IN THE

Supreme Court of Virginia

RECORD NO. 130633

RGR, LLC,

Appellant,

v.

GEORGIA SETTLE,
PERSONAL REPRESENTATIVE
OF CHARLES G. SETTLE, JR.,
DECEASED,

Appellee.

BRIEF OF APPELLEE

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I. STATEMENT OF THE CASE

A. The Nature of the Case

Charles Settle, Sr. was killed when a Norfolk Southern train struck his dump truck as he was attempting to cross the railroad tracks at Kapp Valley Way in Haymarket, Virginia, to deliver gravel to a Prince William County Service Authority pipeline project. JA 433 (8/27/12 Tr. at 71:13-17); JA 435 (8/27/12 Tr. at 73:14-21). The case went to trial on our claim that RGR, LLC was negligent for stacking a huge pile of lumber – taller than Mr. Settle's truck – so close to the tracks that it obstructed Mr. Settle's view of the approaching train and crippled his ability to avoid that danger.

In its portrayal of the facts (RGR Br. at 3-4), RGR fails to tell this Court that RGR stipulated to certain critical facts: that *it* had stacked the lumber in its fatal position, and that the stack was seven feet inside Norfolk Southern's right-of-way. JA 436 (8/27/12 Tr. at 74:8-12).[1] Thus, not only did RGR trespass on Norfolk Southern's property to stack its lumber, but in doing so it deprived Mr. Settle of part of the safety zone that a railroad right-of-way is designed to create. And at trial one of RGR's owners admitted that he knew that their lumber stack "needlessly cuts down the visibility of a motorist"

[1] Emblematic of the credibility of RGR's argument is their claim, notwithstanding this stipulation, that the trial court "ignored the facts" that RGR did not have "any access" to Norfolk Southern's property. RGR Br. at 24 n.16.

attempting to cross the tracks, limiting the critical time in which the driver could see, perceive, and react to an approaching train. JA 540-41 (8/28/12 Tr. at 80:13-81:19).

How dangerous a condition RGR created is evident from the photographs of the scene, taken shortly after the collision, that the jury was able to examine. Plaintiff's Exh. 2A (Supp. JA 281)[2] is a photograph of the side of the stacked lumber facing the road Mr. Settle was on, with the stopped train on the left, and the remains of Mr. Settle's truck in the foreground. This photograph shows the massive scale of the obstructing lumber stacks along with their proximity to the railroad tracks.

Plaintiff's Exh. 4B (middle photograph) (Supp. JA 291) is an aerial photograph of the scene. The top of the picture is East, the direction in which the train was going. Mr. Settle was traveling South, left to right in the photograph. This photograph illustrates how the conditions created by RGR handicapped Mr. Settle's ability to see and hear the approaching train. A blow-up of this photograph was used during trial and became a focus of the jury's deliberations, as we will describe below. (For the Court's convenience,

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[2] The original color photographs that were admitted into evidence were not available when the Joint Appendix needed to be bound, so black-and-white copies were used in their stead. When the color originals became available, they were bound in the Supplemental Joint Appendix. As those photographs are clearer, and were actually seen by the jury, we will refer only to them.

a copy is appended to this brief.)

Plaintiff's Exh. 2C (Supp. JA 283) and 2D (Supp. JA 284) show the perspective a driver in the cab of a truck, like Mr. Settle, would have as he approached the crossing. To get to a position where he could see down the tracks to his right, that driver had to come far enough forward around the stacked lumber so the nose of his truck was dangerously close to an oncoming train.

Finally, illustrating the consequences of that dilemma, and a cruel fact of this case, is Plaintiff's Exh. 3C (Supp. JA 288). This photograph shows the engine of the train that struck Mr. Settle's truck. Note that the damage to the engine from the collision is localized in the right front corner. The engine barely clipped Mr. Settle's truck, but, given the mass of the train, that was enough to produce the fatal result. But this shows how close Mr. Settle came to avoiding this deadly collision. If Mr. Settle had not been robbed of critical seconds to see, perceive, and react to the oncoming train by the conditions created by RGR, we would not be before this Court now.

The facts relevant to RGR's liability for creating the obstruction and its contributory negligence defense were vigorously contested. At the close of our evidence, the trial court denied RGR's motion to strike based on their claim – repeatedly made and rejected in pre-trial proceedings -- that they

owed no duty to Mr. Settle, JA 587 (8/28/12 Tr. 166:4-12), and that Mr. Settle was contributorily negligent as a matter of law. *Id.* (Tr. at 166:13-19). The jury rejected RGR's contributory negligence defense, and found RGR negligent.

To overcome the heavily fact-bound character of this case, RGR largely rests its case on two untrue assertions. First, RGR denies it had any duty to Mr. Settle by misrepresenting our legal claim as a kind of premises liability theory. Thus RGR says we want to hold it "responsible for the well-being of guests on adjacent, private property," RGR Br. at 23, or "alleged negligent maintenance of its property." *Id.* But RGR *affirmatively* placed its massive stack of lumber in a position so close to the railroad crossing -- partly trespassing on the railroad's private property -- that it dangerously obstructed the view and hearing of motorists trying to cross.

We accused RGR of such active wrongdoing, not some passive failure to protect the "well-being" of people on neighboring land, or to properly deal with a dangerous natural condition on their property, of which they were unaware. JA 50 (Fourth Amended Complaint ("Compl.") ¶ 6); JA 52 (Compl. ¶ 11); JA 66 (Compl. ¶ 56); JA 77 (Compl. ¶¶ 79-80). A premises liability theory commonly alleges negligence based on a defendant's failure to act to deal with a dangerous condition not of its own making. In this case, we have

alleged classic negligence from RGR's "affirmative conduct;" RGR was the "genesis" of the dangerous condition at the Kapp Valley Crossing.[3] *See Ashby v. Faison & Associates, Inc.*, 247 Va. 166, 169-70, 440 S.E.2d 603, 605 (1994); *Busch v. Gaglio,* 207 Va. 343, 346, 150 S.E.2d 110, 112 (1966); *Jefferson v. Regal Cinemas, Inc.,* 2010 WL 3894127, at *5 (E.D.Va. Oct. 4, 2010) ("Virginia law distinguishes between cases where a plaintiff alleges negligence from a defendant's 'affirmative conduct,' and cases where a plaintiff alleges negligence from a defendant's 'passive conduct.'"). Stacking the lumber where it formed a hazardous obstruction to motorists trying to cross the tracks was not a passive posture by RGR. It was not an act of God, of nature, or of anyone other than RGR. Holding 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.

Second, RGR repeatedly claims that its evidence of Mr. Settle's alleged contributory negligence was uncontradicted, *see, e.g.,* RGR Br. at 2, 6, 10, 37, and that there was no evidence that RGR should have known that the condition it created was dangerous. *Id.,* at 22. This, too, is simply false, as our Counter-Statement of Facts below will show.

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[3] This legal distinction has also been traditionally expressed in terms of nonfeasance versus misfeasance. *See generally* L. Eldredge, *Tort Liability to Trespassers,* 12 TEMPLE L. Q. 32 (1937).

At bottom, RGR's arguments strike at traditional tort principles and trial procedure. The most elementary duty recognized in tort law over the generations is the duty to use ordinary care not to endanger others. The extraordinary variety of human activity means that we can negligently endanger each other through almost limitless means in countless circumstances. Here, the jury found that RGR negligently endangered Charles Settle by how it stacked its lumber and where it did so – on its property and on Norfolk Southern's property so close to a railroad crossing that it dangerously obscured approaching trains, as even one of RGR's owners conceded. The jury found RGR liable under the classic tort understanding of negligence because of what RGR *did* in the circumstances of this case, *not* because RGR passively allowed some condition, of which it was not aware, to exist. *See* JA 153-54, 156 (jury instructions on negligence).

RGR's arguments manipulate the means by which RGR endangered Mr. Settle – massive stacks of lumber in dangerous locations – to try to concoct legal distinctions where there aren't any and to ascribe to Mrs. Settle a legal theory "Virginia does not recognize." RGR Br. at 13. The utter lack of merit to these arguments is put in stark relief by RGR's claim that it had no notice of the dangerous condition *it* created. *Id.* at 23. Thus, RGR reprises

here its repeated, and repeatedly rejected, maneuver to "clarify" (as RGR puts it) a traditional negligence theory out of existence and substitute in its place a theory by which RGR can escape liability for its deadly actions. On at least four occasions, two different judges of the Circuit Court declined to adopt RGR's no-duty "clarification," and the case properly went to trial and to the jury under traditional negligence principles.

In addition, RGR's bald, untrue claim that their evidence of contributory negligence was uncontroverted is obviously designed to retroactively take that question away from the jury that rendered a verdict RGR does not like. But competing evidence *did* vigorously contest that issue, and the jury carefully evaluated that evidence to reach its verdict. RGR's argument on this record at this point invites this Court to improperly usurp a role exclusively assigned to the jury.

B. <u>Material Proceedings Below</u>

RGR has described the material proceedings below. RGR Br. at 9-13. We note here one error in RGR's description and set out two additional relevant aspects of those proceedings.

1. RGR contends that the trial court gave two instructions – Nos. 7 and 11b – over their objection. RGR Br. at 10-11. While that is correct with respect to Instruction No. 7, that was not the understanding of the trial court

regarding Instruction No. 11b. The trial court stated: "11-B is agreed." JA 689 (9/4/12 Tr. at 137:20). RGR did not challenge the trial court's understanding.

2. The no-duty argument RGR makes here was advanced in pre-trial motions four times. Two different judges of the Circuit Court of Prince William County rejected that argument each time. *See* Order (Sept. 23, 2009)(Hamblen, J.)(R. 607-608); Order (Feb. 2, 2010)(Hamblen, J.)(R. 701-703); Order (Oct. 5, 2010)(O'Brien, J.)(R. 2083-84); Order (July 1, 2011)(O'Brien, J.)(R. 4500-4503). The contributory negligence argument RGR makes was also rejected in the proceedings on those motions. (This is not to mention the rejections of the contributory negligence argument repeatedly made by Norfolk Southern.)

3. As part of the jury's evaluation of the competing evidence concerning RGR's claim of contributory negligence, counsel for Mrs. Settle urged the jury to closely examine the blown-up aerial photograph of Plaintiff's Exh. 4B to determine if the claims of the train's crew concerning what they could see were plausible given the physical layout of the scene. JA 698-99 (closing argument); Supp. JA 291(Pl. Exh. 4B)(middle photograph and appended hereto). Only the letter-size version of this exhibit was originally sent back to the jury room. Sometime after their deliberations began, the jury

asked to have the blown-up pictures of the scene, and that request was granted. JA 710-12 (9/4/12 Tr. at 260:9-262:3).

II. COUNTER-STATEMENT OF FACTS

A. RGR's Lack of Reasonable Care

Charles Settle, Sr., was a truck driver employed by the R.L. Rider Company. JA 435 (8/27/12 Tr. at 73:12-13). At the time of his death, Rider was under contract with the Prince William County Service Authority to construct a pipeline for the county's sewer system. JA 435 (8/27/12 Tr. at 73:14-17). Mr. Settle was killed as he was crossing the Norfolk Southern railroad tracks at the Kapp Valley Way to deliver a load of gravel to the sewer project. JA 435 (8/27/12 Tr. 73:18-21).

RGR stipulated that it had stacked the lumber (as seen in the photographic evidence, Supp. JA 281, 282, 283, 284, 286, 287, 289, 290, 291, 292, 293 (Pl. Exhs. 2A, 2B, 2C, 2D, 3A, 3B, 3D, 4A, 4B, 4D, 4E)) that obstructed Mr. Settle's ability to see and hear an approaching train, and that RGR had placed the stack partly off of RGR's property, seven feet within Norfolk Southern's right-of-way. JA 436 (8/27/12 Tr. at 74:8-12).

RGR is owned by Robert and Gene Frogale. JA 518 (8/28/12 Tr. at 58:17-20). "RGR" stands for "Robert," "Gene," and "Reload." JA 518-19 (8/28/12 Tr. at 58:12-59:4). At its facility at the Kapp Valley Crossing, RGR

"offloads lumber from railcars and then reloads it onto tractor-trailers." JA 519 (8/28/12 Tr. at 59:7-9). The Frogales had a reload operation at that facility for 34 years before the death of Mr. Settle. JA 519-20 (8/28/12 Tr. at 59:13-60:3).[4] RGR originally owned the site of this reload facility, but at the time of the collision had sold it and was leasing it back for its reload operations. JA 520 (8/28/12 Tr. at 60:4-8); JA 436 (8/27/12 Tr. at 73:4-7). On the stand, Mr. Gene Frogale underscored that he "had personal knowledge of this particular site for 34 years." JA 521 (8/28/12 Tr. at 61:15-17).

Mr. Frogale admitted that, while the Kapp Valley Way and the Crossing originally weren't used "at all," JA 538 (8/28/12 Tr. at 78:17), for the 12 years before Mr. Settle's death the property on the opposite side of the Crossing was owned by Mr. Danny Humphreys, who operated a landscaping company from that location. JA 538-39 (8/28/12 Tr. 78:20-79:9). *See also* JA 482 (155:5-12)(testimony of Mr. Humphreys). As a result, Mr. Frogale testified, Kapp Valley Way and the Crossing "became a big thoroughfare." JA 538 (8/28/12 Tr. at 78:22). In addition, a building products company parked their vehicles on the other side of the Crossing. JA 539 (8/28/12 Tr. at 79:10-13).

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[4] RGR states that RGR was not named as a defendant in this case until December 22, 2010. RGR Br. at 9. This is misleading. The Frogales were playing a shell game with various fictitious names for their reload enterprise, and we were naming them as we were able to track them.

At the time of the collision, the sewer project made the Crossing even busier. One of RGR's employees, Michael White, testified that the increased traffic of heavy construction vehicles for the sewer project had been noticeable for some time before the collision. JA 492-94 (8/28/12 Tr. at 12:19-14:2).

Mr. Frogale admitted that he knew what a railroad right-of-way is, JA 523 (8/28/12 Tr. at 63:18-19), and that he knew before Mr. Settle's death what the dimensions of the Norfolk Southern right-of-way bordering RGR's yard were. JA 532 (8/28/12 Tr. 72:9-12). Mr. Frogale conceded that if RGR had not placed its lumber stacks partly on the right-of-way a driver approaching the Crossing would have had more time to perceive an approaching train and to react safely to it. JA 540-41 (8/28/12 Tr. at 80:13-81:9). More specifically, Mr. Frogale admitted that on the day of the collision that killed Mr. Settle, RGR's lumber stack "needlessly cut down the visibility of Mr. Settle." JA 541 (8/28/12 Tr. at 81:14-19).

Mr. Humphreys added independent confirmation of Gene Frogale's concession. He testified that once a driver passes RGR's buildings along Kapp Valley Way[5] the driver cannot see along the tracks to the right (the direction from which the train that killed Mr. Settle came) until he can look around the corner at the end of the lumber stacks near the rails. JA 485

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[5] Those buildings can be seen in the middle, on the left, of Plaintiff's Exh. 4B. JA 291 (and appended hereto).

(8/27/12 Tr. at 158:7-19); JA 486 (8/27/12 Tr. at 159:13-21); JA 487-88 (8/27/12 Tr. at 160:21-161:14).

Yet Mr. Frogale also testified that he never gave RGR's two employees at that facility – Michael Lawson and Michael White -- any instructions not to stack materials in the right-of-way. JA 536 (8/28/12 Tr. at 76:14-22). Indeed, Mr. Frogale explained that he would "drop in" to the RGR facility to "check in" with the employees there only "once a month." JA 539-40 (8/28/12 Tr. at 79:18-80:9).

One of RGR's employees, Michael White, testified that he actually saw Gene Frogale "every five or six months maybe," and he saw Robert Frogale only once. JA 502 (8/28/12 at 23:5-7). RGR never gave its employees a "standard with regard to how high … to stack the lumber." JA 502-503 (8/28/12 Tr. at 23:21-24:2). So for "the majority of the time" it was Mr. Lawson and Mr. White who were running the RGR yard unsupervised by any higher-ups from RGR. JA 502 (8/28/12 Tr. at 23:13-15).

Finally, Mr. White also confirmed Mr. Frogale's admission that the dangerous obstruction RGR created with its lumber stack was truly unnecessary. Using the middle photograph of Plaintiff's Exh. 4A (Supp. JA 290), Mr. White explained that they could have stacked the lumber in any of the wide open spaces of RGR's yard clearly seen in that photograph (far out

of harm's way and certainly not trespassing on the railroad's right-of-way) and that he did not know why they stacked the lumber where they did. JA 497-500 (8/28/12 Tr. at 18:20-21:16).

B. The Competing Evidence Concerning Contributory Negligence

RGR asserts that evidence supporting its contributory negligence defense was uncontradicted. *E.g.* RGR Br. at 2, 37-39. RGR argues that this supposedly unrefuted evidence showed that Mr. Settle did not use ordinary care by failing to stop, *id.* at 6, 38; by failing to look for approaching trains, *id.* at 6, 38-39; and by failing to hear the train's horn. *Id.* at 37-38. RGR can make such assertions only because it simply ignores the record. RGR refuses to acknowledge to this Court the voluminous evidence that contradicts RGR's arguments, and obviously led the jury to reject them.

In fact, the jury received evidence that (1) it was dangerous for a driver of a fully loaded dump truck to stop at the Kapp Valley Crossing, and that he could see an approaching train only when he was so close to the tracks that getting hit was nearly unavoidable; (2) no witness could have seen where Mr. Settle was looking; and (3) none of the five witnesses near the scene – including two of RGR's employees – heard the warning horn that the train's crew claimed they blew.

1. Dangerous to stop/dangerous to go. The Kapp Valley Crossing

was not marked by any gate, warning signal, stop sign, or even a line on the road to suggest a stopping point, only by a crossbuck.[6] JA 434 (8/27/12 Tr. at 72:1-3); JA 605 (8/29/12 Tr. at 50:2-10). RGR's truck driving expert, Richard Young, admitted that ordinary care did not require a driver to stop at this kind of crossing when he "believed no train was coming." Sept. 4, 2012 Tr. 50:12-15. He admitted that when a train is coming a truck should stop no closer than 15 feet from the nearest rail because the driver "needs time to see, proceed, and react." *Id.* at 42:7-14; 41:9-18; 42:20-22. RGR's lumber stack did not give Mr. Settle that space.

The train that killed Mr. Settle came from his right (*i.e.*, the West). The evidence showed that RGR's lumber stack was placed 7 feet into the safety zone of Norfolk Southern's right-of-way. JA 434 (8/27/12 Tr. at 72:8-15); JA 436 (8/27/12 Tr. at 74:10-12).[7] The distance from the front end of Mr. Settle's truck to where he was in the cab was eight feet. JA 437 (8/27/12 Tr. at 75:6-

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[6] While the Kapp Valley Crossing is a "private crossing" because Kapp Valley Way is not a public highway, that attribute only has relevance for the legal duties of a railroad. Public crossings are regulated by federal and state statutory law, which mandate the types of gates, warnings, and other safety measures a railroad must employ. The common law governs private crossings. *See* B. Timberlake, *Railroad Law,* 43 U.RICH.L.REV. 337, 357-76 (2008); *Chandler v. National Railroad Passenger Corp.,* 882 F. Supp. 533 (E.D.Va. 1995).

[7] *See also* JA 441-42 (8/27/12 Tr. at 80:21-81:4)(Norfolk Southern terminal superintendent Justin Meko)("[S]afety is … probably the most important aspect of a right-of-way.").

8). This meant that when Mr. Settle could see around the edge of the lumber toward the direction of the oncoming train, the nose of his truck was 12.5 feet from the rails (or 10 feet from the outer edge of the train itself, which overhangs the rails by 2.5 feet). JA 436 (8/27/12 Tr. at 74:8-10); JA 436-37 (8/27/12 Tr. at 74:20-75:2).[8] Thus RGR's lumber stack forced Mr. Settle into the 15-foot hazard zone that even RGR's expert said he needed to avoid before Mr. Settle could even see if a train was coming.

All the witnesses who claimed to have seen Mr. Settle approach the Crossing testified that he was going very slowly, 5 mph or less. JA 463 (8/27/12 Tr. at 103:16-18)(Jose Mendosa); JA 465-66 (8/27/12 Tr. at 105:22-106:7)(Jose Mendosa); JA 469 (8/27/12 Tr. at 109:11-13)(Luis Bonilla); JA 643 (8/29/12 Tr. at 134:14-20)(Thomas Streett, train engineer).[9] At 5 mph, Mr. Settle would have traveled 7.33 feet-per-second. JA 437 (8/27/12 Tr. at 75:13-14). The trial court took notice of the fact that an average driver's perception-reaction time is 1.5 seconds. JA 593 (8/29/12 Tr. at 32:4-7). That means that even traveling at "walking speed," JA 646 (8/29/12 Tr. at 137:2-

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[8] *See also* Supp. JA 291 (Pl. Ex.4B); Pl. Ex.7(R.5559); Supp. JA 281 (Pl. Ex.2A); Supp. JA 283 (Pl. Ex.2C); Supp. JA 284 (Pl. Ex.2D)(various aerial and at-ground photographs of the scene).

[9] The train's conductor, Roger Janney, testified that Mr. Settle appeared to be braking, JA 612 (8/29/12 Tr. at 76:4-5), inferring that Mr. Settle was trying to stop. Also, Mr. Settle's supervisor, George Rider, testified that he was such a good driver that his employer gave him one of the company's new trucks to drive. JA 666 (9/4/12 Tr. at 24:19-21).

3), Mr. Settle would have gone through the 10 feet between his truck and the train just in the time it took him to become *aware* of an approaching train, much less to actually stop. *See also* JA 479 (8/27/12 Tr. at 149:14-17)(Timothy Weston, plaintiff's truck expert: a loaded truck like Mr. Settle's would take ten feet to stop going five mph *after* deciding to do so).

Compounding the danger was the fact that trains came from *both* directions, not just the side obstructed by the lumber stack, and did not follow a set schedule. JA 436 (8/27/12 Tr. at 74:12-15). Indeed, trains at that crossing mostly came from Mr. Settle's left (*i.e.*, the East). JA 487-88 (8/27/12 Tr. at 160:21-161:3). The train that killed Mr. Settle was traveling at approximately 45 mph, JA 436 (8/27/12 Tr. at 74:17-19), a common speed for that stretch of track. Because of the curve in the tracks, *see* Supp. JA 289 (Pl. Ex.3D); Supp. JA 291 (Pl. Ex.4B)(aerial photographs), Mr. Settle could first see a train approaching from the East when it was 600 feet away (or, traveling at 45 mph, 8.99 seconds away). JA 443 (8/27/12 Tr. at 82:12-13). There was no evidence that anyone knew the train schedule or how fast the trains came through this busy industrial area.

So the jury had to consider this evidence: assume Mr. Settle stopped 15 feet from the rails to get out of his truck to see if a train was coming from the West. If he thought the coast was clear, he would then have to move his

30-foot long truck (JA 437 (8/27/12 Tr. at 75:3-5)) 65 feet from a dead stop to safely cross the tracks.[10] With over 13 tons of gravel, Mr. Settle's truck could start moving only very slowly, at only 1 to 2 mph. JA 477 (8/27/12/ Tr. at 147:13-18). Even if he could instantly start at 4 mph, which he could not, he would only be traveling 5.87 feet per second. If a train came from his left (the most likely direction) after he thought all was clear, he could not have gotten his truck across the tracks in time to avoid a collision. This damned-if-you-do-damned-if-you-don't predicament meant that it was not safe to simply stop before crossing those tracks. Thus one of Mr. Settle's fellow truck drivers, Mr. Compton, testified that the safest course, which he followed, was to approach the Crossing slowly, but not stop. JA 625 (8/29/12 Tr. at 106:11-16). In fact he testified that he never came to a complete stop when using that Crossing. JA 632 (8/29/12 Tr. at 113:20- 114:1); JA 641 (8/29/12 Tr. at 122:3-6).[11] From the evidence before it, the jury could reasonably conclude

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[10] That is, 15 feet on his side of the tracks, plus the five feet between the rails (JA 436 (8/27/12 Tr. at 74:20-12)), plus the 45 feet to bring his 30-foot long truck 15 feet away from the rails on the other side.

[11] RGR claims that Mr. Compton testified that "under the same conditions" he had "sufficient room and visibility to see an approaching train and to stop if necessary." RGR Br. at 5. That is not what Mr. Compton said. There was no evidence that he crossed "under the same conditions." After all, Mr. Settle had safely made it across those tracks many times, too, as RGR has pointed out. RGR Br. at 37. What was different the day Mr. Settle was killed, and fortunately a condition Mr. Compton never had to confront, was that a train

that Mr. Settle did use ordinary care in the circumstances.

2. No one could see Mr. Settle's face. RGR claims that the conductor and engineer testified, "without contradiction," that Mr. Settle did not look to see if a train was approaching. RGR Br. at 6. But on cross examination the engineer, Thomas Street, (in a position closest to Mr. Settle) admitted that he could not see Mr. Settle's face or where he may have been looking. JA 657 (8/29/12 Tr. at 151:10-18).

Moreover, the evidence cast serious doubt on the train crew's claim that they saw Mr. Settle twice before he emerged from behind the lumber stacks. Besides the implausibility of being able to see inside the cab of a truck from 100 yards away,[12] the physical layout – the same obstructions that blocked Mr. Settle's ability to see and hear the train -- made the crew's claim that they could see Mr. Settle dubious, as the aerial photograph illustrated. Supp. JA 291 (Pl.Ex.4B)(middle picture and appended hereto); JA 698-700 (9/4/2 Tr. at 210:13-212:9)(closing argument).[13]

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was so close to the Crossing when Mr. Settle could see around the lumber stack that he had no time to take action before he was hit.

[12] One of the eyewitnesses in a truck on the other side of the Crossing from Mr. Settle, Mr. Mendosa, testified that they could not see Mr. Settle's face as he drove down to the Crossing, and they were much closer (six car lengths) and stationary. JA 463 (8/27/12 Tr. at 103:5-7).

[13] This evidence became a focus of the jury's deliberations, as they requested that the blown-up versions of these photographs be sent into the jury room. JA 710 (9/4/12 Tr. at 260:9-13); JA 712 (9/4/12 Tr. at 262:1-3).

Furthermore, our railroad expert, Colon Fulk, testified that Norfolk Southern crews were trained to throw the emergency brake "without hesitation" as soon as they perceived a danger of hitting someone, JA 674 (9/4/12/ Tr. at 108:7-14), an important safety reaction to delay the train to give a person escape time, JA 674-75 (9/4/12 Tr. at 108:18-109:8), and to avoid a derailment. JA 675-76 (9/4/12 Tr. at 109:9-110:14.) Yet both crew members conceded that it was the conductor—the one *not* driving the train—who threw the brakes and only *after* impact. JA 616 (8/29/12 Tr. at 79:5-7); JA 617 (8/29/12 Tr. at 96:7-14); JA 651-52 (8/29/12 Tr. at 144:17-145:1). That was consistent with the fact that the lumber stack blocked their view, too, so they first saw Mr. Settle as he emerged from behind the stack, right before the collision.

Further clouding the crew's credibility was their testimony that they were either already on the floor at impact, JA 647 (8/29/12 Tr. at 138:8-10)(engineer), or were in the process of diving to the floor. JA 613 (8/29/12 Tr. at 76:5-8)(conductor). Either way, given the seconds such a move took, and the speed of the train (at 45 mph, 66 feet-per-second), any claim that either of them saw which way Mr. Settle was looking when they were close enough to see was simply incredible. *See* JA 705 (9/4/12 Tr. at 217:4-13); Sept. 4, 2012 Tr. at 251:6-9)(closing argument). The jury obviously did not

believe them.

3. No warning horn was blown. RGR claims that "the evidence is uncontradicted" that Mr. Settle "failed" to hear the train's horn, supposedly blown as the train approached the Kapp Valley Crossing. RGR Br. at 37, 42, 43. The only source of evidence that the horn was blown near the collision point (as opposed to at the Route 15 crossing a quarter mile earlier) – the only point where Mr. Settle could possibly have heard it[14] -- is the train crew. Here again, their testimony rested on the notion that they saw Mr. Settle far enough in advance to have time to react and to sound a warning horn. As we have described above, the physical layout and other evidence of the movements of the train crew contradicts that claim.

A final fact adds to the incredible features of the train crew's testimony. After the collision, the handle of the horn was found to be broken. Or, as the conductor conveniently claimed, "at the last second it broke." JA 615 (8/29/12 Tr. at 78:11-18).

Five other witnesses, including RGR's own employees, testified that no horn was sounded immediately before the collision. JA 461 (8/27/12 Tr. at

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[14] As the aerial view of the scene in Plaintiff's Exh. 4B (Supp. JA 291 (middle photograph and appended hereto) illustrates, if the horn were blown as the train was crossing Route 15, a quarter mile away, Mr. Settle would have been farther back on Kapp Valley Way (to the left on Pl. Ex. 4B) where his vision and hearing were completely blocked by RGR's buildings.

101:10-13)(Mr. Mendosa (eyewitness in truck on other side of crossing) – no horn from the time the train crossed Route 15 to the collision); JA 417 (8/27/12 Tr. at 111:11-13)(Mr. Bonilla (in truck with Mr. Mendosa) – horn blown only once); JA 483 (8/27/12 Tr. at 156:8-14)(Mr. Humphreys (in a truck behind Mr. Mendosa and Mr. Bonilla) – neither heard nor felt the train approach); JA 495 (8/28/12 Tr. at 15:3-13)(Mr. White (RGR employee working in the RGR yard at the time of the collision) – horn blown before Route 15 crossing); JA 509-10 (8/28/12 Tr. at 35:1-36:16)(Mr. Lawson (RGR employee working in the RGR yard at the time of the collision) – horn not blown near time of collision). And both of RGR's employees working in the RGR yard testified that the horn was blown at least 30 seconds before the crash (consistent with it being blown as the train approached the Route 15 crossing). JA 495 (8/28/12 Tr. at 15:19-22)(Mr. White); JA 509-10 (8/28/12 Tr. at 35:5-36:10)(Mr. Lawson). Thirty seconds before the collision Mr. Settle would have been far up Kapp Valley Way, nowhere near the Crossing, his vision and hearing blocked by RGR's buildings. *See* Supp. JA 291 (Pl. Ex. 4B – middle photograph and appended hereto).

III. ARGUMENT

A. Standard of Review.

Assignment of Error 1. To the extent that RGR claims it had no duty at all to motorists, RGR's statement that the existence of a legal duty is a question of law that is reviewed *de novo* is correct. RGR Br. at 16.

Assignment of Error 2. RGR contends that the trial court erred by denying RGR's motions to strike at the trial. RGR is correct that a highly deferential standard applies to this Court's review of a denial of motions to strike. *Id.* at 17. The issue on a motion to strike is whether a plaintiff has made out a prima facie case. A "motion to strike is in effect a motion for summary judgment which is not to be granted if any material fact is genuinely in dispute." *Costner v. Lackey*, 223 Va. 377, 290 S.E.2d 818 (1982). In reviewing the evidence, the trial court must

> accept as true all the evidence favorable to the plaintiff as well as any reasonable inference a jury might draw therefrom which would sustain the plaintiff's cause of action. The trial court is not to judge the weight and credibility of the evidence, and may not reject any inference from the evidence favorable to the plaintiff unless it would defy logic and common sense.

Upper Occoquan Sewage Auth. v. Blake Constr. Co., 266 Va. 582, 590 n.6, 587 S.E.2d 721, 725 n.6 (2003). This standard also applies to this Court's review of the trial court's decision on the motion to strike. *Kiddell v Labowitz*, 284 Va. 611, 628-29, 733 S.E.2d 622, 631-32 (2012).

Only a jury is in a position to "weigh the evidence, determine the credibility of the witnesses, and ultimately decide these issues when reasonable minds could differ about them." *Kimberlin v. PM Transport, Inc.*, 264 Va. 261, 266, 563 S.E.2d 665, 667 (2002). Only when reasonable minds could not differ about issues of negligence, contributory negligence, and proximate cause can they be decided by a court. *Griffin v. Shively,* 227 Va. 317, 320, 315 S.E.2d 210, 212 (1984).

Assignment of Error 3. While RGR is correct that review of whether a jury instruction accurately states the law is undertaken *de novo* as a question of law, RGR Br. at 17, part of determining whether to set aside a jury instruction includes a judgment whether the jury was actually misled by any inaccuracy in the instruction. *Online Res. Corp. v. Lawlor*, 285 Va. 40, 57, 736 S.E.2d 886, 895 (2013).

Assignment of Error 4. This Assignment of Error claims that it was error for the trial court not to set aside the jury's verdict or grant RGR's motions for a new trial and remittitur. RGR Br. at 14. RGR concedes that a "verdict may be set aside only where it is contrary to the evidence or without evidence to support it." *Id.* at 17.[15] The standard of review here is also highly

[15] Va. Code § 8.01-430, which RGR cites as the source of the relevant standard of review, says nothing about the circumstances under which a jury verdict may be set aside.

deferential. The judgment of the trial court is presumed to be correct. *Sugarland Run Homeowners Ass'n v. Halfmann,* 260 Va. 366, 371, 535 S.E.2d 469, 472 (2000). This Court must consider the evidence in the light most favorable to the plaintiff, and cannot disturb the verdict" unless it is plainly wrong or without evidence to support it." *Omega Protein, Inc. v. Forrest,* 284 Va. 432, 439, 732 S.E.2d 708, 711-12(2012).

RGR also cites *Sugarland* for the proposition that "[t]he questions of law raised here, however, are reviewed de novo." RGR Br. at 17-18. While *de novo* review of legal questions is a correct proposition generally, and properly applied, for example, in review of Assignment of Error 1, it has no application here. *Sugarland* says nothing about *de novo* review in this context, as RGR claims. *See* 260 Va. at 371-72, 535 S.E.2d at 472.

Assignment of Error 5. This Assignment of Error addresses the interpretation of VA. CODE §8.01-382, a question of law reviewed *de novo.*

B. RGR Owed Mr. Settle the Most "Basic and Necessary" Duty to Use Ordinary Care Not To Endanger Him. (Assignments of Error 1, 2, 3, and 4)

1. The Duty of Care. This Court has long recognized, and applied in a variety of circumstances, an elementary and universally accepted principle of the common law – "the duty of every man to so use his own property as not to injure the persons or property of others." *Standard Oil Co. v. Wakefield's*

Adm'r, 102 Va. 824, 47 S.E. 830, 831 (1904). As the *Standard Oil* Court elaborated:

> whenever one person is, by circumstances, placed in such a position with regard to another that every one of ordinary sense who did think would recognize at once that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or the property of the other, a duty arises to use ordinary care and skill to avoid such injury.

Id., 47 S.E. at 832.

This Court went on to explain that this duty followed from "universally recognized rules of right and wrong":

> Every one … ought, by the universally recognized rules of right and wrong, to think so much with regard to the safety of others who might be jeopardized by his conduct; and if, being in such circumstances, he does not think, and in consequence neglects, or if he neglects to use ordinary care and skill and injury ensues, the law, which takes cognizance of and enforces rules of right and wrong, will force him to give indemnity for the injury.

Id. (quoting *Heaven v. Pender, L.R.,* 11 Q.B.Div. 503).

This Court has expressed this duty in terms directly applicable to this case:

> [There is] that basic and necessary regulation of civilization which forbids any person, because of his own convenience, to recklessly, heedlessly, or carelessly injure another. Nobody is permitted by the law to create with impunity a stumbling block, a trap, a snare or a pitfall for the feet of those rightfully proceeding on their way.

Louisville & N.R. Co. v. O'Neil, 119 Va. 611, 89 S.E. 862, 866 (Va. 1916).

This foundational principle of tort law has animated this Court's decisions in a variety of contexts over the years. *See, e.g., Southern States Grain Marketing Co-op, Inc. v. Garber,* 205 Va. 757, 761, 139 S.E.2d 793, 796 (Va. 1965)(relying on *Standard Oil* in a case involving negligent operation of a hoist in a grain storage center); *T.E. Ritter Corp. v. Rose,* 200 Va. 736, 742, 107 S.E.2d 479, 483-84 (Va. 1959)(relying on *Standard Oil* in a case when an earth mover collided with a train); *Rice v. Turner*, 191 Va. 601, 605, 62 S.E.2d 24, 26 (Va. 1950)(recognizing that "[t]he 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" in an action for damages when plaintiff's car collided with defendant's cow); *Perlin v. Chappell,* 198 Va. 861, 864, 96 S.E.2d 805, 808 (1957)(while acknowledging that Virginia has not adopted the specific common law duty of an owner of domestic animals to keep them off the land of others, quoting and applying the more general rule of *Rice, supra,* to find negligence when a heifer escaped from a stockyard and injured the plaintiff).

This principle is reflected in the RESTATEMENT (SECOND) OF TORTS §364, which provides that a "possessor of land is subject to liability to others outside of the land for physical harm caused by a structure or other artificial condition

on the land, which the possessor realizes or should realize will involve an unreasonable risk of such harm, if … the possessor has created the condition." *See also Harleysville Ins. Co. v Val. Lbr. and Bldg. Materials, Inc.*, 56 Va.Cir. 59, 2001 WL 34047909, at *5 (Va.Cir.Ct. 2001)(citing *Collins v. George,* 102 Va. 509, 46 S.E. 684 (1904))("This principle was recognized by the Supreme Court of Virginia long before its pronouncement by the editors of the Restatement.").

As one of Virginia's leading scholars on tort law has unequivocally put it, "[t]here is … a general duty not to injure others. This duty arises whenever defendant's conduct creates a risk of harm to others." Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, §1.1.1, at 2 (3d ed. 2003). Prof. Friend goes on to explain:

> [I]t is apparent from the cases that the only "relationship" which must exist is a sufficient juxtaposition of the parties in time and space to place the plaintiff in danger from the defendant's acts. It is, in the language of the Supreme Court of Virginia, a duty which is "owed to mankind generally."

Id. (quoting *Overstreet v. Security Storage Co.,* 148 Va. 306, 317, 138 S.E. 552, 555 (Va. 1927)).

RGR does not challenge, but attempts to dodge, these precedents by its repeated rhetorical ploy of seeking to “clarify” the duty on which we rely.

See, e.g., RGR Br. at 9.[16] RGR does anything but clarify, going on to deny this is a premises liability case, *id.* at 15, but then claiming that's what the trial court made it. *Id.* at 16. In the process, RGR never comes to grips with the actual duty on which we relied and which the trial court correctly recognized. Instead it reformulates a duty in quasi-premises-liability terms and ascribes this RGR-concocted duty to Mrs. Settle's case and to the trial court. Thus RGR claims we are trying to make it "responsible for the well-being of guests on a third-party's adjacent, private property." *Id.* at 23. Similarly, it claims we, and the court below, are trying to make a premises owner into "an insurer for the safety of its invitee." *Id.* This is all nonsense to cloud, not "clarify," the issue.

The difference between the duty truly at issue here and premises liability notions is illustrated by a case cited by RGR, *Cline v Dunlora S., LLC*, 284 Va. 102, 726 S.E.2d 14 (2012). In *Cline,* a negligence action was brought against a private landowner for injuries caused by a dead tree falling on a vehicle. This Court held that a property owner had "no duty to those outside the land with respect to natural conditions existing on the land, regardless of their dangerous condition." 284 Va. at 106, 726 S.E.2d at 16.

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[16] RGR also attempts to distinguish some of these cases by simply picking the circumstances of a particular case in which this general duty was applied, and then arguing that the principle cannot apply here, where the circumstances are different. *See, e.g,* RGR Br. at 22.

Nevertheless, the *Cline* Court pointed out that any private party may be held liable if its *affirmative* activity endangers travelers on a roadway:

> Any part of the highway may be used by the traveler .... No private person has a right to place any obstruction which interferes with this right on any part of the highway within its exterior limits.... The duty of the [public entity that maintains the highway] is to perform a positive act in the preparation and preservation of a sufficient traveled way. The duty of others is to abstain from doing any act by which any part of the highway would become more dangerous to the traveler than in a state of nature, or than in the state in which the [public entity that maintains the highway] has left it.

284 Va. at 109, 726 S.E.2d at 18.

Consistent with *Cline*, our Complaint exhaustively alleged that RGR was negligent in *affirmatively* using its property – both the lumber itself and its storage yard -- to endanger others by unreasonably and dangerously obstructing the view of drivers trying to cross the railroad tracks at Kapp Valley Way. *See* JA 49-50 (Compl. ¶¶ 2, 3, 5-6); JA 52 (Compl. ¶¶ 11-12, 14); JA 57-61 (Compl.¶¶ 31-37); JA 65-66 (Compl.¶¶ 51-56); JA 68 (Compl.¶¶ 65-67); JA 70 (Compl.¶ 75); JA 71 (Compl.¶¶ 79-80); JA 72-73 (Compl.¶¶ 88, 90); JA 3-74 (Compl.¶¶ 92-95).[17] The evidence at trial

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[17] Because Norfolk Southern was a defendant and did business with RGR, our Complaint alleged concerted action between the two. *See* JA 71 (Compl.¶ 79). We also alleged that Mr. Settle's wrongful death was caused by the "joint and several negligence" of the defendants. JA 72 (Compl.¶¶ 88-89). So in addition to the fact that only RGR actually created the dangerous obstruction, there is no basis for RGR's claim that our negligence allegations

established those facts, at least to the satisfaction of the jury.

Moreover, we alleged that it is well-recognized by experts in highway-rail safety that the 15-foot area on each side of a crossing is the hazard zone, which a vehicle must expeditiously get through, or stop before, but never stop in. *See* JA 23-25 (Compl.¶¶ 31-36). *See also* VA. CODE § 46.2-885 (requiring a driver approaching a rail crossing to stop no less than 15 feet from the nearest rail when a train is visible and poses a hazard). As noted above, RGR's own expert agreed that a motorist should not stop within that hazard zone. RGR created a very serious risk of harm to Mr. Settle by stacking its lumber in a position that prevented him from complying with this safety principle – that is, RGR blocked Mr. Settle's vision so he could see an approaching train only after he had gotten closer than 15 feet from the nearest rail. And RGR's owner admitted he appreciated the danger created by RGR's lumber stacks. Thus RGR violated not only a general duty to exercise reasonable care to avoid endangering others, but violated a specific aspect of that duty – preventing another person from protecting himself from danger. *See* RESTATEMENT (SECOND) OF TORTS § 305, "Preventing Protective Action" ("An act may be negligent if the actor ... realizes or should realize that

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"boil down" to some concerted action theory. RGR BR. at 20-21. Similarly, our evidence at trial did not vary from the allegations in our Complaint. *Id.* at 32-34.

it is likely to prevent another or a third person from taking action which the actor realizes or should realize is necessary for the aid or protection of the other.").

The trial court did not embellish the issue, but instructed the jury correctly (using the exact words of this Court in *Rice*): "Every person has a duty to exercise ordinary care in the use and maintenance of its property to prevent injury or death to others." JA 171 (Jury Instruction 11b).

2. No Notice Requirement. RGR also complains that it had no notice of "any dangerous condition," RGR Br. at 23, as if it had nothing to do with creating that condition. RGR goes on to argue, inconsistently, that the lumber pile was "an open and obvious condition" and RGR had no duty to warn Mr. Settle of its dangers. *Id.* at 24-25. So RGR, under its theory, escapes liability because it had no notice of the dangerous condition (it created), but it also escapes liability because the dangerousness of the condition should have been obvious to Mr. Settle?

Such contortions are again a function of RGR's strawman strategy of reformulating the duty claimed in this case into a variation of a premises liability theory. In the premises liability context, a notice requirement is logical and only fair, as the dangerous condition (whether natural or artificial) is often not of the defendant's making. But here, where RGR is the genesis of the

dangerous condition, a requirement of actual notice makes no sense. RGR cites no authority for the notion that notice is an element of an ordinary negligence claim, as we have here. RGR's unsupported claim that there are "notice and knowledge requirements that accompany this general duty of ordinary care" is simply not true. *Id.* at 31.

Even in the premises liability context, courts distinguish between cases involving the defendant's "affirmative conduct" versus those that involve "passive conduct." In affirmative conduct cases, there is no actual notice requirement. Rather, "the foreseeability of the danger ... [is] the relevant question for [a] jury to consider in determining whether [a] defendant [has] been negligent." *O'Brien v. Everfast, Inc.,* 254 Va. 326, 491 S.E.2d 712, 715 (1997). *See also Memco Stores, Inc. v. Yeatman,* 232 Va. 50, 348 S.E.2d 228, 230 (1986) (In affirmative conduct cases, the jury must determine whether "an ordinarily prudent person, given the facts and circumstances [the defendant] knew or should have known, could have foreseen the risk of danger resulting from such circumstances."); *Holcombe v. NationsBanc Fin'l Serv. Corp.*, 248 Va. 445, 447-48, 450 S.E.2d 158, 160 (1994)(Whether the defendant used proper care in stacking partitions, including whether the danger that the partitions would fall and injure someone was foreseeable, was a jury question.).

Most basically, RGR's legal argument concerning notice is beside-the-point. Throughout this argument RGR simply ignores the striking facts of this case. One of RGR's owners, Gene Frogale, admitted that he knew where the railroad's right-of-way was, JA 532 (8/28/12 Tr. at 72:9-12) and that the lumber pile was dangerous. JA 540-41 (8/28/12 Tr. at 80:13-81:19).

3. Correct Jury Instructions. As part of its "no duty" posture, RGR complains about two jury instructions (Nos. 11(b) and 7) on the ground that they were "based on premises liability theory." RGR Br. at 29. RGR's argument concerning these instructions is essentially a rerun of its no-duty claim, which we have addressed above. Indeed, Instruction 11(b) is simply a faithful articulation of the duty RGR did have, drawn directly from this Court's precedents: "[e]very person has a duty to exercise ordinary care in the use and maintenance of its property to prevent injury or death to others." JA 171; *Rice,* 191 Va. at 603, 62 S.E.2d at 26. Moreover, RGR has waived its ability to challenge Instruction 11(b) before this Court as it agreed to this instruction in the trial court proceedings. JA 680 (9/4/12 Tr. at 137:20).

Furthermore, while RGR engages in an extended riff on legal theory and case law, it fails to address the central, practical issue in evaluating a jury instruction: did an instruction, as the jury heard it, mislead them? *Online Res. Corp.,* 285 Va. at 57, 736 S.E. 2d at 895. This failure is most evident in

RGR's attack on Instruction 7. RGR discusses a treatise and a case, and the context of those authorities, RGR Br. at 29-30, but this technical legal discussion, of course, is not what the jury heard. This was what the jury heard as Instruction 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." JA 169.

In the context of the evidence in this case, this instruction had nothing to do with premises liability, but, as the trial court ruled, concerned RGR's claim that it did not know where the railroad's right-of-way was. JA 690-92 (9/4/12 Tr. at 162:13-164:5). *See, e.g.,* JA 523-24 (8/28/12 Tr. at 63:4-9) (Gene Frogale initially claiming he was "uninformed about the right-of-way" before conceding on cross examination that he did know where it was). This point went to RGR's negligence being so thoroughgoing that its owners – who either knew or should have known the limits of the property after having had "personal knowledge" of it for 34 years (owning it most of that time) -- never told their employees not to stack their lumber in the right-of-way. *See* JA 694-96 (9/4/12 Tr. at 204:19-206:7)(closing argument). As a result, RGR trespassed into the safety zone of the railroad's right-of-way to stack its lumber even closer to the rails, creating a worse obstruction than if they had

kept their lumber on their own property. Even if this instruction were in some way erroneous – which it was not – it "need not be set aside if it was clear the jury was not misled." *Riverside Hosp., Inc. v. Johnson,* 272 Va. 518, 537, 636 S.E.2d 416, 426 (2006). RGR does not show the jury was misled, because they were not.

Assignments of Error 1, 2, 3, and 4 are without merit.

C. The Trial Court Did Not Err in Denying RGR's Motions to Strike Because Material Facts Were in Dispute. (Assignment of Error 2)

RGR claims its motions to strike should have been granted because (a) it had no duty to Mr. Settle;[18] (b) he was contributorily negligent; and (c) as a result, RGR's lumber stack was not a proximate cause of his death. RGR Br. at 13-14. RGR's alleged error should be rejected because it rests on false assertions that the evidence in their favor was undisputed.

Under Virginia law, it is a question of fact whether reasonable care required a tort victim to stop before crossing train tracks. *Southern Ry.Co. v. Campbell,* 172 Va. 311, 317, 1 S.E.2d 255, 257 (1939). *Wright v. Norfolk & Western Ry. Co.*, on which RGR relies, RGR BR. at 40-41, 43, far from being to the contrary, underscored that while a person crossing tracks has "the duty to look and listen with reasonable care; he [does] not have the absolute duty

[18] We have addressed RGR's "no-duty" argument above, and we will not reiterate it here.

to discover the presence of the train." 245 Va. 160, 170-71, 427 S.E.2d 724, 730 (1993).[19] *See also Smith v. Carpenter,* 198 Va. 91, 93, 92 S.E.2d 275, 277 (1956)("The law does not require a person to know that he is absolutely safe before taking a given course of action. He is only required to exercise ordinary care to avoid accidents -- such care as a reasonably prudent person would exercise under the circumstances.").

Moreover, a victim of a railroad crossing collision is not contributorily negligent if his efforts to perceive an approaching train were rendered ineffective by an obstruction or other actions of the defendant. Whether that is the case is a question of fact for the jury to determine. *Norfolk & P.B.L.R. Co. v. Freeman,* 192 Va. 400, 408, 64 S.E.2d 732, 736 (1951); *Chapman's Adm'r v. Hines,* 134 Va. 274, 115 S.E. 373, 375 (1922). This Court has underscored that

> [w]here a traveler's view of a crossing is obstructed and he cautiously approaches it and is injured, the Supreme Court of the United States has ... held that his negligence, if any, is for the jury.... Justice Cardozo in delivering the opinion commented on the conduct of the truck driver in going on the tracks and held that his negligence, if he were guilty of any, was for the jury. He used this language: "In such circumstances the question, we think, was for the jury whether reasonable caution forbade his going forward in reliance on the sense of hearing, unaided by that of sight. No

[19] *Wright* also differs substantially from this case because in *Wright* there was "no conflict in the evidence on the issue of contributory negligence." *Id.*at 171, 427 S.E.2d at 730.

> doubt it was his duty to look along the track from his seat, if looking would avail to warn him of the danger. This does not mean, however, that if vision was cut off by obstacles, there was negligence in going on."

Campbell, 172 Va. at 323, 1 S.E.2d at 260(quoting *Pokora v. Wabash Ry. Co.,* 292 U.S. 98, 101 (1934)).

As this case comes to this Court, reasonable minds – those of the jury – have already disagreed with RGR's portrayal of the evidence. "Courts constantly have to refer to juries the question of what is reasonable conduct, or reasonable prudence, under all the circumstances of the case, with no other guide than their own judgment and conclusion as reasonable men." *Chesapeake & O. Ry. v. Allen*, 137 Va. 516, 120 S.E. 157, 158-59 (1923). That is one reason why this Court has said that "a party who comes before [this Court] with a jury verdict approved by the trial court occupies the most favored position known to the law." *Sugarland*, 260 Va. at 371, 535 S.E.2d at 472. *See also Atrium Unit Owners Ass'n v King*, 266 Va. 288, 293, 585 S.E.2d 545, 547 (2003)(same).

To overcome the highly deferential standard of review, and the stubborn fact of the jury's verdict, RGR has grounded its argument on an extreme claim -- that the evidence was *uncontradicted* that Mr. Settle was contributorily negligent, and so RGR's lumber stack was not a proximate cause of his death. *See* RGR Br. at 36. To substantiate that claim, RGR

proceeds to recount *part* of the evidence, conveniently leaving out the evidence that contradicted the cited evidence. *Id.* at 37-39. That will not do.

We introduced significant evidence contradicting each building block of RGR's contributory negligence claim. Specifically, we introduced evidence that:

- operation of a heavy truck in the conditions at the Kapp Valley Crossing made it dangerous to automatically stop the truck each time one crossed the tracks, *see* Counter-Statement of Facts, at 13-18 *supra*;
- no one could have seen Mr. Settle's face to determine in which direction he was looking, *see* Counter-Statement of Facts, at 18-20 *supra*;
- the train did not blow a warning horn as it approached the Kapp Valley Crossing, *see* Counter-Statement of Facts, at 20-21 *supra*;
- Mr. Settle was recognized by his employer as one of its safest drivers, had repeatedly traversed the Kapp Valley Crossing safely (as RGR itself points out), and to all appearances was approaching the Crossing carefully moments before he was killed, *see* Counter-Statement of Facts, at 15 *supra.*

Moreover, the record indicates that the jury took very seriously their responsibility to carefully evaluate the evidence presented to them. For example, evidence of the physical layout of the collision scene was among the most important components of the case. As we have described above, the jury was not satisfied with the letter-sized version of photographs of the

scene to do their job. They asked for the blown-up versions to be sent back to them.

There is no basis for this Court to second-guess the jury's determination that Mr. Settle was not contributorily negligent and accordingly that RGR's obstructing lumber stack was a proximate cause of Mr. Settle's death. Assignment of Error 2 is without merit.

D. The Verdict Was Neither Plainly Wrong Nor Without Evidence to Support It. (Assignment of Error 4)

RGR contends that the verdict should have been set aside because as a matter of law it had no duty to Mr. Settle and because it was contrary to the evidence. RGR Br. at 14. We have already fully responded to RGR's no-duty argument, and will not repeat it here. In our Counter-Statement of Facts, we have reviewed the evidence that was before the jury showing that RGR breached its duty to motorists like Charles Settle, that Mr. Settle used reasonable in care in trying to cross the tracks the day he was killed, and that RGR's lumber stack was a proximate cause of his death – a record that utterly contradicts any claim there was no evidence to support the jury's verdict or that the verdict was plainly wrong.

Sugarland, relied on by RGR, RGR Br. at 35-36, does not support this Assignment of Error. In *Sugarland,* a child was killed by a car when he rode

his bicycle from a pathway owned by the defendant homeowners association into the street. 260 Va. at 368, 470 S.E.2d at 470. Though the plaintiff claimed various conditions at the intersection caused the collision, the evidence, unlike this case, was uncontradicted that the street and intersection were "clearly visible" to the victim. *Id.* at 374, 4790 S.E.2d at 473. The difference from this case is captured by the *Sugarland* Court's observation that "[t]his case is not one where [the victim] had 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." *Id.* at 374, 470 S.E.2d at 473-74. Here, a truck driver approaching the Kapp Valley Crossing *did* have to bring his vehicle beyond the edge of RGR's lumber stacks, with the front of his truck close to the tracks in the 15-foot hazard zone, in order to see and hear and approaching train.

RGR's Assignment of Error 4 is without merit.

E. The Trial Court Correctly Calculated the Settlement Offset. (Assignment of Error 5)

The jury awarded damages of $2.5 million with prejudgment interest at the statutory rate running from Oct. 12, 2008. JA 175 (Verdict Form). In applying VA. CODE §8.01-35.1 to effect an offset of the earlier $500,000 settlement with Norfolk Southern, the trial court concluded that the damage award plus the prejudgment interest constituted the "amount recovered"

under the statute. So the trial court ordered the sum of the damage and prejudgment interest awards -- $3,085,205.48 – be reduced by the $500,000 settlement. JA 271 (Partial Final Judgment Order, Jan. 13, 2013). The trial court further ordered statutory post-judgment interest be awarded on the principal sum awarded by the jury, that is the $2.5 million damages award. JA 272 (Partial Final Judgment Order, Jan. 13, 2013).

RGR argues that the trial court erred in its calculation of the settlement offset. According to RGR, the court should have reduced the $2.5 million by the $500,000 first, and then calculated prejudgment interest on that figure. RGR Br. at 44-45. RGR argues that the calculation must be done this way (1) to "harmonize" the offset statute (VA. CODE §8.01-35.1) with the interest statute (VA. CODE §8.01-382), and (2) to prevent a double recovery. RGR Br. at 44. Both elements of RGR's argument fail.

1. To achieve this "harmony," RGR claims that the "amount recovered" as used in §8.01-35.1 (that is, the figure which is reduced by a settlement amount) must be limited to mean the same thing as the "principal sum" as used in §8.01-382 (that is, the figure on which prejudgment interest is calculated). RGR gives no reason, and certainly cites no authority, for its claim that these two statutes, which serve different purposes and use different language to achieve those purposes, must be "harmonized"

(meaning equated) as it argues. That premise is simply wrong. Moreover, the strained harmonization RGR advocates does obvious violence to the different texts chosen by the General Assembly to write these statutes and conflicts with established judicial understandings of them.

As a matter of the straightforward meaning of these English words, when one speaks of the "amount recovered" by a plaintiff in a lawsuit in which prejudgment interest was awarded, one unmistakeably means the damage award plus the prejudgment interest. No one hearing a reference to the "amount recovered" in these circumstances would ever understand the speaker to mean only the damage award. So too in reading these statutes. No one would ever read "any amount recovered" as used in §8.01-35.1 as meaning only "any principal sum awarded" as used in §8.01-382. RGR certainly offers no authority to suggest that the General Assembly was using these words in such a weird way.

This Court has consistently adhered to the principle that "[p]rejudgment interest is normally designed to make the plaintiff whole and is part of the *actual damages sought to be recovered*." *Dairyland Ins. Co. v. Douthat*, 248 Va. 627, 631, 449 S.E.2d 799, 801 (1994)(quoting *Monessen Southwestern Ry. v. Morgan,* 486 U.S. 330, 335 (1988))(emphasis added). *See also Pulliam v. Coastal Emergency Services of Richmond, Inc,* 251 Va. 1, 25, 509

S.E.2d 307, 321 (1999)(quoting *Dairyland*); *Upper Occoquan*, 275 Va. at 63, 655 S.E.2d at 23 (quoting *Dairyland*). The "actual damages sought to be recovered" (which includes prejudgment interest) can quite comfortably be equated "any amount recovered" as used in §8.01-35.1.

Moreover, RGR's exercise in "harmony" is transparently and narrowly self-serving. One sees the strained harmonization of statutes RGR seeks here nowhere else in this Court's reading of statutes. For example, this Court was hardly in tune with RGR's particular brand of harmony in *Pulliam*, which construed the scope of the statutory cap on the "total amount recoverable" in a medical malpractice case to include both damages and prejudgment interest. 257 Va. at 25, 509 S.E.2d at 320-21. In truth, accepting RGR's unprecedented argument here would only sow discord in this Court's precedents.

The "amount recovered" by Mrs. Settle was $3,085,205.48. The trial court correctly applied the statutorily prescribed offset to reduce it by the $500,000.00 settlement.

2. To support its double-recovery claim, RGR states that the trial court ordered post-judgment interest to accrue on the result of subtracting the settlement amount from the sum of the damages and prejudgment interest awards. RGR Br. at 45. This would obviously result in interest accruing in

part on interest, and run afoul of *Upper Occoquan*, as RGR argues.

But the complete answer to this argument is that RGR's portrayal of what the trial court did is patently wrong, and is easily checked by looking at the trial court's Order. In that Order we find that "post-judgment interest is awarded on the principal verdict amount of $2,500,000 from September 6, 2012 until paid." JA 272 (Partial Final Judgment Order, Jan. 13, 2012). No double-recovery, no interest on interest, there.

Assignment of Error 5 is without merit.

Conclusion

For the foregoing reasons, the verdict of the Circuit Court of the County of Prince William in this case should be affirmed.

Respectfully submitted,

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CERTIFICATE

I hereby certify that Rule 5:26 of the Rules of the Supreme Court of Virginia has been complied with, and pursuant to the Rule, fifteen copies of the foregoing Brief of Appellee have been filed with the Clerk of the Supreme Court of Virginia, and three copies each have been mailed, via U.S. Mail, postage prepaid, this 20th day of March, 2014, to the following counsel for Petitioner:

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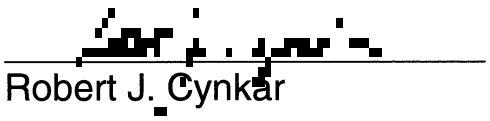
An electronic copy was also sent by email to each counsel on the same day and also emailed to the Clerk of the Supreme Court of Virginia at scvbriefs@courts.state.va.us.



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