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

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

Sumner tries to obscure that the Virginia Supreme Court, in its own words, applied a "significantly more lenient" standard of proof, Pet. App. 8a, contrary to FELA's text and in conflict with other courts. He simply wishes away the problem by declaring that the court did not apply a lower standard. But that is what it said and what it did. *Id.* at 8a–11a.

Sumner also insists that lower courts agree on FELA's "relaxed causation standard," but that is not the question decided below or presented here. This case, and the split of authority, are about FELA's "standard of proof"—what amount of evidence is "sufficient to create a jury issue." Pet. App. 8a, 10a–11a. On this issue, courts are openly split.

Sumner claims that the majority below did not address but-for causation. But the *only* issue disputed and decided below was—in Sumner's own words—whether he produced enough evidence to show that he "would not have fallen *but for* the negligently narrow walkway." Opp. 12 (emphasis added). And while Sumner contends that Norfolk Southern conceded but-for causation, the railroad argued consistently that there was no evidence of causation at all—and that FELA does not permit speculation to take the place of evidence. A bare majority rejected those arguments and applied a standard of proof that clashes with FELA's text, this Court's precedents, and the decisions of other courts. And that standard was dispositive, as every Justice below agreed. The petition should be granted.

I. THE DECISION BELOW APPLIED A "SIGNIFICANTLY MORE LENIENT" STANDARD OF PROOF.

The Virginia Supreme Court said that "the standard of proof in [a] FELA action is significantly more lenient than in a common-law tort action." Pet. App. 8a. The court then applied that lower standard to uphold the jury verdict, *id.* at 10a–14a, over a vigorous dissent arguing that "FELA retains the requirement that the plaintiff prove 'but for' causation" under "the same" principles that govern common-law tort cases, *id.* at 17a, 25a.

Even so, Sumner says the court below did not apply a lower standard of proof. He claims that Norfolk Southern "seizes on one sentence," which describes FELA's negligence standard. Opp. 19–23 & n.5. Not so.

The majority below did exactly what it said: It applied a "significantly more lenient" evidentiary standard, unique to FELA cases. It cited only FELA cases, not common-law tort cases. Pet. App. 11a–14a. It also referred repeatedly to supposedly FELA-specific principles: "*In FELA cases*, causation . . . does not require direct evidence." *Id.* at 11a–12a (emphasis added). Or, "*in FELA cases* '[i]t is no answer to say that the jury's verdict involved speculation.'" *Id.* at 11a (alteration in original) (emphasis added). The decision below thus depends on a supposedly "*significant difference between FELA cases and common-law tort actions*." *Id.* (emphasis added). And three Justices dissented because "the 'but for' causation principles at issue" in a FELA case "are the same" as in any tort case. *Id.* at 25a; see *id.* at 17a ("FELA retains the requirement that the plaintiff prove 'but for' causation . . . .").

Sumner's contrary reading of the court's standard-of-proof statement—as merely noting that "FELA 'abolished the common law contributory negligence rule,'" Opp. 21–22—is not plausible. The court had already observed that FELA "excludes the traditional common-law defense[ ] of contributory negligence." Pet. App. 8a. Nor would it make sense to describe abolishing an affirmative defense as changing the "standard of proof." These are distinct concepts. *E.g.*, *Am. Dredging Co.* v. *Miller*, 510 U.S. 443, 454 (1994). And the court's other cases make clear that when it refers to the "standard of proof in a FELA action," it means the "weight of the evidence." *Norfolk S. Ry.* v. *Rogers*, 621 S.E.2d 59, 66 (Va. 2005). In any event, as just explained, the court's entire analysis springs from the supposedly different evidentiary standards for FELA cases. Pet. App. 11a.

Sumner emphasizes that the court below supported its standard-of-proof statement by citing *Hughes*, which focused on negligence rather than causation. Opp. 22 (discussing *Norfolk & W. Ry.* v. *Hughes*, 439 S.E.2d 411, 413 (Va. 1994)). But *Hughes* itself relied on *Rogers*, a causation case. Pet. 15. And the court below cited *Hughes* again to say that "[i]n FELA cases, causation . . . does not require direct evidence." Pet. App. 11a.

Sumner's own arguments confirm the point. He says (at 20) that the decision below aligns with cases like *Schulenberg* v. *BNSF Railway*, which held that the "standard . . . in determining whether there is sufficient evidence to send a FELA case to the jury is significantly broader than . . . in common law negligence actions." 911 F.3d 1276, 1286 (10th Cir. 2018). This is exactly the relaxed evidentiary standard that Sumner disclaims.

Finally, Sumner repeatedly faults Norfolk Southern for suggesting that the decision below "eliminat[es] the plaintiff's duty to prove even but-for causation." Pet. 2; see Opp. 1, 19–20, 22, 24–26, 28. But Norfolk Southern does not contend that the Virginia court formally eliminated FELA's causation element. *E.g.*, Pet. 18. The point is that—as the dissent below recognized—the majority's decision *effectively* "abrogate[s]" that requirement by reducing the plaintiff's burden to a vanishing point. Pet. App. 19a; Pet. 24–25.

II. THE DECISION BELOW IS WRONG.

Neither FELA's text, nor this Court's recent decisions, nor *Rogers* (which *Hughes* cited) supports a lower standard of proof. Pet. 11–19. And Congress rejected language expanding the jury's role under FELA, instead keeping the traditional "common-law" standard. *Id.* at 17 (quoting *Rogers* v. *Mo. Pac. R.R.*, 352 U.S. 500, 508 n.18 (1957)).

Sumner ignores all of this. Instead, like the court below, he relies on three of this Court's mid-century decisions reviewing the sufficiency of the evidence in FELA cases. Opp. 10–16 (discussing *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29 (1944), *Lavender* v. *Kurn*, 327 U.S. 645 (1946), and *Gallick* v. *Balt. & Ohio R.R.*, 372 U.S. 108 (1963)). But he does not contend that these cases adopted a lower standard of proof for FELA claims. In fact, he seems to agree that they applied the same standard that governs summary judgment or a directed verdict in any civil case. Compare Opp. 16 (citing *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250–51 (1986)), with Pet. 16–17 (same). And he says (at 15) that "[e]ach of these decisions is consistent with" *Rogers*'s explanation of the "test of a jury case." See 352 U.S. at 506–10. But *Rogers* did not adopt a lower standard of

proof—it merely held that FELA employs a relaxed substantive causation standard. Pet. 16–17. Thus, Sumner effectively concedes that the majority below erred by relying on these decisions to adopt a "significantly more lenient" standard of proof.

Nor do these cases suggest that Sumner's jury verdict could survive under the correct standard. As the dissent explained, these cases do not "embrace speculation in any case, FELA or otherwise." Pet. App. 21a. Rather, they hold that a FELA plaintiff, like any other, must "present probative facts from which the negligence and the causal relation could reasonably be inferred." *Tennant*, 321 U.S. at 32; see *Lavender*, 327 U.S. at 652 (there must be "a reasonable basis in the record for inferring" causation). And in each case, "there was conflicting *evidence* from which the jury could draw inferences either in favor of the plaintiff's theory or the railroad's theory." Pet. App. 20a (dissent). Here, by contrast, there was "no basis in fact upon which a jury could draw an inference that the extra width would have spared [Sumner] from a fall." *Id.* at 16a.

Sumner's contrary arguments rely on just the sort of speculation this Court's cases prohibit. Sumner says there is "'strong evidence' that he fell from the narrow path." Opp. 11–12. The key question, though, is *why* he fell. And on that point, Sumner argues only that a "wider path *might well* have prevented [his] injuries." *Id.* at 12 (emphasis added). That Sumner told an EMT that he "lost his ba[la]nce," Opp. 4 (alteration in original), does not support the verdict. Setting aside that he also told his doctors that he "blacked out," Pet. App. 123a, nothing in his statement to the EMT (or elsewhere in the record) shows that "but for a few extra inches of width on the level portion of the path, [he] would

have recovered and would not have fallen down the embankment." *Id.* at 19a (dissent). And Sumner's reliance (at 10) on his liability expert's testimony is misplaced. Duffany admitted that he had "no idea what role, if any, that [the] walk path could have played" in Sumner's accident. Pet. App. 18a. Likewise, Sumner is wrong to claim (at 17) that the "state inspector's testimony linked the injuries with a slip and fall." The inspector did not see Sumner fall. Resp. App. 13a.

In all events, the opinions below confirm that Sumner could not satisfy the ordinary common-law standard of proof. The majority emphasized that its decision turned on "a significant difference between FELA cases and common-law tort actions." Pet. App. 11a; see *id.* at 14a. And the dissent explained, without contradiction, that Sumner could not prevail under the proper standard. *Id.* at 18a–19a, 24a–25a. Thus, every Justice below recognized that Sumner's claims would have failed without the majority's "significantly more lenient"—and erroneous—standard.

III. LOWER COURTS ARE DIVIDED.

FELA jurisprudence is a "muddle about factual cause, scope of liability, the burden of production, and the relationship of these concepts." Michael D. Green, *The Federal Employers' Liability Act: Sense and Nonsense About Causation*, 61 DePaul L. Rev. 503, 528 (2012) (footnote omitted). In particular, courts are split three ways on FELA's burden of production, which (as here) they generally call the "standard of proof." Pet. 11 n.1. Some courts apply a relaxed standard only on causation; some apply it to negligence too; and some correctly apply the same standards that govern any other case, under either federal or state law. *Id.* at 19–24.

Sumner responds that, after *McBride*, "lower courts agree that FELA has a relaxed causation standard." Opp. 24. But that is not the question here. *McBride* answered a substantive question: What degree of causation does FELA require—but-for, common-law proximate, or something in between? See *CSX Transp., Inc.* v. *McBride*, 564 U.S. 685, 688 (2011); *id.* at 710 (Roberts, C.J., dissenting). The question here, on which courts remain divided, is different: What quantum of evidence is "sufficient to create a jury issue"? Pet. App. 10a–11a.

On *this* question, Sumner cannot explain away the split. For one thing, he ignores every pre-*McBride* case. That might make sense if *McBride* had addressed this question, but as just explained, it did not. Moreover, lower courts have not treated *McBride* as relevant to the standard of proof. Pet. 20–21.

Sumner fares no better with the cases he does address. He says, for example, that the Virginia courts apply the same "legal standard governing sufficiency of the evidence" in FELA cases as the Sixth Circuit. Opp. 25. But as he admits, the Sixth Circuit recognizes that "[t]he relaxed causation standard under FELA does not affect plaintiff's obligation to . . . establish 'but-for causation.'" *Id.* (alteration in original) (quoting *Garza* v. *Norfolk S. Ry.*, 536 F. App'x 517, 520 (6th Cir. 2013)). *Garza* noted that "[a]bsent express language to the contrary, the elements of a FELA claim are determined by reference to the common law," and correctly applied the ordinary summary-judgment standard, which requires "specific facts showing . . . a genuine issue for trial." 536 F. App'x at 519, 522 (quoting *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 324 (1986)). The Fourth Circuit cases

(which Sumner ignores) did the same. Pet. 22–23. The court below did the opposite.[1]

Likewise, several state high courts hold that because FELA's language does not dictate the standard of proof, "state procedural rules" govern. *Mills* v. *CSX Transp., Inc.*, 300 S.W.3d 627, 631–32 (Tenn. 2009) (applying ordinary state "burden of production" standards); see *Cottles* v. *Norfolk S. Ry.*, 224 So. 3d 572, 579–82 (Ala. 2016) (noting FELA's "relaxed standard of causation" but applying state law requiring "substantial evidence" to avoid summary judgment); *Lipsteuer* v. *CSX Transp., Inc.*, 37 S.W.3d 732, 735 (Ky. 2001) (applying state law, not the "less restrictive" federal standard, because "summary judgment is a procedural issue"). And some state courts hold that federal law controls this question, but that "FELA claims are evaluated as if they were common law negligence claims." *Peterson* v. *Nat'l R.R. Passenger Corp.*, 618 S.E.2d 903, 905–06 & n.3 (S.C. 2005) (asking "whether the evidence is of such a quality and weight that reasonable and fair-minded jurors" could rule for the plaintiff). All of these cases clash with the decision below and with other state high courts' rulings that "a significantly reduced evidentiary standard applies in FELA cases," *e.g.*, *Seeberger* v. *Burlington N. R.R.*, 982 P.2d 1149, 1152 (Wash. 1999) (en banc); Pet. 21–22. This is just the kind of turmoil in lower-court decisionmaking that warrants this Court's review.

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[1] Sumner notes (at 25 n.7) that the petition quoted language from *Strickland* v. *Norfolk Southern Railway* describing the plaintiff's argument, but he overlooks that the court agreed with the plaintiff, holding (incorrectly) that the district court misapplied the "relaxed burden of proof." 692 F.3d 1151, 1157 (11th Cir. 2012).

Finally, Sumner does not dispute the acknowledged split on whether a relaxed standard of proof applies only to causation or also to negligence. Pet. 21–22. But he declares this disagreement irrelevant because negligence is uncontested here. Opp. 24 n.6. That argument overlooks the point, which he elsewhere emphasizes, that the decision below relied on a negligence case to adopt the lower standard of proof. See *Hughes*, 439 S.E.2d at 413; Opp. 22–23. Indeed, the decision below and *Hughes* together suggest that the Virginia Supreme Court applies the lower standard to every FELA element, in mistaken reliance on this Court's substantive causation decisions. See Pet. 15. In turn, if this Court reverses the decision below because FELA's text nowhere contemplates a lower standard of proof, that holding will likely resolve the lower courts' disagreement on both causation and negligence. But at the very least, a decision on the standard of proof for causation will resolve one important conflict among the lower courts and provide much-needed guidance on the rest of the "muddle." Green, *supra*, at 528.

IV. THIS ISSUE IS IMPORTANT AND RECURRING.

Sumner does not dispute that this is a key issue in almost every FELA and Jones Act case. Pet. 24. Nor does he dispute that, as the lower courts currently administer these statutes, they are close to becoming the kind of "workers' compensation statute[s]" that Congress declined to adopt. *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543–44 (1994). And he does not claim that any valid purpose is served by exempting these cases from the summary-judgment regime that governs every other civil claim. He objects (at 2) to Norfolk Southern calling this result "bizarre," but never acknowledges—much less defends—that the

decision below lowers the burden of production but *not* the standard of proof at trial, creating a category of unsupported jury verdicts that are nevertheless unreviewable. Pet. 18–19, 25. This issue warrants the Court's attention.

V. THIS CASE IS AN IDEAL VEHICLE.

Sumner says this is a poor vehicle because the court below did not specifically distinguish but-for causation from proximate causation. Opp. 8, 26–27 & n.8. It is unclear why that would matter, since the court explicitly applied a lower standard of proof to the entire causation inquiry. In any event, the court *did* distinguish the "standard of proof" it applied from the "issue of proximate cause." Pet. App. 8a. And the only disputed question was "whether the evidence was sufficient to create a jury issue," *id.* at 14a, on whether (in Sumner's own words) he "would not have fallen *but for* the negligently narrow walkway," Opp. 12 (emphasis added). That is not a question of proximate causation, *i.e.*, whether "the causal link . . . is [too] attenuated." *Paroline* v. *United States*, 572 U.S. 434, 445 (2014). It is a question of factual, "but for" cause. See *id.* at 449–50; Pet. App. 16a (dissent) (issue is whether Sumner showed that "'but for' the railroad's negligence, he would not have fallen").

Likewise, Sumner is wrong to suggest that Norfolk Southern conceded but-for causation, disputing only proximate cause. Opp. 29. Norfolk Southern argued that the evidence "did not allow the jury to find that the walk path . . . played any role in causing" Sumner's fall. Add. 28a. It also argued that "[n]othing in [FELA] permits speculation to substitute for factually-grounded evidence on causation," *id.* at 27a, and urged the court to apply Virginia's normal summary-judgment standard, see *id.* at 25a–26a & n.6. And while Sumner quotes snippets from the trial-

court transcript (at 29), Norfolk Southern argued there that Sumner produced "no evidence whatsoever" of causation: Sumner "can't show how [the path's width] caused or contributed to the accident" because "there's no evidence" of "where he was when he fell or what he was doing or what role, if any," the path played. Pet. App. 81a.

Finally, Sumner faults Norfolk Southern for not objecting to the jury instructions. Opp. 28. But the jury instructions are not the problem. Pet. 18–19, 21. The problem is the standard the majority used to decide "whether the evidence was sufficient to create a jury issue." Pet. App. 10a–11a; see *id.* at 16a (dissent). The instructions were correct—but the case never should have gone to the jury.

CONCLUSION

For the reasons stated above and in the petition, the petition should be granted.

Respectfully submitted,

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ADDENDUM

ADDENDUM

IN THE SUPREME COURT OF VIRGINIA

Record No. 180121

NORFOLK SOUTHERN RAILWAY COMPANY,

Appellant,

v.

MARK SUMNER,

Appellee.

BRIEF OF APPELLANT

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IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. 180121

NORFOLKSOUTHERN RAILWAY COMPANY,

Appellant / Defendant,

MARK A. SUMNER,

Appellee / Plaintiff.

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This appeal raises, in a pure form, the recurring issue of "ipse dixit" expert testimony in civil litigation: speculative expert testimony that is not grounded in the facts. Here, an expert was allowed, over objection, to speculate that a wider flat area on a walk path *might* have prevented *an* accident. This speculation was the essential causation link in plaintiff's claim that *his* accident and injuries resulted in whole or in part from the asserted lack of a wider flat area.

The expert's speculation was not tied to the facts of *this* plaintiff's accident. The very limited evidence did not permit a conclusion that the width of the flat part of the path played any role in *this* accident, or that the wider flat area advocated by the expert *could or would* have prevented *this* accident or the plaintiff's injuries. On cross-examination, the expert conceded that he had no idea what role, if any, the walk path played in causing this incident.

The expert's testimony should have been excluded as inadmissible speculation. The speculative nature of the expert's testimony also rendered the evidence insufficient to create a jury issue on causation.

ASSIGNMENTS OF ERROR

1. The circuit court erred in admitting expert witness Duffany's speculative and unfounded testimony, which also exceeded the scope of Duffany's expertise, regarding how a wider walk path might have prevented some falls where no evidence linked Duffany's speculation to a fact-based causal mechanism for this plaintiff's fall. (Preserved at J. A. 8-12, 25-28, 122 23, 200-25, 293-98, 312-30.)

2. The circuit court erred in failing to grant Norfolk Southern's motions to strike the evidence and motion to set aside the verdict asserting that the evidence failed to create a jury issue as to whether the width of the walk path "resulted in" the plaintiff's accident. (Preserved at J. A. 16-21, 25-28, 200-25, 293-98, 312-30.)

NATURE OF THE CASE AND MATERIAL PROCEEDINGS

Mark Sumner, a conductor employed by Norfolk Southern Railway Company ("Norfolk Southern"), bought this action under the Federal Employers' Liability Act ("FELA") for injuries sustained in an unwitnessed accident on the job. Sumner alleged that the injuries he suffered when he left a walk path beside a siding were the result of the railroad's negligence. His sole theory of negligence was that the flat part of the walk path was too narrow at the point above where he ended up after leaving the walk path, and that his injuries resulted, in whole or in part, from this narrowness.

The case was tried to a jury for three days. The trial court overruled Norfolk Southern's objections to the testimony of plaintiff's expert, Raymond Duffany, speculating about how the walk path might have caused or contributed to Sumner's accident, and how a wider flat area on the path might have prevented that accident. (J.A. 122-23.) The court denied Norfolk Southern's motions to strike the plaintiff's evidence, made at the close of the plaintiff's evidence and at the close of all the evidence on the grounds that Duffany's testimony was inadmissible and that, even with Duffany's objectionable testimony, the evidence failed to present a jury issue on causation. (J.A. 25-28, 200-25, 293-98,) The jury returned a verdict for the plaintiff in the amount of $336,923.00. The court denied Norfolk Southern's post-trial motion to set aside the verdict and enter judgment for the defendant on the grounds previously raised. (J.A. 5-21, 25-28, 328-30.)

STATEMENT OF FACTS

The incident. The underlying incident occurred on February 26, 2013, at approximately 8:35 a.m., at the East Bradley Pass Track, a siding located east of and next to the main line approximately two miles north of, and outside of, Norfolk Southern's Danville yard. The weather was cloudy, with light rain, 38 degrees. (J. A. 42-43, 45-46, 61, 230, 334.) Sumner was the conductor on a north-bound freight train.

The train crew had been instructed to place a set, or "cut," of cars into the siding. The north-bound train stopped on the main line so that the rear-most car in the cut was south of the switch for the siding. Uncontradicted testimony showed that Sumner, performing his conductor's duties, dismounted the train, separated it at the back of the cut, and rode forward on the last car as the locomotive pulled the cut north

of the switch. He dismounted and began walking back south, away from the locomotive, toward the switch located 29.3 feet south of the last car in the cut. Presumably, he was walking on the walk path on the siding's east (outer) side. (J. A. 35, 62-66.)

Sumner testified that, in the ordinary course of events, he would have "knock[ed] off the switch timer" (a protective timing device on the switch from the main line to the siding), then headed away from the locomotive another 198.9 feet south to release the derail (a mechanism preventing car movement on the siding), then returned north, toward the locomotive, to throw the switch, and then communicated by radio with the engineer as the cut was backed into the siding.[1] (J. A. 33-37, 190-93.)

There was no evidence that any of these events occurred. Post-accident investigation revealed that the

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[1] The locations of and physical distances between key landmarks were crucial to this case. Based on the testimony and Pl. Exh. 6, a Track Diagram (J. A. 338), the key landmarks and distances, from north to south (nearest the locomotive to farthest away from the locomotive), were:

(1) the last car in the cut as it sat behind the locomotive on the main line ("the rear of the set-off");

(2) the switch 29.3 feet south of that, at the upper end of the siding;

(3) disturbed soil on the outer edge of the walk path identified and measured by the witness who discovered it as 60 feet south of the switch/ 138.9 feet north of the derail;

(4) the point on the walk path even with where Sumner was found down the adjacent embankment, 140.4 feet south of the switch / 58.5 feet north of the derail; and

(5) the derail, the landmark farthest away from the locomotive, located 198.9 feet south of the switch. The total distance from the rear of the set-off to the derail was 228.2 feet.

switch had not been thrown to the siding, and the derail had not been released. (J. A. 291.) Instead, at some point, Sumner went over the outer edge of the walk path and over the edge of the adjacent wooded, brush-covered embankment. No one witnessed Sumner's accident, and Sumner had no memory of what happened. After Sumner failed to respond to the engineer's radio calls, the engineer found Sumner lying his back on the ground, 30-35 feet down the embankment, with his head up the hill,. His position was even with a point on the path 140.4 feet south of the switch/ 58.5 feet north of the derail. (J. A. 38-39, 57, 72-73, 334, 338.)

Sumner asked the engineer, "What are we doing here? What happened?" The engineer described Sumner as "very disoriented" and recalled Sumner making statements about his injures. (J.A. 39.) Sumner had bitten through his tongue, suffered a concussion, broken a clavicle, and broken multiple ribs. The nature of these injuries suggested Sumner had suffered a very hard fall or falls in which he had been unable to protect himself. Rescue personnel were called and railroad supervisors were notified.

At trial, Sumner recalled making the initial cut but had no further recollection of the accident. He did not remember being on the walk path and had no independent recollection of where he left the path. He did not know what caused him to leave the path. He did not know whether the walk path caused his accident. He had no knowledge of how or why he ended up down the embankment below the walk path. (J. A. 182-91, 194-95.)

The only evidence of what happened came from Sumner's reports to third parties after the accident. An EMT who attended Sumner on the embankment recorded that Sumner said he was walking on the

"fire right away [right-of way], when he lost his bance [balance] on the wet gravel and fell." (J. A. 354.) Later that day and on the next day, Sumner reported to three separate doctors on three separate occasions at the Danville Regional Medical Center that, prior to his fall, he experienced a passing out or blacking out type of episode. (Def. Exhs. 5, 6 & 7, R. 1859-61.) One of these, Dr. Boro, recorded Sumner saying that he "essentially had some blurred vision and then blacked out and woke up at the bottom of the railroad embankment . . . he states that he felt funny prior to blacking out, and although in various places he has or has not had some blurring of his vision, he states to me he did have some blurring of his vision." (Def. Exh. 7, R. 1861.)

On the day of the accident, Norfolk Southern supervisor Robert Lewis arrived at the hospital shortly after Sumner arrived. Sumner asked to see Lewis. Sumner told Lewis that "he wasn't sure [what happened], that he was walking along and then he blacked out." Mrs. Sumner had not yet arrived at the hospital when this conversation occurred. (J. A. 239-40.)[2]

No one saw Sumner leave the walk path. There was no further evidence of how Sumner left the walk path, or what caused him to do that, or how he ended up where he was found, down the wooded embankment. There was no evidence of where Sumner was laterally

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[2] The evidence of Sumner's post-accident statements that he blacked or passed out precluded him from asserting a *res ipsa loquitur* claim. That doctrine applies "only when the circumstances of the incident, without further proof, are such that, in the ordinary course of events, the incident could not have happened except on the theory of negligence. . . . [and] never applies in the case of an unexplained accident that may have been attributable to one of two causes, for one of which the defendant is not responsible." *Lewis v. Carpenter Co.*, 252 Va. 296, 300 (1996).

– what part of the surface he was on – when he "lost his balance on the wet gravel and fell." There was no evidence of what caused him to lose his balance or of the nature of Sumner's fall. No evidence suggested that the event was of such a nature that any opportunity had existed for Sumner take any action to avoid or lessen his injuries. No evidence suggested he had had any opportunity to regain his balance, or to take protective or mitigating action, or otherwise to prevent himself from going over the edge and down the adjacent slope.

No evidence showed conclusively where, within the 228.2 feet between the rear of the set-off and the derail, Sumner left the path, and this location was disputed at trial. Sumner's case on liability was based on the railroad's initial assumptions, which later proved mistaken, that he had been walking north, toward the locomotive, and had left the walk path immediately above the place where he was found down the embankment, 140.4 feet south of the switch/ 58.5 feet north of the derail. (J. A. 117-19.)

John Sherrill, a railroad inspector employed by the Commonwealth, personally observed, from a distance, Sumner dismounting and beginning to walk south from the rear of the set-off before the accident. After learning of Sumner's fall from the railroad's radio communications, Sherrill inspected the path and took his own measurements and photographs. Sherrill identified disturbed earth and debris on the outer edge of the path at a point 60 feet south of the switch/ 138.9 feet north of the derail, which suggested to Sherrill that Sumner left the path there. (J. A. 59-66, 70, 74, 348-51; R. 1209 10.) Norfolk Southern learned of Sherrill's relevant information only well after the accident.

The record included photographs of the accident scene taken both on the morning of the accident and 20 months later, when plaintiff's expert Robert Duffany inspected the scene. Sherrill's photographs taken the morning of the accident showed the path in question looking south (J. A. 348), the area where Sumner came to rest (J. A. 350), and the disturbed earth and debris Sherrill identified as suggesting where Sumner left the path. (J. A. 349, 351.) The path as it existed that morning was also shown in Norfolk Southern photos looking north (J. A. 352, 359, 361) and looking south (J. A. 360, 362). The person pointing in Def. Exhs. 10 and 11 (J. A. 361-62) was standing at the point above, and indicating toward, where Sumner was found down the embankment. Defendant's exhibits 2 and 3 (J. A. 357-58) showed Duffany (in the red vest) on the path 20 months later.

The negligence evidence. Sumner's negligence theory at trial was that the flat, "safe" part of the walk path, at the point above where he was found, was too narrow, and that his injuries resulted in whole or in part from this narrowness.[3] The evidence showed that

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[3] Plaintiff's expert Robert Duffany also testified that some railroads use smaller "yard" ballast, which is easier to walk on, in railroad yards, whereas the ballast along this siding was the larger "road" ballast that presented a more challenging walking surface. (J. A. 109-11, 142-44, 170-73.) This siding unequivocally was not in a yard, but instead was adjacent to the main line two miles outside the Danville yard. Plaintiff did not argue negligence based on the size of the ballast.

Moreover, this Court has ruled that encountering the normal, known condition of ballast is not a basis for a claim of negligence under the FELA. *Norfolk Southern Rwy. v. Trimiew*, 253 Va. 22, 27-29 (1997) ("Workers like this plaintiff were fully aware of the normal condition of ungroomed ballast from long railroad experience . . .; they knew that ungroomed ballast was 'difficult'

at the switch, and for more than 100 feet south of the switch, the level part of the walk path was at least 44-48 inches wide. (J. A. 119, 162-63.) At the point above where Sumner was found, the whole walk path was four to five feet wide, including level and sloping areas. The railroad's evidence was that this entire width was a safe and customary walk path, and there was no history of similar incidents at this location. (J. A. 263-64: R. 1613-14.)

Robert Duffany qualified as plaintiff's "expert in railroad engineering practices and operations including railroad track construction, inspection, maintenance, and repair, especially with respect to railroad walkways." (J. A. 103-04.) Duffany testified that, at the point on the path above where Sumner was found, the flat, "safe" part of the walking area within the path was only 15 inches wide. Duffany testified that the sloping portions of the path were not a safe walking surface. (J. A. 120-22.) Based on his experience in the industry, Duffany testified that the minimum width for a flat and "safe" part of a walk path was 24 inches. (J. A. 105.)[4]

The causation evidence and Norfolk Southern's objections. Having testified that the flat part of the walk path should have been 24 inches wide, but was only

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to walk upon. Thus, given these facts, there was no basis for the defendant to foresee that the ballast, laid in routine fashion for miles along open track in open country, posed an unreasonable danger to employees such as this plaintiff.").

Plaintiff also expressly disclaimed any argument that the railroad had a duty to provide a dry walking surface in this situation, and did not argue negligence based on the wetness of the walk path. (J. A. 215.)

[4] Norfolk Southern's objections to this expert testimony were overruled. That ruling is not being challenged in this appeal.

15 inches wide at the point above where Sumner was found, Duffany then testified, over Norfolk Southern's objections, in an attempt to establish that this narrowness caused Sumner's injuries, and that a wider flat area would have prevented those injuries:

> Q [by Mr. Moody, plaintiff's counsel]: The jury has heard that the minimum is 24 inches. Your measurements were 15 inches. Can you explain to the jury *how the additional width of that walkway may have reduced the likelihood of the risk of an accident in this case*?
>
> Mr. Creasy [defense counsel]: Your Honor, that's going to call for speculation on his part. There's not enough facts for him to formulate that opinion. We object on the grounds of speculation.
>
> Mr. Moody: I think he can testify as to what that – what the purpose of that is and why –
>
> Mr. Creasy: He would have to lay a foundation as to what facts he can rely on.
>
> The Court: I think some foundation is probably necessary for him to express that specific opinion as to why the difference, what makes 24 inches safer than 15.
>
> Q [by Mr. Moody]: That's the question, Mr. Duffany. Can you explain that to the jury?
>
> A Yes. If you try to walk in a 15-inch wide area, you would have a difficult time trying to do that. In addition to that, 24 inches gives you – and knowing that you are walking on that large ballast, which *moves and tends to roll underfoot traffic*, *if you do stumble or trip, it gives you that extra margin you have to recover from a possible fall or an area to fall in other than over the cliff*.

> Mr. Creasy: Your Honor, he's not qualified as an expert in ergonomics or any of that type of mechanical – I mean he's a railroad engineer with regards to walk path. Now he's getting into areas dealing with ergonomics and how the human body works. That exceeds the scope of his expertise.[5]
>
> The Court: I don't think it does. I think he's entitled to express that opinion.

(J. A. 122-23, emphases added).

Duffany continued:

> Q [by Mr. Moody]: Did you take any exception to this contour as far as from a safety standpoint for a walkway?
>
> A: Well, if you are walking anywhere outside that 15 inches, you are on some sort of slope. If you step over here on this little ridge there, you are going to – *it's going to move on that big rock. That big rock is going to move on you causing you to trip or stumble.*
>
> * * *
>
> Well, if you are trying to stay on that 15-inch wide narrow path, you place a foot or whatever on top of that ridge, *that ballast is going to move. It's going to cause you to go one way or the other*.
>
> * * *
>
> Q: Twenty-four-inch minimum walkway, what is the purpose?

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[5] As noted, Duffany was qualified only as "an expert in railroad engineering practices and operations including railroad track construction, inspection, maintenance, and repair, especially with respect to railroad walkways." (J. A. 103-04.)

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

(J. A. 126-28, emphases added.)

On cross-examination, Duffany conceded that *he had no idea what role, if any, the walk path played* in causing Sumner's accident:

Q: You don't know what the Plaintiff, Mr. Sumner, was doing at the time he fell, do you?

A: Just that he was walking. That's the only thing I know. He was walking towards a derail.

Q: Therefore, you don't know what role *this path* could have had in causing *this particular incident* because you don't know what he was doing at that time, do you?

A: I know he was walking and he was on what I consider an unsafe substandard walkway.

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

A: *Correct.*

(J. A. 150, emphases added.)

Duffany performed no analysis or study to determine whether a fifteen-inch walk path was inherently unsafe, or whether adding an additional nine inches would have prevented *this* incident from occurring. (J. A. 149-50.)

The motions to strike. Norfolk Southern moved to strike the evidence at the close of Plaintiff's evidence, and again at the close of all evidence, asserting that the evidence failed to create a jury issue on liability. Both motions were denied. (J. A. 200-25, 293-98.)

Responding to the first motion, Sumner argued that "if the Plaintiff can prove anything happened on part of the railroad, he's entitled to recover," and that "the FELA was meant as an alternative or substitute for workers' compensation." (J. A. 206, 217.) Responding to the court's question, counsel expressly disavowed arguing that the railroad was required to have only dry gravel in the walkway. (J. A. 215.) Counsel reaffirmed that Sumner's case rested on the theory that if the flat walkway had been 9 inches wider, "it was less likely that this man would have been injured." (J. A. 215.)

Citing Duffany's testimony that "a wider path gives an individual margin for error," the court denied the motion to strike:

> Norfolk Southern is not a guarantor of safety. They are not a guarantor of dry ballast. But it's foreseeable that a worker is going to be walking on wet ballast. And if it's foreseeable that it's more slippery when wet than not, . . . then it's foreseeable that somebody could slip on ballast. It's foreseeable that a wider path would prevent them from falling down. So I think there's sufficient grounds to take the case to the jury.

(J. A. 225.)

ARGUMENT AND AUTHORITIES

Introduction. Under 45 U.S.C. § 51, a railroad is "liable in damages to any person suffering injury while

he is employed by such carrier . . . resulting in whole or in part from the negligence of [the railroad]." In *Conrail v. Gottshall*, 512 U.S. 532, 543 (1994), the Supreme Court reaffirmed that the FELA is "not . . . a worker's compensation statute," and that the employer is not "the insurer of the safety of his employees . . . . The basis of . . . liability is . . . negligence, not the fact that injuries occur." 512 U.S. at 543.

Negligence under the FELA is governed by traditional common law principles, *Gotshall*, 512 U.S. at 543-44. Causation under the FELA, however, is governed by a "relaxed" standard as compared to traditional common law causation: under the FELA, a railroad's negligence need not be the sole or the principal cause of injury. Rather, in *CSX Transportation, Inc., v. McBride*, 564 U.S. 685 (2011), the Court reaffirmed its ruling in *Rogers v. Missouri Pacific R. Co*., 352 U.S. 500 (1957), and approved a causation instruction translating the statutory language "resulting in whole or in part" as "Defendant's negligence played a part – no matter how small – in bringing about the injury." 564 U.S. at 690, 695-99. The Court, however, expressly rejected the idea that *Rogers* had eliminated the concept of proximate causation in FELA cases. The Court expressly said *Rogers* did not permit a jury to impose liability on the basis of mere "but for" causation. *Id*. at 699-700, 700 n.9, 704.

I. Duffany's causation testimony should have been stricken as speculative, lacking an adequate foundation in fact, and exceeding the scope of his expertise.

Standard of Review. A trial court's admission of expert testimony is reviewed for abuse of discretion, but a trial court commits reversible error in admitting expert testimony if it has "an insufficient factual basis"

or if the expert fails "to consider all variables bearing on the inferences to be drawn from the facts observed." *John v. Im*, 263 Va. 315, 320 (2002) (citations omitted). While a circuit court has discretion to admit opinion testimony based upon an adequate factual foundation, it "has no discretion to admit clearly inadmissible evidence." *Holiday Motor Corp. v. Walters*, 292 Va. 461, 483 (2016).

"Expert testimony founded upon assumptions that have no basis in fact is not merely subject to refutation by cross-examination or by counter-experts; it is inadmissible. Failure of the trial court to strike such testimony upon a motion timely made is error subject to reversal on appeal. Furthermore, expert testimony is inadmissible if the expert fails to consider all the variables that bear upon the inferences to be deduced from the facts observed." *Hyundai Motor Co. v. Duncan*, 289 Va. 147, 155 (2015).

"Although experts may extrapolate opinions from existing data, a circuit court should not admit expert opinion 'which is connected to existing data only by the *ipse dixit* of the expert.'" *Duncan*, 289 Va. at 156, *quoting General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

The Virginia Rules of Evidence reflect these governing principles. Under Va. R. Evid. 2:703(a), reflecting Va. Code § 8.01-401.1, an expert witness in a civil action "may give testimony and render an opinion or *draw inferences from facts, circumstances, or data* made known to or perceived by such witness." (Emphasis added.) Under Va. R. Evid. 2:702 (a)(i), reflecting Va. Code § 8.01-401.3(A), "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," a qualified expert may testify thereto. Under Va. R. Evid. 2:702(b), expert testimony "may include

opinions of the witness *established with a reasonable degree of probability*, or it may address *empirical data from which such probability may be established* in the mind of the finder of fact," but "[t]estimony that is speculative . . . is not admissible." (Emphases added.)

This Court has recently applied these principles to exclude speculative, unfounded testimony in a variety of contexts. Most of these contexts have been more technically complex than the facts of the present case. Some involved speculative testimony on causation, others involved testimony about negligence or other breach of duty, and some involved both.

- In *Walters, supra*, an expert's testimony on defective design was inadmissible because it relied on an unfounded assumption, for which there was no evidentiary support, that a different design of a convertible's roof latch would not have become disconnected in a crash, and an unfounded assumption that if the latch had remained connected, the roof would not have collapsed in a roll-over accident. The expert's proposed remedy – a different latch design – was "pure speculation." 292 Va. at 484.
- In *Duncan, supra*, an expert's testimony about defective design and causation - that a different design would have prevented the injuries - was inadmissible because it was "based on his *ipse dixit* assumption" that an airbag would have deployed and protected the driver if its sensor had been differently located. 289 Va. at 156.
- In *CHN Am. LLC v. Smith*, 281 Va. 60, 67-70 (2011), the testimony of two experts about defective manufacture and causation lacked adequate foundation in the facts of the case and was

inadmissible. One expert performed no tests or other analysis, and simply assumed the existence of a defect based solely on the fact that a hose failed during use. A second expert's testimony about alternative designs was speculative because his opinions were based on assumptions not supported by facts, and he conceded he did not know whether the alternatives would make the mower at issue unsafe, or would even be feasible or effective.

- In *Toraish v. Lee*, 293 Va. 262, 269-70 (2017), an expert's testimony in a medical malpractice case was inadmissible because the expert's opinion relied on an assumption that was not established by other evidence at trial.
- In *Dixon v. Sublett*, 295 Va. 60, 67-69 (2018), the plaintiff in a medical malpractice failed to prove causation. The plaintiff presented expert evidence that the defendant surgeon should have taken different actions, but presented no evidence that the suggested remedy – those different actions – would have produced a different outcome. This Court ruled that the trial court should have granted the defendant's motion to strike the evidence on the basis of lack of causation.
- In *Martin v. Lahti*, 295 Va. 77, 87-88 (2018), another medical malpractice action, the trial court properly excluded lay opinion testimony, and dismissed the complaint for lack of proof of causation, because the crucial lay opinion testimony was not based on the witness's own perceptions or personal knowledge, but instead was "nothing but speculation" about the thought processes of the decedent.

In summary, an expert testifying that an asserted defect caused an accident must ground his testimony in the facts of the accident. His testimony must rest on reasonable inferences drawn from facts about what happened, not on speculation about what could or might have happened. Likewise, when an expert proposes a remedy – a different design or construction or condition or procedure – that assertedly would have prevented the accident or mitigated the injuries, that testimony must rest on reasonable inferences arising from the facts in evidence, not on speculation, and must show that the proposed remedy would have produced a different outcome.

Here, the trial court rejected Norfolk Southern's arguments based on these cases and principals, stating that the analogy to "*Duncan*, a products liability case. I mean, that is comparing apples to gorillas . . . When we are talking about simple negligence versus a products liability issue, I mean, I just – I don't think *Duncan* tells me very much." (J. A. 324-25.)

The trial court missed the point. *Duncan*, *Walters*, and similar cases are not relevant because the details of the expert issues they analyzed also exist here. Those cases are relevant because they illustrate that proffered expert testimony – in any context - is speculative and inadmissible if it is not tied to the facts in evidence "by more than the *ipse dixit* of the expert." In *Duncan*, *Walters*, and the other similar cases, this Court examined the foundations of technical expert testimony – what had been established as fact, what had not been established, and what reasonable inferences arose from that state of the evidence. That examination uncovered the lack of adequate foundation in those cases. This case required the same analysis.

Sumner rested his case on his statement, recorded by an EMS responder, that he "lost his ba[la]nce on the wet gravel and fell." The evidence showed that, at the place on the path that was the focus of Duffany's testimony, the whole walk path was four to five feet wide, including sloping portions and a flat area 15 inches wide that, according to Duffany, was the only safe walking area. But no one saw what happened to Sumner, and Sumner himself did not know what happened.

No one saw where Sumner was, either laterally or longitudinally, on the path. Implicit in Duffany's speculation that a wider flat area would have protected Sumner was the assumption that Sumner was in that flat area when he lost his balance. But no witness testified to that and no other evidence suggested it. No evidence addressed what *caused* Sumner to "lose his balance." Sumner's statement established that he was *on* wet gravel, but did not address *where* that wet gravel was, or *why* or *how* he lost his balance. No one saw what sequence of movements occurred as he lost his balance and fell. No one testified that Sumner was conscious or aware of his movements when he lost his balance, or could have reacted in any way that would have mitigated his injuries. No evidence showed how or why Sumner moved out of the flat area, moved over the sloped gravel, continued to move over the edge of the adjacent embankment, and ended up lying on his back, 30-35 feet down a wooded and brush-covered embankment, with a punctured tongue, a concussion, a broken clavicle, and multiple broken ribs,

In this vacuum of evidence about what actually happened, Duffany's attempt to address causation could only be speculative and lacking an adequate foundation in the facts. Duffany was permitted to speculate in

answering the question "*how the additional width* [24 inches versus 15 inches] of that walkway *may have reduced the likelihood of the risk of an accident* in this case." The very wording of counsel's question, on its face, called for speculation. "May have" is not "did in fact." "May have reduced the likelihood of the risk" is not "did, to a reasonable degree of probability, based on the reasonable inferences arising from the known facts." The question addressed only possibilities, not what in fact happened here. This is not an unfair parsing of counsel's question to Duffany. The oblique, tentative phrasing demonstrated that counsel was stretching beyond the facts of this accident to solicit testimony about generic possibilities, not about established facts and reasonable inferences on which an expert opinion could be based.

Duffany continued to testify in generalities: "If you try to walk . . . you would have a difficult time . . . ." This testimony was not tied to any facts about where Sumner was walking or what difficulties, if any, he in fact encountered. Duffany spoke generically about "large ballast, which moves and tends to roll under foot traffic, if you do stumble or trip." But no evidence suggested that, in fact, any ballast "rolled" or "moved" under Sumner's feet, or that Sumner "stumbled" or "tripped."

Duffany speculated that, generically speaking, if someone did "stumble" or "trip," a wider path would provide an "extra margin" to "recover" or "an area to fall in other than over the cliff." But no facts in evidence supported an inference that Sumner's accident, however it occurred, was one in which an "extra margin" would have been beneficial, or one from which he could have "recovered," or one in which he could have fallen elsewhere than he did. Only speculation could create those scenarios.

On cross-examination, Duffany candidly conceded that he had no idea what role, if any, the walk path could have played in causing this incident. That admission confirmed the wholly speculative nature of the testimony to which Norfolk Southern objected, and confirmed that it should have been excluded. Under these circumstances, the trial court had no discretion to admit Duffany's speculative and unfounded testimony.

Without this testimony, the record contains no evidence suggesting that the narrowness of the flat part of walk path at one particular point – the sole claim of negligence – played any part in causing Sumner's injuries. If this Court agrees that Duffany's testimony was inadmissible, final judgment must be entered for Norfolk Southern.

II. Even with Duffany's speculative testimony, the evidence did not create a jury issue as to whether Sumner's injuries resulted from the width of the walk path.

Standard of review. On a motion to strike the evidence as insufficient, as a matter of law, to create a jury issue, "the duty of the [trial] court is to accept as true all the evidence favorable to the plaintiff as well as any reasonable inference a jury might draw therefrom." *Owens v. DRS Auto. Fantomworks, Inc.*, 288 Va. 489, 495 (2014). In reviewing a trial court's refusal to grant such a motion or to set aside a jury verdict, this Court, too, reviews the evidence in the light most favorable to the plaintiff, and the trial court's judgment will not be set aside unless it is plainly wrong or without evidence to support it. Va. Code § 8.01-680; *Dixon v. Sublett*, 295 Va. 60, 66 (2018). This is a ques-

tion of law, which is reviewed *de novo* by this Court. *Owens, supra*, 288 Va. at 495.[6]

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[6] At oral argument on Norfolk Southern's petition, a question from the bench asked whether the *de novo* standard was the correct standard of review. *Owens* affirms that it is, and, for the following reasons, counsel believes *Owens* is correct.

Analytically, the question presented by a motion to strike the evidence is the same question presented by a motion for summary judgment: whether the evidence, taken in the light most favorable to the non-moving party, is sufficient to create a jury issue. Recognizing this analytical congruence, this Court has said that "a motion to strike is in effect a motion for summary judgment, which is not to be granted if any material fact is genuinely in dispute." *Costner v. Lackey*, 223 Va. 377, 381 (1982). Under Rule 3:20, a trial court enters summary judgment upon sustaining a motion to strike the evidence.

In Hale v. Maersk Line Ltd., 284 Va. 358, 372 (2012), and in other decisions this Court has affirmed that a trial court's ruling on a motion for summary judgment presents a question of law that is reviewed *de novo* on appeal. A motion for summary judgment requires "the application of law to undisputed facts." *Id*. To determine whether there are disputed facts, the court must adopt all reasonable inferences from the evidence in favor of the non-moving party, but not inferences that are "strained, forced, or contrary to reason." *Carson v. LeBlanc*, 245 Va. 135, 139-40 (1993). *Hale* applied this standard in reviewing a grant of summary judgment. 284 Va. at 375.

This Court has ruled that the issue raised by motions to strike – whether, as a matter of law, there is insufficient evidence to submit an issue to a jury – can also be raised post-trial by a motion to set aside. *E.g., SuperValue, Inc. v. Johnson*, 273 Va. 356, 369 (2008); *Gabbard v. Knight*, 202 Va. 40, 42 (1960). The issue is the same in both instances, and presumably the same standard of appellate review applies in both. At the time motions to strike must be made, of course, there have been no findings of fact and no post-trial rulings, and so Code § 8.01-680, by its terms, does not apply. When that statute becomes applicable, following final judgment in the trial court, its application presents this Court with a question of law governed, as was the original motion

The FELA does not require a plaintiff to prove common law proximate causation - that the railroad's negligence was the sole or the principal cause of injury. Instead, the FELA's "relaxed" standard of causation imposes liability for injuries "resulting in whole or in part from the negligence of" the railroad. But, as the Supreme Court has made clear, this "relaxed" standard is not satisfied by proof of mere "but for" causation. Nothing in this "relaxed" standard permits speculation to substitute for factually-grounded evidence on causation. The evidence must show that the railroad's negligence in fact played a part in causing the plaintiff's injuries. Speculation cannot fill that gap.

The same defects that rendered Duffany's testimony speculative, unfounded, and inadmissible rendered it inadequate to support submitting the issue of causation to the jury. The evidence on causation in this case, taken in the light most favorable to Sumner, showed that Sumner left the walk path after beginning to walk south. He was found, lying on the ground and suffering from significant injuries, 30-35 feet down a wooded embankment, 140.4 feet south of the switch and 58.5 feet north of the derail. Sumner told a medical responder that he "lost his ba[la]nce on wet gravel and fell." Duffany assumed Sumner had fallen from the path at the point above where he was found. At that point, according to Duffany, the flat, safe part of a four-to-five foot walk path was only 15 inches wide, but should have been at least 24 inches wide in order to gives someone who ""tripped" or "stumbled" when the ballast "rolled" a chance to regain his balance.

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to strike in the trial court, by the required deferential view of the evidence.

Duffany's speculative testimony furnished the sole causation link in Sumner's opposition to the motions to strike, his argument to the jury, and his opposition to the post-trial motions. (J. A. 215, 224-25, 307-308, 320-22.)

On the evidence in this case, beyond the facts that Sumner was on the path, and that he lost his balance, fell, and suffered injuries, everything was speculation. The evidence did not allow the jury to conclude where Sumner was, within the four-to-five-foot-wide path at the location Duffany identified, when he lost his balance, or what he was doing at the time, or what sequence of movements occurred before and as Sumner lost his balance and fell. The evidence did not allow the jury to find that the walk path, or the asserted narrowness of its flat part, played any role in causing Sumner to lose his balance and fall, or contributed in any way to Sumner' injuries. It did not allow a finding that ballast rolled under Sumner's feet, or that Sumner "stumbled" or "tripped" on ballast. It did not allow a finding that Sumner was conscious or aware of his situation, or able to react to it. It did not allow a finding that his fall was of such a nature that he could have recovered from it, or that an extra 9 inches of width in the flat part of the path would have allowed him to recover or to direct his fall in a different direction.

The trial court was mistaken in reasoning that, on the evidence in this case, a jury issue existed here because, hypothetically, it was foreseeable that *somebody* "*could slip* on ballast." That speculative supposition could not tie the actual evidence about Sumner's particular fall to the asserted narrowness of the flat part of this path.

The trial court was mistaken in reasoning that a jury issue existed because it was foreseeable that a wider path "would prevent them from falling down." Both in general and in the particular circumstances of the known facts about Sumner's fall, that conclusion could only rest on speculation. It would be *possible* that a wider surface could prevent *some* falls under *some* circumstances. But there was no evidence here of that type of fall or those circumstances, and no evidence moved that mere possibility into the realm of probability, much less fact. Duffany candidly admitted that he could not say what role, if any, this path played in Sumner's fall. The evidence did not permit the jury to conclude that it played any part.

At trial, Sumner relied heavily on two Supreme Court FELA decisions for the proposition that, effectively, causation is always a jury issue in FELA cases. Those cases do not support an argument that the evidence in this case created a jury issue on causation.

In *Gallick v. B & O Railroad*, 372 U.S. 108, 113, 116-17 (1963), the employee suffered an insect bite as he was working near a stagnant, fetid pool the railroad had allowed to exist on railroad property in an area where employees were required to work. The evidence established that insects were known to exist in the pool, which contained dead rats and pigeons. The plaintiff had stood next to this pool as he worked for about half a minute, and as he started to walk away, within a few steps and one or two seconds, he felt the bite, felt a large insect under his trousers at the site of the bite, and crushed the insect, which fell out of his trouser leg. He had seen similar insects on the dead rats and pigeons in the pool. A serious infection arising from the bite necessitated the amputation of both of the employees' legs.

The Supreme Court rejected the employer's argument that, even though it negligently maintained the fetid pool on its property, in proximity to its employees, the evidence failed to show a causal connection to the plaintiff's injuries. The Court quoted *Rogers v. Missouri Pacific R.*, *supra*, 352 U.S. at 506-07, to the effect that

> [u]nder the statute the test of a jury case is simply whether the proofs justify *with reason* the conclusion that employer negligence played any part . . . in producing the injury . . . . Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, *with reason*, the conclusion may be drawn that negligence of the employer played any part at all in the injury . . ."

372 U.S. at 116-17 (emphases added). In *Gallick*, as the evidence recited above indicates, the evidence *with reason* – that is, based on a sufficient foundation in the facts of the accident, and not on unfounded speculation – created a jury issue on causation.

In *Lavender v. Kurn*, 327 U.S. 645 (1946), after a train backed through a switch in a busy rail yard at night, the employee who had just opened the switch for the train was found lying on the ground, unconscious, with a fractured skull, having been struck in the back of the head by a "fast moving small round object." He died shortly thereafter. The parties disputed whether the offending object was the swinging end of a mail hook that, under the evidence, could have swung out at the needed angle and height as the train backed up, or instead was a club wielded by an unseen intruder.

Lavender involved an unwitnessed accident, as does the present case, but it also involved ample physical evidence supporting the mail hook theory of causation. Topographical details, facts regarding the train's movements, the nature and particular physical characteristics of the plaintiff's injuries, physical evidence including marks on the plaintiff's hat and blood stains on the ground, the physical characteristics of the mail hook and its mounting mechanism, all taken together, made the mail hook theory a *reasonable* explanation that the jury was entitled to consider.

In *Gallick* and *Lavender*, a significant factual basis existed for submitting negligence and causation to the jury. Such a factual basis does not exist here. The issue of causation should not have been submitted to the jury, and the judgment for the plaintiff here should be reversed and final judgment entered for Norfolk Southern.

CONCLUSION

For the foregoing reasons, Norfolk Southern requests this Court to reverse the trial court's judgment and enter final judgment for Norfolk Southern.

Respectfully submitted,

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CERTIFICATE

The undersigned hereby certifies that the foregoing Brief of Appellant complies with Rule 5:26, that the required copies were filed with the Clerk of the Supreme Court of Virginia, and that a copy was sent via electronic mail to Willard J. Moody, Jr., Esquire (will@moodyrrlaw.com) and to Michael R. Davis, Esquire (mike@moodyrrlaw.com), 500 Crawford Street, Suite 200, Post Office Box 1138, Portsmouth, Virginia 23705, counsel of record for the appellee, this 11th day of June, 2018.

/s/ John D. Eure
John D. Eure