alleging that the railroad was negligent in allowing a pool of stagnant water to attract insects, which resulted in the bite and subsequent infection. A jury returned a verdict

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intendent's testimony (and the altered report) and rely on other testimony, including what Sumner said when the EMT discovered him at the bottom of the embankment.

[2] The dissent agreed that *Lavender* "stands for the unremarkable proposition that conflicting evidence from which a jury could draw opposite conclusions requires the trial court to submit the case to a jury." App. 21a (McCullough, J., dissenting). The dissent evidently took issue with this Court's statement, which the majority quoted (at App. 11a-12a), that "[i]t is no answer to say that the jury's verdict involved speculation and conjecture." *Lavender*, 327 U.S. at 653. But that "passage does not embrace speculation in any case, FELA or otherwise," App. 21a (McCullough, J., dissenting), and is best read as describing a jury's reasonable inferences from evidence, not wild guessing in the absence of probative facts.

for him. The court of appeals reversed; the court concluded that there was "no direct evidence" of any connection between the railroad's stagnant pool and the substance that caused the worker's condition and that the worker failed to "negative the alternative possibility" that the insect came from one of several other nearby pools not owned by the railroad. *Id.* at 112.

This Court reversed, holding that the court of appeals "improperly invaded the function and province of the jury" and that there was sufficient evidence that the railroad's negligence caused the worker's injury. *Id.* at 113. Specifically, this Court held that the lower court "erred in demanding either direct evidence" between the railroad's fetid pool and the insect or "more substantial circumstantial evidence" that the railroad's fetid pool attracted and infected the particular insect. *Id.* at 114. The Court reiterated that in FELA cases a court's function is not to search the record for conflicting circumstantial evidence to take the case away from the jury, but merely to ensure "'the reasonableness of the particular inference or conclusion drawn by the jury.'" *Id.* at 114-15 (quoting *Tennant*, 321 U.S. at 35).

Each of these decisions is consistent with, and part of, this Court's repeated admonitions that "Congress vested the power of decision in [FELA] actions exclusively in the jury 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*, 352 U.S. at 510 (footnote omitted); *see also*, *e.g.*, *Gallick*, 372 U.S. at 115 (on issues of negligence and causation, "'[t]he very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable'") (quoting *Tennant*,

321 U.S. at 35) (collecting cases); *Schulz v. Pennsylvania R.R. Co.*, 350 U.S. 523, 526 (1956) (concluding, in a Jones Act case,[3] there was sufficient evidence of causation to send the case to the jury even though decedent "might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights," and emphasizing that "[f]act finding does not require mathematical certainty" and that "[j]urors are supposed to reach their conclusions" from "proof of circumstances from which inferences can fairly be drawn"); *cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986) ("If reasonable minds could differ as to the import of the evidence, . . . a verdict should not be directed.") (citing *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949)). The Virginia Supreme Court correctly applied the applicable legal standard based on this Court's precedents.

3. The Dissent Failed To Consider Crucial Facts

The dissent agreed with the majority that FELA juries can draw inferences from circumstantial evidence, but neglected material facts. The dissent acknowledged that the facts in *Gallick* "permitted the jury to draw a logical inference that the bug that bit the employee came from the stagnant pool owned by the railroad rather than from elsewhere and, therefore, the case was properly submitted to the jury." App. 22a (McCullough, J., dissenting). But the dissent failed to address the probative evidence in this case, such as the EMT report, the state inspector's testimony regarding the narrow

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[3] FELA standards apply to Jones Act cases. *See* 46 U.S.C. § 30104.

point at which Sumner fell, and petitioner's own investigation of where Sumner fell—from which the jury here could reasonably conclude that petitioner's negligence, as in *Gallick*, played a part in causing the injury.

This case is also worlds apart from *Fedorczyk v. Caribbean Cruise Lines, Ltd.*, 82 F.3d 69 (3d Cir. 1996), upon which the dissent relied (at App. 25a-26a). There, the plaintiff slipped and fell in a bathtub and alleged that the defendant's failure to adequately strip the tub caused her injuries. The court affirmed summary judgment for the defendant. Although she discovered after the accident that her feet could fit in between the nonskid strips, "[n]o evidence presented tend[ed] to prove [the plaintiff] was standing either on or off the stripping at the time she fell" and thus the jury was "left to speculate" about the cause in fact of the plaintiff's injury. *Fedorczyk*, 82 F.3d at 75. Here, there is no such problem. The evidence shows Sumner fell 58.5 feet north of the derail, a point on the walkway that was too narrow. And both the EMT report and the state inspector's testimony linked the injuries with a slip and fall on the wet ballast at that narrow point. The jury's conclusion that petitioner's negligence contributed to Sumner's injuries finds more than adequate support in the record.[4]

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[4] In *Fedorczyk*, the plaintiff's expert testified that more stripping would have reduced the likelihood of a fall. The court agreed with this common-sense conclusion. *See* 82 F.3d at 75 ("We agree that the more stripping there is in the tub, the less likely it is a person would fall because of inadequate stripping."). Here, Duffany similarly testified that wider is better, App. 37a, and that a wider walkway "may have reduced the likelihood of the risk of an accident in this case," App. 49a-50a.

The dissent suggests various possibilities for how and why Sumner fell, including that "he lost consciousness due to some medical episode." App. 19a (McCullough, J., dissenting). But a plaintiff need not establish that "other potential causes" were "conclusively negated by the proofs." *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 109 (1959); *see also Gallick*, 372 U.S. at 112 (rejecting the need to present evidence that "would negative the alternative possibility" that the insect came from a nearby pool instead of the railroad's pool). And, as this Court has emphasized, "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Rogers*, 352 U.S. at 508 n.17. Making "due allowance for all reasonably possible inferences," a FELA plaintiff is only "required to present probative facts from which the negligence and the causal relation could reasonably be inferred." *Tennant*, 321 U.S. at 32-33. Indeed, in *Tennant*, "[t]he ringing of the bell might well have saved [the switchman's] life" and the "jury could thus find that [the railroad] was liable." *Id.* at 34. Here, the Virginia Supreme Court correctly concluded that "[t]here was evidence to support the inference that the defendant's negligence played a part, however small, in causing the fall which was the source of the plaintiff's injury." App. 14a.

B. Petitioner Omits Facts and Misconstrues the Decision Below

1. Petitioner Ignores Crucial Facts

In an effort to cast doubt on the Virginia court's decision, petitioner repeatedly asserts a lack of evidence. The record demonstrates otherwise. Petitioner repeatedly claims (at 2, 8) that "there was no evidence that Sumner did stumble or trip, much less

that he did so where the footpath narrowed." But the EMT who arrived at the scene recorded Sumner's statement that he lost his balance on the wet gravel and fell. And Duffany's measurements showed the footpath directly above where Sumner was found was only 15 inches wide. Petitioner also claims (at 7) that "there was no evidence of where [Sumner] left the path." But the state inspector identified the location where he concluded Sumner left the walk path based on disturbed earth and ballast, where Sumner was heading, and Sumner's location in the ravine below. Petitioner's own investigation concluded, based on disturbed earth and where Sumner was found, that Sumner went over the edge of the embankment 58.5 feet north of the derail, which is where the walkway was negligently narrow. Petitioner also claims (at 10) that no evidence supported the theory that an extra nine inches would have allowed Sumner to recover his step and avoid the fall. Yet Duffany testified explicitly that a 24-inch minimum walk path gives an extra margin to recover or a place to fall other than over the cliff. Moreover, the jury was entitled to rely on its common sense that a walk path narrower than shoulder width contributed to Sumner's fall. To withdraw this case from the jury a court would need to find that "fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." *Rogers*, 352 U.S. at 510. This is not such a case, and, indeed, the evidence directly refutes petitioner's contentions. The petition should be denied.

2. Petitioner Misinterprets the Decision Below

Petitioner argues (at 2) that the decision below "eliminat[es] the plaintiff's duty to prove even but-for

causation." That is incorrect. The Virginia Supreme Court understood that but-for causation is required and can be inferred from circumstantial evidence. And petitioner's erroneous argument relies entirely on one sentence from the state court's decision taken out of context.

The Virginia Supreme Court did not eliminate but-for causation. In analyzing the issue of causation, the court expressly relied on *Tennant*, which makes clear that a jury can infer but-for causation based on facts in evidence. *See Tennant*, 321 U.S. at 34 ("The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable.").

Petitioner argues strenuously (at 2)—in its only assignment of error—that the court below "eliminat[ed]" but-for causation. But if the Virginia Supreme Court "had intended such a sea change in [causation] principles it would have said so clearly." *McBride*, 564 U.S. at 710 (Roberts, C.J., dissenting) (citation omitted). Instead, the Virginia court emphasized that it "continue[s] to adhere to the construction of FELA that we expressed in [*Bly v. Southern Railway Co.*, 31 S.E.2d 564 (Va. 1944)]," which applied "*Tennant* in the year it was handed down." App. 13a-14a.

Petitioner seizes on one sentence in the Virginia Supreme Court's decision: "Indeed, the standard of proof in an FELA action is significantly more lenient than in a common-law tort action." App. 8a.[5] That is

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[5] Petitioner mischaracterizes the sentence (at 2, 3, 11) as the Virginia court's "holding"—it is not. The court instead held that "the evidence was sufficient to create a jury issue on causation" and, more specifically, that "[t]here was evidence to support the inference that the defendant's negligence played a

a red herring, as context and the opinion the Virginia court cited for this proposition make clear.

First, the sequence and topics of the paragraphs in the Virginia court's opinion make clear that the sentence appears as part of the court's rule statement regarding *negligence*, not causation. "There were two issues before the jury, negligence and causation." App. 10a. The court's analysis section takes each issue in turn. After two introductory paragraphs on the purpose of FELA and the applicability of federal law, the court discusses negligence in the third paragraph, followed by causation in the fourth. App. 7a-8a. Specifically, the third paragraph explains that "a railroad has a non-delegable and continuing duty to use reasonable care to furnish its employees a safe place to work" and that "a breach of these duties constitutes negligence." *Id.* The third paragraph, still on negligence, concludes by stating that "a FELA plaintiff may carry that burden by proof that is entirely circumstantial. Indeed, the standard of proof in an FELA action is significantly more lenient than in a common-law tort action." App. 8a (citations omitted). The court turns to causation only in the fourth paragraph, explaining that "[t]he issue of proximate cause is *also* treated more leniently in FELA cases than in common-law tort actions" and quoting the familiar, relaxed causation standard from *Rogers*. *Id.* (emphasis added). Thus, read in context, the court's reference to the "standard of proof" in the third paragraph on negligence applies to the standard of care, not causation. Contrary to petitioner's suggestions (at 3, 19), this reference is not "bizarre"—the statement makes

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part, however small, in causing the fall which was the source of the plaintiff's injury." App. 14a.

sense because FELA "abolished the common law contributory negligence rule, which barred plaintiffs whose negligence had contributed to their injuries from recovering for the negligence of another." *McBride*, 564 U.S. at 708 (Roberts, C.J., dissenting). But it in no way "eliminat[es]" but-for causation.

Second, the case the Virginia court cited for this proposition also makes clear that the court did not purport to change FELA causation. In support of its statement that "the standard of proof in an FELA action is significantly more lenient than in a common-law tort action," App. 8a, the Virginia Supreme Court cited its decision in *Norfolk & Western Railway Co. v. Hughes*, 439 S.E.2d 411, 413 (Va. 1994). In that case, the court considered whether the plaintiff presented "sufficient evidence to support the jury's finding of negligence." *Id.* at 414. Causation was not at issue, and the court had no occasion to consider it. *See id.* ("[W]e do not consider [defendant's] remaining assignments of error."). The plaintiff argued that the defendant railroad knew or should have known of an unsafe crosstie that allegedly injured him. The court held that there was insufficient evidence on negligence because the record showed that the rail tracks were inspected twice per week and no defects were apparent the day before the accident. *Id.* at 413. There were no facts "from which an inference could be drawn" that the railroad knew or should have known of the unsafe condition. *Id.* The court also rejected the plaintiff's alternative theory of negligence—that he was required to work with insufficient lighting—because the record showed the railroad provided him a lantern. *Id.* at 414.

In explaining the applicable legal standard, the court quoted *Rogers* for the proposition that a FELA plaintiff need only prove employer negligence played

"'any part'" in producing the injury and that "'[i]t does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence.'" *Id.* at 413 (quoting 352 U.S. at 506). The court went on to state, in words that the court below here echoed, "[e]ven though *the standard of proof in a F.E.L.A. action is more lenient than in a common law action*, the plaintiff nevertheless is still required to establish some act of negligence in order to prevail." *Id.* (emphasis added).

In a case solely about negligence, where the court had just described the elimination of contributory negligence, the court's reference to a more lenient standard of proof logically refers to negligence. After all, by abolishing contributory negligence as a defense and bar to recovery, Congress provided that an employee need not establish the absence of employee contributory negligence—thus lowering the standard of proof as to negligence and what conduct was culpable for the worker's injuries. *See Central Vt. Ry. Co. v. White*, 238 U.S. 507, 510-12 (1915) (FELA defendant bears the burden of proving contributory negligence "even in trials in states which hold that the burden is on the plaintiff"); *Southern Ry. Co. v. Mason*, 89 S.E. 225, 228 (Va. 1916) (explaining that, at Virginia common law, if plaintiff's evidence disclosed contributory negligence, "the burden still rest[ed] on [plaintiff] to relieve himself of the suspicion of his own negligence") (citation omitted). Petitioner's assertion (at 17) that the Virginia Supreme Court "appears to conflate" the standards for proximate causation and the burden of production has no basis.

In any event, the Virginia court's conclusions also make clear that it did not mean to somehow

eliminate but-for causation. The court specifically concluded that "the present case is unlike" its decision in *Hughes*, where "'the record [was] devoid of any facts' to support an inference favorable to the plaintiff on a required issue." App. 14a-15a (quoting *Hughes*, 439 S.E.2d at 414) (alteration below). As explained *supra* Part I.A.1, the facts amply support the jury's verdict that petitioner's negligence contributed to cause Sumner's injuries. Having consistently lost below, petitioner attempts as a last gasp to secure a different outcome by contorting the Virginia Supreme Court's opinion and omitting key facts. This Court should reject that effort.

II. THERE IS NO CONFLICT AMONG THE LOWER COURTS

The sole question raised in the petition is whether the evidence on causation was sufficient to survive a directed verdict.[6] On that issue, there is no split of authority—lower courts agree that FELA has a relaxed causation standard and that causation can be established based on reasonable inferences drawn from circumstantial evidence.

In *McBride*, this Court clarified the general causation standard applicable in FELA cases as whether negligence played "a part—no matter how small—in bringing about the injury." 564 U.S. at 705. The Court also specifically rejected the argument that the "plaintiff's injury must *probably* ('more likely than not') follow from the railroad's negligent conduct." *Id.* Petitioner identifies no subsequent lower court opinion inconsistent with that decision.

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[6] As petitioner concedes (at 26), "[n]egligence is not contested." Thus, petitioner's citations (at 21-22) to cases involving the failure to exercise due care have no bearing here.

Petitioner cites only four cases since *McBride*, and none of those cases eliminates but-for causation or creates a split of authority over the correct legal standard governing sufficiency of the evidence in FELA cases. *See Schulenberg v. BNSF Ry. Co.*, 911 F.3d 1276, 1286 (10th Cir. 2018) (quoting this Court's decisions in *Lavender* and *Tennant* to explain that "[a] FELA case can be taken from the jury only when there is a complete absence of probative facts to support the employee's claim" but that, "after making due allowance for all reasonably possible inferences," "mere speculation" cannot "do duty for probative facts") (citation and brackets omitted); *Garza v. Norfolk Southern Ry. Co.*, 536 F. App'x 517, 520-21 (6th Cir. 2013) (unpublished) ("[t]he relaxed causation standard under FELA does not affect plaintiff's obligation to prove that the railroad was in fact negligent" or establish "but-for causation") (brackets omitted); *Strickland v. Norfolk Southern Ry. Co.*, 692 F.3d 1151, 1157 (11th Cir. 2012) (recognizing that, "to survive a motion for summary judgment, a plaintiff asserting a FELA claim must demonstrate that a question of fact exists concerning whether the employer's negligence played a part, however slight, in the employee's injuries");[7] *Huffman*

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[7] Petitioner quotes the *Strickland* opinion out of context when arguing (at 20-21) that the court "cit[ed] *McBride* to say that 'summary judgment is disfavored in FELA actions'"; rather, the court merely noted that "Strickland *argued* that summary judgment is disfavored in FELA actions." 692 F.3d at 1156 (emphasis added). Petitioner also quotes (at 21) *Strickland*'s reference to "featherweight" evidence, but the word merely describes the familiar relaxed standard of causation *McBride* confirmed. *See Smith v. Trans-World Drilling Co.*, 772 F.2d 157, 162 (5th Cir. 1985) ("Unlike the 'featherweight' standard of causation in a Jones Act claim, the standard in an

v. Union Pac. R.R., 675 F.3d 412, 422, 426 (5th Cir. 2012) (explaining that "our task is simply to decide whether there was sufficient evidence for a jury to infer—based on their common sense and common understanding—that [defendant's negligence] contributed in any way to [the injury]" and that jurors "may not simply guess"). These cases do not suggest any confusion or conflict with regard to the appropriate legal standard for the sufficiency of causation evidence in FELA cases.

To be sure, different cases will reach different results, but that is merely a reflection of different facts, not different legal standards. None of the post-*McBride* cases cited by petitioner reflects any split of authority with regard to causation or sufficiency of the evidence in FELA cases.

III. THIS CASE PRESENTS A POOR VEHICLE FOR REVIEW

A. The Virginia Supreme Court Did Not Pass on the Question as Framed by Petitioner

This case is a poor vehicle for review in this Court because the Virginia Supreme Court did not address the question as framed by petitioner. Petitioner's main argument is that the decision below somehow "eliminat[es]" but-for causation. However, the majority opinion focuses on whether circumstantial evidence is sufficient to establish causation under FELA, not on the difference between but-for and proximate causation. The opinion does not specifically address

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unseaworthiness claim is 'proximate cause in the traditional sense.'") (citation omitted).

or analyze but-for causation, presumably because the majority considered the answer to be an obvious yes.[8]

Although the dissent argues that but-for causation is lacking, the dissent omits key facts that support the jury's verdict as to causation. The only fact the dissent cites is that Sumner's expert declined to say conclusively whether the walkway played a part in causing Sumner's injuries. App. 18a (McCullough, J., dissenting). But "[t]he jury's power to draw the inference that" petitioner's negligence in fact contributed to Sumner's injuries "was not impaired by the failure of any [expert] witness to testify that it was in fact the cause." *Sentilles*, 361 U.S. at 109 (Jones Act case where three medical experts declined to say conclusively that negligence activated latent tubercular condition). And other evidence tended to prove that petitioner's negligence contributed to cause the harm. The jury was entitled to rely on its common sense in drawing the reasonable inference that petitioner's negligence contributed to cause Sumner's injuries.

At the same time, the dissent recognized "the unremarkable proposition that conflicting evidence from which a jury could draw opposite conclusions requires the trial court to submit the case to a jury." App. 21a (McCullough, J., dissenting).

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[8] Petitioner states that the sole question "'is whether the evidence was sufficient to create a jury issue on [but for] causation.'" Pet. 26 (quoting App. 14a) (alteration by petitioner). Petitioner's modification of the Virginia court's conclusion—inserting "but for"—makes clear that the court did not squarely address the issue.

B. Petitioner Failed To Challenge the Jury Instructions and Thus Waived Its Argument Here

In addition, this case does not warrant review because petitioner waived the very argument it presents here. Petitioner argues (at 2-3) that "[t]he court below erred in holding that FELA imposes a lower standard of proof than the common law" by somehow "eliminating the plaintiff's duty to prove even but-for causation." Petitioner not only misconstrues the facts; it also waived this argument. The trial court instructed the jury that Sumner had the burden to prove by the preponderance of the evidence that petitioner was negligent and that such negligence caused the injuries. App. 110a. The court further instructed: "A railroad has caused or contributed to the employee's injury if the railroad's negligence played a part, no matter how small, in bringing about the injury. The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence." App. 111a. The court also explained to the jury: "Any fact that may be proved by direct evidence may be proved by circumstantial evidence; that is, you may draw all reasonable and legitimate inferences and deductions from the evidence." App. 109a. These instructions, to which petitioner consented, App. 9a; Resp. App. 53a, make clear that Sumner could satisfy his burden of establishing causation through circumstantial evidence alone. If petitioner believed that proving "but-for" causation required something more, it could have objected or introduced a different instruction. Petitioner failed to do so. Petitioner cannot now complain of an alleged defect it failed to raise below and preserve at trial. *See City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam)

("[w]e ordinarily will not decide questions not raised or litigated in the lower courts," and "[t]hat rule has special force where the party seeking to argue the issue has failed to object to a jury instruction"). In any event, these jury instructions track the same instructions at issue in *McBride* and are unobjectionable.

Petitioner's arguments below also make clear that it waived the argument with respect to but-for causation it purports to raise here. At trial, petitioner argued strenuously that Sumner had failed to establish proximate causation, but recognized that there was at least but-for causation. *See* App. 81a ("Where they are is just a but for."); Resp. App. 50a-51a ("This is a but-for case, and as was articulated in the McBride case, that is just simply not enough to establish causation."); App. 90a ("This is a but for case. That's all they got because nobody can place him there."); *see also* App. 86a (trial court: noting that "what [defense counsel] is arguing, you have a but for" causation). Similarly, in briefing before the Virginia Supreme Court, petitioner implicitly recognized but-for causation existed when it argued that FELA's relaxed standard for proximate cause "is not satisfied by proof of mere 'but for' causation." Appellant Va. Br. 27. Now before this Court, petitioner conjures up a new argument that the Virginia Supreme Court somehow abandoned the traditional requirement of but-for causation by affirming the jury's verdict. That argument is not true to the record.

The record in this case demonstrates ample evidence supporting the jury's reasonable inferences on causation. Even if the Court did wish to reexamine the standard for the sufficiency of the

evidence in FELA cases, this case is not an appropriate one in which to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 5, 2019

APPENDIX

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IN THE CIRCUIT COURT FOR THE
CITY OF DANVILLE

Case No. CL15000079

MARK A. SUMNER,
Plaintiff,
v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant.

VOLUME 1
August 7, 2017
9:00 a.m.

HEARD BEFORE:
THE HONORABLE JAMES J. REYNOLDS

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* * *

[69]

TEDDY LESTER

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

DIRECT EXAMINATION

* * *

[113]

* * *

BY MR. MOODY:

Q Can you describe the conditions that day as far as the footing, moisture, and whether those conditions – what those conditions were like? Tell the jury what you just talked about.

A It was wet. Like I said, cold. And even as we came by the yard at Greensboro, North Carolina they told us that it could possibly be ice on the rock or ballast as I referred to it, to be on the lookout.

Q Who told you that?

A The yardmaster in Greensboro.

Q The yardmaster on the railroad instructed your crew that?

A They called us via radio and said be cautious because it's cold, wet. Said possibly be ice on the ballast.

* * *

[125]

* * *

MR. DAVIS: The next witness is going to be Norfolk Southern employee, Collan Campbell, we're going to present by reading portions of his discovery deposition.

* * *

[127]

* * *

Q Are you still employed by Norfolk Southern?

A Yes.

* * *

[128]

* * *

Q What position did you hold as of February 26, 2013?

A Management trainee.

* * *

[130]

* * *

Q You are listed in Norfolk Southern's Interrogatory Answers as someone who participated in the investigation of Mr. Sumner's incident. Is that true? Did you assist in some way in investigating this incident?

A Yes.

Q Tell me what specifically you did in [131] furtherance of the investigation of this incident.

A I think I helped with the write-up of the PowerPoint, taking measurements and. And that's it that I can remember.

* * *

[136]

* * *

Q Do you remember what the ground conditions were like that morning?

A As far as the walking conditions on the side of the track?

Q Or as you went down the ravine, when you went down the embankment to get to Mr. Sumner. And

what I'm after, was it icy? Was it wet? Was it muddy? What was the ground like that day?

A I guess you could say it was wet.

Q Was there mud from the walkway down the [137] embankment?

A Yes, sir, there was mud.

Q Had it been raining that morning?

A Yes.

Q Was it still raining when you got to the scene?

A No.

Q You don't remember seeing any ice accumulated on the ground?

A No.

* * *

[143]

* * *

MR. DAVIS: During the deposition we marked the second version of the write-up, Your Honor, as Campbell Exhibit 2. We've appended an exhibit sticker to mark it as [144] Plaintiff's Exhibit 5.

MR. CREASY: No objection, Your Honor.

THE COURT: That will be admitted.

(Plaintiff's Exhibit 5 was marked for identification and admitted into evidence.)

* * *

[145]

* * *

Q All right. Handing you a set of documents that have Bates numbers NSRC30 through 39. Is this the document that you have been referring to as the PowerPoint?

A Yes.

Q And you and Mr. Smith, did you say, helped to put this together?

A Yes. Mainly me.

Q Mainly you?

[146]

A Yes.

Q All right. Does what I have put in front of you appear to be a complete copy of the PowerPoint that you created relative to the investigation of this incident?

A Yes.

MR. DAVIS: During the deposition we marked that as Campbell Exhibit Number 3, Your Honor. And I would tender that to the Court as Plaintiff's Exhibit 6.

MR. CREASY: No objection.

THE COURT: That will be admitted.

(Plaintiff's Exhibit 6 was marked for identification and admitted into evidence.)

* * *

BY MR. DAVIS:

Q Now, on the first page of this document, Mr. Campbell, there are a number of measurements and markings to denote the locations of [147] the

switch and the derail and the position where you-all concluded that Mr. Sumner fell.

Are those based on measurements that you took at the scene that morning?

A Yes.

Q And, again, did you do your best to make sure that you took reasonably accurate measurements of all the things that are mentioned there?

A Yes.

Q And do you believe that the values given to those various measurements on this track diagram are all accurate?

A Yes.

Q How was it determined from where Mr. Sumner had fallen?

A From where the ground had been disturbed and his positioning at the bottom of the embankment.

Q Okay. The blue dot that we see in the track diagram that has the notation, "position where employee fell," is that the area on the walkway where you found the ground disturbed when you got to the scene that morning?

[148]

A No. The walkway wasn't disturbed but the side of the embankment was disturbed.

Q And Mr. Sumner's body was directly below that area down in the ravine?

A Yes.

Q Is that right?

A Yes.

Q To your knowledge, no one had moved Mr. Sumner from the area where he fell to the area where you found him when you got to the scene?

A Yeah. No one had moved him, no.

Q And you determined that the point at which he went over the side of the embankment was 58.5 feet north of the derail. Is that accurate?

A That's correct.

* * *

[158]

* * *

JOHN SHERRILL

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

DIRECT EXAMINATION

BY MR. DAVIS:

Q Good afternoon, sir.

A Good afternoon.

Q Would you state your full name, please?

A John Russell Sherrill.

[159]

Q Do you live here in Danville, Mr. Sherrill?

A I do.

Q Are you employed?

A I'm retired.

Q What was your occupation before you retired?

A I was a railroad safety inspector with the Commonwealth of Virginia State Corporation Commission.

Q Was your employer the Commonwealth of Virginia?

A Yes.

Q Is that what you were doing in February of 2013 when this incident occurred?

A Yes.

Q Earlier in your career had you worked for the defendant, Norfolk Southern?

A Yes.

Q And for how long did you work for Norfolk Southern?

A From July of 1971 to March of 1993.

Q And what did you do for Norfolk Southern when you worked for them?

[160]

A I started out as a service attendant in the mechanical department and worked my way up to foreman of mechanical.

Q Was all of your work for Norfolk Southern in the mechanical department?

A Yes.

Q For the ladies of the jury, does that mean you worked on railroad cars, railroad locomotives, keeping those maintained?

A Right.

Q Did you ever maintain or repair railroad tracks in your work for Norfolk Southern?

A No.

Q Do you consider yourself to be an expert in track safety?

A No.

Q So even though your title with the state corporation commission was manager of railroad safety, you don't hold yourself out as an expert in track safety; is that correct?

A No.

Q Were you working in Danville on the day that Mr. Sumner fell?

A Yes.

[161]

Q And more specifically, were you actually watching and listening to Mr. Sumner and his engineer do their work at the time Mr. Sumner fell?

A Yes.

Q Why were you doing that?

A The federal government has regulations that require the employees of Norfolk Southern and any other railroad to do a specific job when they're performing a – a railroad safety inspection of the brakes. And that's what I was doing, watching, making sure they did it right.

Q How did you know where they were going to be and what they were going to be doing that morning?

A I had a radio and listened to the communications over the radio from the yardmaster to the train.

Q And where was that crew going to be bringing in their train?

A They were going to East Bradley's track to set off and pick up.

Q About how far is that from the Danville yard?

A Approximately two miles.

[162]

Q And how did you get over there to the East Bradley tracks?

A There's an underpass that goes right under the switch for East Bradley track. It used to be the old Richmond Road. And that's where I was.

Q Were you on the ground?

A No. I was in my car.

Q So there's an actual road there and you could sit in your car and watch what the train crew was doing?

A Yes.

Q We marked as Plaintiff's Exhibit 3 earlier a photograph looking north at East Bradley and you see a switch here and the rear of a car that's on the main line.

Approximately where were you? Just to give the jury some understanding, where were you in your vehicle?

A I would be to the left of the cars that are sitting on the main line down the side of the hill. It actually goes down about 30 feet from the level of the rail to the road level.

Q If it goes down to 30 feet, how could you even see the tracks or the cars on the tracks?

[163]

A The street has an incline that goes up from there. And I positioned myself where I could see the actual rail on the main line.

Q So you're on a road somewhere to the west of these tracks but close enough that you can see the cars on the track and the crew?

A Yes.

Q And did you actually see Mr. Sumner and his engineer bring their train into the East Bradley tracks?

A Yes.

Q And did you –

A They didn't go into the East Bradley track.

Q They came in the main line where the East Bradley pass track is located?

A Right.

Q And did you see them cut some cars off the end of their train and leave those cars on the main line?

A Yes.

Q When they pulled forward with the cars that they still had ahold of, were they moving towards you?

[164]

A Yes.

Q And could you tell whether the conductor, Mr. Sumner, rode on that train as they pulled forward?

A Yes.

Q And where would he have been riding?

A He would have been riding on the ladder that gives access to the top of the car and the seal step.

Q Which car within the cut that was being pulled up the track was he riding on?

A It would be the rear car.

Q So in this photograph, if you assume that this was the cut that they were pulling forward past the switch, would he have been on this car?

A Yes.

Q And which side would he have been riding on?

A He would have been riding on what would be the west side.

Q That's where he rode up from where he had made the cut?

A Yes.

Q What did you see Mr. Sumner do next [165] after that train had come to a stop just past that switch?

A I saw him dismount the car and walk across the main line toward East Bradley switch.

Q And when you say East Bradley switch – let me show you what's been marked as Exhibit 1. Can you point to East Bradley switch?

A Here.

Q So he was coming from here over to the switch?

A Yes.

Q And you saw him do that?

A Yes.

Q You could see him?

A Yes.

Q And what did you see from that point?

A From that point he went south beside the main line until it was out of my vision.

Q And you say beside the main line –

A Well, beside the East Bradley track.

Q On what path did you believe that he was walking?

A Here on this side of the East Bradley track.

[166]

Q Could you see his entire body?

A No.

Q What portion of him could you see?

A From about mid thoracic region or mid stomach up.

Q And as he got further and further away from you, could you still see all of that?

A No. As he got further away he went out of sight.

Q Now, you don't believe you actually saw him fall, do you?

A I know I didn't.

Q About how far were you able to watch him walk past that switch before you could no longer see him?

A It would be hard to say. I couldn't say specifically. I really wasn't paying that much attention to him because I knew where he was going and he just went out of my sight.

Q While you could still see him, did Mr. Sumner appear to you to be in any kind of distress?

A No.

Q Was he stumbling?

[167]

A No.

Q Did he appear to be confused or unstable?

A No.

Q Were you also monitoring the train crew's radio communications that morning?

A Yes.

Q So you could hear Mr. Sumner and his engineer talking on the radio?

A Yes.

Q Did you ever hear Mr. Sumner say anything over the radio that morning to suggest that he was in distress or might be having a medical emergency?

A No.

Q So what happened after Mr. Sumner was no longer within your sight?

A A certain amount of time went by, and I'm not sure how long it was, and then there was a lot of commotion, radio traffic.

And then people that aren't normally around when they do a brake test started showing up.

Q Did you learn what had happened by listening to the radio?

[168]

A No.

Q How did you learn what had happened?

A I physically went out of my car and up to the main line and that's where I observed what was going on.

Q What was going on? What did you see?

A There was – let me think – I'm thinking at least four individuals there from the railroad.

And I actually went over and observed Mr. Sumner at the bottom of this slope or the hill that goes down from the east side of the East Bradley track.

Q Did you ever go down the hill to try to assist him?

A No.

Q Did you ever hear Mr. Sumner say anything after he fell and before he was taken away from the scene?

A No.

Q Did you ever hear Mr. Sumner say anything to anyone about how this incident had occurred?

A No.

[169]

Q After Mr. Sumner had been taken from the scene, did you take some photographs to try to depict the area where he fell?

A I did.

Q When did you take those pictures?

A Right after he was removed from the scene and en route to the hospital.

Q And subsequently did you also put some captions and arrows on those pictures?

A Yes.

Q I'm going to put up one of those on the screen, sir, and ask if this is one of the pictures that you took that day. Do you recognize that as one of the photographs?

A Yes, I do.

Q What have you imposed over that picture? What does that say?

A "The conductor was walking toward the derail."

Q And the arrows that you've put at the bottom of the picture and then at the top, what are you pointing out?

A The arrow at the bottom depicts the path that is normally taken by employees to approach [170] the derail.

Q That's the walk path?

A Yes.

Q That you believe Mr. Sumner was on before he left your vision?

A Yes.

Q Does this accurately depict the location where Mr. Sumner went off the walkway when he fell?

A Approximately.

Q Are you able to pinpoint just from looking at this picture where he went over the side of that walkway?

A Yes.

Q Can you come down and show that to the members of the jury?

A At this point.

Q How was it that you were able to determine where he went over the side?

A The ballast and the dirt was pushed down like something had been lying there and it was also pushed up. There was a little berm like it was pushed up against this small tree here.

Q And what I'm going to do, sir, I'm [171] going to take the paper copy of that and I'm going to ask you to mark that on the paper copy of the exhibit.

For the record, I'm asking you to mark the location that you believe Mr. Sumner went over the edge of the walkway.

A (Witness complies).

Q Will you circle that, sir, and then draw a line out from it and put your initials in the white margin?

A (Witness complies).

Q Thank you very much.

MR. DAVIS: Plaintiff would move this photograph as Plaintiff's Exhibit 7, Your Honor.

MR. CREASY: No objection.

THE COURT: That will be Plaintiff's Exhibit 7.

(Plaintiff's Exhibit 7 was marked for identification and admitted into evidence.)

BY MR. DAVIS:

Q I'm going to put up another photograph, [172] Mr. Sherrill. Is this also a picture that you took and captioned?

A Yes.

Q What does this depict?

A It depicts what I described awhile ago with the ballast and the dirt being pushed down against the small tree. And then as you go beyond the tree and then down the hill is the way it appeared to me that it was also moved from the side as the object or the individual went down the hill.

Q Are you able to estimate for the jury how far it was from the walkway to the bottom of the hill where Mr. Sumner lay?

A Approximately 30 feet.

Q What have you written in your caption in this photograph?

A "He slid down the embankment over the cross ties."

MR. DAVIS: Your Honor, we would mark as Plaintiff's Exhibit 8 this photograph and tender it to the Court.

MR. CREASY: No objection, Your Honor.

THE COURT: That will be Plaintiff's [173] Exhibit 8.

(Plaintiff's Exhibit 8 was marked for identification and admitted into evidence.)

BY MR. DAVIS:

Q I'll show you another photograph, Mr. Sherrill. Do you recognize this as another photograph that you took of the scene on February 26, 2013?

A Yes.

Q What have you written in your caption?

A "He came to rest here, on his back, with his head up hill."

Q And the area just below the white arrow, is that where you recall Mr. Sumner being when you got to the scene that day?

A Yes.

MR. DAVIS: Your Honor, we would mark this photograph as Plaintiff's Exhibit 9.

MR. CREASY: No objection Your Honor.

THE COURT: That will be Exhibit 9.

[174]

(Plaintiff's Exhibit 9 was marked for identification and admitted into evidence.)

BY MR. DAVIS:

Q We have one final photograph, Mr. Sherrill. Is this also a picture that you took on February 26, 2013, at the scene of this incident?

A Yes.

Q And what does your caption say?

A "Conductor fell and slid into this tree."

Q And what was it about the scene that made you believe that Mr. Sumner had slid into that tree?

A The dirt and gravel was impacted and pushed down.

Q After – is this the same location where his body was at rest when you got to the scene?

A No. He was at the bottom of this ravine.

Q So you believe he hit that tree and then continued down the hill?

A Yes.

[175]

MR. DAVIS: We move this in as Plaintiff's 10, Your Honor.

MR. CREASY: No objection, Your Honor.

THE COURT: That will be Exhibit 10.

(Plaintiff's Exhibit 10 was marked for identification and admitted into evidence.)

BY MR. DAVIS:

Q While you were observing this train crew on February 26, 2013, did Mr. Sumner follow all of the rules and regulations that you were there to enforce?

A Yes.

Q In any of the radio communications that you heard that day, did Mr. Sumner ever state that he was dizzy?

A No.

Q Did he ever state that he was disoriented?

A No.

Q Did he ever state that he was having vision problems?

A No.

[176]

Q Did he sound and appear to you to be acting normally at all times that you could hear or see him before he fell?

A Yes.

MR. DAVIS: That's all the questions I have, sir.

THE COURT: Mr. Creasy?

MR. CREASY: Thank you, Your Honor.

* * *

IN THE CIRCUIT COURT FOR THE
CITY OF DANVILLE

Case No. CL15000079

MARK A. SUMNER,
Plaintiff,
v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant.

VOLUME 2
August 8, 2017
9:00 a.m.

HEARD BEFORE:
THE HONORABLE JAMES J. REYNOLDS

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[4]

* * *

THE COURT: Good morning, counsel. Are we ready to proceed?

MR. DAVIS: We have a few housekeeping matters before we bring the jury in, Your Honor. At the end of the day yesterday, the Plaintiff indicated that we wanted to submit the EMS record as Plaintiff's Exhibit 12. Defense counsel has conferred with us, and we've agreed to redactions. I have that to tender to the Court.

THE COURT: Without objection, that will be Plaintiff's Exhibit 12. What I will do, Mr. Davis, is let you move that in formally when the jury comes out.

* * *

[8]

* * *

MR. DAVIS: Before we call our next witness, Your Honor, the Plaintiff would move into evidence Exhibit 12 by agreement.

THE COURT: All right.

MR. CREASY: Without objection.

THE COURT: Without objection, that will be admitted.

(Plaintiff's Exhibit 12 was marked for identification and admitted into evidence.)

* * *

[97]

* * *

NATASHA SUMNER

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

[98]

DIRECT EXAMINATION

BY MR. DAVIS:

Q Good morning.

A Good morning.

Q Will you tell the ladies of the jury your first name?

A Natasha.

Q You are married to Mark Sumner?

A I am.

Q How long have you and Mark been married?

A Thirteen years.

Q Do you work outside the home?

A I do. I'm a dental hygienist.

Q How long have you worked as a dental hygienist?

A Twenty years.

Q Were you at work on February 26, 2013, the day of Mark's accident?

A I was.

Q How did you learn he had been hurt?

A The chaplain of Danville Hospital called me.

[99]

Q About what time was that, do you remember?

A I had just dismissed my 8:40 patient. I did not get my 9:20 patient. Maybe 9:15 or somewhere.

Q What did you do when you found out that Mark had been injured?

A I asked them to cancel my patients and got in the car and came home.

Q Where do you work?

A Mount Airy, North Carolina.

Q About how far is that from the Danville Medical Center where Mark had –

A Almost two hours.

Q Do you know about what time you got to the hospital?

A 11, maybe a little after 11.

Q Did you come by yourself?

A No. Actually I asked my pastor to meet me and drive me because the weather was bad, the roads were slick.

Q When you did get to the hospital, were there any Norfolk Southern officials that were already there when you arrived?

A Yes. There was a Don Taylor that took [100] me back to the room where Mark was at in the emergency area.

Q Anyone else that you remember from Norfolk Southern?

A No.

Q Had you known Mr. Taylor before that morning?

A No.

Q Had Mark already been admitted into a hospital room when you got there?

A No.

Q Where was he?

A In the ER/trauma.

Q You were able to go back and see him?

A Yes.

Q How did he appear to you when you first got to the hospital?

A He was in a lot of pain, but he was in and out of consciousness.

Q When he was conscious, could he carry on a normal conversation with you?

A No.

Q While you were there, did Mark speak to any of the Norfolk Southern officials?

[101]

A No.

Q Did any additional people come to the hospital other than Mr. Taylor while you were there with Mark?

A I was told they were there, but they didn't come in the room.

Q You never spoke with any of them?

A No.

Q Do you know how long they stayed around before Mark was admitted into the hospital?

A No.

Q How long did he stay in the Danville Regional Medical Center?

A I believe it was three days. I believe he came home on Friday.

Q If the accident happened on the 26th of February, was he discharged on the 28th?

A The 28th or 29th.

Q During that time, did you ever leave the hospital to go back home?

A No.

Q Did you ever leave the hospital just to run some errands or go eat?

A No.

[102]

Q Did you ever leave his side?

A No.

Q Do you remember doctors coming to see Mark during the hospital visit?

A They did, but they talked to me.

Q Did you ever hear Mark give any of the doctors that tended to him in the hospital an account of what had happened to him to cause this fall?

A No.

Q Did Mark ever tell you what happened to cause this fall?

A No. Mark did not know where he was at, no.

Q To this day, has he ever told you what happened to cause him to fall?

A No.

Q Have you ever heard him tell anyone that he fainted out there?

A No.

Q Have you ever heard him tell anyone he blacked out that day?

A No.

Q That he had a seizure?

A No.

[103]

Q That he got so dizzy he fell down?

A No.

Q That he had vision problems before he fell?

A No.

Q Before the accident in all the time – you said you have been married 13 years. How long have you known Mark?

A Fourteen years.

Q In all the time you have known him, has he ever fainted?

A No.

Q Has he ever passed out?

A No.

Q Ever had a seizure?

A No.

Q Blacked out?

A No.

Q Ever had a problem with vertigo or dizziness?

A No.

Q Did that include since the accident, any of those things ever happen to him since February 26, 2013, that you are aware of?

[104]

A No.

Q You said you were there in the hospital for several days. When he was discharged, did you bring him home?

A I did.

Q Once you got Mark home from the hospital after the accident, tell the ladies of the jury what it was like to live with him in those first few weeks following the incident.

A It was like taking care of a newborn. I had to feed him, help him with the bathroom, bathe him, and he was heavily medicated. He didn't know where he was at. He slept a lot, and he couldn't communicate with me very well. So it was like an infant.

Q How long do you recall it being like that before he started to get a little more like himself?

A It was after the surgery.

Q Do you remember when that was, when the surgery was, the first one?

A March 14th.

Q How long after the surgery before Mark started to regain some of his ability to function in [105] daily activities?

A Three weeks maybe.

* * *

IN THE CIRCUIT COURT FOR THE
CITY OF DANVILLE

Case No. CL15000079

MARK A. SUMNER,
Plaintiff,
v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant.

VOLUME 3
August 9, 2017
8:57 a.m.

HEARD BEFORE:
THE HONORABLE JAMES J. REYNOLDS

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* * *

[4]

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

[5]

DIRECT EXAMINATION

BY MS. BENTLEY:

Q Good morning, Mr. Lewis.

A Good morning.

Q Could you please tell the jury your name?

A Robert Lewis.

Q And Mr. Lewis, where do you live?

A I live in Flowery Branch, Georgia.

Q Are you employed by Norfolk Southern?

A Yes, ma'am, I am.

Q How long have you worked for Norfolk Southern?

A Twenty-eight years.

Q What is your current job title?

A I am assistant general manager for Richmond.

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

A Yes, ma'am, it is.

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

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

Q And when did you first hire onto Norfolk Southern?

A In April of 1989.

Q And that was as a brakeman?

A Yes, ma'am.

Q When did you move into management?

A In April of 1997.

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

A Assistant trainmaster and master, trainsmaster.

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

A Yes, ma'am.

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

A Division superintendent of Piedmont Division.

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

A Yes, ma'am.

[7]

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

A Yes, ma'am.

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

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

Q Did you know Mr. Sumner before this accident?

A Not personally, no, ma'am.

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

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

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

A Yes, ma'am.

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

[8]

A No, ma'am.

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

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

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

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

Q Why did you go to the hospital?

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

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

A Yes, ma'am.

Q And did you do that?

MR. MOODY: Objection; leading.

THE COURT: Rephrase.

BY MS. BENTLEY:

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

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

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

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

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

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

MR. MOODY: Objection; hearsay.

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

MS. BENTLEY: Well, Your Honor, it is not offered for the truth of the matter. It is offered for

the truth of what the nurse says. It explained what he did.

BY MS. BENTLEY:

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

A She told me –

MR. MOODY: Objection.

THE COURT: You can't tell us what the nurse said. Just what you did as a result of [11] what she said.

THE WITNESS: I followed her back to Mr. Sumner.

BY MS. BENTLEY:

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

MR. MOODY: Object.

THE COURT: I am going to allow that.

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

BY MS. BENTLEY:

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

A No, ma'am.

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

A He was on a gurney and he had his arm in a type of a sling. I asked him how he felt, how he was doing, and he said that he had better days. And I asked him – asked him if he knew what happened, how things happened. The conversation turned to

that. He told me that he wasn't sure, that [12] he was walking along and then he blacked out.

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

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

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

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

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

A Yes, ma'am.

Q Did he appear lucid?

A Yes, ma'am.

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

A Yes, ma'am.

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

A No, ma'am.

Q Was he slurring his words at all?

A No, ma'am.

[13]

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

A No, ma'am.

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

A No, ma'am.

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

A No, ma'am.

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

A No, ma'am.

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

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

Q Mr. Sumner's wife was not present?

A No, ma'am.

Q After that conversation, what did you do?

[14]

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

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

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

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

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

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

A Yes, ma'am, if I recall.

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

A Yes, ma'am.

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

[15]

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

A Yes, ma'am.

Q And what has been marked as Plaintiff's Exhibit 5, does that exhibit – does that write-up have a new paragraph in there?

A It has the – this is the official submitted version, yes, ma'am, for the complete investigation.

Q So Plaintiff's – paragraph five is the final version that you approved?

A Yes, ma'am.

Q And are you a signatory on that report?

A Yes, ma'am.

Q Did you make – well, let's show that one to the jury.

MS. BENTLEY: Five, Mr. Creasy.

BY MS. BENTLEY:

Q Okay. So Mr. Lewis, when you first received Plaintiff's Exhibit 4, the first draft of this report, did you instruct anyone to add anything to the report prior to your sign-off on it?

A Yes, ma'am. This report I received [16] from Larry, if I remember correctly, and I asked him to add the part where I had spoke to Mr. Sumner again in the hospital.

Q Can you –

MS. BENTLEY: Your Honor, may he get down and show the jury?

BY MS. BENTLEY:

Q Can you point out to the jury on this screen what portion of the report that you instructed them to add?

A This right here (indicating).

Q "Upon investigation, immediately upon the first responder's arrival on the scene of the incident, Mr. Sumner stated, 'I did not know what happened. I blacked out and I do not even know how I got here.'"

And then the second sentence, it is at the Danville Regional Emergency Room, "Sumner made the statement again that he did not know what happened and that he blacked out"?

A Yes, ma'am.

Q Where did the information for the first sentence off that paragraph come from?

[17]

A On my way to the hospital, I had spoke to several of the responding officers that were immediately – I recall that being part of one of the conversations that I had with Collan Campbell, Don Taylor, Mark Smith, Trainmaster Smith, and – I can't remember which one it was.

Q You may return.

Mr. Lewis, as the division superintendent for the Piedmont Division, were you authorized to make that change to the report?

A Yes, ma'am. It is my report.

Q And did you need to consult with Collan Campbell before making that change?

A No, ma'am.

Q What was Collan Campbell's position at that time?

A Collan Campbell was management trainee. He would have been new to the railroad and railroad – and the railroad industry.

Q He was a trainee under your supervision further down the chain of command?

A Yes, ma'am.

MS. BENTLEY: Thank you, Mr. Lewis. No further questions.

[18]

THE COURT: Cross, Mr. Moody?

MR. MOODY: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. MOODY:

Q Good morning, Mr. Lewis.

A Good morning, sir.

Q Am I correct that Mark Sumner had never met you before this?

A I had met a lot of people in the Piedmont Division. I don't remember directly meeting Mr. Sumner.

Q He wouldn't have known you?

A Only – no, sir. Not that I recall.

Q And when you say you didn't know him, either you admit you didn't know him at all, never met him, never seen him –

A May have met him during an office visit, but I did not recognize him.

Q And you went – you went straight to the hospital that morning is what you did first? That is what you testified in your deposition; is that correct?

[19]

A I believe I went straight to the hospital, yes, sir.

Q And you were the first one from Norfolk Southern? There were no other Norfolk Southern people there, right?

A I can't say for certain, but I do –

Q Do you recall anyone else being there?

A I don't recall anyone else.

Q And when you went into the triage room – that is where he was that morning, still in triage?

A I assume so. I didn't see any names on the rooms, but yes, sir.

Q He was lying on a gurney?

A Yes, sir.

Q He is still laying on the gurney?

A Yes, sir.

Q And at that time, you didn't know if he had been administered any narcotic pain medications, do you?

A No, sir.

Q And to this day, you don't know –

A No, sir.

Q – at that point when you spoke to him?

[20]

A No, sir, I don't.

Q Now, when you spoke to him, I think you said some nurses were coming in and out, doctors?

A Yes. Attendants, nurses, staff.

Q Did you know he had sustained a significant head injury when you were speaking to him at that point?

A There was no mention of that. I didn't make any comment on it.

Q It is fair to say you didn't know that?

A What he told me was he bit his tongue, he had separated his shoulder, and he broke his wrist.

Q Now, you attributed some statements to him that morning, and one of the statements was you said he told you – I think you said he was walking along and blacked out. That is what you just testified to.

A Yes, sir.

Q When we took your deposition, sir, under oath, you testified that he was walking, that he told you he was walking the train and that is when he blacked out.

That is what you said in your [21] deposition; isn't that correct, sir?

A It is the same. It is the same.

Q It is?

A When you are walking along the side of the train, it is.

Q Am I correct that in your deposition, you said he said to you, "I was walking the train"?

A He was walking alongside the train.

MR. MOODY: Can I refresh his recollection?

THE COURT: You may.

BY MR. MOODY:

Q I would like to refresh your recollection, sir.

Do you recall us taking your deposition? Actually, Mr. Davis did.

A Yes, sir.

Q It was – according to this, it was November 11, 2015, a little while back, but you recall that?

A Yes.

Q I am going to show you the testimony we had, and what it says, Mr. Davis was asking you a [22] question. It says, "Tell me anything that you can recall Mr. Sumner saying to you while you were there at the hospital that day."

A Yes, sir. That's correct.

Q Is that correct?

A Yes.

Q I read that right?

A Yes.

Q Your answer was, "I walked back and Mr. Sumner was laying on a gurney. I asked him how he was doing, and he made a comment about being better. He had better days. I asked him if he knew what happened. He told me that he blacked out as he was walking the train."

A Yes, sir.

Q I read that right?

A Yes, sir, you did.

Q There in Danville?

A Yes, sir.

Q Then you said, "He was concerned about getting back to work because he" –

MS. BENTLEY: Objection, Your Honor. That is exceeding the scope of direct.

MR. MOODY: I am going to ask him about [23] this as well.

THE COURT: I am going to allow it.

BY MR. MOODY:

Q "He was concerned about getting back to work because he had just bought a new truck and was worried about the payments for his truck."

Did I read that correctly?

A Yes, sir, you did.

Q So his words to you that you testified to is you said that he said he was walking – walking the train?

A Yes, sir.

Q Walking the train.

Well, when this accident happened, he wasn't walking the train, that's correct isn't it?

A No, sir, that is not correct. He was walking – it is interchangeable. If I am walking alongside the train or walking beside the train, I don't see a difference.

Q Well, normally, in brakeman, conductor lingo, "Walking the train" means you are walking the train and you are checking the train and you are doing something with respect to a train.

[24]

That is normally what that means; isn't that true?

A When I am walking a train, I could be inspecting it. I could be preparing it. There is different – absolutely different things I could be doing when I am walking the train, yes, sir.

Q Looking for car numbers to see where to make your cut?

A Booking a car, absolutely.

Q Seeing that the brakes are applied?

A Doing a brake test, yes, sir.

Q Those are some of the things you are doing when you are walking the train, right?

A Yes, sir.

Q There was no train on these East Bradley tracks at the time he was walking along that track, was there?

A His train was separated in two pieces when he was walking.

Q Was there a train on the East Bradley track when he was walking along that?

A No, sir.

Q So he was not walking the train, was he?

[25]

A I don't see the difference, but he was walking beside his train or walking along the train the right of way, so I don't see a difference.

Q Well, one part of his train was way back south.

A Uh-huh.

Q Have you seen these photos?

A Yes.

Q One part of his train was way back here (indicating)?

A Yes, sir.

Q He wasn't walking this train at all?

A No, sir.

Q And the other part of his train was up above the switch the other way, right?

A Yes, sir.

Q So he wasn't walking either of those two pieces of his train; is that true?

A That is true.

Q Something you left out in your testimony was his statement to you that he told you that he had just bought a new truck.

You didn't mention that he said that, though, did you?

[26]

A He did say that, yes, sir.

Q And he was worried about his payments? He said that?

A Yes, sir.

Q Do you even know if he had a new truck?

A I don't.

Q Do you know if that was correct at all?

A I don't.

Q This conversation with you and he alone took about three minutes? Four minutes?

A Yes, sir. It wasn't that long.

Q Did you speak to medical personnel at the hospital?

A No, no. Other than the nurse that brought me back first.

Q Could you tell from his – how he was, if he had had something wrong? He had a concussion or head trauma from talking to you? Could you tell that?

A No, sir.

Q After you left the hospital – as I understand, his family was never there when you were there, right?

A No, sir. I went back out front. [27] Waited. I can't tell you how long I was there. Don Taylor did come up, so – Don Taylor or someone. I can't remember who it was.

Q I asked was his family there. That is all I asked.

A No, sir.

Q His wife is sitting right back there.

A No.

Q You left the hospital after that and went back to Danville and spoke to some of your other officers; is that right?

A I would have went back to the site, but – back to Danville, yes, sir.

Q And as a result of going back to the site and talking to the other officers, you asked them to change the write-up from the first version to the second version that we just saw as Exhibit 5?

A I did tell them to, yes, sir.

Q You did that in part based on your conversation in the hospital. That is one thing, right?

A Yes, sir.

Q You did it based in part on what Norfolk Southern officials in Danville told you that [28] the emergency medical technicians had told them, right?

A Yes, sir.

Q And what your officials – who was it that told you what the emergency medical technicians said?

A I don't remember.

Q Bo Blair?

A I don't remember. I can't tell you for certain who it was.

Q They told you that the emergency medical technician said that he said he blacked out, didn't know what happened. That is what the official told you, right?

A That was during one of the conversations on my way to the hospital. That was part of one of the conversation I had, yes, sir.

Q That is what your official told you the EMT said to them, correct?

A Yes, sir.

Q And did you check that with the EMTs, if he ever made any such statements to that effect?

A They weren't at the hospital when I arrived. No, sir.

[29]

Q Do you know if the EMT records that exist contain any such statements?

A No, sir, I don't. I haven't seen them.

Q If he would have told you something like what the emergency technicians said that that is what made him fall down the hill, that would be an important fact to put in the record?

A I am not familiar with what they put in the record.

Q That would be an important fact? You put it in yours.

A I am – incidents happen, yes, sir. I do put it in my report. I am trying to prevent any incidents from happening. Yes, sir. I do put it in my report.

MR. MOODY: No further questions.

THE COURT: Any redirect?

MS. BENTLEY: We have a motion to take up with the Court outside the presence of the jury.

THE COURT: Do you need any further questions from Mr. Lewis at this time?

MS. BENTLEY: No, sir.

THE COURT: You may step down, [30] Mr. Lewis. Please go back out in the hall.

* * *

[126]

* * *

THE COURT: All right.

MR. CREASY: Thank you, Your Honor.

THE COURT: It is closed.

MR. CREASY: Okay. Your Honor, at this time, the Defendant Norfolk Southern Railway Company would renew its motion to strike on the grounds we argued at the close of Plaintiff's evidence yesterday and again on [127] the grounds as articulated in the Defendant's pretrial memorandum on the liability issues. We believe that with the addition of the Defendant's evidence, Your Honor, at this point, again, on the grounds that we had argued, there is no evidence whatsoever to show how and why this incident occurred. This is a but-for case, and as was articulated in

the McBride case, that is just simply not enough to establish causation.

We would ask the Court to strike the Plaintiff's evidence and enter a judgment in favor of Norfolk Southern Railway Company.

MR. MOODY: We would just reiterate our arguments that were previously made and adopt those, as well as just pointing there is sufficient evidence of negligence from Mr. Duffany to go to the jury, and based on that evidence, as well as the rest of the record, this jury can reasonably foresee that this – the conditions of the walkway could lead to this accident and could cause this accident in whole or in part under the standards of the Federal Employer Liability [128] Act.

THE COURT: Well, even though we are at a different stage in the case, the Court still has to look at the evidence in the light most favorable to the Plaintiff here in determining the motion to strike, and I think there is sufficient evidence to go to jury on the question of negligence and causation.

I will overrule the motion to strike and note your exception.

MR. CREASY: Thank you, Your Honor. If you note our exception.

Your Honor, I had one more motion, if I may, before we adjourn prior to the submission of jury instructions.

In light of the Court's ruling denying the Defendant's motion to strike and in light of the Supreme Court of Virginia's opinions in Spensley v. Menson and Wright v. Norfolk and Western

Railway, we state on the record that we continue to believe the issue of liability and damages should not be submitted to the jury but instead should be decided by the Court.

[129]

We recognize that the Court has decided to submit these issues to the jury. Consequently, we must preserve our legal theories and instructions, and we must inform the Court where appropriate of any objections we have to the form or content of the Plaintiff's instructions of the issues of liability and damages.

We ask that the record reflect that we have consistently maintained that no jury issue was presented to the Plaintiff's claims in this case and that we object generally to the issues of liabilities and damages being submitted to the jury and that we have not invited this Court to commit error through any agreement or failure to object.

We would also appreciate the Court stating for the record that all proceedings regarding instructions on the issues of liability and damages that were the subject of the Defendant's motion to strike are being conducted subject to and without prejudice to the Defendant's position, but the Plaintiff's claim should have been decided by the Court [130] as a matter of law.

Thank you, Your Honor.

THE COURT: Any problem with that, Mr. Moody?

MR. MOODY: No problem with them stating their objection, Your Honor, no.

THE COURT: The Court will note that while it has previously used the term on the record that if instructions are agreed upon, that was understanding the Defendant's right to object to specific instructions and state those objections on the record where appropriate, but I think we have agreed that the instructions that the Court has prepared and presented to counsel are correct and accurate statements of the law and are the appropriate instructions given the Court's rulings.

MR. CREASY: Correct. Yes, Your Honor. We are just – under the Spensley decision, we just want to make sure we haven't waived anything or invited the Court to commit error by submitting instructions in light of the Court's ruling denying our motion to [131] strike.

THE COURT: Counsel, you may have a seat.

* * *

PLAINTIFF'S EXHIBIT 5

SUBJECT: ON DUUTY [sic] ILLNESS DANVILLE DISTRICT CONDUCTOR

Mr. G.R. Comstock:

The following On Duty illness is submitted:

Date:
February 26, 2013

Time:
8:35AM

Name:
M.A. Sumner

Occupation
Conductor

Location
Danville, VA

Seniority Date:
May 23, 2011

Previous Injuries
0

Immediate Supervisor
C V Blair

Reference on-duty illness to Danville District Conductor M.A. Sumner, which occurred at approximately 8:35 am February 26, 2013 in Danville, VA at MP 233.8 while serving as conductor on train 36QP226 and making their set off in the east Bradley track in Danville VA.

INCIDENT:

Crew was on duty at 4:30 am in Linwood, NC. Crew consisted of Engineer T.R. Lester and conductor M.A. Sumner. Train 36QP226 arrived in Danville approximately 8:14am and traveled north to MP 233.8 to make their set off in east Bradley track north of Danville Yard. At approximately 8:50 am Danville yardmaster was notified by engineer Lester that conductor Sumner had not responded to him over the radio so he went back to check on him and found that he had fallen down the embankment.

INCIDENT INVESTIGATION:

Incident was investigated by Trainmaster C.V. Blair, Trainmaster D.V. Cline, Assistant Trainmaster JM Smith, Assistant Trainmaster DL Taylor, and M.T. Collan Campbell, Div. RFE David Carter.

Train 36QP226 arrived in Danville, VA approximately 8:14 am then traveled north to MP 233.8 to make their set off in east Bradley track. Train stopped at the east Bradley switch and let the conductor down to secure the train and pull by the switch. Conductor was walking north from making the cut to the main line switch. Conductor Sumner was communicating with engineer Lester over the radio counting down till train was pass the switch. Engineer Lester reported that Summer [sic] had counted him down pass the switch and then he never heard from him again. Engineer Lester waited approximately ten minutes and still no response so he went back to the rear of the set off and did not see MA Sumner. He walked further down and found MA Sumner had fallen down the embankment. When he got down to him he was conscious but disoriented and did not know what had happen. Engineer Lester notified the Danville Yardmaster at approximately

8:50 am. Danville Yardmaster immediately notified local supervision and 911.

Upon investigation MA Sumner was walking north from his cut to the main line switch at approximately 282 feet from the cut he fell down the embankment, which was estimated to be sloping approximately 70 degrees and 35ft down. The embankment was covered with debris and trees.

Upon investigation; immediately upon first responders arrival on scene of incident Mr. Sumner stated "I did not know what happened, I blacked out and do not even know how I got here". At the Danville Regional Medical Emergency room, Sumner made the statement again that "he did not know what happen and that he blacked out".

Walking conditions from the cut to the incident point: approximately 5ft wide walking path, gently sloping to the east. Walking surface consist of ballast and small gravel. Walking conditions are good. Weather conditions at the time of the incident: 38 degrees, cloudy and raining, daylight.

Mr. Sumner was wearing his high visibility vest and observed his boots to be made of hard leather in good condition with a 90 degree heel.

Treatment:

MA Sumner was transported by Danville fire and EMS at approximately 9:30am to the Danville Regional Medical Center. At present Sumner is being evaluated for his injuries.

As of February 27, 2013 Mr. Sumner is still being evaluated by medical personnel and further testing is being conducted.

PERSONAL HISTORY: M.A. Sumner was born on making him 40 years old. Hire date May 23, 2011 promoted to conductor October 28 2011. Mr. Sumner is estimated to weigh 240 pounds and his height is approximately 6 feet.

Training History:

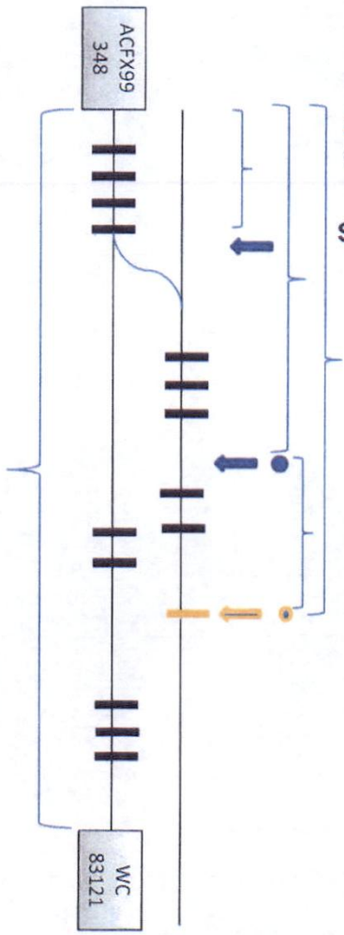
M.A. Sumner	Conductor
Total Rule Checks Last 6 months:	40
Last Rule Check:	2/12/2013
Last Train Ride:	2/11/2013
Last Safety Contact:	2/20/2013
Rules Class:	1/16/2013
Violations Last 6 Months:	none
One to One:	1/16/2013
Last Banner Check:	1/12/2013

Attachments: Form 11131, Career Service Record, Rule checks, Safety History, Diagram, Photos

Rob Lewis
Superintendent

PLAINTIFF'S EXHIBIT 6

Track Diagram



29.3 ft. from rear of train set off (ACFX99348) to switch

Switch

453.2 ft. from rear of train set off (ACFX 99348) to rear end of train (WC 83121)

Position where employee fell (171 ft. from rear of train)

58.5 ft. from position where employee fell to derail

Derail (228.2 ft. from rear of train set off)

EXHIBIT
#3 Campbell 10/22/15

EXHIBIT
6

PENGAD 800-631-6989

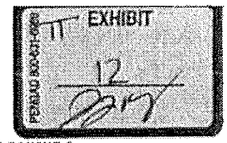
NSRC0000030

338

1825

PLAINTIFF'S EXHIBIT 7

EXHIBIT
1835
PENGAD 800-631-6989



PLAINTIFF'S EXHIBIT 12

60a

DANVILLE LIFE SAVING &
FIRST AID CREW INC
202 CHRISTOPHER LANE
DANVILLE, VA 24541

Billing Report

Incident Date: 02/26/2013 | Call #: 130570046 | Patient Care #: 1
Life Threat: No

Patient Information

Last Name:	sumner	Phone:	
First Name:	mark	Apartment #:	
Middle Initial #:		Address:	
Social Security #:		Address 2:	
Age:	40	City:	Pilot Mountain
Date of Birth:		State:	NC
Gender:	Male	Postal Code:	27041
		County:	Surry

Closest Relative/Guardian
Name: ,
Address: Pilot Mountain, NC
Relationship:
Phone #:

Billing Information

Payment Method:	Self Pay	Work Related?	Yes
CMS Service Level:	ALS, Level 1 Emergency	Response Urgency:	Immediate
Date/Time CPR Disc:		Air Ambulance Modifier:	

Medicare Questionnaire

Medically Necessary:	Yes	Transported To/For:	Closest Facility
Moved by Stretcher:	Yes	Round Trip Reason:	
Visible Hemorrhaging:	Yes	Stretcher Reason:	trauma, neck shoulder head injury
Unconscious/Shock:	Yes	Physical Restraints:	No
Bed Confined Before:	No	Hospital Admit:	No
Bed Confined After:	No	Weight:	KG / LB
Type of Transport:	Initial Trip	MSP Reason:	

Call Type and Location

Call Type: Traumatic Injury
Resp. Mode: Lights and Sirens
Urgency: Immediate
Response: 911 Response
Location: Other Location
Address: 745 halifax rd
Danville, Danville (city), VA 24541

Call Disposition

Disposition: Treated, Transported by EMS
Resp. Mode: Lights and Sirens
Dest. Type: Hospital
Dest. Name: Danville Regional Medical Center, 142 S. Main Street, Danville, VA 24541

Response Times and Mileage

1st Resp Arr:
PSAP: 08:59
Disp: 08:59
Notified:
Unit Disp: 08:59
Enroute: 08:59
At Scene: 09:10
At Patient: 09:10
Depart: 09:46
Arrive Dest: 09:53

Incident #: 130570046
Call Sign: TRANSPORT 25
Veh. #: TRANSPORT 25
Start Miles:
Scene Miles: 23164.0 To Scene: 0.0
Dest. Miles: 23168.0 To Dest: 4.0

Patient Name: sumner, mark

In Service: 10:12
In 10:13 **End Miles:** 23188.0 **To End:** 0.0
Quarters:
Cancelled:

Medical Surgery History
Patient Denies PMH

Patient Condition

Primary Impression: Traumatic Injury
Secondary Impression: Other
Chief Complaint: right shoulder pain X 10 Minutes
Secondary Complaint: back pain X 10 Minutes
Primary Symptom: Pain - Extremity
Other Symptoms: Bleeding, Altered Mental Status, Weakness, Pain - Back, Dizziness, Headache, Pain - Extremity
Cause Of Injury: Falls

Narrative

Summary of Events

he was complaining of pain in his right shoulder and right side of his chest. he did state that he got off the train to check something on the train. he was walking on the fire right away. when he lost his bance on the wet gravel and fell.

Patient Vitals

Time	B/P	Pulse	Rhythm	Resp.	Effort	SpO2	SpO2 Qual.	EtCO2	GCS	Pain	Stroke Sc	PTA	B.G.	RTS	Limb	Patient Position
09:10	133/93	93	RR	20	Normal	98	Rm. Air						87		Left Arm	Sitting

ECG Monitor

Time	ECG Type	ECG Lead	ECG Interpretation	ECG Ectopy	Cause For Change

Procedures and Treatments

Time	Crew	Name	Location	Size of Equipment	Attempts	Response	Success	Comments
09:15	WH	Spinal Immobilization - Long Back Board			1			back board, head blocks, spider straps
09:47	WH	Venous Access-Extremity	Forearm-Left	18	1	Unchanged	Yes	

Medication Administered

Time	Crew	Medication	Route	Dosage	Response	PTA	Comments
09:46	WH	Oxygen (non-rebreather mask)	NRB/PRB	15 LPM	Improved	No	

PLAINTIFF'S EXHIBIT 12

61a

09:47 WH	Normal Saline		Intravenous	Lock/Flush	Unchanged	No

Unit Personnel

Crew Member	Level of Certification	Role
Henderson IV, Walter (WH)	EMT Enhanced	Primary Patient Caregiver
Mangrum, David (DM)	EMT-Basic	Driver

Service-Defined Questions

Please list additional personnel on unit.