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No. 130633

RGR, LLC,

Appellant/Defendant,

v.

GEORGIA SETTLE,
Personal Representative of the Estate of
Charles E. Settle, Sr., deceased,

Appellee/Plaintiff.

REPLY BRIEF OF APPELLANT

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RGR, LLC, pursuant to Rule 5:29, respectfully submits the following Reply Brief to respond to the contentions made by Mrs. Settle in her Brief of Appellee ("Settle Br."). To establish actionable negligence, Mrs. Settle "had the burden to show the existence of a legal duty, a breach of the duty, and proximate cause resulting in damage." *Atrium Unit Owners Ass'n v. King*, 266 Va. 288, 293 (2003). Mrs. Settle failed to carry her burden, and her Brief of Appellee demonstrates that Mrs. Settle is (and has been) mix-and-matching different concepts of law in an effort to create a duty where none otherwise exists. The trial court erred by inviting the jury to speculate and render a verdict that was plainly wrong as a matter of law and without evidence to support it.

I. Mrs. Settle Fails to Articulate Any Legal Duty Owed by RGR

Whether a duty exists is "a pure question of law." *Burns v. Johnson*, 250 Va. 41, 45 (1995). If the allegations are legally sufficient to establish a duty as a matter of law, then it becomes a matter for the jury, upon the evidence, to "determine[ ] whether the duty has been performed." *Acme Markets, Inc. v. Remschel*, 181 Va. 171, 178 (1943).

Agreeing the common law applies, Settle Br. at 14, n.6, Mrs. Settle asks this Court to countenance the trial court's errors and recognize a generalized duty of care that has never been recognized by this Court. As

she did throughout the proceedings below, Mrs. Settle takes statements from this Court's precedents, removes them from their procedural and factual context, and fashions a duty in a vacuum. Mrs. Settle's Brief of Appellee demonstrates why the judgment below should be reversed.

A. Mrs. Settle's Description of RGR's Lumber Pile Confirms that the Lumber Pile was Open and Obvious

Mrs. Settle's description of RGR's lumber pile supports RGR's assertion that the lumber pile was an open and obvious condition. Mrs. Settle describes RGR's lumber pile as a "huge pile of lumber – taller than Mr. Settle's truck." Settle Br. at 1. Citing one of her own exhibits, Mrs. Settle states that the "photograph shows the massive scale of the obstructing lumber stacks along with their proximity to the railroad tracks." Settle Br. at 2 (citing Supp. App. 281). Mrs. Settle described Kapp Valley Way, where this "huge" and "massive" lumber pile was located, as a "busy industrial area," where the trains came from "*both* directions" and "did not follow a set schedule." Settle Br. at 16 (emphasis in original).

This apparent concession by Mrs. Settle demonstrates why RGR had no duty to Mr. Settle. If an "owner has no duty to warn its invitee of an unsafe condition which is open and obvious to a reasonable person exercising ordinary care for his own safety," *Fobbs v. Webb Bldg. Ltd. P'ship*, 232 Va. 227, 229 (1986) (citation omitted), then RGR had no duty to

warn Mr. Settle about “massive” and “huge” lumber piles that were taller than Mr. Settle’s truck when he was not even an invitee. Moreover, in the specific context of railroad crossings, this Court has stated:

> [T]he general rule has been announced that whether one crossing a railroad at grade is required to stop before going thereon, is a question for the jury under proper instructions. But, on the other hand, it is equally well established that one who goes on a crossing without looking and listening and is injured, cannot recover because he is guilty of contributory negligence as a matter of law. *Washington & Old Dominion Railway Co. v. Zell's Adm'r*, 118 Va. 755 [(1915)], illustrates this rule which is well stated in the second headnote. It follows: “At grade crossings of railroads the rights of a traveler on the highway and of the railroad company are ‘mutual, reciprocal and co-extensive,’ but generally a moving train is accorded the right of way. A traveler approaching such crossing for the purpose of crossing must always exercise care proportioned to the known danger, and this care must be such as one who knows the danger and of the prior right of passage would be expected to exercise. The duty of looking and listening for approaching trains must be discharged in such manner as will make the looking and listening effective. The greater the danger, the greater the measure of duty. The track itself is a proclamation of danger, and the traveler has no right to proceed across the track without such looking and listening for approaching trains, and if he does, and in consequence thereof is injured, there can be no recovery, although the railroad company may also be guilty of negligence proximately contributing to such injury.

S. Ry. Co. v. Campbell, 172 Va. 311, 317-18 (1939). Given Mrs. Settle's description of RGR's lumber pile, Mr. Settle was required to approach the private crossing at Kapp Valley Way with "care proportioned to the known danger." As this Court noted in *Campbell*, in crossing the tracks Mr. Settle "must look where looking is effectual" and he cannot "wait until his view is obstructed and say that it would have been useless for him to have looked then." 172 Va. at 318.

Mrs. Settle contends that by placing the lumber pile where it did, RGR actively prevented Mr. Settle from exercising due care. She contends that RGR created a "dangerous to stop/dangerous to go" situation. Settle Br. at 13. She argues that if Mr. Settle had stopped in position where his view of the tracks was clear, he could not then accelerate quickly enough from a stopped position to safely cross the tracks. Settle Br. at 17.

Significantly, Mrs. Settle does not argue that vehicles routinely traveling on Kapp Valley Way could not safely stop short of the tracks, even with the lumber pile present, and then safely cross after looking and listening for oncoming trains. Mrs. Settle's "dangerous to stop/dangerous to go" circumstance arises solely from the unique size and gearing characteristics of the dump truck Mr. Settle was driving and the 13 ton load he was hauling. Yet there was no evidence that RGR had any notice that

loaded dump trucks presented unique safety issues in terms of their ability to quickly stop or start at the crossing. In any event, faced with this predicament, Mrs. Settle's argument demonstrates that Mr. Settle intentionally did not come to a stop. RGR cannot, as a matter of law, be liable where Mr. Settle knowingly placed himself at risk of harm in the face of an open and obvious hazard. Moreover, Mr. Settle had other options. He could have alerted his employer to the situation and the employer could have identified an alternative location to dump the gravel. He and/or his employer could have alerted RGR to the situation and requested that it move its lumber pile. Neither occurred.

B. RGR Did Not Have Any Relationship with Mr. Settle Giving Rise to Any Legal Duty

Mrs. Settle argues that "[h]olding a business entity liable for *creating*, as part of its business operations, a deathtrap like this is within the mainstream of our most venerable principles of tort law." Settle Br. at 5 (emphasis in original). She fails, however, to identify any relationship between RGR and Mr. Settle that would give rise to a legal duty.

There "is no such thing as negligence in the abstract, or in the general . . . . Negligence must be in relation to some person." *Dudley v. Offender Aid and Restoration of Richmond, Inc.*, 241 Va. 270, 277-78 (1991) (citations omitted). Stated differently, in order for a duty to arise,

there must be a relationship between the plaintiff and defendant. *See, e.g., Yuzefovsky v. St. John's Wood Apts.*, 261 Va. 97, 108 (2001) (discussing duties that arise by virtue of special relationships between plaintiff and defendant). In the context of a "business entity" such as RGR (to use her phrasing), Mrs. Settle needed to allege and prove a relationship between RGR and Mr. Settle giving rise to a duty, but she failed to do so.

Mrs. Settle approvingly notes that the trial court rejected RGR's attempt to clarify the duty being alleged by Mrs. Settle. Settle Br. at 7. On July 1, 2011, the trial court overruled RGR's demurrer and plea in bar, in which RGR argued it owed no duty to Mr. Settle. Settle Br. at 8 (citing the trial court's July 1, 2011 Order at R. 4500-4503); *see also* RGR Opening Br. at 9 & n.3. During the hearing on RGR's demurrer and plea in bar, Mrs. Settle argued that Mr. Settle's status was irrelevant and stated: "And whether or not you pigeonhole Mr. Settle as an invitee or licensee, you know, there's a bottom-line, commonsense, common-law duty of care here." 6/27/11 Tr. at 155:6-9. Continuing, Mrs. Settle also stated: "And so I would say that, number one, the distinction between a licensee and an invitee at the end of the day for the bottom-line legal duties doesn't matter here." 6/27/11 Tr. at 156:14-17.

The repeated failures by the trial court to clarify Mr. Settle's relationship with RGR or his status on Kapp Valley Way prevented RGR from properly defending itself, invited the jury to speculate, and resulted in a verdict that was plainly wrong as a matter of law and without evidence to support it.

C. Mrs. Settle Mischaracterizes the Record in an Attempt to Show that RGR Had Notice

Mrs. Settle effectively concedes that to be liable, it was necessary for her to prove that RGR had notice of the alleged hazardous condition created by its lumber pile. She contends there was evidence of notice, but mischaracterizes the evidence. When viewed in context, the evidence demonstrates that RGR did not have notice sufficient to impose any duty of care to Mr. Settle.

First, Mrs. Settle mischaracterizes the agreed stipulation read to the jury at the beginning of the trial. RGR and Mrs. Settle stipulated that RGR stacked the lumber pile at issue and that a "portion of the lumber stack was approximately seven feet inside of Norfolk Southern's right-of-way." App. 436 (8/27/12 Tr. at 74:8-12). The stipulation did not say that RGR knew or had reason to know at the time of the accident that its lumber pile was in Norfolk Southern's right-of-way. And even if it did, that would simply be acknowledgment of a trespass, not notice of a dangerous condition.

Second, Mrs. Settle mischaracterizes the testimony of one of RGR's owners, Mr. Gene Frogale. *See* Settle Br. at 1-2, 10-11. Mrs. Settle says that Mr. Frogale "admitted that he knew that their lumber stack 'needlessly cuts down the visibility of a motorist' attempting to cross the tracks, limiting the critical time in which the driver could see, perceive, and react to an approaching train." Settle Br. at 1-2 (citing App. 540-41 (8/28/12 Tr. at 80:13-81:19). Here is the entirety of Mr. Frogale's testimony on this point:

> Q. You testified in your deposition that this wood pile stack of lumber here was eight feet long.
>
> A. Yes.
>
> Q. And you *now* know that you were seven feet inside the right-of-way?
>
> A. I know *now*, yes.
>
> . . . .
>
> Q. You would agree, would you not, that moving this lumber pile back that's contained in the picture, if this part were not here on the right-of-way, only this part here, that's this far back, you would agree that that would give more visibility to motorists coming down?
>
> A. Yes.
>
> Q. It would give a driver more time to see?
>
> A. Yes.
>
> Q. More time to perceive?
>
> A. Yes. But he has to stop there.
>
> Q. Well, hold on a second. Give him more time to perceive, right?
>
> A. Yes.
>
> Q. More time to react, correct?

A. Yes.

Q. React so that he can stop if he sees a train approaching, right?

A. Yes.

Q. So having that lumber pile there needlessly cuts down the visibility of a motorist, doesn't it?

A. Yes.

Q. And by being in that location, it needlessly cut down the visibility of Mr. Settle, didn't it?

A. That lumber stack?

Q. Yes, sir.

A. Yes.

App. 537 (8/28/12 Tr. at 77:2-8) (emphasis added); App. 540-41 (8/28/12 Tr. at 80:13-81:19). There was no evidence that Mr. Frogale or any employee of RGR knew or had reason to know prior to this accident that the lumber pile created any dangerous condition on Kapp Valley Way. This is exactly the type of after-the fact, hindsight opinion testimony that this Court has stated does *not* indicate notice or knowledge at the time of the event itself sufficient to impose a duty. *See, e.g., Rice v. Turner*, 191 Va. 601, 608 (1950); *Page v. Arnold*, 227 Va. 74, 80-81 (1984).

Finally, Mrs. Settle does not respond to the fact that the lumber pile had been in the same location since at least 2000. *See* RGR Opening Br. at 7. There was no evidence that Mr. Humphreys, who operated the business on the other side of Kapp Valley Way, or any one from Wolf

Realty, Norfolk Southern, Rider, or anyone else ever complained to RGR about the lumber pile or otherwise put RGR on notice of that the lumber pile created a dangerous condition.

Mrs. Settle attempts to draw a distinction between "affirmative conduct" and "passive conduct," and relies on six cases she previously has not cited.[1] A review of these cases indicates it is unclear whether the lumber pile would be classified as affirmative or passive conduct. *See Busch*, 207 Va. at 346 (noting that condition of premises is analyzed as passive conduct). Regardless, it was necessary for Mrs. Settle to establish that RGR knew or had reason to know that the lumber pile created an unsafe or dangerous condition. *See, e.g., Busch*, 207 Va. at 347.[2] Given the length of time the lumber pile had been at its location without complaint, concern, or notice to RGR, Mrs. Settle failed to show that RGR knew or

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[1] *See* Settle Br. at 4-5, 32 (citing *Jefferson v. Regal Cinemas, Inc.*, 2010 U.S. Dist. LEXIS 106062 (E.D. Va. Oct. 4, 2010); *O'Brien v. Everfast, Inc.*, 254 Va. 326 (1997); *Holcombe v. NationsBanc Fin'l Serv. Corp.*, 248 Va. 445 (1994); *Ashby v. Faison & Assoc.*, 247 Va. 166 (1994); *Memco Stores, Inc. v. Yeatman*, 232 Va. 50 (1986); *Busch v. Gaglio*, 207 Va. 343 (1966)).

[2] Additionally, each of these six cases demonstrates both the necessity and importance of determining the status of or relationship between the plaintiff and the defendant in a negligence case. *See Ashby*, 247 Va. at 169 (invitee); *Busch*, 207 Va. at 344 (social guest/licensee); *Holcombe*, 248 Va. at 159 (invitee); *Jefferson*, 2010 U.S. Dist. LEXIS 106062, at *10 (invitee); *Yeatman*, 232 Va. at 230-32 (invitee); *O'Brien*, 254 Va. at 327 (invitee).

had reason to know it was an unsafe or dangerous condition at the time of the accident.

D. The Trial Court's Failure to Require Mrs. Settle to Define the Duty Owed by RGR is Illustrated by Mrs. Settle's Erroneous Jury Instructions

As an initial matter, Mrs. Settle is incorrect that RGR waived its objection to Mrs. Settle's Instruction 11b. Recognizing that the trial court had repeatedly (and incorrectly) ruled against it, counsel for RGR stated when addressing Instruction 11b: "We preserve, of course, all of our arguments about duty, but Your Honor has ruled against us, and so while preserving our objection, as between these [two], we would select 11-B." App. 688 (9/4/12 Tr. at 135:7-10). *See also* RGR Opening Br. at 10-11, 14 & n.10 (noting where objection to Instruction 11b was preserved by RGR). Mrs. Settle takes the trial court's subsequent summary of the instructions out of context and fails to note this specific objection made by RGR. *See* Settle Br. at 33 (citing App. 689 (9/4/12 Tr. at 137:18-21).

The evidence at trial demonstrated that in the twelve years prior to the accident, RGR's lumber pile was in the same location and no one ever complained to RGR about it or otherwise noted any concern. Rather than focus on whether RGR knew or had reason to know that the lumber pile created an unsafe or dangerous condition, the trial court gave Instructions

7 and 11b. These two instructions were incorrect statements of law in the context of a negligence case, and invited the jury to assume knowledge or notice on the part of RGR. Giving these two instructions was both plainly wrong as a matter of law and without any evidentiary support.

II. Mrs. Settle Fails to Show How RGR's Lumber Pile Proximately Caused Mr. Settle's Death

As set forth in RGR's Opening Brief, the facts of this case are strikingly similar to the facts in *Sugarland Run Homeowners Ass'n v. Halfmann*, 260 Va. 366 (2000), and the jury verdict here should be reversed for the same reason. Mrs. Settle argues that Mr. Settle had to bring his vehicle beyond the edge of the lumber pile to see an approaching train, whereas in *Sugarland* the bicyclist did not have "'to ride his bicycle into the edge of [the street] and look around the switch/transformer boxes in order to determine whether any vehicle was approaching from his left.'" Settle Br. at 40 (quoting *Sugarland*, 260 Va. at 374).

Mrs. Settle fails to note that the lumber pile at issue here was approximately the same distance from the tracks as the switch/transformer boxes were from the edge of the road in *Sugarland*. 260 Va. at 374, 470 S.E.2d at 473 ("Those boxes were 10 to 15 feet back from the edge of the street."). Mr. Compton, another Rider employee who also crossed Kapp Valley Way on the same project with Mr. Settle, testified that he had room

to stop at the lumber pile with enough room to see the railroad tracks. *See* RGR Opening Br. at 5, 39.

Mrs. Settle concedes that Mr. Settle could have stopped with the nose of his truck 12.5 feet from the rails and had a clear view of oncoming trains. Settle Br. at 15. In other words, as in *Sugarland*, there was a safe position for Mr. Settle to stop, well short of the tracks, and look and listen for a train. Mrs. Settle argues that this placed Mr. Settle in a "danger zone," but the conceded fact that he could have stopped short of the tracks and avoided the collision brings this case squarely under *Sugarland*. The evidence was insufficient as a matter of law to establish that RGR's lumber pile proximately caused the collision.

III. Mr. Settle's Death Was Caused by His Contributory Negligence

Mrs. Settle highlights the "massive" and "huge" size of RGR's lumber pile, Settle Br. at 1 & 2, and notes repeatedly that the crossing at Kapp Valley Way was dangerous. *See, e.g.,* Settle Br. at 2-6, 12-14, 30-32. Mrs. Settle states that "[t]o get to a position where he could see down the tracks to his right, [Mr. Settle] had to come far enough forward around the stacked lumber so the nose of his truck was dangerously close to an oncoming train." Settle Br. at 3. In light of the tracks themselves being a proclamation of danger, and the open and obvious nature of RGR's lumber

pile, Mrs. Settle fails to explain why proceeding onto the tracks was reasonable under her characterization of the crossing. As explained by RGR's expert, under the facts of this case, Mr. Settle should have "[c]ome to a complete stop" before attempting to cross the private crossing at Kapp Valley Way. App. 669 (9/4/12 Tr. at 37:18-21). Stated differently, if a driver cannot come to a stop and still cross safely, the driver should not cross at all and it is negligent to try to do so.

Finally, similar to the "ultrahazardous" characterization rejected by this Court in *Wright v. Norfolk & W. Ry. Co.*, 245 Va. 160, 171-72 (1993), Mrs. Settle contends that the crossing at Kapp Valley Way was too hazardous to be crossed safely by a fully loaded dump truck, because you cannot stop the truck and still get safely across the tracks. Settle Br. at 13 ("Dangerous to stop/dangerous to go") & 17 ("This damned-if-you-do-damned-if-you-don't predicament meant that it was not safe to simply stop before crossing those tracks."). But, in addition to the fact there was no evidence RGR knew or had reason to know that its lumber pile created an unsafe or dangerous condition, RGR did not own the crossing or have permission to use it, was not responsible for the speed of the trains, was not responsible for the design of the crossing or for its use as a construction entrance, and was not responsible for the size and weight of

Mr. Settle's truck. Ultimately, the decision about whether to cross under these conditions, and whether to stop, was Mr. Settle's. Mr. Settle failed "to look and listen at a time and place when both looking and listening will be effective." *Wright*, 245 Va. at 170-71. Because of his contributory negligence, Mr. Settle was struck and killed by a train owned and operated by Norfolk Southern.

IV. Conclusion

For these reasons, and those stated in its Opening Brief, RGR, LLC respectfully asks this Court to reverse the judgment of the trial court and enter final judgment in its favor, or, alternatively, to reverse the judgment of the trial court and remand the case for a new trial.

Dated: April 3, 2014

Respectfully submitted,

RGR, LLC

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CERTIFICATE

The undersigned hereby certifies that the foregoing complies with Rules 5:6, 5:26, and 5:29, and further certifies as follows:

(1) The Appellant/Defendant is RGR, LLC.

(2) Counsel for the Appellant/Defendant are:

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(5) On this 3rd day of April, 2014:

a) Fifteen copies of the foregoing Reply Brief of Appellant were hand delivered to Clerk's Office of the Supreme Court of Virginia for filing.

b) An electronic copy of the foregoing Reply Brief of the Appellant was sent via electronic mail to scvbriefs@courts.state.va.us and to Counsel for the Appellee.

c) Three copies of the foregoing Reply Brief of the Appellant were sent via first class mail to Robert Cynkar, Counsel for the Appellee.

Robert W. Loftin