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 FINAL BRIEF

Paul F. Tecklenburg, Esquire
Rivers T. Jenkins, III, Esquire
P.O. Box 20667
Charleston, SC 29413
(843) 534-2628
Attorneys for Appellant

John A. Moss, Esquire
3575 Piedmont Road, NE, Ste. 1560
Atlanta, GA 30305
(404) 264-1292

John E. Parker, Esquire
P.O. Box 457
Hampton, SC 29924
(803) 943-2111
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court erred in denying Appellant Norfolk Southern's motions for Directed Verdict and Judgment Notwithstanding the Verdict on the Negligent Assignment cause of action (Count II), where there is no duty under the Federal Employers Liability Act requiring a railroad to manage an employee's medical treatment or rehabilitation, nor to call into question an unrestricted medical clearance or accommodate work limitations not imposed by the employee's treating physician, and where the Respondent's liability expert gave unreliable testimony contrary to established law and not more than a scintilla of evidence was presented to establish any such duty was breached?

2. Whether the trial court erred in denying Appellant Norfolk Southern's motions for Directed Verdict and Judgment Notwithstanding the Verdict as to the Prompt Aid cause of action (Count III), where Respondent failed to present more than a scintilla of evidence supporting his claim that Appellant Norfolk Southern was chargeable with notice of an emergency and additionally failed to present evidence of a causal connection between any delay and alleged additional injury or damage?

3. Whether the trial court erred in failing to direct a verdict as to Respondent's claim for future wage loss damages where no evidence was presented at trial demonstrating that Respondent's condition continues or could not be overcome?

4. Whether the trial court erred in admitting into evidence Dr. Lina's August 2, 2007 disqualification letter and subsequently compounded the error by denying Dr. Lina the opportunity to explain the opinions expressed therein?

5. Whether the trial court erred in instructing the jury to determine the extent of Appellant Norfolk Southern's duty to provide its employees with a reasonably safe workplace, as well as in refusing to charge the jury regarding the effect safety rules violations may have on the Respondent's contributory negligence, to refusing to charge the jury on limitations within the Appellant's duties to monitor an employee's medical condition, provide vocational rehabilitation services, and render aid, while also failing to limit prejudicial testimony in reference to Respondent's handicapped son whose condition was not germane to the matters at issue at trial?

STATEMENT OF THE CASE

This case arises out of events that occurred on and before May 31, 2007. Trumaine Moorer ("Respondent"), an employee of Norfolk Southern Railway Company ("Appellant" or "Norfolk Southern"), filed his Complaint on January 7, 2009 (R. p. 8), claiming liability pursuant to 45 U.S.C. § 51, the Federal Employers' Liability Act ("FELA"), based on a May 31 incident involving Respondent's dehydration, muscle cramping, hospitalization and diagnosis of rhabdomyolysis (R. pp. 6-11).

Respondent filed litigation in the Orangeburg County Court of Common Pleas, initially alleging three causes of action. The first was based on a May 9, 2007 incident (the "First Incident"), a claim eventually withdrawn by Respondent. (See July 12, 2010 Order by Honorable Edgar W. Dickson, R. p. 1). Respondent alleged in his Second Cause of Action for negligent assignment that Appellant knew Respondent was susceptible to heat related injury, Respondent was exposed to heat, subsequently triggering another such incident on May 31, 2007 (the "Second Incident"; R. pp. 9-10). Respondent alleged that Appellant did not take steps to provide additional manpower or a way to cool Respondent's body temperature, and failed to provide a reasonably safe place to work. Respondent's Third Cause of Action for failure to render prompt aid alleged that as the Second Incident occurred, Norfolk Southern's management personnel were aware of Respondent's condition, but failed to send emergency personnel to Orangeburg or stop the engine as it returned to Columbia, and thereby aggravated Respondent's injuries. Plaintiff sought damages incurred due to lost wages, medical expenses, pain and suffering, additional future medical expense, future loss of earnings and benefits (R. p.

10-11). Appellant generally denied these allegations and asserted affirmative defenses (R. p. 13-19).

Respondent moved to transfer the case from Orangeburg County to Richland County, a motion that was granted in Hon. Edgar Dickson's Order Transferring Venue, filed July 20, 2010. The case was tried before a jury in Richland County September 19 through September 23, 2011, with Honorable DeAndrea G. Benjamin presiding. The jury did not reach a verdict, and a mistrial was declared. (See Order, October 4, 2011 by Judge Benjamin, R. p. 2).

The case was tried for a second time in Richland County March 5 through March 9, 2012, again before Judge Benjamin. Immediately before picking the jury, the trial court denied Respondent's Motion to Transfer Venue based on the convenience of witnesses. At the close of Respondent's case, Appellant timely moved for directed verdict on all pending causes of action, based on liability, causation, and damages. (R. p. 622, line 22 – p. 631, line 11). Judge Benjamin denied Appellant's motion, and submitted the case to the jury (R. p. 631, line 12 - p. 632, line 18). The motion for directed verdict was renewed at the close of Appellant's case. (R. p. 1200, lines 15–22). The jury returned a verdict for the Respondent, finding $1,100,000 damages, but assigned 40% or comparative negligence to the Respondent and 60% to the Appellant (R. p. 3). The trial court granted a ten–day extension of time for Appellant to file JNOV and New Trial motions (R. p. 1299, lines 19–23), which were timely filed. (See Defendant's Motion for JNOV and Alternative Motion for New Trial, filed March 19, 2012, R. p. 1957). The trial court confirmed the verdict in a Form 4 Order filed March 19, 2012 (R. p. 3). The trial court denied Appellant's Motion for JNOV or New Trial with a Form 4

Order, filed March 29, 2012 (R. p. 4). Appellant filed its Motion to Amend Judgment on April 4, 2012 (R. p. 1975), which was granted in the trial court's Order dated May 9, 2012 (R. p. 5). Appellant timely served its Notice of Appeal on May 11, 2012 (R. p. 20).

STATEMENT OF FACTS

Respondent was 33 years old and a conductor for Norfolk Southern. A conductor works outside, doing a job that requires walking, setting hand brakes (a job made easier with a tool called a "brake stick"), tying air hoses, writing down car numbers and other paperwork. (R. p. 102, lines 2–16; p. 105, lines 12–22; p. 108, line 17 – p. 109, line 3; and p. 109, line 14 – p. 110, line 13). According to Michael McClanahan, who testified as Respondent's vocational expert, the typical tasks of a conductor are generally considered "light" as defined by the US Department of Labor; the only heavy task involve lifting a "knuckle." (R. p. 318, line 11 – p. 319, line 21). There is no evidence Respondent was involved in lifting knuckles in the days or hours prior to the First or Second Incidents.

After receiving extensive training in McDonough, Georgia during 2006, Respondent was given on–the–job training, working all jobs in Norfolk Southern's Charleston District, including the Train P28. (R. p. 214, line 11 – p. 215, line 5). Respondent was no stranger to the P28 Train, having previously worked on it for a full week in 2006 (R. p. 643, line 15 – p. 644, line 19), performing well, and appearing to absorb the training well according to his score sheets at the time. (R. p. 645, lines 6–14). New conductors are also are afforded the opportunity to take refresher training on

particular routes and jobs. (R. p. 647, line 18 – p. 648, line 8). Respondent completed his training on January 11, 2007, and was eligible based on his union seniority to "mark up" for an assigned or "extra board" job in the Charleston District. (R. p. 129, line 7 – p. 132, line 5; and p. 649, line 3 - P. 650, line 6). Respondent worked the P28 Train on March 13, 2007, prior to the First Incident. (R. p. 748, lines 5–24; and D. Ex. 3, R. p. 1367, 1374). Train P28 originates and terminates in Columbia, South Carolina, and serviced an average of just over four industries per day in or near Orangeburg, South Carolina in the five months prior to the Second Incident. (R. p. 718, line 13 – p. 719, line 21; and D. Ex 29, R. p. 1436, 1441). The typical crew assigned to Train P 28 includes one engineer and one conductor, and it was staffed in the same manner for over six of the seven years prior to Respondent's incidents. (R. p. 653, line 10 – p. 657, line 1; and D. Ex. 81, R. p. 1593).

On May 8, 2007, Respondent reported to work on Appellant's Train P28 and returned to his home in St. George, South Carolina, late in the evening. Respondent had cramps in his hands before leaving work on May 8, 2007 and "shook them off" without telling his co–workers or supervisors at that time. He did not remember eating meals during the day. (R. p. 225, lines 1–15; and p. 164, lines 10–17). Respondent's wife testified he had muscle cramping and sweated profusely the evening of May 8, 2007, and the early morning of May 9, 2007. (R. p. 609, line 22 – p. 620, line 16). In spite of the symptoms, Respondent elected to travel back to Columbia on May 9, 2007, arriving at 10:25 a.m. He did not report the muscle cramping and profuse sweating he experienced the night before to his co–workers or supervisors. (R. p. 77, lines 19–25). As he worked, the Respondent put on his rain gear (not supplied by Appellant), some of which he wore as he began feeling sick, whereupon he sat on the ground (R. p. 165, line 24 – p. 166, line

10; and p. 228, lines 5–13) and EMS personnel were called to the scene. (R. p. 166, line 24 – p. 167, line 8).

At the hospital, the Respondent, for the first time, told Norfolk Southern employees he had been sick the night before May 9, 2007, with the same symptoms, and his injury was not job related, which was later reduced to a written statement. (R. p. 169, lines 5–13; p. 231, lines 12–22; p. 701, line 15 – p. 703, line 1; and P. Ex. 2, R. p. 1310). Respondent confirmed no one at Norfolk Southern asked him to lie about the origin of his illness, and he voluntarily and unilaterally decided to give the statement. (R. p. 169, lines 5–13; p. 231, lines 12–22; p. 701, line 15 – p. 703, line 1; and P. Ex. 2, R. p. 1310). This account was consistent with what he told his supervisor, Trainmaster William Deshazor, whose conversation with Respondent was reflected in a Norfolk Southern report indicating lack of proper nutrition prior to the First Incident. (R. p. 701, line 15 – p. 703, line 1; and D. Ex. 11, R. p. 1390).

After discharge from the hospital for what appeared to be dehydration, the Respondent then followed up with his existing primary care physician, Dr. James H. Dantzler on May 17, 2007. (R. p. 483, line 8 – p. 484, line 9). Respondent saw Dr. Dantzler for clearance to return to work, which Dr. Dantzler provided to him. (R. p. 488, line 24 – p. 489, line 15). Dr. Dantzler gave the Respondent a note allowing him to return to work with no restrictions. (R. p. 490, line 6 – p. 491, line 7; and D. Ex. 66, R. p. 1522). Respondent's liability expert, Douglas Casa, testified well after the fact that Dr. Dantzler should have placed restrictions on the Respondent, and also should have required him to work either limited hours and/or be acclimatized back to the work setting. (R. p. 433, line 18 – p. 436, line 14).

Respondent met with his supervisor to provide the return–to–work note, and requested a work assignment as soon as possible. (R. p. 704, line 9 – p. 707, line 25). The return–to–work release was reviewed by Vickie Carroll–White, a registered nurse with Appellant's medical department, and she requested additional medical records from the Respondent, which she received on May 25, 2007. (R. p. 1174, line 18 – p. 1179, line 13; and D. Ex. 69, R. p. 1568). Based upon the records, representations about Dr. Dantzler's records from the Respondent (R. p. 1179, line 14 – p. 1181, line 25), and the unrestricted return to work note from Dr. Dantzler, Nurse White concluded it was appropriate for Moorer to return to his duties if he desired to do so.[1] (R. p. 1182, line 17 – p. 1184, line 5; and p. 1184, line 12 – p. 1185, line 9).

After the First Incident, the Respondent felt ready to return to work, which he did on May 30, 2007. (R. p. 168, lines 13–20; and p. 233, lines 6–17). He did so without objection from his wife, who thought doing so was a matter of common sense. (R. p.610, Lines 20–23; and p. 617, lines 2–24). Even though Respondent had previously requested from a supervisor and received an extra man to enhance his prior training (i.e., a brakeman) months prior on a different work assignment (R. p. 220, line 25 – p. 221, line 7), Respondent made no such request on May 9, May 30 or May 31, 2007. (R. p. 227,

---

[1] Eventually *after* the Second Incident on May 31, 2007, Nurse Carroll–White received more specific notes from Dr. Dantzler indicating that, upon Respondent's release on May 17, 2007, Dr. Dantzler noted that Respondent should consume water and take breaks, in addition to avoiding alcohol and caffeine. The *Safety and General Conduct Rules* of Norfolk Southern encourage the consumption of water and the performance of work at the employee's own pace (R. p. 1362). Nurse White states Dr. Dantzler's recommendation of consuming water and taking breaks was consistent with Norfolk Southern's existing work practices, and therefore would not change her decision to allow Moorer's return to work after the First Incident. (R. p. 1186, line 6 – p. 1191, line 17).

lines 2–4; p. 698, lines 2–15; and p. 749, lines 2–7). Respondent finished his work on the P28 Train on May 30, 2007, apparently without incident and under relatively light work conditions. Engineer Tommy Connelly testified that as far as the number of cars pulled from and placed with customers that day, it was a "fantastic day." (R. p. 768, line 2 – p. 770, line 1).

The next day, May 31, 2007, again working on the P28 Train, Respondent called Mr. Deshazor at 2:26 p.m. and stated that he was not feeling well, but Respondent did not express any urgency or give any indication he needed immediate medical attention. (R. p. 710, line 11 – p. 712, line 4). Mr. Deshazor would have done what was necessary to arrange medical assistance, but he relied on Respondent's request simply to return to Columbia on the train. (R. p. 710, line 11 – p. 712, line 4). No testimony was presented at trial as to what "illness" the Respondent described during this conversation. Respondent said that he was going to put the train back together then ride back to Columbia. By his own admission, Respondent does not fault Appellant's employees for his decision to return to Columbia at 2:26 p.m. (R. p. 171, line 10 – p. 172, line 18; and p. 234, line 9 – p. 235, line 4). After the call from Respondent, Trainmaster Deshazor called his supervisor, Superintendent David Stinson, telling him that Respondent was not feeling well and informing Stinson that the P28 would be returning directly to Columbia. (R. p. 713, lines 3–13).

A track authority[2] was received on the P28 Train at 2:28 p.m. to proceed from SC 76 in Rowesville to SC 104 near Columbia. (R. p. 749, line 8 – p. 751, line 9). Engineer Connelly called Trainmaster Deshazor at 2:58 p.m. to inform him the Respondent was feeling worse. (R. p. 714, line 9 – p. 715, line 19; and p. 738, lines 11–23). Again, no testimony was presented that there was any communication of the type of "illness" Respondent had or to define "worse". (R. p. 714, line 9 – p. 715, line 19; and p. 738, lines 11–23). Trainmaster Deshazor specifically asked Engineer Connelly if it was necessary to remove Respondent from the train and Mr. Connelly declined, saying that they were heading to Columbia. (R. p. 740, line 25 – p. 741, line 16). Superintendent Stinson recalled that Trainmaster Deshazor requested him to meet the train when it arrived back in Columbia. Mr. Stinson agreed, and asked if it was an emergency. He learned there had only been a request for someone to meet the train back at the Andrews Yard office (in Columbia) because Respondent was not feeling well. (R. p. 832, line 6 – p. 833, line 6).

Engineer Connelly called Superintendent Stinson at 3:21 p.m., and Mr. Stinson asked him if the train needed to be stopped, but Mr. Connelly told him the train would get to Andrews Yard shortly running at a track speed of 49 mph. (R. p. 774, line 11 – p. 777, line 22). As with Trainmaster Deshazor during his telephone call with Superintendent Stinson, Engineer Connelly did not request emergency personnel and did not describe any particular illness. (R. p. 834, line 21 – p. 835, line 15; and p. 835, line 25 – p. 836, line 17). An emergency call to 9–1–1 was made at 3:56 p.m. (See D. Ex. 72, R. p. 1580) after the train arrived at Andrews Yard, where Mr. Stinson awaited its arrival. (R. p. 176,

---

[2] "Track authority" or a "track warrant" is permission (from a dispatcher) for a train to occupy a certain section of mainline track. (R. p. 762, lines 17–22).

line 2 – p. 177, line 22). The fire department arrived at Andrews Yard at 4:02 p.m., followed by the EMS. (R. p. 123, line 12 – p. 124, line 13). Respondent went to Palmetto Health Baptist Hospital where he was diagnosed with rhabdomyolysis. (D. Ex. 73, R. p. 1582). The hospital follow–up note indicates that it was "unusual" to have two episodes of rhabdomyolysis in such a short time period. (D. Ex. 75, R. p. 1585).

Many weeks after the Second Incident, Dr. Paula Lina of the Appellant's medical department became aware of the Second Incident and she reviewed the medical records from both Respondent's First and Second Incidents. (R. p. 992, line 11 – p. 993, line 9; p. 1001, line 24 – p. 1005, line 1; and R. p. 1186, line 6 – p. 1191, line 17). Based upon her review of the medical literature applicable to heat illnesses, the recurrent nature of the Respondent's problem, the light exertion level of conductor activities, and the moderate temperature and humidity on the days in question, she explained her conclusion that Respondent had unexplained recurrent rhabdomyolysis due to an underlying susceptibility to heat illness—but this testimony was not allowed to be heard by the jury due to the trial court's rulings. (R. p. 35, line 6 – p. 43, line 23; and R. p. 809, line 9 – p. 813, line 24 ruling on: Lina 9/30/2008 Depo., P. 45, Line 2 - P. 49, Line 17 (R. pp. 1005, 1006, and 1036-1038). Nevertheless, Dr. Lina's opinion that Respondent was not qualified to return to work (also not fully explained to the jury as a result of the trial court's rulings) was provided in her August 2, 2007 correspondence to Respondent. (P. Ex 3, R. p. 1311). At trial, Appellant Norfolk Southern proffered Dr. Lina's testimony that she was willing to reconsider her disqualification if additional medical evidence were presented by the Respondent, but this testimony was disallowed by the trial court as well.

(R. p. 819, line 17 – p. 821, line 2 ruling on: Lina 9/30/2008 Depo R. p. 1039, lines 16–25).

Respondent's liability expert on heat injuries, Douglas Casa, claimed over Appellant's objections (preserved from the first trial, Ct. Ex. 1, R. pp. 1994-2021) that Appellant's medical department had a duty prior to Respondent's Second Incident to not accept Dr. Dantzler's unrestricted work release issued before the Second Incident. (R. p. 433, , line 18 – p. 436, line 4; and p. 436, line 10 – p. 441, line 2). He testified that Appellant should have restricted Respondent to limited work hours and/or seen to it that he was "acclimatized" into the work setting despite Dr. Dantzler's clean return to work release, again *prior* to the Second Incident. (R. p. 433, line 18 – p. 436, line 4; and p. 436, line 10 – p. 441, line 2). On the other hand, Casa also opined in his deposition that heat chamber tests and other medical procedures could be undertaken to determine if Respondent could return to work as a conductor, but the trial court did not permit Appellant Norfolk Southern to present that testimony. (R. p. 807, Line 6 – p. 809, line 6 ruling on: Casa 2/5/2010 Depo., R. p. 1163, line 18 – p. 1164, line 13; and p. 1165, line 24 – p. 1167, line 1).

ARGUMENT

I. The Trial Court Erred In Not Directing a Verdict on The Negligent Assignment Cause Of Action (Count II), As There Is No Duty Under the FELA Requiring A Railroad To Manage An Employee's Medical Treatment Or Rehabilitation, To Second Guess An Unrestricted Medical Clearance or To Accommodate Work Limitations Not Imposed by the Treating Physician.

A. The FELA requires proof of the traditional common law elements of a negligence case, including duty and breach, and Respondent failed to show a scintilla of evidence that Appellant had a duty to apply work restrictions when none were placed by Respondent's physician.

As an initial matter, the court must determine, as a matter of law, whether the law even recognizes a particular duty. Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999); see also Rogers v. Atlantic Coast Line R.R. Co., 222 S.C. 66, 72, 71 S.E.2d 585, 587 (1952) ("Negligence being a mixed question of law and fact, it is the court's duty to define negligence . . . ."). Generally speaking, a railroad company may be negligent for requiring its employee to perform work beyond his physical capacity where the railroad knew or should have known that the employee possessed a diminished work capacity. Fogg v. Nat'l R.R. Passenger Corp., 585 A.2d 786, 789 (D.C. 1991). But, this duty is not unlimited—the "FELA is not a workers' compensation scheme and does not make an employer the insurer of the safety of his employees while they are on duty." Montgomery v. CSX Transp., Inc., 376 S.C. 37, 49, 656 S.E.2d 20, 25 (2008) (quoting Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 543 (1994)) (internal quotation marks omitted).

The general standard of proof in a FELA claim requires that a plaintiff, such as Respondent, prove the traditional common law elements of negligence: duty, breach, causation and damages. See Brown v. CSX Transp., Inc., 18 F.3d 245, 248–250 (4th Cir. 1994); Montgomery, 376 S.C. at 52. A showing of reasonable foreseeability of harm is also essential to a FELA claim. Rogers v. Norfolk Southern Corp., 356 S.C. 85, 93, 588 S.E.2d 87, 91 (2003) ("[FELA] does not require that employers be omniscient, only that they exercise reasonable care."). Additionally, the relaxed standard of proof for FELA claims only applies to the element of causation. Montgomery, 376 S.C. at 52.

It follows then that a railroad company does not have a duty to second guess an employee's personal treating physician. This is particularly true when, following an event requiring medical treatment, the railroad company did not hire the physician who treated the employee. Respondent's own personal physician provided him with a work release with no restrictions noted. Undoubtedly, there are situations where a railroad company is liable for improperly handling an employee's return to work under other circumstances, most notably when the railroad either ignores restrictions given by a medical professional or is charged with notice by virtue of its own agent/doctor being hired to treat an employee (discussed infra at §IA.1–2.). However, this is not such a case and there is no basis for finding that Appellant had such a duty.

1. No work restrictions were ever imposed or were known to Appellant before the Second Incident occurred.

Respondent admitted through his counsel's opening statement that, prior to the Second Incident, Appellant was not on notice of any work limitations generated by his private physician. Any such limitations were in the notes of Respondent's physician, and did not accompany the otherwise clean return to work slip Respondent provided to Appellant. (R. p. 61, lines 9–17; and R. p. 1186, line 6 – p. 1191, line 17; and compare D. Ex 66 and D. Ex. 68 (R. p. 1522 and 1563) with D. Ex. 88 (R. p. 1714).

When an employee comes back to work with a return–to–work slip from his personal physician with restrictions, the railroad must not ignore those restrictions. See, e.g., Rivera v. Union Pac. R.R. Co., 378 F.3d 502, 508 (5th Cir. 2004) (holding the employer–railroad liable where employee's supervisor assigned employee to a task which "exceeded his physical capabilities" despite supervisor's knowledge of employee's note

from chiropractor imposing a fifteen pound lifting restriction); Fogg, 585 A.2d at 789 (affirming lower court's judgment in favor of Plaintiff–employee where employer allowed employee to continue working despite knowledge of her previous injuries as indicated by a note from her doctor). Conversely, if no such restrictions are made known to the railroad, the railroad is not chargeable with notice of those limitations, no duty to follow them arises, and consequently no breach can be established. See e.g. Rogers v. Norfolk Southern, 356 S.C. at 94 (affirming the Court of Appeals' ruling that Norfolk Southern was not chargeable with notice of a problem at a site prior to arrival of the person capable of learning of the problem).

The evidence developed during trial established that Appellant lacked notice that Respondent was medically limited in his ability to work or needed accommodation to that end. After Respondent was released from the hospital following the First Incident, he followed up with his primary care physician, Dr. Dantzler, who then provided Respondent with medical clearance to return to work. Appellant requested additional information (including hospital records) and Respondent provided them, but Respondent was not requested by Appellant to see any other physician. (R. p. 170, line 24 – p. 171, line 2). Respondent eventually returned to work on May 30, 2007. (R. p. 167, line 13 – p. 168, line 18).

Respondent provided his supervisor, Trainmaster Deshazor, with Dr. Dantzler's note medically clearing Respondent to return to work. (R. p. 704, line 9 – p. 706, line 21; D. Ex. 66, R. p. 1522; and D. Ex. 68, R. p. 1563). Mr. Deshazor noticed the return to work authorization provided by Respondent contained absolutely no work restrictions and he subsequently forwarded the RTW note to the Appellant's medical department. (R.

p. 704, line 9 – p. 706, line 21; D. Ex. 66, R. p. 1522; and D. Ex. 68, R. p. 1563). Upon reviewing the paperwork forwarded by Mr. Deshazor, Nurse White realized Respondent had been treated in the hospital prior to Dr. Dantzler clearing him to return to work; when Nurse White became aware of this, she requested additional records from Respondent's follow–up visit with Dr. Dantzler. (R. p. 1174, line 18 – p. 1179, line 13; and D. Ex. 68, R. p. 1563).

After making a good–faith effort to determine the existence of a report from Respondent's May 17th visit with Dr. Dantzler, Nurse White was told by Respondent (incorrectly, it turns out; see Statement of Facts, fn. 1 supra.) no such report existed. (R. p. 1179, line 14 – p. 1181, line 25). Nurse White then reviewed the additional hospital records (D. Ex. 69, R. p. 1568) and determined Respondent had been released with the perception his was condition resolved. (R. p. 1182, line 17 – p. 1183, line 5). Nurse White was comfortable in authorizing Respondent to return to work, because (1) the Respondent's personal treatment records indicated his condition was stable and under control, and (2) his return to work records as provided by his personal physician, Dr. Dantzler, contained no restrictions. (R. p. 1184, line 12 – p. 1185, line 9). None of Appellant's doctors were involved in reviewing paperwork. (Id.).

It was not until August 1, 2007—well after Respondent's Second Incident, which is the subject of this lawsuit—that Nurse White finally received the previously requested May 17th report from Dr. Dantzler's office. (see Statement of Facts, fn. 1 supra.) Ultimately, the report provided no meaningful additional information about Respondent's condition that could have prevented the Second Incident; it is only contained common sense recommendations, such as avoiding caffeine and alcohol, taking frequent breaks

and maintaining hydration in order to better cope with the heat. Therefore, even if common sense could be fairly considered a medically imposed work limitation, it is consistent with Appellant's guidance and rules applicable to any employee activity or task. (R. p. 1186, line 6 – p. 1191, line 17; and D. Ex. 2, R. p. 1362).

"The law does not require that employers be omniscient, only that they exercise reasonable care." Rogers v. Norfolk Southern, 356 S.C. at 94. Accordingly, there was no evidence, and certainly not more than a scintilla of evidence, suggesting that Appellant received notice of work limitations and a potential need, at that time, to arrange for accommodation or acclimatization of Respondent. "Norfolk Southern had a duty to provide its employees with a safe workplace. Nevertheless, the employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances . . . ." Id.

As a result, there was no evidence suggesting that Appellant had any duty to impose work limitations on Respondent. There was no such duty because Appellant was not on notice as to any diminished capacity in Respondent's physical capabilities, and, more importantly, even if there was any such notice, the so–called "limitations" set forth by Dr. Dantzler were not limitations at all, given the work environment and the congruence of the "limitations" with the existing work rules and guidance already set forth by the Appellant.

2. Appellant did not expand its duty to Respondent by treating or providing medical advice to Respondent.

A railroad may expand its otherwise limited duty to an employee where it retains a physician to conduct a physical examination or treatment on an employee. Isgett v.

Seaboard Coastline R.R. Co., 332 F. Supp. 1127, 1142–1143 (D.S.C. 1971) (holding employer–railroad liable where it retained a physician to conduct a physical on employee and the physician ignored employee's diabetic condition directly affecting his ability to walk); Fletcher v. Union Pac. R.R. Co., 621 F.2d 902, 909 (8th Cir. 1980) ("Generally, a railroad has no duty to ascertain whether an employee is physically fit for his job, but if it undertakes to give physical examinations, it is liable if it performs such undertaking negligently."). For a railroad to be liable under this category there must be evidence that the railroad either hired the physician or had reason to believe the physician was not reasonably competent. See Fletcher, 621 F.2d at 909–10.

In Fulk v. Illinois Central Railroad Co., 22 F.3d 120 (7th Cir. 1994), a plaintiff argued a railroad–employer was liable where its medical department failed to monitor an employee's hypertension. In rejecting the notion that a railroad has a duty to ascertain whether an employee is physically fit for his job, the court held that "requiring an employer to oversee an employee's compliance with doctors' orders is too paternalistic a mandate for a court to impose, even under the liberal strictures of the FELA." Id. at 125. The court affirmed the directed verdict of the trial court on the basis that a doctor employed by the railroad does not have an obligation for continued examination of its employees, or to perform physicals of its employees.

Nurse White described her limited role in the matter following Respondent's First Incident. She and others in her department may request and review medical records after a previously injured employee receives authorization to return to work from his doctor, but neither she nor anyone in her department provides treatment. (R. p. 1171, line 5 – p. 1172, line 10). Appellant's medical department is not a treatment clinic, but instead

functions only as an administrative office. (R. p. 1171, lines 14–20). Accordingly, the medical department personnel did not form a doctor–patient relationship with the Respondent or other employees. (R. p. 1169, line 20 – p. 1172, Line 10). Appellant did not get involved in Respondent's course of treatment; this was confirmed by the Respondent's testimony at trial, when he stated that Appellant did not request him to see any other specialist or physician. (R. p. 170, line 24 – p. 171, line 2). Additionally, Respondent's counsel admitted further that a staff doctor with Appellant's medical department, Dr. Paula Lina, was not involved in the decision to allow the Respondent to come back to work prior to his Second Incident. (R. p. 61, lines 18–24; and Lina 9/30/2008 Depo, R. p. 1001, line 24 – p. 1005, line 1.).

Appellant timely moved for a directed verdict at the close of Respondent's case based on the lack of duty to manage or monitor the Respondent's medical situation or to provide medical advice or any breach thereof, but the motion was denied. (R. p. 622, line 4 – p. 626, line 24; p. 628, lines 10 – 25; and p. 631, line 12 – p. 632, line 18). As more than a scintilla of evidence is required to affirm a trial court's denial of a directed verdict motion, and no evidence was proffered to support a finding of a duty, the trial court's denial of Appellant's motion should be reversed.

B. Douglas Casa's unreliable and inadmissible opinions were contrary to FELA law governing duties of railroads, and not sufficient to establish Norfolk Southern had a duty that was breached.

1. Unreliable expert testimony is inadmissible, and Casa's testimony should have been excluded in toto pursuant to Watson v. Ford Motor Co.

Appellant filed its Memorandum in Support of its Motion *In Limine* to Exclude Testimony of Respondent's Expert, Douglas J. Casa, on September 19, 2011, which was

adopted again by reference in a later motion filed March 5, 2012.[3] In Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010), the Supreme Court of South Carolina held that the foundational requirements of qualification and reliability of every expert must be assessed by the trial court. The *voir dire* and testimony of Douglas Casa revealed he was not familiar enough with Respondent's medical history (including whether specific tests have been performed) to testify reliably about the relation between Respondent's heat incidents and his workplace stresses. (Casa 6/21/2010 Depo, R. p. 387, line 19 – p. 393, line 4). As a result of his lack of meaningful experience in private industry, Douglas Casa was unaware of any private industry that had adopted the recommendations he espoused. (Casa 6/21/2010 Depo, R. p. 387, line 19 – p. 388, line 10; and p. 389, line 13 – p. 392, line 10). More importantly, the standards he adopted for athletes and military service personnel were simply unreliable because he offered no testimony comparing the duties of a railroad conductor in the workplace to a highly active athlete and *voir dire* revealed that he was in fact not in a position to do so. (Casa 6/21/2010 Depo, R. p. 387, line 19 – p. 388, line 10; and p. 389, line 13 – p. 392, line 10). These points were argued unsuccessfully to the trial court during a motion *in limine* in the first trial. (Ct. Ex. 1, R. p. 1994, line 4 – p. 2005, line 15).

Although the trial court struck one of many portions of Douglas Casa's testimony that attempted to render opinions as to policies Appellant's management should have had in place, numerous other impermissible opinions of Douglas Casa remained in the record for the Second Trial. (R. p. 373, line 17 – p. 374, line 6 ruling on: Casa 6/21/2010 Depo.,

---

[3] For the sake of brevity, Appellant adopts its prior motions in limine and arguments made to the trial court (R. p. 90-93, 1858, 1890, 1993-2007).

R. p. 405, line 14 – p. 406, line 4). Specifically, the trial court noted in the first trial that Douglas Casa had created policy guidelines to help organizations manage people working in hot environments, but the court chose to ignore that all of these organizations fell into one of two categories: sports medicine organizations or military units. (Id. and Ct. Ex. 1, R. p. 2006, line 9 – p. 2007, line 17 ruling on: Casa 6/21/2010 Depo., R. p. 385, line 7 – p. 386, line 23). These rulings were adopted at the Second Trial. (R. p. 90, line 13 – p. 93, line 20).

The thrust of Douglas Casa's remaining testimony was that railroad companies should have strategies or policies in place to acclimatize anyone returning to work after a heat related incident; ultimately, he suggested that Appellant should have implemented a plan to accommodate Respondent with a reduced workday, medical monitoring, and air-conditioning. (R. p. 362, line 10 – p. 365, line 24 ruling on: Casa 6/21/2010 Depo., R. p. 405, line 14 – p. 407, line 7; R. p. 370, line 24 – p. 373, line 6 ruling on: Casa 6/21/2010 Depo., R. p. 407, line 8 – p. 408, line 2; and R. p. 365, line 25 – p. 370, line 23 ruling on: Casa 6/21/2010 Depo., R. p. 417, lines 11–17).

During the first trial, Appellant took exception to Douglas Casa's testimony arguing that such duties were not implicated under the circumstances of the present case, but the trial court overruled the objections. (Ct. Ex. 1, R. p. 2008, line 21 – p. 2021, line 20). Grounded in the principles espoused in Watson, these arguments were repeated in similar fashion at the second trial—with additional portions of Douglas Casa's testimony specified as unreliable and running contrary to any established duty (Casa 6/21/2010 Depo., R. p. 407, line 8 – p. 408, line 2; p. 418, lines 8–11; and p. 449, lines 6–24), but the court again erroneously overruled the objections. (R. p. 90, line 13 – p. 93, line 20).

The trial court had already indicated it would adopt its prior rulings that Douglas Casa's opinion simply went to the weight of the evidence. (R. p. 91, lines 3–5 and lines 14–18; and p. 93, lines 14–18).

2. Douglas Casa's opinions were contrary to established labor law and the FELA and should have been excluded.

Douglas Casa's suggestion of something less than a full–time unrestricted return to work, requiring part–time work in order to "acclimatize" the respondent, stood in contrast to Appellant's seniority system. This system is built into Appellant's collective bargaining agreement, according to the unrebutted testimony provided by Superintendent Stinson. (R. p. 1150, line 24 – p. 1152, line 10). Cf. Eckles v. Consol. Rail Corp., 94 F.3d 1041 (7th Cir.1996) (holding that employer is not required to accommodate a disabled employee under ADA where doing so would upset seniority system under collective bargaining agreement), cert. denied, 520 U.S. 1146 (1997). The trial court rejected arguments to exclude portions of Douglas Casa's testimony as containing opinions violative of the collective bargaining agreement. (R. p. 362, line 12 – p. 365, line 16).

Aside from Dr. Casa's lack of qualifications to testify reliably regarding industrial duties of care (that would be violative of a collective–bargaining agreement), his testimony regarding what Appellant should have done in order to accommodate and manage Respondent's situation upon return to work was also contrary to established FELA law. See Fulk, 22 F.3d at 124–25; Fletcher, 621 F.2d at 909 (holding that a railroad may breach its duty where it ignores employee's medical limitations received from the railroad's doctor). He testified that when Respondent returned to work,

Appellant needed to schedule a specific type of "consultation" with him; Casa's rationale was that such a session should not be performed by supervisory personnel such as Trainmaster Deshazor, but instead by a person with medical training or experience. (Casa 6/21/2010 Depo., R. p. 417, lines 11–17). The discussion Casa was referring to was the instance where Deshazor visited with Respondent during his first day back on May 30, 2007. Deshazor was not aware of any problems for Respondent on May 30, 2007. Indeed, Deshazor visited Respondent while he was working on the P28 train and learned that Respondent felt fine and was keeping up with hydrating appropriately. (R. p. 706, line 22 – p. 707, line 25; and p. 709, lines 13–25). Regardless of whether Dr. Casa's testimony was directed at Appellant's management, medical department, lack of medical monitoring or lack of policies (Casa 6/21/2010 Depo., R. p. 407, line 8 – p. 408, line 2; p. 409, lines 8–11; and p. 449, lines 6–24), the testimony was contrary to established law. See Fulk, 22 F.3d at 124–125.

An expert cannot properly testify to a jury with opinions that are contrary to law. See Andrews v. Metro N. Commuter R.R. Co., 882 F.2d 705, 707–09, 710 (2d Cir. 1989) ("Instead of forming an opinion based on . . . well–settled rules of law, [the expert] made his own law."), cited with approval by Dixon v. CSX Transp., Inc., 990 F.2d 1440, 1453 (4th Cir. 1993). Dr. Casa made his own law here, and without his testimony, there was not even a scintilla of evidence suggesting how Appellant was chargeable with any duty to manage Respondent's return as suggested by Dr. Casa.

C. The trial court erred in denying Appellant's motion for directed verdict and JNOV on the Negligent Assignment Cause of Action, as there were no facts sufficient to give rise to a duty to add manpower or a duty for a railroad to monitor and second guess medical treatment.

1. **The standard in FELA cases, as provided by federal law, requires more than a scintilla of evidence for the nonmoving party to survive both a motion for directed verdict and JNOV.**

South Carolina has adopted federal law for a State court presiding over a FELA action when deciding a motion for Judgment Notwithstanding the Verdict (JNOV). In Rogers v. Norfolk Southern, the South Carolina Supreme Court held:

> [T]he evidence and all reasonable inferences from it are assessed in the light most favorable to the non–moving party . . . and the credibility of all evidence favoring the non–moving party is assumed. . . . Assessed in this way, the evidence must then be of such quality and weight that reasonable and fair–minded men in the exercise of impartial judgment could reasonably return a verdict for the non–moving party. . . . [A] mere scintilla of evidence is not sufficient to withstand the challenge.

Rogers v. Norfolk Southern, 356 S.C. at 91–92 (internal quotation marks omitted) (citing Crinkley v. Holiday Inns, 844 F.2d 156, 160 (4th Cir. 1988).

Setting a higher burden than that which is required in South Carolina state courts, the federal standard in FELA cases mandates that "before the case may be properly left to the jury there must be more than a scintilla of evidence establishing defendant's liability." Id. at 91 (citing Brady v. Southern Ry. Co., 320 U.S. 476, 479 (1943) ("The weight of the evidence under the [FELA] must be more than a scintilla before the case may be properly left to the discretion of the trier of fact . . . ."). "When reviewing the denial of a motion for directed verdict or JNOV, this Court applies the same standard as the trial court." Fettler v. Gentner, 396 S.C. 461, 466, 722 S.E.2d 26, 29 (Ct. App. 2012) (emphasis added) (citations omitted). Reading Rogers v. Norfolk Southern and Fettler in unison yields the result that an appellate court should reverse the trial court's ruling where there was only a scintilla of evidence—not *more* than a scintilla, as the federal standard requires—to support the ruling or when the ruling is controlled by an error of law.

2. At trial, there was no showing of inadequate manpower at the time of Respondent's Second Incident

There was no testimony to the effect that it was dangerous for Train P28 to be manned with only an engineer and a single conductor. Additionally, it is important to note that the job position of conductor is self–paced, allowing the employee to take breaks as needed. Appellant's Conductor William Chavis confirmed that Respondent's P28 train had seven cars on May 31, 2007 and that Chavis previously worked the same job with as many as 25 cars without incident or heat injury. (R. p. 143, lines 10–21; and p. 147, lines 12–18). Conductor Chavis described the work on the P28 on May 31, 2007 as "a light day." (R. p. 147, lines 4–11). This was confirmed by Trainmaster Deshazor, based on a comparison to the relative amounts of work done on the P28 in the five months prior to May 31, 2007 (R. p. 718, line 21 – p. 719, line 19; and D. Ex. 029, R. p. 1436). In fact, for over six (6) of the seven (7) years prior to Respondent's Second Incident, the P28 had been worked with one conductor. Additionally, Appellant's Conductor Jay Norwood took over the P28 job the day after May 31, 2007, and while he confirmed that the job is hot and tough (R. p. 282, line 17 – p. 284, line 3), he never characterized it in terms that could support a finding of negligence on the part of Norfolk Southern for assigning only one conductor. (R. p. 284, line 25 – p. 285, line 25). Indeed, Norwood confirmed that he was able to work P28 safely as a single conductor with an engineer as part of a two–man crew. (R. p. 295, lines 16–20).

Courts recognize that "job–related stress is a genuine problem of modern day life." Moody v. Boston & Maine Corp., 921 F.2d 1, 4 (1st Cir. 1990) (involving death of railroad employee from a heart attack after increased hours and calls for work during off

hours). However, job–related stress is simply not the type of problem intended to be dealt with by the FELA. Id.; see also Capriotti v. Consol. Rail Corp., 878 F. Supp. 429 (N.D.N.Y. 1995) (holding that employee who suffered heart attack after having more responsibility, more hours, and more erratic schedules did not have actionable FELA claim where he merely complained of too much work). The fact that a job may be easier with more workers does not constitute negligence. Montgomery, 376 S.C. at 55 (quoting McKennon v. CSX Transp., Inc., 897 F. Supp. 1024 (M.D. Tenn.), aff'd, 56 F.3d 64 (6th Cir. 1995)).

3. The trial court erred in denying Appellant's directed verdict and JNOV motions based on the standard under the FELA, and there are policy implications to the trial court's error.

As discussed throughout Section I of this brief, there was not more than a scintilla of evidence presented at trial to establish the existence of a duty or breach thereof. For that reason, the trial court's denial of the directed verdict motion or JNOV must be reversed. In addition, allowing the jury's verdict to stand would have serious policy implications for employers.

Companies and employers regularly rely on return to work notes received from physicians treating their employees. Additionally, companies like Norfolk Southern should not be penalized with additional duties at law simply because they have a medical department. If the reward for having such a department is to shoulder duties not heretofore recognized by the law, as if non–treating staff doctors and nurses were treating clinicians, the liability risk of such a safety venture may be too high to justify.

II. The Trial Court Erred in Refusing to Grant Appellant's Motion for Directed Verdict and JNOV as to the Cause of Action for Prompt Aid (Count III) as There Was No Showing Appellant Was Chargeable with Notice of an Emergency and No Showing Any Delay Caused Additional Injury or Damage.

A. There is not more than a scintilla of evidence Appellant was chargeable with notice of an emergency prior to when EMS was called.

Analysis of whether an employee's condition is so dire as to trigger an employer's duty to render aid is a question of law. Bell v. Norfolk Southern Ry. Co., 476 S.E.2d 3, 4 (Ga. Ct. App. 1996). An employer has a duty under the FELA to render medical assistance "when an employee, to the employer's knowledge, becomes so seriously ill while at work as to render him helpless to obtain medical aid or assistance for himself." Id. at 3. To trigger the duty, "the employee must show that his condition is such that he is in immediate danger of loss of life or of great bodily harm." Id. If the employee is not debilitated, and even if (in hindsight) medical aid might be appropriate, so long as railroad supervisory personnel acted reasonably in response to uncontradicted representations concerning the need for aid, there is no issue of fact for the jury. Id. at 5. Bell is consistent with the teaching of the South Carolina Supreme Court that a defendant is not subject to the duty, and therefore cannot breach it, if the defendant–employer has no knowledge of circumstances giving rise to that duty. Rogers v. Norfolk Southern, 356 S.C. at 94 (holding trial court committed error in denying Norfolk Southern's motion for directed verdict where Norfolk Southern was not chargeable with knowledge of the condition which brought about the employee's injury).

1. **Respondent conceded through his counsel he was not attempting to establish liability through any actions of Engineer Tommy Connelly.**

Respondent's counsel urged the jury not to blame "Tommy Connelly for not identifying and calling EMS." Specifically, Respondent's counsel stated to the jury:

> It didn't become an emergency after the train stopped in the yard. I think that is probably fair. This had been an emergency for some time. I'm not blaming Tommy Connelly for not identifying and calling EMS. I'm blaming Norfolk Southern for not communicating with itself.

(R. p. 1216, lines 8–13) (emphasis added).

Counsel exculpated Tommy Connelly individually, and consequentially Appellant, for any failure to identify the need for emergency services or to call EMS before the locomotive arrived in Columbia. A corporation such as Appellant can only be liable for negligence due to acts or omissions of its employees—a bedrock principle well known to Respondent's experienced counsel. FELA cases are subject to the common-law rule of *respondeat superior*. Sobieski v. Ispat Island, Inc., 413 F.3d 628, 631–32 (7th Cir. 2005) (holding Jones act and FELA cases provide for vicarious liability of an employer through the common law rule of *respondeat superior*). Accordingly, this argument constituted a judicial admission that no liability could accrue to Appellant through Engineer Tommy Connelly's actions or lack thereof.

South Carolina has recognized the concept of a judicial admission by an attorney on behalf of his client, albeit in an extrajudicial and therefore less egregious context than when made in open court during closing arguments before a jury. James A. Patrick III & Ross G. Anderson, Attorney Admissions, South Carolina Lawyer, Nov./Dec. 1995, at 20 (citing Long v. Atlantic Homes, 311 S.C. 237, 240, 428 S.E.2d 711, 713 (1993) (finding

judicial admission occurred in attorney letter admitting contractor–subcontractor relationship)). It is a commonly known principle that FELA liability flows from negligent acts by fellow employees. Accordingly, Respondent's counsel (a very capable FELA trial attorney) intentionally relinquished a known right of Respondent to recover on account of acts or omissions by Engineer Connelly. See, e.g., Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) (holding that counsel's statement—"I will not argue with your verdict"—was mere advocacy and not a waiver of right to file motion for new trial *nisi additur*, especially since it was not argued in opposition to the *additur*).

Here, liability based on any error by Engineer Connelly was unequivocally waived. Finally, it should be noted that it is highly questionable whether Engineer Connelly refused aid to the Respondent in any event. Even though Engineer Connelly recalls that Respondent telling him he was getting worse, Respondent remained capable of communication, and Connelly recalled that Respondent at no time requested a doctor. (R. p. 772, line 24 – p. 773, line 14; and p. 774, line 11 – p. 777, line 2).

2. Trainmaster Deshazor and Superintendent Stinson did not know there was an emergency.

As a matter of logic, any alleged failure in communication could not include Engineer Connelly's failure to identify the need for EMS. Accordingly, the only other employees potentially blameworthy for failing to render aid promptly are Stinson and Deshazor. But, Stinson and Deshazor were never told there was an emergency and, even when they asked if the train should be stopped in order to remove Respondent, both were told by the

train crew that it was not necessary. (R. p. 752, line 15 – p. 753, line 22; and p. 835, line 25 – p. 836, line 12).

a. Respondent nor Engineer Connelly requested emergency assistance from Trainmaster Deshazor.

Trainmaster Deshazor testified he learned that the Respondent was "feeling sick" directly from the Respondent at 2:26 p.m. on May 31, 2007. (R. p. 710, line 11 – p. 712, line 4). There is no testimony in the record that either Deshazor or Respondent communicated that this incident was a heat–related illness. Indeed, Respondent does not even fault Trainmaster Deshazor for failing to act following this initial conversation, and conceded as much during his direct testimony at trial. (R. p. 171, line 10 – p. 172, line 10). At 2:58 p.m. on May 31, 2007, a second call was made to Trainmaster Deshazor during which Engineer Connelly announced that the Respondent was "feeling worse." There is no evidence either Deshazor received communication as to the type of illness being suffered, the specific physical condition of the Respondent, or any indication that he was helpless or in immediate danger of loss of life or of great bodily harm. Engineer Connelly did not request EMS or other medical services despite having an inquiry from Trainmaster Deshazor whether the same was needed. In short, Deshazor did not have the type of knowledge which could implicate any duty or breach under Bell.

b. Engineer Connelly did not request emergency assistance from Superintendent Stinson

Superintendent Stinson falls into a similar vein as Deshazor. Stinson testified that he talked with Trainmaster Deshazor and knew that the Respondent was feeling sick, but was not aware of an emergency. (R. p. 832, line 6 – p. 833, line 6). Then, at 3:21 p.m. on May 31, Stinson had a telephone conversation with Engineer Connelly, the substance of

which was virtually identical to the conversation Stinson had with Deshazor. Stinson specifically asked Connelly if there was an emergency and whether the train should stop short of Columbia; Stinson was told there was no emergency and that the train could proceed to Andrews Yard in Columbia. (R. p. 774, line 11 – p. 777, line 2; p. 834, line 21 – p. 835, line 15; and p. 835, line 25 – p. 836, line 12).

c. Statements offered at trial that Respondent was "feeling worse" do not constitute more than a scintilla of evidence that Respondent needed emergency aid because Engineer Connelly stated Respondent did not require emergency aid.

Superintendent Stinson specifically asked Engineer Connelly if it was necessary to stop the train short of Columbia. Stinson would have called EMS if requested; he asked his Engineer if it was required and accepted Engineer Connelly's assessment of the situation that EMS was not needed and the related decision to return to Columbia. (R. p. 775, lines 18–25; and p. 852, line 13 – p. 853, line 10). As outlined above, Trainmaster Deshazor asked Respondent whether the train needed to stop, and Respondent declined and elected to ride the train to Columbia. Any testimony to the effect that Respondent was feeling worse can only mean what it says, and no inference can be drawn that it must mean that emergency services were needed; both Engineer Connelly and Respondent were asked if the train should be stopped and both responded no, asserting the return to Columbia was preferred..

If Engineer Connelly failed to discern the need for EMS (which seems dubious given that Respondent was communicating with Connelly, and Respondent never requested a doctor, *see* R. p. 772, line 24 – p. 773, line 14; and p. 776, lines 7–14), that failure is a nonfactor according to Respondent's counsel. In short, Respondent did not

prove any duty to render aid was breached by Appellant. Respondent did not prove the existence of any duty to render prompt aid, as none was requested or declined as far as Appellant's management personnel could tell. Therefore, Respondent's Cause of Action for prompt aid fails, and the trial court erred in declining to grant Appellant's motion for JNOV.

3. Respondent failed to present competent proof of damages casued by any delay in medical treatment.

Even if Respondent had put forth more than a scintilla of evidence to support a finding of a duty to render prompt aid and a breach of that duty, the claim still fails as Respondent showed no damages linked to a delay in treatment. As noted in Appellant's motion for directed verdict, Respondent was required to provide competent proof of any damage caused in whole or in part by any negligent delay in medical treatment. (R. p. 626, line 25 – p. 628, line 9). During closing argument at trial, Respondent argued that the train could have been stopped near St. Matthews rather than running an additional 40 minutes to Columbia, South Carolina. However, Respondent presented no evidence relating to any potential time difference in initiation and receipt of treatment had EMS been called in St. Mathews instead of Columbia. Furthermore, there was no evidence concerning the difference had the train stopped somewhere else before arriving in Columbia. Additionally, there was no evidence concerning the type of treatment that could have been provided between Orangeburg and Columbia. The only evidence presented involved testimony merely speculating that emergency services might be available somewhere in St. Matthews. (R. p. 745, lines 1–3). Although Engineer Connelly accepted the premise put forth by Respondent's counsel that EMS was available

in St. Matthews, there was absolutely no testimony regarding any quantitative difference in response time or in promptness of treatment that Respondent claimed would have occurred if Engineer Connelly or anyone else determined it was more advisable to stop the train and bring EMS to Respondent. (R. p. 782, lines 3–20).

Any medical opinions in the record that providing treatment is always better sooner rather than later depend on a premise that is *not* in this record: the existence of a meaningful difference in timing and quality of treatment if the train had stopped prior to reaching Columbia. Appellant argued to the trial court in its motion for directed verdict that there was no evidence indicating how any timing differences may have affected Respondent, thereby leaving the jury to speculate as to damages. (R. p. 626, line 25 – p. 628, line 9; and p. 629, line 1 – 21). Beyond mere speculation about response times had the train stopped and EMS been called, there simply was no demonstration of how any unquantified delay might be used to affix additional injury or damage.

Respondent's theory required the jury to speculate as to what damage may have resulted to Respondent from the delay. Speculation as to causation is simply not permissible. See Norton v. Norfolk Southern Ry. Co., 341 S.C. 165, 174, 533 S.E.2d 608, 613 (Ct. App. 2000) ("[T]here must be some shreds of proof both of negligence and of causation, and [only] speculation, conjecture and possibilities will not be enough.") (citations omitted) (quoting W. Page Keeton et al., Prosser & Keeton on Torts § 80, at 579 (5th ed. 1984) (internal quotation marks omitted), rev'd on other grounds, 350 S.C. 473, 567 S.E.2d 851 (2002). With all inferences and evidence presented at trial even construed most favorably to Respondent, he did not present more than a mere scintilla of

evidence as to the causation between the delay in treatment for his already worsening condition and any additional injury ultimately suffered.

III. The Trial Court Erred in Failing to Direct a Verdict as to Respondent's Claim for Future Wage Loss Damages When There is no Evidence that Respondent's Condition Continues or Could Not Be Overcome.

Respondent did not testify that he has had any recurring episodes of rhabdomyolysis since May 31, 2007. At trial, in an attempt to establish future damages and wage loss, Respondent merely pointed to the disqualification letter of Dr. Paula Lina dated August 2, 2007.[4] (P. Ex. 3, R. p. 1311). But, Dr. Lina said there was no causal connection established between the workplace and Respondent's injury and that Respondent likely had an unexplained underlying susceptibility to heat illness. (R. p. 35, line 6 – p. 43, line 23; and R. p. 809, line 9 – p. 813, line 24 ruling on: Paula Lina 9/30/2008 Depo., P. 45, Line 2 - P. 49, Line 17 (R. pp. 1005, 1006, and 1036-1038)). This opinion was not heard by the jury due to the trial court's rulings.

Under these circumstances, Dr. Lina's decision to not risk a third chance of Respondent being injured is not proof that Respondent has any permanent injury or future economic loss. Indeed, Dr. Lina testified in her deposition that she had not received the full medical work up from the Respondent and she never purported to give any opinion to

---

[4] Notably, subsequent to his May 31, 2007 incident, Respondent was not helpless. With full awareness of his need to be careful in the heat, Respondent successfully completed military style training in order to qualify and work as a police officer with the St. George Police Department, where he is currently employed. (R. p. 197, line 1 – p. 198, line 15). Respondent also worked for three months prior to the second trial (during summer) at the Kinder Morgan rail facility in Charleston, performing duties very similar to that of the conductor at Norfolk Southern. (R. p. 260, line 14 – p. 261, line 8).

a reasonable degree of medical certainty that he had a permanent injury, which she was not allowed to explain to the jury. (See Section IV.A. infra).[5]

Respondent's own treating physician, Dr. Dantzler, testified that Respondent could return to work as a conductor after the Second Incident; Dantzler simply recommended to Respondent that he needed to monitor himself and stay hydrated. (Dantzler Depo., R. p. 506, line 23 – p. 507, line 17; and p. 509, line 10 – p. 510, line 11). Dr. Dantzler gave this same advice after the First Incident on May 9, 2007. This advice reflects common sense principles that are applicable to anyone in the general population for avoiding a heat incident. (Dantzler Depo., R. p. 506, line 23 – p. 507, line 17; and p. 509, line 10 – p. 510, line 11).

Regardless of whether characterized as common sense advice or restrictions, the lack of difference between the restrictions given by Respondent's treating physician after the First Incident and Second Incident destroys Respondent's claim that the Second Incident caused some palpable, lasting injury. In other words, there was no change in condition identified or caused by any act of negligence from the Second Incident, much less resulting future damage. These arguments were made in Appellant's motion for directed verdict. (R. p. 629, line 1 – p. 631, line 10).

The Respondent had the burden of proving his alleged future damages were caused in whole or in part by the negligence of the Appellant and Respondent failed to

---

[5] On the other hand, Dr. Casa testified in his deposition that additional tests could assist in returning Respondent to work as a conductor, but this portion of his testimony was excluded by the trial court over Appellant's objection. (R. p. 807, line 8 – p. 809, line 6 ruling on: Casa 2/5/2010 Depo., R. p. 1163, line 18 – p. 1164, line 13; and p. 1165, line 24 – p. 1167, Line 1).

meet that burden. In summary, not more than a scintilla of evidence was presented on what future damage was caused to Respondent.

IV. The Trial Court Erred in Admitting Into Evidence Dr. Lina's August 2, 2007 Disqualification Letter, and Compounded the Error by Refusing to Allow Her to Explain Her Opinion, and in Giving and Refusing Certain Jury Charges To Appellant's Prejudice.

A. The trial court erred in admitting Dr. Lina's August 2, 2007 letter and subsequently denying her the opportunity to explain her opinions.

Dr. Paula Lina of the Appellant's Medical Department made a determination on August 2, 2007 that Respondent was disqualified from being a conductor due to recurrent heat illness—an opinion she was denied the opportunity to explain to the jury. (R. p. 35, line 6 – p. 43, line 23; and R. p. 809, line 9 – p. 813, line 24 ruling on: Lina 9/30/2008 Depo., P. 45, Line 2 - P. 49, Line 17 (R. pp. 1005, 1006, and 1036-1038)). Dr. Lina explained at her deposition that she believed Respondent had an unexplained, recurrent rhabdomyolysis caused by an underlying medical condition, and she was concerned that because of Respondent's unusual presentation, he had not had a thorough evaluation or comprehensive workup by his doctors, but the trial court denied admission of this testimony. (R. p. 951, line 18 – p. 952, line 1 ruling on: Paula Lina 8/20/2009 Depo., 1139, line 1 – p. 1140, line 12).

Appellate proffered Dr. Lina's testimony that numerous underlying conditions would have to be examined, including potentially revealing tests. (R. p. 951, line 18 – p. 952, line 12 ruling on: Paula Lina 8/20/2009 Depo., 1148, line 14 – p. 1149, line 20). The tests to which Dr. Lina referred were more specifically identified by Dr. Casa (although large parts of Dr. Casa's testimony should have been excluded, the court erred

in excluding his comments regarding additional medical tests). (R. p. 807, line 8 – p. 809, line 6 ruling on: Casa 2/5/2010 Depo., p. 1163, line 18 – p. 1164, line 13; and p. 1165, line 24 – p. 1167, line 1). Dr. Lina's testimony regarding the need for additional tests to be conducted by Respondent's doctors was improperly excluded by the trial court. [6]

Further, Dr. Lina held the opinion that Respondent's recurrent incidence of heat related issues was most likely attributable to an underlying but not precisely defined condition, especially in light of other factors, including relatively moderate temperatures at the time of Respondent's incidents. In forming this opinion, she also considered the Respondent's relatively good physical condition and the fact that other employees had not suffered similar incidents. (R. p. 815, line 14 – p. 817, line 13 ruling on: Paula Lina 9/30/2008 Depo., R. p. 1018, line 8 – p. 1019, line 7). This testimony was also important to explain her August 2, 2007 letter.

The testimony regarding Dr. Lina's opinions on underlying medical conditions was not offered by the Respondent at trial for the purpose of establishing medical causation, but was instead offered to explain her determination as an industrial physician as to why the Respondent was not fit for duty. "A reliable differential diagnosis eliminates each potential cause until arriving at one that cannot be ruled out or concluding that of those that cannot be ruled out, one is most likely." Graves v. CAS Med. Sys., Inc., ___ S.C. ___, 735 S.E.2d 650, 656 (2012) (citing Westberry v. Gislaved

---

[6] It should be noted that Dr. Lina is not involved in Respondent's clinical or future care. She identified the future care to be the responsibility of Respondent's treating physician or specialists, which was not her role. (Paula Lina 9/30/2008 Depo., R. p. 1034, line 20 – p. 1035, line 1). Her role was limited to deciding on behalf of Appellant Norfolk Southern whether it was advisable, in light of the medical information received, to allow Respondent to return to work after the Second Incident.

Gummi AB, 178 F.3d 257, 262 (4th Cir.1999)). This reasoning applies equally to Appellant's proffered testimony of Dr. Lina during trial, and the trial court erred in not allowing Dr. Lina to testify that the First and Second Incidents occurred because "there is likely some underlying susceptibility." (R. p. 815, line 14 – p. 817, line 13 ruling on: Paula Lina 9/30/2008 Depo., R. p. 1018, line 8 – p. 1019, line 7). See Mayhew v. Bell S.S. Co., 917 F.2d 961, 964 (6th Cir. 1990).

The trial court ruled as if Dr. Lina's testimony of causation did not meet the "most probable" test under Scoggins v. McClellion, 321 S.C. 264, 268, 468 S.E.2d 12, 14 (Ct. App. 1996).

> Under this test 'it is not sufficient for the expert . . . to testify merely that the ailment might or could have resulted from the alleged cause. He must go further and testify that taking into consideration all the data it is his professional opinion that the result in question most probably came from the cause alleged.'

Id. (quoting Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991)). However, an expert need not use the actual words "most probably." Id. (citing Gamble v. Price, 289 S.C. 538, 541, 347 S.E.2d 131, 132–33 (Ct. App. 1986)). So long as the opinion "represents his professional judgment as to the most likely one among the possible causes," the testimony should be heard and considered by the jury. Id. (quoting Norland v. Washington Gen. Hosp., 461 F.2d 694, 697 (8th Cir. 1972)).

Here, the trial court confused admissibility with the sufficiency of evidence. See Martin v. Mobley, 253 S.C. 103, 109, 169 S.E.2d 278, 281 (1969) (holding that a doctor's unwillingness to testify as to the most probable cause of the Respondent's injuries "affected . . . only the weight and not the admissibility of the proffered evidence"). Once

the evidence is deemed admissible, so long as it "is based upon facts sufficient to form the basis for an opinion, the trier of fact determines its probative value." Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 207, 662 S.E.2d 444, 450 (Ct. App. 2008).

Proximate cause is not an element of a FELA claim. CSX Transp., Inc. v. McBride, 564 U.S. at ___, 131 S.Ct. 2630, 2643 (2011). In McBride, the U.S. Supreme Court dispelled the trial court's impression that an expert must testify to the level of "most probably," and stated:

> If taken to mean the Plaintiff's injury must *probably* ('more likely than not') follow from the railroad's negligent conduct, then the force of FELA's 'resulting in whole or in part' language would be blunted. Railroad negligence would 'probably' cause a worker's injury only if that negligence was a *dominant* contributor to the injury, not merely a contributor in any part."

Id. at ___, 131 S.Ct. at 2644 (second emphasis added).

Thus, although testimony cannot be purely speculative, an expert need not testify to a "reasonable degree of medical certainty" that a railroad employee's injuries "most probably" resulted from the defendant-railroad's negligence, because doing so would reflect the standard for proximate cause rather than the appropriate analysis under the FELA. Pearson v. Bridges, 344 S.C. 366, 371 n.4, 544 S.E.2d 617, 619 n.4 (2001); see Mayhew, 917 F.2d at 964 ("[B]ecause of the relaxed standards applied in FELA . . . suits we *do not* believe that a medical expert must be able to articulate to a 'reasonable degree of medical certainty' that the defendant's negligence had a causal relationship with the [Respondent's] injury . . . . Instead . . . a medical expert must be able to articulate that it is likely . . . or more than possible that the defendant's negligence had a causal relationship with the [Respondent's] injury.").

A company's decisions and motivations for declining an employee's return to service are not subject to the already forgiving rules of evidence applicable under the FELA that require only an opinion regarding causation to be based on a "more than possible" standard. Id. Because a lower standard applies to Dr. Lina's determinations as to Respondent's return to service—a medical opinion which inherently included her differential analysis justifying her decision—she should have been permitted by the trial court to explain the basis for her decision.

B. The Trial Court Abused its Discretion in Improperly Instructing the Jury as to Appellant's Duty to Provide a Reasonably Safe Workplace and Failing to Instruct the Jury as to Other Relevant Matters.

A 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. See e.g., Carson v. CSX Transp., Inc., 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012); Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). On appeal, jury instructions must be considered "as a whole in light of the evidence and issues presented at trial." Hennes v. Shaw, 397 S.C. 391, 402, 725 S.E.2d 501, 507 (Ct. App. 2012). Where the instruction is not reasonably free from error, portions of the instruction read in isolation that could be considered misleading may constitute reversible error. Id. Additionally, an erroneous jury instruction will constitute reversible error where an appellant can show that it was injured and prejudiced by the erroneous instruction. See Ellison v. Simmons, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961).

It should be noted the trial court judge graciously indicated that she would adopt her prior rulings from the first trial and all objections and arguments from the previous proceeding would be put into the record of the second trial. (R. p. 1040, line 10 – p.

1041, line 12; p. 1294, line 23 – p. 1295, line 15; and Ct. Ex. 1, R. p. 2025, line 23 – p. 2027, line 13).

1. The trial court abused its discretion in refusing to instruct the jury with Appellant's Requests to Charge No. 6 or 29 informing that a railroad has no duty to monitor an employee's medical condition.

At trial, the line of questioning by Respondent's counsel to Nurse White suggested that Appellant's staff doctors (who are not actively practicing or treating clinicians) should have been actively involved in treating Respondent. (R. p. 1192, line 16 – p. 1193, line 1). Respondent's counsel sought Nurse White's confirmation that Appellant has no policy requiring deeper medical inquiry in connection with heat events. (R. p. 1193, lines 6–9). Further questioning of Nurse White by Respondent's counsel implied that Appellant's doctors could and should have ordered work-hardening therapy for the Respondent, even though Nurse White testified that typically the treating physician makes those types of recommendations. (R. p. 1197, line 23 – p. 1198, line 20). In other portions of his cross-examination of Nurse White, counsel went so far as to compare the medical department's August 1, 2007, date of receipt of Dr. Dantzler's May 17 note with the date of Dr. Lina's August 2, 2007, letter disqualifying plaintiff as a conductor, in an effort to raise a question as to why Dr. Lina didn't get involved sooner. (R. p. 1194, lines 1–7; and P. Ex. 3, R. p. 1311).

In addition, a substantial part of Respondent's case included testimony by Douglas Casa concerning erroneous duties for Appellant's medical department. This testimony stood in direct opposition to the law made clear in Fulk that a railroad has no general duty to ascertain whether an employee is physically fit. (See Defendant's Request to Charge Number 6, R. p. 1301). Relatedly, counsel questioned Trainmaster

Deshazor as to whether he had training on managing someone returning from a heat injury. (R. p. 722, line 16 – p. 723, line 16).

Respondent's counsel argued to the jury that Appellant breached a duty that does not exist, as indicated in Fulk. He argued that Dr. Lina should have been involved with Respondent's treatment between the First and Second Incidents. (R. p. 1249, lines 11–19). Respondent's counsel took this position with the jury despite taking a contrary position with the trial court when he asserted that he did not intend to argue that Appellant's medical department was negligent (R. p. 45, line 1 – p. 46, line 7); he asserted this position in order to gain admission of Dr. Lina's August 2, 2007 disqualification letter. Respondent's counsel further argued Appellant should have "drilled deeper" in seeking medical information after the First Incident (R. p. 1205, lines 1–12). In other words, Respondent's counsel argued Appellant breached a duty to second-guess the return to work note of Respondent's own primary care physician. (R. p. 1204, line 5 – p. 1205, line 12). Finally, he urged that Appellant had the "tools, the talent and the ability to call, to manage this properly, to take it one more step and let the [Appellant] doctor be involved and manage [Respondent Moorer]." (R. p. 1205, line 23 – p. 1206, line 1).

Accordingly, Respondent's entire theory for his negligent assignment claim depended on the law recognizing a duty for the railroad to proactively seek out, monitor, and intervene in an employee's medical situation. Without waiving its position that the trial court should have granted its motion for directed verdict on the Negligent Assignment Cause of Action or JNOV, Appellant asserts the trial court committed additional error in failing to charge Defendant's Request to Charge No. 6. (See Ct. Ex.

13, R. p. 1301, citing Fulk, 22 F.3d 120 (holding that a railroad has no general duty to ascertain physical fitness or continual monitoring after release by physician) and Ct. Ex. 1, R. p. 2025, line 23 – p. 2027, line 13). Additionally, the trial court should have charged Defendant's Request to Charge No. 29 (Ct. Ex. 13, R. p. 1301, 1305) citing Nat'l R.R. Passenger Corp. v. Krouse, 627 A.2d 489, 499 (D.C. 1993) (holding a railroad breaches its duty if it knew or should have known assignment would aggravate the employee's condition) and Ct. Ex. 1, R. p. 2043, line 5 – p. 2044, line 3)).

Even if the trial court believed there was a question of fact as to whether Appellant breached a duty in assigning Respondent to his work prior to the Second Incident, Requests No. 6 and 29 (See Ct. Ex. 13, R. pp. 1301 and 1305), would have provided some guidance to the jury in light of the otherwise unlimited duty determinations seemingly entrusted to them as discussed in § IV. D, infra. Whatever the duty to properly assign work may entail under the circumstances of this case, having received an unrestricted return to work note from the treating physician, Appellant did not have the duty to determine fitness or monitor Respondent, and the jury should have been so charged.

"An abuse of discretion occurs when the trial court's ruling is based on an error of law *or* is not supported by the evidence." Fettler, 396 S.C. at 470 (emphasis added) (citations omitted). Based on the errors outlined above, the trial court abused its discretion in refusing to instruct the jury on Appellant's Request to Charge No. 6 or 29. (See Ct. Ex. 13, R. pp. 1301 and 1305). To properly address the issue of duty with respect to Appellant's medical department, it was imperative that the trial court charge the jury on the law as stated in Fulk.

2. **The trial court abused its discretion in failing to charge the jury that a finding of negligence may not be based on alleged shortcomings in vocational rehabilitation services.**

As a result of the continuous suggestions throughout the trial by Respondent that a duty exists to provide Respondent a job, Defendant's Request to Charge Number 11 (R. p. 1303), was appropriate to instruct the jury as to the provision of vocational rehabilitation services. The jury should have been provided a charge which would fairly exclude such a duty as a basis for finding negligence.

Respondent testified regarding his interactions with the Appellant's vocational department through whom he took vocational tests in an effort to qualify for less physically demanding positions at the railroad after he was disqualified as a conductor. (R. p. 193, line 5 – p. 194, line 5). Admittedly, mitigation of damage was an issue in the case. But testimony elicited by Respondent's counsel's line of questioning of both the Respondent and his wife consistently sought to establish the inference that Appellant had a duty to re-qualify the Respondent for work in some capacity following his Second Incident. (R. p. 194, line 16 – p. 196, line 20; p. 203, line 5 – p. 204, line 7; p. 205, line 14 – p. 206, line 2; p. 208, lines 8–15; p. 271, lines 4–21; p. 272, line 18 – p. 273, line 1; and p. 613, line 11 – p. 614, line 3). Respondent's counsel continued this line of questioning with Allon White from the Appellant's Vocational Department, suggesting Appellant had breached some duty to Respondent who had "fallen through the cracks"—a characterization with which Allon White did not agree. (R. p. 965, line 14 – p. 968, line 6).

Ultimately, Respondent's counsel argued to the jury that Respondent should not have fallen through the cracks, as if it were a duty of Appellant to see to it that

Respondent would be fully rehabilitated from a vocational standpoint. (R. p. 1217, line 15 – p. 1220, line 3; and p. 1221, lines 7–9). He even argued that Appellant "still had a chance to fix this, right? Employ the guy." (R. p. 1217, lines 21–22).

The trial court erred in not instructing the jury to the effect that vocational efforts could not be considered in determining whether Appellant was negligent. (Ct. Ex. 1, R. p. 2038, line 20 – p. 2042, line 21). This recurring theme and testimony elicited in Respondent's case supports the Request for Charge No. 11. (Ct. Ex. 13, R. p. 1301, 1305). As a matter of law, there is no duty on the railroad to provide vocational rehabilitation services (even if those services may be relevant to mitigation of damages), and Appellant was prejudiced by the lack of any such charge in light of all of the questioning and counsel's argument suggesting otherwise.

3. The trial court abused its discretion in failing to charge the jury as to prompt aid as indicated in Defendant's Request to Charge No. 10.

At the first trial of this matter in September, 2011, counsel for both parties and the trial court discussed Defendant's Request to Charge No. 10 at length, but ultimately the trial court declined to charge it. (Ct. Ex. 1, R. p. 1302; R. p. 2028, line 19 – p. 2038, line 19; and p. 2051, line 14 – p. 2052, line 9). Without waiving its position that directed verdict or JNOV should have been granted on the Prompt Aid Cause of Action, Appellant submits the court committed additional reversible error in excluding this charge, based on the rationale contained in Section II. A. 1., *supra*, regarding prompt aid. Without such a charge, Appellant was prejudiced in that the jury might well conclude Appellant was negligent for failing to render prompt aid simply by virtue of the fact Respondent had a medical situation that worsened. Appellant's position with the trial court was that if

Respondent was capable of requesting aid and failed to do so, even if there was serious a medical situation that was not patent to Appellant, or if Appellant was not aware that emergency aid was being requested, the charge would inform the jury that there can be no negligence under the circumstances.

4. The trial court abused its discretion in failing to charge the jury as to the effect of rule violations on contributory negligence

Defendant's Exhibit 95 is Appellant's Safety Rule Book which Respondent had in his possession prior to and at the time of the incidents at issue. (R. p. 215, line 8 – p. 217, line 4). Rule N of this book provides that an employee must promptly report any health incident that impairs his ability to work. There is also guidance on the avoidance of heat related issues. (See excerpt of D. Ex. 95 (R. p. 1807, 1810-1811 and D. Ex. 2, R. p. 1362). The evidence is clear that on May 9, 2007, Respondent failed to report the ailments he had suffered the morning and day before that indicated the onset of rhabdomyolysis. Dr. Casa testified that Respondent was not fully recovered from the First Incident by the time of the Second Incident. (Casa 6/10/2010 Depo., R. p. 412, line 17 – p. 413, line 5). Respondent argued at trial that he was never formally charged with a safety rule violation, but this position does not change the fact that his violation of the safety rules could constitute contributory negligence. If Respondent had complied with Rule N and reported his unhealthy situation, it is likely neither the First Incident nor Second Incident would have occurred. At trial, Appellant was entitled to Charge Number 15 stating that evidence of a safety rule violation can be contributory negligence. (Ct. Ex. 13, R. p. 1301, 1304). Omission of Charge Number 15 was prejudicial since there was a question of fact on the issue.

C. The trial court erred in its application of the FELA standard of negligence by improperly instructing the jury that a railroad's duty in providing a safe place to work increases as the employee's duties increase.

The charge the trial court read to the jury regarding Appellant's duty to provide a safe work environment was as follows: "The Defendant has a duty to furnish the Respondent with a reasonably safe place to work, increasing as the duties of the employee increases. The greater the risk of harm, the greater the required level of care." (R. p. 1268, lines 11–15).[7]

The aforementioned charge allowing the jury to determine the extent of duty should not have been given. "The issue of negligence is a mixed question of law and fact." Staples v. Duell, 329 S.C. 503, 506, 494 S.E.2d 639, 641 (Ct. App. 1997). "The court must first determine whether a duty arises in one party to exercise reasonable care for the benefit of another under the facts of a given case. The existence and scope of the duty are questions of law." Id. at 506–07. Following the court's determination of duty, "the jury determines whether a breach of the duty has occurred, and the resulting damages." Id. at 507. The problem with the charge given at trial over Appellant's objection is that it takes concepts applicable to determining whether or not there has been a breach and throws them into the realm of the jury determining the extent of any duty. Appellant argued against the charge, because it was inappropriate and not supported by case law. (Ct. Ex. 1, R. p. 2045, line 12 – p. 2048, line 19; and p. 2049, line 21 – p. 2051, line 25).

---

[7] It should be noted again that the trial court judge determined she would adopt her prior rulings from the first trial and all objections and arguments from the previous proceeding would be put into the record of the second trial. (R. p. 1040, line 10 – p. 1041, line 12; p. 1294, line 23 – p. 1295, line 15; and Ct. Ex. 1, R. p. 2045, line 12 – p. 2048, line 19).

Perhaps aware that the trial court had adopted its previous rulings on jury charges from the first trial, Respondent's counsel exacerbated the error by arguing to the jury in the second trial that the duty to provide a reasonably safe place to work increases as the risk to the employee increases which, in the context of a life-threatening injury, is a 'high duty." (R. p. 1251, lines 14–25). The charge included no limits or guidance in defining the boundaries of Appellant's duty to provide a reasonably safe workplace. Even worse, the charge encouraged the jury itself to determine the extent of Appellant's duty. The jury was allowed to usurp the trial court's appropriate role in defining the railroad's legal duty. Such a task rests solely within the province of the trial court. See Staples, 329 S.C. at 506–07. Additionally, the temptation of the jurist to use hindsight in assessing the extent of that duty works extreme prejudice to Appellant's position as the charge blurred fundamental legal concepts of duty and breach.

D. If the case is reversed and remanded for retrial, the trial court should be instructed to exclude from evidence all testimony that Respondent's stepson is handicapped.

At trial, the court denied Appellant's motion *in limine* to exclude testimony concerning Respondent's handicapped stepson. Respondent took the position that motivation for receipt of health benefits was relevant and the fact that the stepson was handicapped constituted such a motivation. Undoubtedly, a handicapped child provides an unquestioned need for benefits, but this need does not answer the real relevancy question. No one doubts that a person might receive benefit and utility from healthcare insurance benefits; their value can be an element of damages in an FELA case, although it is not clear that a dependent's need translates into recoverable damages, as opposed to that of the FELA employee who undoubtedly has a right to recover them. (R. p. 47, line

14 – p. 50, line 7). Following this logic, Appellant asserts that the Respondent's motivation for wanting health benefits for a dependent is not relevant to the case and therefore, testimony gratuitously mentioning his stepson's situation is highly prejudicial under the circumstances.

In denying Appellant's motion, the trial court stated: "I'm not sure how it prejudices [Appellant] other than the fact that *people are going to feel sorry for him* because he has a disabled son." (R. p. 49, lines 12–15) (emphasis added). Evidence is found to be unfairly prejudicial where "it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." State v. Cheeseboro, 346 S.C 526, 547, 552 S.E.2d 300, 311 (2001); State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991); State v. Caldwell, 378 S.C. 268, 287, 662 S.E.2d 474, 484 (Ct. App. 2008); see also Fed. R. Evid. 403 Advisory Committee notes ("'Unfair prejudice' within its context means an Undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.").[8]

The trial court's remarks could not have more perfectly summarized the prejudicial nature of the testimony. See, e.g., Cheeseboro, 345 S.C. at 547. Inexplicably, the trial court allowed the testimony as elicited during direct testimony from both the Respondent and his economist expert. (R. p. 201, lines 2 – 15; and p. 312, line 15 – p. 313, line 11). After that testimony, the trial court was reminded of Rule 403, but the court still did not believe that the prejudicial effect of the testimony outweighed its probative value. (R. p. 353, line 19 – p. 360, line 5).

---

[8] South Carolina Rules of Evidence 401 and 403 are identical to their federal counterparts. See Alexander, 303 S.C. 377.

This prejudicial testimony was calculated in part to do nothing more than evoke sympathy from the jury based on circumstances not germane to the matter before the trial court. See Old Chief v. United States, 519 U.S. 172, 184 (1997) ("[W]hat counts as the Rule 403 'probative value' of an item of evidence, as distinct from its Rule 401 'relevance,' may be calculated by comparing evidentiary alternatives."). If this matter is remanded for retrial, Appellant respectfully requests this appellate court, in the spirit of preserving the understanding and purpose of Rule 403, to direct the trial court to properly apply Rule 403 and to exclude reference to the status of Respondent's handicapped child.

CONCLUSION

For the reasons stated above, Appellant respectfully requests that this Court reverse the jury's verdict, reverse the orders dated March 19, March 29, and May 9, 2012, and direct an entry of judgment for Appellant. In the alternative, the Appellant respectfully requests that this Court reverse and remand for a new trial consistent with the relief sought herein.

TECKLENBURG & JENKINS, LLC

Paul F. Tecklenburg – SC Bar No. 10295
Rivers T. Jenkins, III – SC Bar No. 64324
1819 Meeting Street Road, Suite A
Charleston, South Carolina 29405
Office: (843) 534–2628
Facsimile: (843) 534–2629
pft@tecklaw.net
rtj@tecklaw.net
Attorneys for Appellant

Charleston, SC

July 3, 2013

Certificate of Counsel

The undersigned hereby certifies that the Appellant's Final Brief contains all references from the initial brief, as well as revised references and corrections due to typographical errors and misspellings which were contained in the initial brief of appellant.

July 3, 2013

Rivers T. Jenkins, III
Paul F. Tecklenburg
Tecklenburg & Jenkins, LLC
1819 Meeting Street Road, Suite A (29405)
P.O. Box 20667
Charleston, SC 29413
(843) 534-2628
Attorneys for Appellant

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.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing ***Final Brief of Appellant*** as served upon all counsel of record this 3rd day of July, 2013, via U.S. First Class Mail, postage pre-paid, and addressed as follows:

John A. Moss, Esquire
STEEL & MOSS, LLP
3575 Piedmont Road, NE, Suite 1560
Atlanta, GA 30305

John E. Parker, Esquire
PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.
101 Mulberry Street, East
P.O. Box 457
Hampton, SC 29924
Attorneys for Respondent

Charleston, SC

Annette M. Mixson, Paralegal