IN THE

Supreme Court of Virginia

RECORD NO. 130633

RGR, LLC,

Appellant,

v.

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

Appellee.

OPENING BRIEF OF APPELLANT

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I. STATEMENT OF THE CASE

RGR, LLC ("RGR") respectfully asks this Court to reverse a $2.5 million jury verdict rendered in favor of the plaintiff, Georgia Settle ("Mrs. Settle"), Personal Representative of the Estate of Charles E. Settle, Jr., deceased ("Mr. Settle"), and enter final judgment in favor of RGR. Mrs. Settle contended at trial that her husband's death was proximately caused by RGR's negligent conduct, but the judgment of the trial court should be reversed because RGR owed no duty to Mr. Settle. Alternatively, should the Court find the existence of a duty, the judgment of the trial court nevertheless should be reversed because Mrs. Settle failed to establish that the lumber pile was the proximate cause of her husband's death and because Mr. Settle was contributorily negligent as a matter of law. In either case, final judgment should be rendered on behalf of RGR.

Mrs. Settle's husband died from injuries he sustained when his vehicle was struck by a train on a private grade crossing located on a private road adjacent to property leased by RGR. Mrs. Settle contended at trial that a lumber pile on RGR's leased property encroached on the railroad's right-of-way and obstructed Mr. Settle's view of the oncoming train. However, Mrs. Settle failed to establish that RGR owed any duty of care to her husband. While the common law of Virginia has recognized a

limited duty by landowners to travelers on adjacent public highways, Virginia law has never recognized a duty by a landowner with regard to third parties traveling on adjacent, private roads. Moreover, there was no evidence that RGR had any notice of Mr. Settle's use of the private crossing or that its lumber pile obstructed sightlines at the crossing. Finally, the evidence was clear and unrefuted that Mr. Settle was contributorily negligent in negotiating the crossing and that the lumber pile was not the proximate cause of his death.

The trial court erred as a matter of law by allowing Mrs. Settle to proceed to trial on a negligence theory not recognized under Virginia law. The trial court then compounded this error by failing to grant motions to strike where: (i) the evidence failed to establish any notice to RGR giving rise to any duty, if one existed; (ii) the evidence failed to establish that RGR's lumber pile was the proximate cause of Mr. Settle's collision with the train; and (iii) the undisputed evidence demonstrated that Mr. Settle was contributorily negligent as he failed to exercise reasonable care before crossing the train tracks. The trial court erred in instructing the jury regarding RGR's duty and then, following trial, the trial court erred as a matter of law in its rulings on various post-trial motions, including its interpretation of Code §§ 8.01-35.1 and 8.01-382.

A. Statement of Facts

At trial, the parties stipulated to the following:

- On October 12, 2004, while driving a 30-foot long dump truck loaded with gravel and weighing in excess of 26,000 pounds, Mr. Settle failed to stop before crossing a private railroad crossing on Kapp Valley Way, and was struck and killed by a train owned and operated by Norfolk Southern Corporation ("Norfolk Southern"). App. 433 (8/27/12 Tr. at 71:13-22); App. 435 (8/27/12 Tr. at 73:18-21); App. 436 (8/27/12 Tr. at 74:3-5).
- Wolf Realty, Inc. ("Wolf Realty") owned Kapp Valley Way, the property on both sides of Kapp Valley Way, and the property on both sides of Norfolk Southern's tracks at the private crossing. App. 434 (8/27/12 Tr. at 72:4-7; 72:16-20).
- RGR operated a lumber yard on land adjacent to Wolf Realty's property that it leased from Rose Investments, LLC ("Rose Investments"). App. 434-435 (8/27/12 Tr. at 72:20-73:7).
- Norfolk Southern owned the railroad tracks and possessed a 30-foot right of way on either side of the tracks. App. 434 (8/27/12 Tr. at 72:4-15).

- A portion of a lumber pile in RGR's lumber yard extended seven feet into this 30-foot right of way. App. 436 (8/27/12 Tr. at 74:6-12).
- Norfolk Southern operated trains in both directions on the railroad tracks that cross Kapp Valley Way, and the trains did not come at the same time every day. App. 436 (8/27/12 Tr. at 74:12-15).
- Mr. Settle was a licensed commercial driver, and, at the time of his death, he was employed as a dump truck driver by RL Rider & Company, which was under contract with the Prince William County Service Authority to construct a pipeline for the county's sewer system. App. 435 (8/27/12 Tr. at 8-17).

The parties also stipulated to the admissibility of Mr. Settle's quarry tickets. App. 435-436 (8/27/12 Tr. at 73:22-74:5). These quarry tickets established that, on the day of the collision, Mr. Settle had already delivered six loads of gravel to his employer's project on Kapp Valley Way, crossing the railroad tracks at the private crossing at least a dozen times that day alone and numerous times in the weeks prior. App. 553 (8/28/12 Tr. at 9-17).

One of Mr. Settle's bosses at RL Rider & Company, Mr. Workman, testified that Mr. Settle and the other drivers using the private crossing at

Kapp Valley Way were made aware that the crossing was a gravel crossing and was without crossing arms. App. 663-664 (8/29/12 Tr. at 197:5-198:2). The evidence also established that another dump truck driver, Mr. Compton, under the same circumstances, had sufficient sightlines to see an oncoming train coming from the same direction as the one that struck Mr. Settle's truck and to stop his truck before reaching the tracks. Mr. Compton was employed by RL Rider & Company, worked on the same project with Mr. Settle, and was familiar with and had used the private crossing at Kapp Valley Way. Mr. Compton testified that while driving an almost identical dump truck, under the same conditions, and at the same crossing, he had sufficient room and visibility to see an approaching train and to stop if necessary. App. 619-642 (8/29/12 Tr. at 100:11-123:10).

Two eyewitnesses to the accident who were stopped at the private crossing, Mr. Mendoza and Mr. Bonilla, testified that they heard the train sound its horn as it approached the crossing.[1] App. 460 (8/27/12 Tr. at 100:20-22); App. 471 (8/27/12 at 111:9-13). Mr. Bonilla testified the horn was "close" and "strong" and that he and Mr. Mendoza stopped at the

[1] The evidence established that the train horn sounded as it approached an adjacent public crossing at Route 15, which was approximately 600 feet from the private Kapp Valley Way crossing. App. 403 (8/27/12 Tr. at 13:16-20); App. 475 (8/27/12 Tr. at 115:9-11).

railroad tracks because they heard the train's horn. App. 472 (8/27/12 Tr. at 112:8-11); App. 475 (8/27/12 Tr. at 115:4-8).[2]

Most importantly, the evidence at trial established that Mr. Settle did not stop his dump truck before driving onto the tracks. App. 463-464 (8/27/12 Tr. at 103:16-104:4); App. 466 (8/27/12 Tr. at 106:8-21); App. 469 (8/27/12 Tr. at 109:7-10). Both Conductor Janney and Engineer Street, who were operating the Norfolk Southern train that struck Mr. Settle's truck, testified without contradiction that they could see Mr. Settle and his truck approaching the crossing, that Mr. Settle did not turn his head to look for an approaching train, and that he did not stop his truck before proceeding across the tracks. App. 610-615 (8/29/12 Tr. at 73:17-78:20); App. 643-647 (8/29/12 Tr. at 134:11-138:5).

RGR presented expert testimony from Mr. Young, a licensed commercial driver. Mr. Young testified that a driver with a commercial driver's license is required to stop at a crossing if the driver is unable to ascertain whether a train is present. App. 668-671 (9/4/12 Tr. at 36:19–

[2] Mr. Humphries was the only witness at trial that testified he did not hear a horn from the train. However, he also admitted that he was behind a box truck (occupied by Mr. Bonilla and Mr. Mendoza – both of whom heard the train horn), in a truck with the windows up, the air conditioning on, and he was talking on his cellphone. App. 483 (8/27/12 Tr. at 156:8-14); App. 489 (8/27/12 Tr. at 166:1-6).

39:1). Based upon his inspection of the crossing and review of the photographs in evidence, Mr. Young testified that Mr. Settle should have "[c]ome to a complete stop" before attempting to cross the private crossing at Kapp Valley Way. App. 669 (Sept. 4, 2012 Tr. at 37:18-21). Mr. Young's expert testimony was unrebutted.

There was no evidence at trial that Mr. Settle or his employer had permission from Wolf Realty to use the private road or the private crossing. There likewise was no evidence at trial that any representative or employee of RGR had ever been on Kapp Valley Way or the private crossing. The property RGR leased had no direct access to the private road or the private crossing.

Conductor Janney testified that the lumber pile had been located on the property leased by RGR since at least when he started working on this particular track in 2000. App. 608 (8/29/12 Tr. at 66:12-20). Mr. Humphreys, who operated a business across Kapp Valley Way that required him to use the private crossing, testified that his business had been there for twelve years and that RGR's lumber pile had been "there all the time." App. 482 (8/27/12 Tr. at 155:8-12); App. 486 (8/27/12 Tr. at 159:2-12).

There was no evidence that Norfolk Southern, Wolf Realty, Mr. Settle, or Mr. Settle's employer had ever complained to or otherwise notified RGR that the lumber pile was obstructing anyone's view of the tracks at the Kapp Valley Way crossing. App. 446-452 (8/27/12 Tr. at 85:3-91:18); App. 594-601 (8/29/12 Tr. at 34:19-41:3). Mr. Humphreys, who had operated a business there at Kapp Valley Way for twelve years and who stated that the lumber pile had been there "all the time," described the lumber pile as an obstruction but admitted he had never complained about it to RGR. App. 486 (8/27/12 Tr. at 159:2-15); App. 489 (8/27/12 Tr. at 166:15-21). Furthermore, the testimony by everyone who regularly traversed the crossing was that they never complained about RGR's lumber pile. App. 444 (8/27/12 Tr. at 83:21); App. 446 (8/27/12 Tr. at 85:12-13); App. 600-601 (8/29/12 Tr. at 40:16-41:3); App. 603 (8/29/12 Tr. at 45:12); App. 606-607 (8/29/12 Tr. at 60:10-61:4); App. 629 (8/29/12 Tr. at 110:3-15). Mr. Rider, one of Mr. Settle's bosses who described Mr. Settle as his friend, testified that he never mentioned anything to RGR about the lumber pile and that none of his employees ever complained about the lumber pile. App. 666-667 (9/4/12 Tr. at 24:15, 25:9-16).

B. Material Proceedings Below

On August 4, 2006, Mrs. Settle filed the first of seven original and amended complaints under four different record numbers naming fourteen different defendants, but not RGR, seeking damages arising from Mr. Settle's death. Not until December 22, 2010, in the eighth complaint she filed (styled as the Fourth Amended Complaint in Case No. 79219), did Mrs. Settle name RGR as a defendant, asserting claims for wrongful death and negligence per se.

The trial court overruled RGR's demurrer and plea in bar.[3] Following a settlement between Norfolk Southern and Mrs. Settle approved by the trial court on August 1, 2012, the trial court allowed Mrs. Settle's wrongful death claim to proceed to trial against RGR as the lone defendant. At a pretrial hearing held that same day, RGR sought clarification regarding the negligence theory being advanced by Mrs. Settle, including any duty RGR, the tenant on adjacent property, allegedly owed to Mr. Settle while he was traveling on a private road across a private railroad crossing.[4] The trial

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[3] RGR filed a Demurrer and a Plea in Bar to the Fourth Amended Complaint on January 20, 2011. App. 76-83. Among other points, RGR argued it owed no duty to Mr. Settle. App. 80.

[4] *See* App. 297-393 (8/1/12 Tr. at 133:3-229:14); App. 98-106 (RGR's Motion to Limit Evidence to Plaintiff's Concerted Action/Joint Enterprise Theory); App. 95-97 (Motion to Exclude Use of Town of Haymarket

court's rulings on RGR's pre-trial motions failed to provide clarification, and the case proceeded to trial. Mrs. Settle did not seek to amend or clarify her Fourth Amended Complaint prior to trial.

A jury trial was held from August 27 to September 5, 2012. At the conclusion of Mrs. Settle's case-in-chief, RGR moved to strike and argued, among other things, that Mrs. Settle failed to show that RGR owed or breached any duty to Mr. Settle (and in any case could owe no duty to Mr. Settle higher than that owed by Wolf Realty), that RGR's lumber pile was not the proximate cause of the collision, and that Mrs. Settle's claims were barred by Mr. Settle's contributory negligence in failing to stop before proceeding onto the private railroad crossing. App. 545-586 (8/28/12 Tr. at 124:15-165:6). RGR's motion to strike was denied. App. 586-589 (8/28/12 Tr. at 165:19-168:19). RGR renewed its motion to strike, again addressing the lack of any duty, the lack of proximate cause, and the unrefuted evidence of Mr. Settle's contributory negligence. App. 672-673 (9/4/12 Tr. at 95:5-96:6); App. 677-684 (9/4/12 Tr. at 112:5-119:20). This motion also was denied. App. 673 (9/4/12 Tr. at 96:7-13); App. 684-685 (9/4/12 Tr. at 119:21-120:4). Over the objections of RGR, the trial court gave the jury two instructions proposed by Mrs. Settle, Instruction 7 and Instruction 11b,

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Municipal Code); App. 84-94 (RGR's Objections to Plaintiff's Witness and Exhibit Lists and Deposition Designations).

that purported to describe duties owed by RGR to Mr. Settle. App. 169; App. 171; App. 686-693 (9/4/12 Tr. at 133:18-134:1, 134:18-135:10, 162:13-164:5, 172:1-20).

On September 5, 2012, the jury returned a verdict in favor of Mrs. Settle, and awarded her $2,500,000, with interest from October 12, 2008. The jury awarded 75% of this verdict to Mrs. Settle and 25% to Mr. Settle's adult son. App. 175.

On October 12, 2012, RGR filed its Motion to Set Aside the Verdict as Contrary to the Law and Evidence, Motion for a New Trial, and Motion for Remittitur.[5] App. 176-177I. The trial court held a hearing on these post-trial motions on October 26, 2012, App. 713-750. On November 6, the trial court denied RGR's post-trial motions and entered Mrs. Settle's proposed final order. App. 229-233. In the November 6 Order, RGR's Objection Number 7 noted an objection based on the failure to set-off against the jury verdict the amount of the Norfolk Southern settlement with Mrs. Settle.[6]

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[5] RGR sought relief pursuant to Code § 8.01-430, and asked the trial court to set aside the jury verdict as contrary to the law and evidence and enter final judgment for RGR. Alternatively, pursuant to Code § 8.01-383 and Code § 8.01-381.1, RGR requested a new trial on all of the issues, or to remit the jury's award.

[6] Following the October 26 hearing, and before the parties received the November 6 Order from the trial court, Mrs. Settle filed supplemental briefs opposing RGR's post-trial motions. App. 212-228. Mrs. Settle then filed a

App. 232. On November 16, the trial court entered an agreed suspension order that vacated the November 6 Order and retained jurisdiction in order to address the set-off. App. 253.

On November 30, 2012, Mrs. Settle filed her Motion for Entry of Final Order. App. 254-257. On December 10, RGR filed its Opposition to Plaintiff's Motion for Entry of Final Order. App. 258-267. In these pleadings, the parties disputed how to interpret the provisions of Code §§ 8.01-35.1 and 8.01-382 and how to apply the proceeds of the Norfolk Southern settlement to the jury verdict rendered against RGR. Mrs. Settle contended that the set-off should be subtracted from the combined sum of the $2.5 million damages award and interest accrued through the date of the judgment, whereas RGR contended that the set-off should apply against the $2.5 million damages award only, with interest to be calculated on the reduced amount from October 12, 2008. Following a hearing on December 14, 2012, the trial court adopted Mrs. Settle's position. App. 760-780.

Motion for Court Approval of Disbursement, and RGR filed a response to the supplemental briefs and opposition to the Motion for Court Approval of Disbursement. App. 234-252. On November 15, Mrs. Settle filed a Motion for Court Approval of Wrongful Death Settlement and a proposed order regarding same.

On January 17, 2013, the trial court entered a Partial Final Judgment Order pursuant to Rule 5:8A.[7] App. 268-279. This timely appeal followed. RGR filed its Petition for Appeal on April 17, 2013. Following a writ panel on August 28, 2013, the panel refused RGR's Petition on October 7, 2013. RGR filed its Petition for Rehearing on October 21, 2013. The Court granted RGR's Petition for Rehearing on January 23, 2014.

II. ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law in not granting RGR's pre-trial motions on August 1, 2012, and by not clarifying the alleged duty RGR owed to Mr. Settle as well as the negligence theory being advocated by Mrs. Settle, instead erroneously allowing Mrs. Settle to proceed against RGR on a premises liability theory although Virginia does not recognize any duty by a premises owner or lessor to a guest on an adjacent property.[8]

2. The trial court erred as a matter of law in not granting RGR's motions to strike at trial on the grounds that (a) Mrs. Settle failed to establish that RGR owed a duty to Mr. Settle, (b) the undisputed evidence demonstrated that Mr. Settle was contributorily negligent as a matter of law and his own negligence was the proximate cause of the collision, and (c)

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[7] The trial court entered its final order pursuant to Rule 5:8A because Norfolk Southern filed a third-party complaint against RGR, Wolf Realty, and others on November 30, 2010. App. 1-48. This third-party complaint remains pending before the trial court.

[8] This assignment of error was preserved in RGR's Motion to Limit Evidence to Plaintiff's Concerted Action/Joint Enterprise Theory (App. 98-106); RGR's Motion to Exclude Use of Town of Haymarket Municipal Code (App. 95-97); RGR's Objections to Plaintiff's Witness and Exhibit Lists and Deposition Designations (App. 84-94); and at the pre-trial hearing on August 1, 2012 at 133:3–229:14 (App. 296-393).

the undisputed evidence demonstrated that RGR's lumber pile was not a proximate cause of the accident where Mr. Settle was killed.[9]

3. The trial court erred as a matter of law in giving premises liability instructions to the jury that are not recognized in, and are contrary to, Virginia law in the context of a non-premises liability case.[10]

4. The trial court erred as a matter of law in not granting RGR's Motion to Set Aside the Verdict as Contrary to the Law and Evidence, Motion for a New Trial, and Motion for Remittitur, where the verdict was contrary to the evidence and incorrect as a matter of law because Mrs. Settle did not establish any duty owed by RGR to Mr. Settle, any breach of any duty by RGR, or that any conduct by RGR was the proximate cause of Mr. Settle's death, and it was incorrect as a matter of law because Virginia does not recognize any duty by a premises owner or lessor to a guest on an adjacent property.[11]

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[9] This assignment of error was preserved at App. 545-589 (8/28/12 Tr. at 124:15–168:19); App. 672-673 (9/4/12 Tr. at 95:5-96:13); and App. 677-685 (9/4/12 Tr. at 112:5–120:4).

[10] This assignment of error was preserved at App. 686-693 (9/4/12 Tr. at 133:18-134:1, 134:18-135:10, 162:13-164:5, 172:1-20); App. 169; App. 171.

[11] This assignment of error was preserved in RGR's Motion to Set Aside the Verdict as Contrary to the Law and Evidence, Motion for a New Trial, and Motion for Remittitur and Memorandum in Support (App. 176-177I); RGR's Reply in Support of its Motion to Set Aside the Verdict as Contrary to the Law and Evidence, Motion for a New Trial, and Motion for Remittitur (App. 203-211); October 26, 2012 Hearing Transcript on RGR's Post-Trial Motions (App. 713-750); RGR's Response to Plaintiff's Supplemental Briefing (App. 234-252); the trial court's Order of November 6, 2012 (App. 229-233); the Hearing Transcript before the trial court on November 16, 2012 (App. 751-759); the Suspension Order entered by the trial court on November 16, 2012 (App. 253); and the Partial Final Judgment Order entered on January 17, 2013 (App. 268-279).

5. The trial court erred as a matter of law in interpreting and applying Code §§ 8.01-35.1 and 8.01-382 to the set-off of the Norfolk Southern settlement.[12]

III. ARGUMENT AND AUTHORITIES

The threshold question in any negligence case is whether the defendant owed a duty of care to the plaintiff. *Burns v. Johnson*, 250 Va. 41, 44, 458 S.E.2d 448, 450 (1995). Mrs. Settle asserted below that this is not a premises liability case. *See, e.g.*, App. 566 (8/28/12 Tr. at 145:10-11). RGR agrees this is *not* a premises liability case as to RGR. Mr. Settle's injuries occurred on Norfolk Southern's railroad tracks on property owned by Wolf Realty. The problem, however, is that in pre-trial motions heard on August 1, 2012, and throughout the trial and post-trial proceedings, both Mrs. Settle and the trial court ignored clear and controlling Virginia precedent regarding wrongful death claims at railroad crossings (and analogous circumstances) and instead relied on premises liability precedent to support the trial court's holdings that RGR owed a duty

[12] This assignment of error was preserved at RGR's Response to Plaintiff's Supplemental Briefing (App. 234-252); the trial court's Order of November 6, 2012 (App. 229-233); the Hearing Transcript before the trial court on November 16, 2012 (App. 751-759); the Suspension Order entered by the trial court on November 16, 2012 (App. 253); RGR's Opposition to Plaintiff's Motion for Entry of Final Order (App. 258-267); the Hearing Transcript before the trial court on December 14, 2012 (App. 760-780); and the Partial Final Judgment Order entered on January 17, 2013 (App. 268-279).

to Mr. Settle, that RGR's lumber was the proximate cause of Mr. Settle being struck and killed by a Norfolk Southern train, and that Mr. Settle was not contributorily negligent.

The trial court's legal errors allowed this case to be improperly cast in the context of premises liability, and allowed the jury to reach a verdict without legal or evidentiary support. The judgment of the trial court should be reversed and judgment entered by this Court in favor of RGR, or, alternatively, the case should be remanded for a new trial.

A. <u>Standard of Review</u>

With regard to Assignment of Error 1, a pre-trial ruling regarding the existence of a legal duty is a question of law that is reviewed de novo. *See, e.g., Hale v. Maersk Line Ltd.*, 284 Va. 358, 379, 732 S.E.2d 8, 20 (2012) ("'We review the trial court's ruling de novo, as [t]he issue whether a legal duty in tort exists is a pure question of law.'") (citation omitted); *Burns v. Johnson*, 250 Va. 41, 45, 458 S.E.2d 448, 451 (1995) ("The question of whether a duty of care exists in a negligence case is a pure question of law. In this case, the trial court erred in refusing to rule, as a matter of law, that the plaintiff had failed to establish defendant owed her a duty under these circumstances.") (citation omitted).

With regard to Assignment of Error 2, when reviewing a motion to strike the plaintiff's evidence, a trial court does not sit as the fact finder but rules "on a matter of law to determine whether the [plaintiff] ha[s] made out a prima facie case." *Costner v. Lackey*, 223 Va. 377, 382, 290 S.E.2d 818, 820 (1982). In such circumstances, a trial court must review the evidence in the light most favorable to the non-moving party. *Baysden v. Roche*, 264 Va. 23, 25, 563 S.E.2d 725, 726 (2002). The same standard applies to this Court's review of the trial court's decision on the motion to strike. *Id.* at 26, 563 S.E.2d at 726. *See also Volpe v. City of Lexington*, 281 Va. 630, 639, 708 S.E.2d 824, 828 (2011).

With regard to Assignment of Error 3, the determination whether a jury instruction accurately states the relevant law is a question of law that is reviewed de novo. *Orthopedic & Sports Physical Therapy Assocs. v. Summit Group Props., LLC*, 283 Va. 777, 782, 724 S.E.2d 718, 721 (2012); *Hancock-Underwood v. Knight*, 277 Va. 127, 131, 670 S.E.2d 720, 722 (2009).

With regard to Assignment of Error 4, a verdict may be set aside only where it is contrary to the evidence or without evidence to support it. Code § 8.01-430. The issues raised in RGR's post-trial motions, however, are

questions of law that are reviewed de novo. *Sugarland Run Homeowners Ass'n v. Halfmann*, 260 Va. 366, 371-72, 535 S.E.2d 469, 472 (2000).

Finally, Assignment of Error 5 is an issue of statutory interpretation that is a pure question of law which this Court reviews de novo. *Crawford v. Haddock*, 270 Va. 524, 528, 621 S.E.2d 127, 129 (2005).

B. RGR Did Not Owe Mr. Settle a Duty of Care (Assignments of Error 1, 2, 3, and 4)

The case proceeded to trial against RGR solely on Mrs. Settle's negligence claim for wrongful death. The trial court erroneously gave two jury instructions that incorrectly imposed a duty on RGR. The first stated that RGR is presumed, as "an owner or vendor of land" to know the "area and boundaries of such, and whether an encumbrance is on his or her property or adjacent property" (Instruction No. 7), and the second stated that "[e]very person has the duty to exercise ordinary care in the use and maintenance of its property to prevent injury to others" (Instruction No. 11b). RGR did not, however, owe Mr. Settle a duty of care.

1. RGR had No Duty of Care to Mr. Settle as a Matter of Law

"An action for negligence only lies where there has been a failure to perform some legal duty which the defendant owes to the party injured." *Balderson v. Robertson*, 203 Va. 484, 487-88, 125 S.E.2d 180, 183 (1962) (citations omitted); *see also Tiller v. Norfolk & W. R. Co.*, 190 Va. 605, 611-

12, 58 S.E.2d 45, 48 (1950) ("It is elementary that where there is no duty, there can be no actionable negligence."); *Gunter's Adm'r v. Southern R. Co.*, 126 Va. 565, 573, 101 S.E. 885, 887 (1920) ("The basis of recovery is the negligence of the defendant, that is, the breach of some duty imposed by law, common or statute. It is always incumbent on the plaintiff to establish this, as it will never be presumed, and in its absence there can be no recovery.").

Here, the Fourth Amended Complaint (or "FAC") alleged a wrongful death cause of action based on allegations of negligence against RGR and Norfolk Southern.[13] App. 49-75. Mrs. Settle failed to allege or prove, however, (1) any duty RGR owed to Mr. Settle or (2) the breach of any purported duty that proximately caused Mr. Settle's unfortunate death. Without an allegation or evidence of a specific duty RGR owed Mr. Settle, or that RGR failed to perform this duty, a wrongful death action cannot survive. The trial court should not have let this case proceed to a jury, or, alternatively, should have struck the evidence and entered judgment in favor of RGR, or set the jury verdict aside and entered judgment for RGR.

[13] Mrs. Settle also alleged negligence per se. *See* App. 73-74 (FAC ¶¶ 92-99). That claim, however, was dismissed, with prejudice, when demurrers to prior iterations of the FAC were sustained. *See* App. 295 (7/9/09 Tr. at 53:20-22); App. 587-589 (8/28/12 Tr. at 166:20-168:19).

See, e.g., Cline v. Dunlora South, LLC, 284 Va. 102, 110, 726 S.E.2d 14, 18 (2012) (refusing to impose a new duty on a landowner that did not exist at common law and was foreign to any precedent of this Court).

The negligence allegations against RGR boiled down to essentially one claim – that RGR "acted in concert with Norfolk Southern in the operation of the offload facility [and] created these sight obstructions within Norfolk Southern's right-of-way with conscious disregard for, or reckless indifference to, the probable harmful consequences of this conduct." App. 37 (FAC ¶ 79).[14] Yet Mrs. Settle presented no evidence concerning concerted action between RGR and Norfolk Southern, and expressly disavowed this theory in her pre-trial motions and during the trial in

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[14] Mrs. Settle also alleged negligence against both Norfolk Southern and RGR, which included a failure to warn, App. 37-38 (FAC ¶¶ 80, 84), failure to maintain, upkeep, and inspect, App. 37 (FAC ¶¶ 81, 82), and failure to make the crossing safe. App. 37-38 (FAC ¶¶ 83, 85). As to Norfolk Southern, Mrs. Settle also alleged that Norfolk Southern failed to move the lumber and failed to warn. App. 37 (FAC ¶ 78). Importantly, Plaintiff did <u>not</u> allege that RGR was negligent in failing to move the lumber stack. *See* App. 36-40 (FAC ¶¶ 74-99). On August 1, 2012, once Mrs. Settle dismissed Norfolk Southern with prejudice from the suit, the claims against Norfolk Southern were also dismissed, and Plaintiff did not amend her claims against RGR. RGR asserts, as it always has throughout these proceedings, that it did not have any duty to warn, to maintain, upkeep, inspect the train tracks or the crossing, or to make the crossing safe. Furthermore, once Norfolk Southern was dismissed, the only remaining allegation against RGR was the concert of action with Norfolk Southern claim.

response to RGR's motion to strike. *See* App. 314 (8/1/12 Tr. at 150:19-20); App. 566 (8/28/12 Tr. at 145:10-11).

Mrs. Settle did allege that, "Defendants owed a duty of reasonable due care to [Mr. Settle] and the public at large in the care, maintenance, upkeep, inspection of the properties identified, including, but not limited to, keeping the premises free from defects, dangerous conditions, and obstructions, and providing adequate and proper warnings to motorists using that railroad crossing." App. 37 (FAC ¶ 81). But Mr. Settle was not a member of the "public at large." He was, at most, an invited guest using a private roadway and a private railroad crossing on Wolf Realty's property.[15]

On multiple occasions before and during the trial, RGR sought clarification as to the nature of the duty it allegedly breached. Although the trial court characterized the claim as "a negligence case," App. 357 (8/1/12 Tr. at 193:15-17), and acknowledged that the existence of a legal duty "is a question of law," App. 355 (8/1/12 Tr. at 191:11-20), the trial court never described the nature of the alleged duty. In response to RGR's motion to strike at the end of Mrs. Settle's case-in-chief, Mrs. Settle argued that RGR

[15] Mrs. Settle stipulated that Wolf Realty was the owner of Kapp Valley Way and its crossing, and that Norfolk Southern owned the tracks, yet Mrs. Settle offered no evidence that either Mr. Settle or his employer had sought or obtained permission from Wolf Realty or Norfolk Southern to use the private road or the private crossing.

owed Mr. Settle a general duty of care and cited in support of her argument several simple negligence cases and the Restatement of Torts. *See* App. 558-567 (8/28/12 Tr. at 137:1-146:15).

The authorities relied on by Mrs. Settle below and in response to RGR's Petition for Appeal do not stand for the proposition that RGR owed any duty of care to someone utilizing a private rail crossing on adjoining private property. The first case, *S. States Grain Mktg. Coop. Inc. v. Garber*, 205 Va. 757, 139 S.E.2d 793 (1965), was an ordinary negligence case against an owner of property for an injury that occurred *on the property owner's land*, while the second, *Rice v. Turner*, 191 Va. 601, 62 S.E.2d 24 (1950), was an ordinary negligence case against a property owner for an injury that occurred on a public road when a cow escaped *from the owner's property*. Mrs. Settle also relied on Restatement (Second) of Torts § 364 (1965) ("Creation or Maintenance of Dangerous Artificial Conditions"), but this section is inapplicable because, among other reasons – including those discussed below in Section B.2, there was no evidence that RGR "kn[ew] or, by the exercise of reasonable care, should [have known] that the structure or other artificial condition is dangerous." *Id.* at § 364 cmt. b (1965).

Mrs. Settle had no support for her contention that a landowner, much less a tenant or possessor like RGR, is responsible for the well-being of guests on a third-party's adjacent, private property. While Mrs. Settle argued in response to RGR's motion to strike at the close of her evidence that she was not preceding on a premises liability theory, *see* App. 566 (8/28/12 Tr. at 145:10-11), she in fact pursued a theory that RGR was liable as a result of the alleged negligent maintenance of its property, and she cited no other legal theory under which she could recover. Ultimately, the trial court erred in allowing a negligence case to proceed against RGR because RGR owed no legal duty to Mr. Settle.

2. RGR Was Not on Notice of Any Dangerous Condition, and Thus Had No Duty

Central to the "general duty of care" advocated by Mrs. Settle is notice by or to the defendant prior to the alleged harm occurring. A premises owner is not an insurer of the safety of its invitee, much less it's neighbor's invitee. *Culpepper v. Neff*, 204 Va. 800, 804, 134 S.E.2d 315, 318-19 (1964). Rather, "actual or constructive knowledge on the part of the owner of a defect causing the injury is necessary to render him liable." *Id. See also Roll 'R' Way Rinks, Inc. v. Smith*, 218 Va. 321, 327, 237 S.E.2d 157, 161 (1977).

Here, there was no evidence at trial that RGR had actual or constructive knowledge at the time of the accident that the lumber pile on its property potentially created any dangerous condition.[16] There was no evidence of any prior accident at the crossing, there was no evidence that anyone from RGR ever used the crossing, nor was there any evidence that Norfolk Southern, Wolf Realty, or anyone else ever complained to RGR that RGR's lumber pile created any visual obstruction. While an RGR employee responded in the affirmative at trial that "no one is needlessly allowed to endanger people," App. 504 (8/28/12 Tr. at 25:3-5), that testimony was given from a hindsight perspective and, at best, were the mere expressions of an employee. *See Rice v. Turner*, 191 Va. 601, 608, 62 S.E.2d 24, 27 (1950). This answer did not suggest in any way that RGR knew of any danger from its lumber pile prior to or at the time of Mr. Settle's collision with the Norfolk Southern train. *See id.*

Nor should it have. The lumber pile was an open and obvious condition. To the extent it did present a sight obstruction, Mr. Settle, a

[16] The trial court ignored the facts that RGR did not have any direct access to, much less ownership or any other possessory interest or privilege in, Kapp Valley Way itself, the railroad crossing on Kapp Valley Way adjacent to the property leased by RGR, or the property owned by Norfolk Southern. Thus, any duties RGR might have would flow, at most, to either Wolf Realty (the owner of Kapp Valley Way and the crossing) or to Norfolk Southern (the owner of the railroad tracks). *See, e.g., Cline*, 284 Va. at 108-10, 726 S.E.2d at 17-18.

licensed commercial driver familiar with the crossing, was trained to take the obstruction into account in negotiating the crossing. 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, 349 S.E.2d 355, 357 (1986) (citing *Appalachian Power Co. v. Sanders*, 232 Va. 189, 193-94, 349 S.E.2d 101, 104-05 (1986); *Indian Acres v. Denion*, 215 Va. 847, 849-50, 213 S.E.2d 797, 799 (1975)). "'[S]uch notice is not required where the dangerous condition is open and obvious, and is patent to a reasonable person exercising ordinary care for his own safety.'" *Fultz v. Delhaize Am., Inc.*, 278 Va. 84, 89, 677 S.E.2d 272, 274 (2009) (quoting *Knight v. Moore*, 179 Va. 139, 146, 18 S.E.2d 266, 269 (1942)).

It was undisputed that the lumber pile had existed at that location since at least 2000, and that Mr. Settle was familiar with the private crossing at Kapp Valley Way (having crossed it many times before and at least 12 times alone on the day of the accident before being struck by the train). To the extent the lumber pile created a danger, and even to the extent that RGR was on notice of the danger, Mr. Settle was also on notice of the open and obvious condition, which relieves RGR of any liability.

The cases relied upon below by Mrs. Settle support RGR's position. *See Louisville & Nashville R.R. Co. v. O'Neil*, 119 Va. 611, 89 S.E. 862 (1916); *Overstreet v. Sec. Storage & Safe Deposit Co.*, 148 Va. 306, 138 S.E. 552 (1927); *Rice v. Turner*, 191 Va. 601, 62 S.E.2d 24 (1950); *T.E. Ritter Corp. v. Rose*, 200 Va. 736, 107 S.E.2d 479 (1959). *See also Cline v. Dunlora South, LLC*, 284 Va. 102, 114-15, 726 S.E.2d 14, 21 (2012) (Lemons, J., dissenting) (advocating adoption of a rule allowing for liability for failure to exercise reasonable care to prevent an unreasonable risk of harm to persons using a public highway if the defendant had notice that a public nuisance caused by natural conditions exists on his land near a public highway).

In *O'Neil*, this Court affirmed a verdict for the plaintiff because the plaintiff had placed the defendant railroad on notice that the obstruction erected by the railroad was dangerous and impeded his pathway. 119 Va. at 627, 89 S.E. at 866.

In *Overstreet*, the plaintiff, an electrician, was injured when an elevator malfunctioned. 148 Va. at 308-11, 138 S.E. at 552-53. The jury returned a verdict for the plaintiff and it was set aside by the trial court. 148 Va. at 316, 138 S.E. at 555. This Court affirmed on the grounds that there was no evidence the defendant had notice of any problem with the elevator

in which the plaintiff was injured and the plaintiff had been using the elevator for a week prior to the accident without incident. 148 Va. at 319-21, 138 S.E. at 555-56.

In *Ritter*, the plaintiff was injured when the "earth mover or scraper" he was driving collided with a passenger train. 200 Va. at 737, 107 S.E.2d at 480. The jury returned a verdict for the plaintiff. On appeal, this Court reversed and entered judgment in favor of the defendant railroad because it did not have notice from the construction company that employed the plaintiff that heavy equipment would be moving across the tracks. 200 Va. at 740, 107 S.E.2d at 482.

The result in *Rice* was similar. The plaintiff was injured while driving on a public road when his car struck a cow. He contended that the owner of the cow was negligent in failing to keep the cow on the owner's property. The jury returned a verdict for the plaintiff. 191 Va. at 603, 62 S.E.2d at 25. On appeal, this Court reversed and entered final judgment for the owner of the cow because there was no evidence that the owner had any notice that the cow had escaped its pasture. 191 Va. at 608-09, 62 S.E.2d at 27. This Court also specifically rejected plaintiff's attempt to rely on after-the-fact statements by an employee as evidence that the defendant employer had

notice at the time of the accident that the cow was loose. 191 Va. at 608, 62 S.E.2d at 27.

The evidence at trial was that RGR's lumber pile had been at that location for perhaps twelve years, but since at least 2000. *See* App. 482 (8/27/12 Tr. at 155:8-12); App. 486 (8/27/12 Tr. at 159:2-12); App. 608 (8/29/12 Tr. 66:12-20). There was no evidence that RGR had any notice that the private crossing was being used by Mr. Settle or his employer. There was no evidence that RGR's employees had ever been on Kapp Valley Way or traversed the crossing. Importantly, there was no evidence anyone – Mr. Settle, his employer, Wolf Realty, Norfolk Southern, or anyone else – had given any notice to RGR that its lumber pile created a danger or impeded anyone's ability to see or hear an oncoming train. App. 446-452 (8/27/12 Tr. at 85:3-91:18); App. 486 (8/27/12 Tr. at 159:2-15); App. 489 (827/12 Tr. at 166:15-21); App. 594-601 (8/29/12 Tr. at 34:19-41:3). The testimony by those who regularly traversed the crossing was that they never complained about RGR's lumber pile. App. 444 (8/27/12 Tr. at 83:21); App. 446 (8/27/12 Tr. at 85:12-13); App. 600-601 (8/29/12 Tr. at 40:16-41:3); App. 603 (8/29/12 Tr. at 45:12); App. 606-607 (8/29/12 Tr. at 60:10-61:4); App. 629 (8/29/12 Tr. at 110:3-15); App. 666-667 (9/4/12 Tr. at 24:15, 25:9-16).

In the absence of any evidence of notice, Mrs. Settle failed to establish that RGR had a duty to Mr. Settle. Consistent with this Court's precedent, the judgment on behalf of Mrs. Settle should be reversed and final judgment entered for RGR.

3. The Trial Court Erred in Instructing the Jury

The two instructions given by the trial court to the jury – over the objection of RGR – regarding the duty RGR supposedly owed Mr. Settle, improperly classified RGR as a property owner and were thus based on premises liability theory. *See* App. 169, 171. These instructions imposed a duty upon RGR that is not supported by Mrs. Settle's allegations, the evidence at trial, or any precedent in Virginia law. The two instructions at issue stated that RGR is presumed, as "an owner or vendor of land" to know the "area and boundaries of such, and whether an encumbrance is on his or her property or adjacent property" (Instruction No. 7), and that "[e]very person has the duty to exercise ordinary care in the use and maintenance of its property to prevent injury to others" (Instruction No. 11b).

In arguing to the trial court for the jury to receive Instruction No. 7, Mrs. Settle cited two sources in support. The first, 31A C.J.S. Evidence § 281, provides the language for what became Instruction No. 7: "In the

absence of evidence to the contrary, it is presumed that an owner or vendor of land knows the area and boundaries of such, and whether an encumbrance is on his or her property or adjacent property. The second was a quotation from *Mathews v. Gillespie*, 137 Va. 639, 645, 120 S.E. 324, 326 (1923): "[O]wners of land generally know their own boundaries, and . . . their deeds should not be construed as intending to convey land to which they have not title." The context of both shows why it was an error as a matter of law for the trial court to give Instruction No. 7 to the jury.

The excerpt from C.J.S. concerns an evidentiary presumption that may be used in the context of boundary disputes or other controversies regarding realty. It has nothing to do with negligence. The quote from *Mathews* provided to the trial court by Mrs. Settle omits a portion of the opinion and contains a typographical error. The entire quote reads:

> By giving emphasis to the specific call for G. Kyle's line, there is, we think, a failure to give proper consideration to the view that owners of land generally know their own boundaries, and that their deeds should not be constructed as intending to convey land to which they have no title, unless the language used therein is so clear as to leave no fair doubt of such an intention.

Mathews, 137 Va. at 645, 120 S.E. at 326. Obviously, *Mathews* was not a negligence case. It involved a dispute about how a deed should be interpreted and applied. There does not appear to be any precedent from

this Court, or any other Virginia court of record, indicating that Instruction No. 7 was given in any type of case – much less a negligence case.

In arguing to the trial court for the jury to receive Instruction No. 11b, Mrs. Settle cited three cases: *Rice*, *Ritter*, and *O'Neil*. In seeking this instruction, Mrs. Settle emphasized the language in *Rice* that states, "The common law imposes upon every person the duty to exercise ordinary care in the use and maintenance of his own property to prevent injury to others." *Rice*, 191 Va. at 605, 62 S.E.2d at 26. Mrs. Settle did not mention the notice and knowledge requirements that accompany this general duty of ordinary care. *See supra* at B.2.[17]

The consequences of recognizing the duty reflected in these two instructions and imposed on RGR by the trial court are considerable. Virginia law requires, at most, limited duties by a landowner to third parties traveling on adjacent, public highways. *See, e.g., Cline*, 284 Va. at 105-10,

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[17] In her post-trial briefing in support of these two instructions, *see* App. 178-202 and 212-228, Mrs. Settle characterized RGR's lumber pile as creating a dangerous condition blocking Mr. Settle's view. Mrs. Settle relied on *Perlin v. Chappell*, 198 Va. 861, 96 S.E.2d 805 (1957), and *Louisville & Nashville R.R. Co. v. O'Neil*, 119 Va. 611, 89 S.E. 862 (1916). Neither supports Mrs. Settle, and both illustrate Mrs. Settle's attempts to improperly import premises liability concepts despite her concessions that her case was not a premises liability case. *Perlin* was a premises liability case involving an escaped heifer, and *O'Neil* was a dispute involving the construction of fence across an easement. Neither supports the position or conclusion that RGR had a duty to Mr. Settle or that RGR's lumber pile proximately caused Mr. Settle to collide with the train.

726 S.E.2d at 16-18 (discussing precedent). Virginia law has never recognized a duty by a landowner with regard to third parties traveling on adjacent, private roads. Importantly, this case is not about a physical obstruction on the private road itself; it is about a passive obstruction on private land adjacent to a private road. Under Mrs. Settle's theory, private property owners or tenants in rural areas (due to the location of their crops), industrial areas (due to the location of their fences or equipment), or residential areas (due to their fences or shrubs) now may be liable for similar passive obstructions that do not touch upon or invade the private road itself. There is no precedent in Virginia recognizing such a duty to protect mere sight lines, and this Court should reverse the judgment of the trial court and enter final judgment in favor of RGR. If left uncorrected, such a liability theory will have far-reaching implications across the Commonwealth.

C. <u>Mrs. Settle's Evidence at Trial Varied from the Allegations in the Fourth Amended Complaint</u> (Assignments of Error 1, 2, 3, and 4)

Virginia law is clear that a trial court "may not base a judgment or decree upon facts not alleged or upon a right, however meritorious, that has not been pleaded and claimed." *Syed v. Zh Techs., Inc.*, 280 Va. 58, 71, 694 S.E.2d 625, 632 (2010) (citing *Hensley v. Dreyer*, 247 Va. 25, 30,

439 S.E.2d 372, 375 (1994)). Once the other defendants to this case were dismissed, the only remaining specific allegation against RGR was found in Paragraph 79 of the Fourth Amended Complaint. *See supra* at Note 14. This paragraph asserted that RGR "acted in concert with Norfolk Southern in the operation of the offload facility created these sight obstructions within Norfolk Southern's right-of-way with conscious disregard for, or reckless indifference to, the probable harmful consequences of this conduct." App. 71 (FAC ¶ 79).

Mrs. Settle never moved to amend the Fourth Amended Complaint after Norfolk Southern was dismissed on August 1, 2012; hence, her sole theory of negligence against RGR was the concert of action negligence claim.[18] At trial, however, Mrs. Settle presented no evidence to support the concert of action allegation, and in fact disavowed any intention to rely on this theory. *See* App. 314 (8/1/12 Tr. at 150:19-20); App. 566 (8/28/12 Tr. at 145:10-11). The trial court should have set aside the jury verdict and entered judgment for RGR because Mrs. Settle's evidence varied so

[18] This allegation incorporated an aspect of gross negligence. App. 71 (FAC ¶ 79 ("with conscious disregard for, or reckless indifference to")). The trial court sustained RGR's demurrer with respect to Mrs. Settle's claim for punitive damages, and rejected during trial Mrs. Settle's efforts to argue that RGR acted recklessly. App. 98-106; App. 555-557 (8/28/12 Tr. at 134-19-136:18); App. 581-589 (8/28/12 Tr. at 160:12-168:19).

drastically from her pleading that the verdict has no basis in either the law or the evidence adduced at trial.[19]

D. RGR's Lumber Pile was Not the Proximate Cause of Mr. Settle's Collision with the Norfolk Southern Train (Assignments of Error 2, 3, and 4)

The undisputed evidence taken in the light most favorable to Mrs. Settle demonstrated that RGR's lumber pile was not the proximate cause of the collision between Mr. Settle and the Norfolk Southern train. A proximate cause of an event is that "act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred." *Sugarland*, 260 Va. at 372, 535 S.E.2d at 472. *See also Ford Motor Co. v. Boomer*, 285 Va. 141, 150, 736 S.E.2d 724, 728 (2013). While proximate causation is generally a matter to be resolved by the jury, "when reasonable people cannot differ, the issue becomes a question of law for the court to decide." *Sugarland*, 260 Va. at 372, 535 S.E.2d at 472.

[19] During the August 1, 2012 hearing, counsel for RGR attempted to gain a better understanding of the claim(s) being brought against it by Mrs. Settle, what defenses to prepare for trial, and what jury instructions to draft. App. 327 (8/1/12 Tr. at 163:2-21). However, even after this hearing, during which Norfolk Southern was dismissed due to settlement, Mrs. Settle did not move to amend the Fourth Amended Complaint to assert any new allegations against RGR.

The Court's decision in *Sugarland* is controlling precedent here. In *Sugarland*, an eight-year-old boy was struck by a car and killed when he rode his bicycle down a private bicycle path and into a public street. His parents brought a wrongful death action against the driver of the automobile and the homeowner's association that owned the private bicycle path. The parents alleged that the association had notice or knowledge of "the unreasonably dangerous condition" existing at the intersection of the bicycle path and the street. *Sugarland*, 260 Va. at 368, 535 S.E.2d at 470. More specifically, the dangerous condition that allegedly existed consisted of various objects and vegetation obstructing the view of the bicycle path from the street (and vice versa) as well as the lack of signs or markings on the bicycle path or the road to warn a bicyclist or motorist about the intersection. *Id.* at 369, 535 S.E.2d at 470.

A jury returned a verdict against the association, but ruled in favor of the driver of the automobile. The association appealed. The undisputed evidence at trial was that the eight-year-old boy did not slow down as he approached the intersection, "nor did he stop or look to his left in the direction of [the driver's] vehicle." *Sugarland*, 260 Va. at 370, 535 S.E.2d at 471. Focusing on this evidence, as well as the undisputed fact that the boy would have seen the automobile had he stopped on the bike path before

attempting to cross the road, this Court reversed the judgment of the trial court and entered judgment in favor of the association, holding that "the evidence was insufficient as a matter of law to establish that the alleged defects in the design of the pathway and its intersection with Sugarland Run Drive were a proximate cause of the accident." *Id.* at 374, 535 S.E.2d at 473-474.

The undisputed evidence established that Mr. Settle was on notice of the potential danger of an approaching train. One of Mr. Settle's bosses at RL Rider & Company, Mr. Workman, testified that Mr. Settle and the other drivers using the private crossing at Kapp Valley Way were made aware that the crossing was a gravel crossing and was without crossing arms. App. 663-664 (8/29/12 Tr. at 197:5-198:2). Furthermore, the crossing itself was a proclamation of danger. *See Wright v. Norfolk & W. Ry. Co.*, 245 Va. 160, 170-71, 427 S.E.2d 724, 730 (1993) ("[A] railroad track is a proclamation of danger and the operator of a vehicle approaching a grade crossing "is required to look and listen at a time and place when both looking and listening will be effective," intelligently using both eyes and ears.") (citations omitted). As with the bicycle rider in *Sugarland*, had Mr. Settle exercised the diligence and care required under Virginia law when approaching and traversing the crossing on Kapp Valley Way, he would not

have been struck by the Norfolk Southern train. The lumber pile did not cause the accident.

E. <u>Mr. Settle's Death was Caused by His Contributory Negligence</u> (Assignments of Error 2, 3, and 4)

The trial court's incorrect rulings regarding Mr. Settle's contributory negligence were contrary to Virginia law, including this Court's holding in *Wright v. Norfolk & W. Ry. Co.*, 245 Va. 160, 427 S.E.2d 724 (1993). If left uncorrected by this Court, the judgment of the trial court would alter Virginia law with respect to contributory negligence and implicitly overrule *Wright*, *Sugarland*, and decades of Virginia jurisprudence.

The evidence was clear and undisputed that Mr. Settle was contributorily negligent in negotiating the crossing:

- Mr. Settle was familiar with the crossing, having crossed it at least a dozen times the day he failed to stop. App. 553 (8/28/12 Tr. at 9-17).
- Six witnesses testified that they heard the Norfolk Southern train sound its horn: Mr. Mendosa, App. 460-461 (8/27/12 Tr. at 100:20–101:9); Mr. Bonilla, App. 471, 475 (8/27/12 Tr. at 111:9-13, 115;1-15); Mr. White, App. 495 (8/28/12 Tr. at 15:3-13); Mr. Lawson, App. 508

(8/28/12 Tr. at 34:21-22); Mr. Janney, App. 609 (8/29/12 Tr. at 72:10-13); Mr. Streett, App. 643 (8/29/12 Tr. at 134:2).[20]

- Four witnesses testified that Mr. Settle failed to stop before attempting to cross the tracks: Mr. Mendosa, App. 463 (8/27/12 Tr. at 103:19-22); Mr. Bonilla, App. 469 (8/27/12 Tr. at 109:7-10); Mr. Janney, App. 615 (8/29/12 Tr. at 78:8-10); and Mr. Streett, App. 645 (8/29/12 Tr. at 136:20-21). Two of those witnesses testified they attempted to signal Mr. Settle to stop: Mr. Mendosa, App. 466 (8/27/12 Tr. at 106:8-19); and Mr. Bonilla, App. 470 (8/27/12 Tr. at 110:4-6).
- Two witnesses testified that Mr. Settle did not look to the left or the right before attempting to cross the tracks: Mr. Janney, App. 610-615

[20] Mr. Humphries was the only witness who did not hear a horn; however, he admitted he was behind a box truck (occupied by Mr. Bonilla and Mr. Mendoza – both of whom heard the train horn), in his truck with the windows up, the air conditioning on, and he was talking on his cellphone. App. 483 (8/27/12 Tr. at 156:8-14); App. 489 (8/27/12 Tr. at 166:1-6). Mr. Humphries did not testify that a horn did *not* sound. Regardless, if it is uncontradicted that the decedent failed to look for an oncoming train, there can be no recovery. *S. Ry. Co. and Chesapeake & Ohio Ry. Co. v. Davis*, 152 Va. 548, 554, 147 S.E. 228, 229 (1929).

(8/29/12 Tr. at 73:17-78:20); and Mr. Streett, App. 643-647 (8/29/12 Tr. at 134:11-138:5).[21]

The law in Virginia is well-established that "one who goes on a [train] crossing without looking and listening and is injured, cannot recover because he is guilty of contributory negligence as a matter of law." *S. Ry. Co. v. Campbell*, 172 Va. 311, 317, 1 S.E.2d 255, 257 (1939) (citing *Washington & Old Dominion Ry. Co. v. Zell's Adm'r*, 118 Va. 755, 760-61, 88 S.E. 309, 310-11 (1915)); *see also Norfolk and W. Ry. Co. v. Hardy*, 152 Va. 783, 794, 148 S.E.2d 839, 842 (1929). In exercising the duty of looking and listening for oncoming trains, this Court has stated that:

> 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***

[21] The evidence also established that another dump truck driver, Mr. Compton, under the same circumstances in an almost identical truck, had sufficient visibility to see oncoming trains and to stop his truck before reaching the tracks. App. 619-642 (8/29/12 Tr. at 100:11-123:10).

> ***railroad company may also be guilty of negligence proximately contributing to such injury.***
>
> In the very recent case of *Virginian Railway Company v. Rodgers*, 170 Va. 581, 587, 197 S.E. 476, 478 (1938), Justice Eggleston speaking for the court reiterates the latter rule: "***This court has many times said that a person approaching a railroad track must look where looking is effectual. He can not wait until his view is obstructed and say that it would have been useless for him to have looked then***."
>
> No pronouncement in the present case is intended to impinge upon or qualify those principles. ***If a traveler drives blindly upon a crossing whether his view is obstructed or unobstructed, takes no precautions for his safety and is injured, his negligence will preclude any recovery on his part.***

Campbell, 172 Va. at 317-18, 1 S.E.2d at 257-58 (quotation marks and citations omitted; emphases added).

In articulating the standard for contributory negligence in the context of railroad crossing accidents, this Court has more recently stated:

> As he approached the crossing, Wright "had the duty to look and listen with reasonable care; he did not have the absolute duty to discover the presence of the train, ***unless by so looking and listening he was bound to have discovered it***." *Norfolk & W. Ry. Co. v. Greenfield*, 219 Va. 122, 132, 244 S.E.2d 781, 786-87 (1978). Repeatedly, we have said that a railroad track is a proclamation of danger and the operator of a vehicle approaching a grade crossing "is required to look and listen at a time and place

> when both looking and listening will be effective," intelligently using both eyes and ears. *Norfolk & W. Ry. Co. v. Epling*, 189 Va. 551, 557, 53 S.E.2d 817, 820 (1949). Trains run on fixed tracks and their course cannot be altered; no such steel-bound limitation controls the movement of motor vehicles. *Id.* When a vehicle operator "drives blindly upon a grade crossing, ***whether his view is obstructed or unobstructed***, and takes no precaution for his own safety and is injured, his negligence precludes recovery." *Id.* Indeed, "***the greater the danger at a particular crossing, the greater the vigilance which is required by the public highway traveler***." *Greenfield*, 219 Va. at 133, 244 S.E.2d at 787.

Wright, 245 Va. at 170-71, 427 S.E.2d at 730 (emphases added).

Wright involved a dump truck full of gravel at a crossing similar to the crossing at Kapp Valley Way, a crossing marked by crossbucks with no other signals, warning devices, or traffic controls in place at or near the crossing. *Id.* at 163, 427 S.E.2d at 725. Plaintiff's experts in *Wright* testified that the crossing was "not reasonably safe" and was "ultrahazardous." *Id.* at 164, 427 S.E.2d at 726. Despite this, after reciting the evidence presented at trial, this Court affirmed the trial court's order setting aside the jury's verdict and entered judgment for the defendant. *Wright*, 245 at 171-72, 427 S.E.2d at 730.

Here, the evidence was uncontradicted that Mr. Settle was contributorily negligent: he was familiar with the crossing; he received

instructions and warnings about the crossing from his employer; he failed to look for an oncoming train before crossing the tracks; he failed to hear that which could be heard; and he failed to make any effort to stop before driving onto the tracks and colliding with the train. Both the law of Virginia, as stated above, and the law of the case, as articulated in the jury instructions, *see* App. 164 (Instruction No. P); App. 165 (Instruction No. R); App. 173 (Instruction No. 20), establish that Mr. Settle had a duty to look and listen for a train before he attempted to cross the railroad tracks – regardless of whether his view was obstructed. The evidence at trial was uncontradicted that Mr. Settle failed to meet this duty.

Mrs. Settle presented no evidence that Mr. Settle looked or listened for a train before attempting to cross the tracks. Indeed, Mrs. Settle made no effort to refute the evidence that Mr. Settle was contributorily negligent. Instead, Mrs. Settle chose to rely throughout the trial on a presumption that Mr. Settle acted reasonably. This presumption did not apply once direct evidence of contributory negligence was presented. Moreover, the jury was not entitled to ignore uncontradicted evidence that Mr. Settle was contributorily negligent.

In *S. Ry. Co. v. Thompson*, 186 Va. 106, 41 S.E.2d 456 (1947), the evidence demonstrated that the plaintiff failed to look before he crossed the

train tracks and was struck by a train. *Id.* at 114, 41 S.E.2d at 460. This Court held that the plaintiff was negligent because he failed to exercise the duty of care required when driving across train tracks, and the Court set aside the jury's verdict and entered judgment for the defendant. *Id.*

Similarly, here, the uncontradicted eyewitness testimony established that Mr. Settle never looked for an oncoming train before reaching the railroad tracks, and did not stop before attempting to cross. The evidence illustrated unequivocally, and without contradiction, that Mr. Settle was contributorily negligent as he failed to exercise reasonable care before crossing the train tracks because he did not stop, he did not look for the train, and he did not listen for the horn. *See Thompson*, 186 Va. at 114, 41 S.E.2d at 460; *Davis*, 152 Va. 548, 554, 147 S.E. 228, 229.

A railroad track itself "is a proclamation of danger and the operator of a vehicle approaching a grade crossing 'is required to look and listen at a time and place when both looking and listening will be effective,' intelligently using both eyes and ears." *Norfolk & W. Ry. Co. v. Epling*, 189 Va. 551, 557, 53 S.E.2d 817, 820 (1949). As in *Wright*, "the only conclusion to be drawn from the whole evidence is that [Mr. Settle] either failed to look and listen with reasonable care, or if he did so look and listen, he failed to discover the immediate presence of the train." *Wright*, 245 Va.

at 172, 427 S.E.2d at 730. Accordingly, the judgment for Mrs. Settle should be reversed and final judgment entered for RGR.

F. <u>The Trial Court Erred as a Matter of Law when Applying the Norfolk Southern Settlement to the Jury Verdict Rendered Against RGR</u>
(Assignment of Error 5)

The trial court erred as a matter of law when applying Mrs. Settle's $500,000 settlement with Norfolk Southern to the jury verdict rendered against RGR. The trial court committed the same error corrected by this Court in *Upper Occoquan Sewage Auth. v. Blake Constr. Co.*, 275 Va. 41, 655 S.E.2d 10 (2008). Based on the definition of "principal sum awarded" in Code § 8.01-382, it is clear that any pre-judgment interest awarded by the jury is not part of the "principal sum awarded." *See* 275 Va. at 67, 655 S.E.2d at 25. Therefore, in order for Code § 8.01-382 to be read in harmony with Code § 8.01-35.1, and to prevent a double-recovery, the set-off from the settlement with Norfolk Southern ($500,000) should have been applied to the principal sum awarded by the jury against RGR ($2,500,000), and then the interest should have been calculated on the remaining $2,000,000 from October 12, 2008 at the 6% rate provided by Code § 6.2-302.

In calculating the set-off, the trial court erred by first adding the damages awarded by the jury to the pre-judgment interest awarded by the

jury, and only then applying the Norfolk Southern settlement against this combined amount. The trial court then held that post-judgment interest would accrue on this new "principal sum." This is contrary to Virginia law. In order to comply with Virginia law and prevent Mrs. Settle from receiving a double recovery, the set-off must be applied first to the damages awarded by the jury and then the remaining amount should serve as the basis for calculating the interest awarded by the jury.

In support of her argument that any set-off resulting from the Norfolk Southern settlement should be applied only after the principal amount and pre-judgment interest awarded by the jury are added together, Mrs. Settle relied on *Dairyland Ins. Co. v. Douthat*, 248 Va. 627, 449 S.E.2d 799 (1994). *See* App. 255 (Mrs. Settle's Motion for Entry of Final Order at 2). In agreeing with Mrs. Settle, the trial court ignored subsequent guidance from this Court regarding how to interpret and apply Code § 8.01-382 in *Upper Occoquan*.

In *Upper Occoquan*, this Court rejected the argument that post-judgment interest may accrue on pre-judgment interest because the pre-judgment interest is "an element of the damages and, thus, is part of the 'principal sum awarded' to a plaintiff." *Upper Occoquan*, 275 Va. at 67, 655 S.E.2d at 25 ("'principal sum awarded' as contemplated by Code § 8.01-

382 is that element of the plaintiff's damages that compensates the plaintiff for the actual harm sustained, but not any pre-judgment interest on those damages that the trier of fact might also award"). As explained by then-Justice Kinser in her concurrence, an award of interest is distinct from the "principal sum awarded" and the two together are "not a lump sum award of damages." *Upper Occoquan*, 275 Va. at 76, 655 S.E.2d at 30 (Kinser, J., concurring). The trial court here committed the same error corrected by this Court in *Upper Occoquan*.

Based on the definition of "principal sum awarded" in Code § 8.01-382 provided by this Court in *Upper Occoquan*, it is clear that any pre-judgment interest awarded by the jury is not part of the "principal sum awarded." Therefore, in order for Code § 8.01-382 to be read in harmony with Code § 8.01-35.1 and to prevent a double-recovery, the set-off from the settlement with Norfolk Southern ($500,000) should have been applied to the principal sum awarded by the jury against RGR ($2,500,000), and then the interest should have been calculated on the remaining $2,000,000 from October 12, 2008 at the 6% rate provided by Code § 6.2-302.

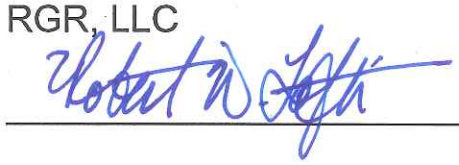
IV. CONCLUSION

For these reasons, RGR, LLC respectfully requests that this Court reverse the judgment of the trial court and enter final judgment in its favor, or, alternatively, reverse the judgment of the trial court and remand the case for a new trial.

Dated: March 4, 2014

Respectfully submitted,

RGR, LLC



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CERTIFICATE

The undersigned hereby certifies that the foregoing complies with Rules 5:26 and 5:27, and further certifies as follows:

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

(2) Counsel for the Appellant/Defendant are:

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(3) The Appellee/Plaintiff is Georgia Settle, Personal Representative of the Estate of Charles E. Settle, Jr., deceased.

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(5) On this 4th day of March, 2014:

a) Fifteen copies of the foregoing Opening Brief of Appellant and fifteen copies of the Joint Appendix were hand delivered to Clerk's Office of the Supreme Court of Virginia for filing.

b) An electronic copy of the foregoing Opening Brief of the Appellant and an electronic copy of the Joint Appendix were delivered on a CD to the Clerk's Office of the Supreme Court of Virginia, and mailed via first class mail to Counsel for the Appellee.

c) Three copies of the foregoing Opening Brief of the Appellant and two copies of the Joint Appendix were sent via first class mail to Robert Cynkar, Counsel for the Appellee.

Robert W. Loftin