THE STATE OF SOUTH CAROLINA
In The Court of Appeals
No. 2012-212062

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Case No.: 2010-CP-40-5460

Trumaine V. Moorer, Respondent,

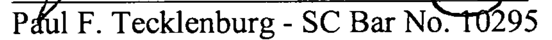
v.

Norfolk Southern Railway Company, Appellant.

APPELLANT'S REPLY

Respectfully submitted,

TECKLENBURG & JENKINS, LLC



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I. If there was any weakened condition of the Respondent when he returned to work, Appellant had no notice or duty to act other than it did because any limitations were not significant enough for his treating physician to include them on the Return-To-Work note.

The only information Appellant knew or should have known was that Respondent had been authorized by his own physician to return to work without limitation. Respondent has not alleged patent incompetence by Dr. Dantzler, and the law does not otherwise impose a duty to second-guess the treating physician's opinion. See Fulk v. Illinois Central Railroad Co., 22 F.3rd 120 (7th Cir. 1994) (holding there is no duty for a railroad to ascertain whether an employee is physically fit). Appellant has no duty to exercise its own, independent medical judgment in controversion of the treating physician's opinion, or to assign extra crew members based on speculation that the treating physician might have failed to supply all information. Id. Therefore, Appellant had no notice of a need for any limitations or other accommodation when Respondent returned.

Dr. Dantzler's Return-To-Work ("RTW") note, received by Appellant sans chart notes, cleared Respondent to work without restrictions. (D. Ex. 66, 68, Dantzler Depo. Exh. 5) There was otherwise no evidence that Respondent's assignment to work on the P 28 train was dangerous. The timing and sequence of Appellant's knowledge and notice is accurately presented in the Brief of Appellant. (App. P. 7, 13), but Respondent's briefing incorrectly portrays Dr. Dantzler's advice to his patient as information Appellant knew or should have known. (Resp. Br. P. 24). A timeline should serve well to make the point:

May 8-9, 2007	Respondent experiences unreported cramping on the job and at home
May 9, 2007	First incident
May 11, 2007	Discharge from Hospital

May 17, 2007	First Visit with Dr. Dantzler
May 17, 2007	Appellant attributes first incident to factors outside the workplace (Ex P.2)
May 17, 2007	Transmittal to Appellant of Dr. Dantzler's unrestricted RTW note (no office notes) (D. Ex. 68 and 66)
May 25, 2007	Moorer hospital records (D 69; T 2 P. 914; Lines 14-22)
May 25, 2007	Nurse Carroll-White conversation with Respondent and follow-up call to Dr. Dantzler's office, and acceptance of RTW note based on available information (T2 P. 916, Lines 8-25; P. 917, line 17 – P. 918, line 5).
May 30, 2007	Respondent returns to work Train P-28 without incident
May 31, 2007	Second incident
July 9, 2007	Dr. Lina's first involvement in Respondent's qualification to return to work as a conductor (Lina Depo. P. 28, Line 11 – P. 29, Line 9);
August 1, 2007	Respondent receives Dr. Dantzler's office notes of May 17, 2007
August 2, 2007	Dr. Lina's Disqualification Letter (P. Ex. 3) and Dr. Prible's first involvement in fitness for duty (Prible Depo. P. 32, Line 23 – P. 33, Line 4)

Respondent's attempt to cast Dr. Dantzler's opinions as if they were known or should have been known to Appellant (Resp. Br. 24 – 26, & FN 20) are without merit unless there is imposed on Appellant a duty to be omniscient. Such a duty does not exist for the same reason that reasonable foreseeability of harm is still an essential element of an FELA negligence claim. Rogers v. Norfolk Southern Corp., 356 S.C. 85, 93, 388 S.E.2d 87, 91 (2003). Appellant requested medical information about Respondent and acted based on the information received, including Dr. Dantzler's RTW note. (See App. Br. PP. 7 – 8, 13 – 16). To say there was a duty to do more must mean that Appellant had a duty tantamount to second-guessing of the treating physician's apparently unlimited RTW note. This is not the law. See Fulk, supra.; and Fletcher v. Union Pac. R.R.Co., 691 F.2d 902, 908 (8th Cir. 1980) (same, but employer may breach duty if, in assigning employee, it ignores employee medical limitations received).

The crux of Respondent's case is that "the work on May 31, 2007 was too much and too hot *for him*, given all the facts." (App. Br. P. 4, emphasis in original; see also

App. Br. P. 11). In addition to citing testimony from Nurse Carol-White (T2 P. 921, 6 – P. 926 Line 17), which explained the timeline outlined above, Appellant's briefing fairly characterizes the effect of opposing counsel's opening statement to the jury. (App. Br. P. 13). For the sake of clarity, an excerpt of that statement is repeated here:

> We learned that Dr. Dantzler filled out a return-to-work slip in the middle of May after the first incident but before the second incident, indicating that Mr. Moorer could work, but the note was accompanied by the actual medical records that imposed restrictions. He needed to be frequently hydrated and take frequent breaks. But the Medical Department at Norfolk Southern did not have the notes that accompanied the return-to-work slip. (T2 P. 154, Lines 9 – 17) (emphasis added).

It is not surprising then that Respondent attempts to blur the timeline and sequence of events regarding when Appellant first learned of any possible restrictions or need for accommodation or a limited work assignment.[1] It is certain the chart notes themselves (D. Ex. 88) that "accompanied" the May 17, 2007 RTW note (D. Ex. 66, 68, Dantzler Depo. Ex. 5) were not received by Appellant until *after* the second incident. Prior to the happening of the second incident, communication of Dr. Dantzler's common sense advice for frequent hydration and breaks were restricted to a conversation with his patient:

> Q. Initially when you released Mr. Moorer to return to work after the first incident, I don't think that you put any restrictions of any kind on him. Is that right?
> A. Nothing more than -- that I noted as far as frequent breaks, increase fluid intake, no caffeine or ethanol. Alcohol.
> Q. What date note are you looking at?
> A. That's on May the 17th, 2007.
> Q. Okay. Then I misunderstood. So there were actually restrictions that accompanied that return to work?
> A. Right. And that's noted in the note.

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[1] The "limitations" actually were accommodated relative to the working conditions. Frequent consumption of water and any necessary breaks are encouraged in Appellant's *Safety and General Conduct Rules.* (See D. Ex. 2 & T2 P. 921, Line 6 – P.926, Line 17)

Q. Okay. Is that the exhibit Mr. Tecklenburg showed you earlier, the return-to-work note?
A. No, sir. That was my note that was in the chart, that I spoke to him.

(Dantzler Depo. P. 39, Lines 5 – 22) (emphasis added).

As explained by Dr. Dantzler, those notes were part of the chart, which Norfolk Southern did not receive prior to the second incident. [2]

In the wisdom of hindsight born form the happening of the second incident, Respondent urges that regardless of the RTW note, he was predisposed by the first incident to a second heat injury, making it incumbent on Appellant essentially to second-guess Dr. Dantzler's RTW note, if not Dr. Dantzler.[3] Reverting to the crux of Respondent's case illuminates the fallacy of Respondent's position. Train P-28 was "too hot *for him*, given all the facts" (App. P. 4, emphasis in original). This rationale for establishing duty demonstrates Respondent's circular logic. Dr. Dantzler's RTW note and the records reviewed by Nurse Caroll-White only informed Appellant that Respondent had recovered from the first incident. The RTW note did not say to get extra help in the heat, to acclimatize, or to avoid working in the heat in any way. Respondent

[2] (See T2 P. 909, Line 18 – P. 914, Line 13 and D. Ex. 68 (same as D. Ex. 66 and Dantzler Deposition Exhibit 5); see also Appellant Br. P. 7, FN 1, citing T2 P. 921 6 – P. 926, Line 17 and compare D. Ex. 68 (no restrictions) with D. Ex. 88 (May 17 Dantzler chart note). Dr. Dantzler's chart notes in Defendant's Exhibit 68/88 share a page in the notes from *June 12, 2007, twelve days after the second incident.* The presence of June 12, 2007 notes removes any doubt over the earliest time when Appellant could have received these notes

[3] Contrary to Respondent's assertions, Appellant's Brief did not misrepresent facts and was not "grossly misleading" to this Court. (See Resp. Br. P. 24, citing App. Br. App. Br. P. 13).

never really answers the question of why there is a duty imposed on Appellant to do more *"for him"* when he appeared to be fully recovered.[4]

Respondent does not identify why Appellant is chargeable with a duty under the circumstances, but instead distracts from logical limitations on its negligent assignment claim by citing to Dr. Dantzler's testimony as if it were known by Appellant prior to the second incident. (App. Br. P. 24 – 26). Respondent posits that a more general duty to safely assign Respondent operates extant from any limitations, such as the lack of duty to determine fitness. (App. Br. P. 26 – 27).[5] This position is wrong on the law. See Fletcher v. Union Pacific RR, 621 F.2d 902, 909-910 (8th Cir. 1980) (holding that duty not to assign work beyond capacity is based on what the employer knew or should have known, but this duty does not require employer to ascertain if employee is physically fit for the job, unless railroad has knowledge of lessened capacity or if its agent/doctor conducts a physical examination).

Despite Respondent's attempts to conflate the information contained on the RTW note and Dr. Dantzler's chart notes, the only reasonable inference from the record is that

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[4] There was no evidence the P-28 was inherently dangerous with a two man crew, even for newer conductors; although some found it difficult and complained at unspecified times. (T2 P. 241, Lines 4-18; P. 395, Line 17 - P. 397, Line 3; P. 397, Line 25 - P. 398, Line 25; P. 408, Lines 16 - 20; P. 628 Line 21 - P. 629, Line 19).

[5] Here, Respondent contends that a medical field test should have been conducted to evaluate his fitness for duty (see also Resp. Br. P. 8, n. 8, regarding the Fee for Service Provider Manual, P. Ex. 8). This manual imposes no duty on Appellant to conduct field tests any more than do Dr. Prible's or Dr. Lina's status as non-clinical medical doctors to intervene in the treatment of Respondent. The Manual undoubtedly allows for a field test, but does not require a determination of the existence of limitations, only the extent of same after they are revealed, to wit: the "Norfolk Southern Medical Director may determine that an applicant/employee with deficiencies ... or other functional limitations"(emphasis added). Under the facts in the trial court below, there was no prior showing of functional limitations in the RTW note or any information received by Appellant suggesting same prior to the second incident. Therefore, there could be no duty to conduct such field tests.

the RTW note received by Appellant gave no indication of any such remaining predisposition or need for accommodation through work restrictions.[6] Only if Appellant really did have a duty to second-guess Dr. Dantzler might it have considered "a medical field test" as posited by Dr. Casa. (App. Br. P. 18 – 20). Notably, Respondent's Brief fails to address why Dr. Casa's opinions regarding field tests and medical consultations were not contrary to law. (See Resp. Br. PP.18 – 22 and compare with App. Br. PP. 20 – 22, citing Eckles v. Cosol Rail Corp., 94 F.3rd 1041 (7th Cir. 1996) (holding an employer need not accommodate a disabled employee if it will upset seniority system under a collective bargaining agreement); see also Fulk, *supra.* and Fletcher, supra. Likewise, Respondent never explains why Dr. Casa's opinions, deriving from experience in high aerobic activities, can be reliably applied to a conductor's job. (T2, p. 431-2, conductor duties described as light to medium). The duty of omniscience and to medically monitor simply does not exist at law, since Appellant would be charged with knowing information of which it inquired and did not receive.

Respondent does not and cannot effectively distinguish case law cited in Appellant's Brief indicating no duty to accommodate unknown medical conditions exists. See Fulk, *supra.*; see also Fletcher, *supra.* Instead, Respondent merely points out testimony to the effect that the conductor position can sometimes be difficult for new conductors unless assisted by a third crew member. (Resp. Br. PP. 4-6). The fact that a

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[6] Respondent goes to great lengths in his Brief to explain why the testimony of Drs. Prible and Lina, as well as the testimony of vocational expert James Shea establish Appellant's knowledge of the need to accommodate and acclimatize Respondent. (App. Br. PP. 10, 12, 14, 17 – 18). Nowhere does Respondent identify evidence suggesting that any of these individuals were involved in decisions touching on Respondent's return to work prior to the second incident. Indeed, Shea was hired as an expert in the litigation itself.

job may be easier or safer using other methods or more workers does not in itself constitute negligence. Montgomery v. CSX Transp., Inc., 376 S.C. 37, 55 656 S. E.2d 20, 30 (S.C. 2008).

Curiously, Respondent seeks support from a case cited in Appellant's brief, Fogg v. Nat'l R.R. Passenger Corp., 585 A.2d 786, 789 (D.C. 1991). Fogg's supervisors ignored her complaints *before* her condition was aggravated during performance of her job responsibilities. Id. at 788. Indeed, Fogg had specifically requested a shortened workweek during her recuperation from a prior incident, including a note from her neurosurgeon recommending same. Id. at 788-789. Instead of accommodations, she was put back to work by her supervisor while cognizant of those specific recommendations. The court held there was a duty to accommodate (or not put the plaintiff back to work at all), but the existence of that duty depended on an appellate record including "evidence from which the Jury might find that Dr. Ammerman's note was presented by Mrs. Fogg to Mr. Kraft [her supervisor]." Id. at 790. Likewise, supervisory "officials could not simply ignore plaintiff's condition and let her continue performing duties that were *visibly* beyond her present capacity." Id. (emphasis added).

There is a critical difference between the facts here and those in Fogg. The defendant in Fogg was on notice and chargeable with a duty that it could breach.[7] To

[7] For example, at page 34 of his Brief Respondent argues Appellant has allegations concerning accommodations based on Respondent's vulnerability. Respondent cleverly attempts to disassociate the medical situation from decisions regarding "staffing and manpower, ... the hotter temperature, and Respondent's vulnerability, ..." (App. Br. 34). Contrary to Fletcher, discussed *supra*, Respondent fails to discern that Respondent's medical situation or "vulnerability" and any resulting manpower/staffing decisions are inexorably intertwined. Respondent never explains how or why Appellant had any duty to accommodate "Respondent's vulnerability," i.e., his medical situation, after it received the clean RTW note from Dr. Dantzler.

impose such a duty as proposed by Respondent requires at least one or the other of two conclusions, neither of which find support in the law. First, one must conclude that if large companies such as Appellant have medical doctors on staff, they have a duty to apply that medical knowledge and experience to the situation of individuals in circumstances similar to Respondent's, even if those circumstances are not known specifically by the doctors. Put into practical application, Respondent would be required to have Drs. Prible and Lina act as if they were treating clinicians for thousands of employees, when the record indisputably shows that individual treatment is simply not included within the scope of their responsibilities. The other possible conclusion would be that the knowledge and medical expertise of Drs. Prible and Lina is imputed to persons like Nurse Carroll-White or Mr. DeShazor. Again, this conclusion makes no sense under any circumstances.

Regardless of how Respondent's proposed new duty is framed, the result would be the same. Companies in Appellant's position would hereafter have a duty not to accept information received from treating physicians, to second-guess them, and to inquire further under the risk of an omniscient standard of care. There is simply no basis for such duties in the law.

II. The trial court erred in its jury instruction that a railroad's duty in providing a safe place to work increases as the employee's risk increases.

The trial court's decision as to a particular jury instruction must be disturbed on appeal where the trial court committed an abuse of its discretion, and a party is prejudiced. See, e.g., Hennes v. Shaw, 397 S.C. 391, 402, 725 S.E.2d 501, 507 (Ct. App. 2012). It is impossible to inform a jury that a duty increases as the risk of harm increases without the jury believing that it is the final arbiter in determining the scope of any such

duty. Respondent does not disagree that the determination of duty is a question of law for the Court. Respondent cites Urie v. Thompson, 337 U.S. 163, 179-180, 69 S.Ct. 1018, 1029 (1949) in support of the charge given by the trial court, but that case did not discuss a jury charge. Further, there is no language in Urie similar to what was charged regarding duty; there is only language addressing the separate issue of breach. "Ordinary care must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated from the neglect." Id. Even if there were language in Urie addressing the rationale behind a court's determination that a duty may increase in certain circumstances, the South Carolina Supreme Court has recognized that quotation of that type of rationale is not necessarily an appropriate jury charge:

> [L]anguage giving reasons for a decision is not always appropriate for use by a trial judge charging a jury. The charge here was inappropriate. It was not a recitation of the law as set forth in Springs; it was a recounting of the policy arguments and rationale of the Springs decision. This policy language, in the context of the Springs decision, is slanted against employers. As such, inclusion of this language in a jury charge was prejudicial and denied Business a fair trial.
>
> Gamble v. International Paper Realty Corp., 323 S.C. 367, 375 474 S.E.2d 438, 442 (1996).

A jury charge should not invite the jury into the trial judge's realm of determining whether there is a duty, the effect of increased risk and resulting increased duty. Respondent's reference to Dr. Prible's testimony (Resp. Br. P. 32) of what he learned after the fact about Respondent's medical condition seems to argue that the jury should have been allowed to determine the extent of any duty based on Dr. Prible's later acquired knowledge and opinion. Respondent is confusing concepts of breach with duty. The use of hindsight in assessing the extent of a duty works extreme prejudice where fundamental concepts of duty and breach are blurred.

III. There was insufficient evidence of an emergency known to Appellant invoking the duty to render aid prior to the P-28 arrival in Columbia.

The law requires Appellant to have knowledge of an emergency before there is a duty to render aid, and it is undisputed that the only two people who could have had knowledge (Respondent and Connelly) were not alleged to have acted improperly. Respondent's citation of Handy v. Union Pac. Ry. Co., 841 P.2d 1210, 1221 (Utah Ct. App.1992) reinforces that the employer's duty to render emergency aid can only arise if it has knowledge that such aid is necessary. In Handy, similar to the holding in Bell v. Norfolk Southern Ry. Co., 476 S.E.2d 3, 4 (Ga. Ct. App. 1996) (discussed in App. Br. at P. 25 – 26), the court held that:

> the question of whether or not an admitted or clearly established state of facts does, or does not, showed that a sick or injured employee is in such a serious condition as to cast upon the employer the duty of furnishing him prompt medical treatment, is one of law for the court's determination. Handy, 841 P.2d at 1221 .

The plaintiff in Handy lodged complaints about her condition to supervisory personnel, even while she exhibited obvious signs of distress. Like Respondent here, Handy remained communicative and her employer did not receive from her any request for emergency aid. Accordingly, despite the potential need for some medical aid as exhibited by Handy's obvious distress, as a matter of law there was no duty for the railroad to render aid. Here, Superintendent Stinson was only advised of a "worsening" condition. (T2 P. 689, Lines 18-20). He asked if there was an emergency and suggested the possibility of stopping the train for evacuating Respondent, but these options were declined by Connelly in favor of returning to Columbia. (T2 P. 662, Line 15 – P.663, Line 22; and P.751, Line 25 – P.752, Line 12). Considering that the complaining

employees in Handy and Bell complained directly to supervisory personnel (who were not exculpated like Connelly here), speculation about communication of Appellant's "worsening" condition alone does not impose a duty to render aid. Such speculation as a matter of law (for the court to determine) does not stand up against specific inquiries made as to the existence of an emergency.

The facts and holdings in both Bell and Handy lend to a similar result in the case at bar. Engineer Connelly said Respondent remained communicative and did not request medical help or a doctor as the rode the P-28 to Columbia. (T2 P.686, Line 11 – P.687, Line 14). This testimony was not refuted by Respondent. Even accepting as true that Respondent (at some unspecified point in time) told Engineer Connelly he needed EMS, both their accounts establish that Respondent was not helpless and was communicative. More importantly, as far as what Appellant should have known, it could have only been originated through Connelly, and he has been exculpated for any failure to identify the need for EMS. (T2 P. 957, Lines 8 – 13).

IV. There is no proof of delayed treatment in the trial record.

Respondent assumes that there was a difference in the timing of treatment and the results thereof, argues at length about the importance of any such difference, but points to no evidence in the record quantifying or otherwise establishing a delay in the first place. Respondent urges to this Court there should have been no delay, but there is no actual evidence in the record to determine what that delay was. In other words, there is no evidence of any difference in the timing or quality of treatment had the train stopped prior to reaching Columbia, as opposed to what actually transpired. Pain and suffering during the second incident cannot be logically or causally related to any so-called delay *if*

there is absolutely no evidence establishing any quantum of delay. With no such proof, the jury was left to speculate as to whether there was any delay at all. See Norton v. Norfolk Southern Ry. Co., 341 S.C. 165, 174, 533 S.E.2d 608, 613 (Ct. App. 2000) (speculation, conjecture and possibilities not sufficient under FELA), rev'd on other grounds; 350 S.C. 473, 567 S.E.2d 851 (2002) (13th juror rule improperly applied in FELA).

V. Dr. Lina's disqualification letter (P. Ex. 3) should not have been admitted, but if admissible, Dr. Lina should have been allowed to explain her opinions.

With regard to Respondent's proof of future lost wages, Appellant states that "Dr. Lina's disqualification is the only opinion that matters." (App. Br. P. 33). If Dr. Lina's rationale and explanation of her opinions (including medical disqualification from railroad work) were too speculative for admission into evidence, then her opinion that Respondent was disqualified (P. Ex. 3) should not have been allowed into evidence in the first place. She stated her belief and opinion that Respondent had an unexplained medical condition. Her rationale for the most probable scenario is proffered in her opinion given through deposition testimony:

> Coupled with my understanding of the conductor's job duties, I felt that this presentation on May 31st, from a clinical standpoint, simply didn't make sense, that in my opinion, it was not reasonably explained by the physical exertion or whether, and that it strongly suggested the presence of an underlying susceptibility to a recurrent episode of heat-related illness, in particular, rhabdomyolysis
>
> ....
>
> That it may be likely that Mr. Moorer may have an underlying medical condition to include genetic or inherited medical conditions.
>
> ...
>
> It's not speculation at all. It's my opinion.

Lina 9/30/2008 Depo. P. 46, Lines 2-20.

This explanation of why she disqualified Respondent was not allowed into evidence, even though Dr. Lina's opinion that Respondent was medically disqualified to return to work as a conductor was admitted. This was an abuse of discretion by the trial court that prejudiced Appellant. "When expert testimony is based upon facts sufficient to form the basis for an [admissible] opinion, the trier of fact determines its probative value." Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 127, 207, 662 S.E.2d 444, 450 (Ct. App. 2008). If Respondent wanted to use Dr. Lina's opinion that Respondent was medically unqualified to return to work after the second incident, Respondent should have been required to accept the rationale supplied by Dr. Lina in support of her opinions.[8] Instead, the trial court erred by keeping this explanation from the jury and Appellant was prejudiced because Dr. Lina's letter was Respondent's only evidence supporting future economic loss.

VI. Other Jury Charges

Appellant's Requested Charges No. 6 and 29 informed the jury of limitations on Appellant's duty in assigning work to Respondent. The rationales as to the lack of any duty to monitor have been discussed at Section I herein. To the extent that there was any question of fact, the court abused its discretion in not instructing the jury on these limitations. When considered in light of the trial court's incorrect charge on duty (see Section II, supra), the absence of appropriate limiting charges in connection with the negligent assignment claim (Appellant's Requests Nos. 6 or 29 (medical monitoring) and

[8] The common law rule of completeness has been incorporated into Rule 32(a)(4), SCRCP, and requires the reading of deposition portions "...which ought in fairness...be considered with the part introduced". Appellant requested that portions of Dr. Lina's depositions be introduced to explain her opinion that Respondent could not return to work, but the court refused.

No. 11 (rehabilitation services)) makes Appellant's point: the jury was put in the position of determining just how much Appellant's duty should increase under the circumstances based on hindsight. Accordingly, the trial court abused its discretion in refusing these charges and by relinquishing to the jury a matter of law reserved for the trial court.

Appellant's Requested Charge No. 11 informed the jury that there are limits on how it should consider evidence of rehabilitation services. Respondent does not address specifically any of the citations in Appellant's Brief (See P. 42 – 43). Surely, Respondent cannot believe any alleged shortcomings by Appellant in the provision of vocational services could be a basis for finding negligence. Nevertheless, Respondent seems to urge that Appellant got what it deserved by raising a failure to mitigate argument (Resp. Br. P. 35). It appears Respondent believes that an absence of case law citation in the Brief of Appellant on this point allows any and all inferences (improper or not) to be urged upon the jury during closing arguments. Appellant's Requested Charge 11 served to inform the jury of the appropriate limits under the circumstances following Respondent's argument, and it was an abuse of discretion not to charge it.

The jury was not instructed to take into account the effect of a rule violation as requested in Appellant's Charge No. 15. The fact that Respondent was never formally charged with such a violation and that the jury assigned 40% comparative fault does not detract from Appellant's position that such a violation was an appropriate consideration.

VII. The testimony regarding Respondent's handicapped son as construed by the trial court was probative of prejudicial inferences as a matter of law (T2 P. 131, Lines 12-15), and its admission constituted clear error.

Respondent never disagrees that the testimony was prejudicial, does not identify testimony concerning any foregone job opportunities, but suggests the prejudicial effect

is somehow ameliorated by the fact that counsel did "overplay our hand" with the jury. (Resp. Br. P. 36). Respondent is incorrect that a generic instruction that "an award may not be based on sympathy" is curative. If such a generic instruction were always sufficient, then there would be no reason to have Rule 403 of the South Carolina Rules of Civil Procedure. Ultimately, when the nature of testimony is itself in the nature of pandering or appealing to the sympathy of the jury, it is not necessary that counsel do the same in order for it to be unfairly prejudicial. State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991). Allowing the testimony was clear error, and all reference to the status of Respondent's handicapped child should have been excluded.

Conclusion

Respondent expressed his desire to return to work after he advised he had a health incident that started at home, after being cleared by his personal physician. Appellant had no duty to second guess Respondent's physician or to act any differently in its handling of Respondent's return to work after the first incident. Further, Respondent advised his illness would not prevent his travel to the train yard in Columbia, and Appellant's supervisory personnel thereafter did not have a duty to render aid based on a mere description of a "worsening" condition. Finally, the trial court made several decisions resulting in reversible error, including a jury charge that failed to set forth a definitive duty owed by Appellant, and the exclusion of testimony necessary to explain an opinion that Respondent could not return to work.

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Trumaine V. Moorer,	Respondent,
v.	
Norfolk Southern Railway Company,	Appellant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Appellant's Reply was served upon all counsel of record this 20th day of May 2013, via U.S. First Class Mail, postage pre-paid, and addressed as follows:

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