IN THE

Supreme Court of Virginia

RECORD NO. 180121

NORFOLK SOUTHERN
RAILWAY COMPANY,

Appellant,

v.

MARK A. SUMNER,

Appellee.

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 4

ARGUMENT AND AUTHORITIES 10

1. Under the FELA's relaxed causation standards, a jury may base its verdict on circumstantial evidence from which it may, with reason, infer that the negligence of the railroad played any part, however small, in the plaintiff's injury 10

2. The trial court properly admitted Duffany's opinion testimony 12

   A. Standard of Review 12

   B. Norfolk Southern has waived any error assigned to the admission of Duffany's opinion on the basis that it exceeded the scope of his expertise 12

   C. Duffany's testimony regarding the rationale for providing a walkway that complied with railroad industry practice had an adequate foundation 13

3. The evidence was more than sufficient to permit the jury to determine that Norfolk Southern's negligence contributed, even in the slightest, to cause Sumner injuries 15

   A. Standard of Review 15

   B. Under the FELA standards that govern this case, Norfolk Southern is liable if the jury can infer from the evidence that Norfolk Southern's negligence played even the slightest role in causing Sumner's injury 17

C. Even excluding Duffany's testimony on causation, there was ample evidence from which the jury could find that Norfolk Southern played a role in Sumner's injury 23

D. Norfolk Southern cannot contest the jury's findings about the circumstances of Sumner's fall, which were based upon conflicting evidence 25

CONCLUSION 28

CERTIFICATE OF SERVICE 30

TABLE OF AUTHORITIES

CASES

Ackley v. Chicago & Northwestern Trans. Co,
820 F.2d 263 (8th Cir. 1987) 11

Andrews v. Commonwealth,
280 Va. 231 (2010) 13

Bailey, Administratrix v. Central Vermont Ry., Inc.,
319 U.S. 350 (1943).....2, 10, 28

Bennett v. Sage Payment Solutions, Inc.,
282 Va. 49 (2011) 16

Bly v. Southern R. Co.,
183 Va. 162 (1944) 25, 26, 27

CHN Am. LLC. v. Smith,
281 Va. 60 (2011) 14

Conrail v. Gottshall,
512 U.S. 532 (1994).....17

Coward v. Wellmont Health Sys.,
812 S.E.2d 766 (2018) 13

CSX Transport., Inc. v. McBride,
564 U.S. 685 (2011)..... 17

CSX v. Miller,
858 A.2d 1025 (Md. 2004) 11

Dennis v. Denver & Rio Grande Western R. Co.,
375 U.S. 208 (1963)..... 18

Dixon v. Sublett,
295 Va. 60 (2018) 15

Fletcher v. Union Pac. R. Co.,
621 F.2d 902 (8th Cir. 1980) 18

Gallick v. Baltimore & Ohio R. R.,
372 U.S. 108 (1963).....Passim

Gibson v. Elgin, Joliet & Eastern Ry. Co.,
246 F.2d 834 (7th Cir. 1957) 19

Harbin v. Burlington Northern Ry. Co.,
921 F.2d 129 (7th Cir. 1990) 10

Harrison v. Missouri Pacific R. Co.,
372 U.S. 248 (1963)..... 18

Holiday Motor Corp. v. Walters,
292 Va. 461 (1983) 14

Howard v. Commonwealth,
281 Va. 455 (2011) 13

Hyundai Motor Company v. Duncan,
289 Va. 147 (2015) 14

John Crane, Inc. v. Hardick,
283 Va. 358 (2012) 13

Jordan v. S. Ry. Co.,
970 F.2d 1350 (4th Cir. 1992) 11

Keesee v. Donigan,
259 Va. 157 (2000) 12

Lavender v. Kurn,
327 U.S. 645 (1946).....16, 21, 25

Missouri Pacific R.R. Co. v. Kansas Gas and Elec. Co.,
862 F.2d 796 (10th Cir. 1988) 19

Norfolk & W. Ry. v. Hodges
228 Va. 254 (1994) 11

Norfolk & W. Ry. v. Hughes,
247 Va. 113 (1994) 2, 11, 17, 18

Norfolk & W. Ry. v. Johnson,
251 Va. 37 (1996) 11

Norfolk & W. Ry. Co. v. Keeling,
265 Va. 228 (2003) 16, 17, 21

Norfolk S. Ry. v. Rogers,
270 Va. 468 (2005) 16

Norfolk S. Ry. v. Trimiew,
253 Va. 22 (1997) 11

Owens-Illinois, Inc. v. Thomas Baker Real Estate, Ltd.,
237 Va. 649 (1989) 15

Palmer v. Atl. Coast Pipeline, LLC,
293 Va. 573 (2017) 13

Patterson v. N & W Railway Co.,
489 F.2d 303 (6th Cir. 1974) 18

RGR, LLC v. Settle,
288 Va. 260 (2014) 4

Roberts v. CSX Transp., Inc.,
279 Va. 111 (2010) 16

Rodriguez v. Delray Connecting R.R.,
473 F.2d 819 (6th Cir. 1973) 10

Rogers v. Missouri Pac. R. R.,
352 U.S. 500 (1957).....2

Schulz v. Pennsylvania R. Co.,
350 U.S. 523 (1956) 19

St. Louis Southwestern Ry Co. v. Dickerson,
470 U.S. 409 (1985) 10

Tennant v. Peoria & Pekin Union Ry. Co.,
321 U.S. 29 (1944) 22, 25, 26

Tiller v. Atlantic C.L.R. Co.,
318 U.S. 54 (1943) 19

Toraish v. Lee,
293 Va. 262 (2017) 14

Wilkerson v. McCarthy,
336 U.S. 53 (1949) 10, 15, 19

STATE STATUTES

Va. Code § 8.01-401.3(A) 4

Va. Code § 8.01-680 16

FEDERAL STATUTES

45 U.S.C. § 51 10

RULES

Rule 5:27(d) 13

INTRODUCTION

In this Federal Employers' Liability Act ("FELA") case, a jury unanimously found that the failure of Norfolk Southern Railway Company ("Norfolk Southern" or "Appellant") to provide a reasonably safe walkway on which Mark A. Sumner ("Sumner") could perform his trackside duties played a part in causing Sumner to be injured.

Sumner sustained severe injuries in the performance of his railroad duties when he fell into a deep ravine from a steep precipice that ran parallel to the Norfolk Southern track on which he was performing switching operations. The fall was not witnessed, and Sumner's head injury subsequently left him unable to recall the incident. Sumner introduced direct evidence that the walkway from which he fell in the performance of his railroad duties was not safe, including expert evidence that the walkway failed to conform to industry standards requiring at least a 24-inch width.

The expert's opinion that the walkway was dangerously narrow is not challenged on appeal. Rather, Norfolk Southern challenges only the expert's testimony that a walkway that conformed to safety standards would have prevented some falls and reduced the likelihood of injury. This testimony on causation merely applied common sense principles to Sumner's dangerous working conditions. Nevertheless, expert testimony on the issue of causation was not necessary to create a jury issue on Norfolk Southern's liability.

Even without the expert testimony that Norfolk Southern challenges on appeal, Sumner introduced sufficient circumstantial evidence from which the jury could reasonably infer that the unsafe condition of the walkway contributed to Sumner's injuries. *Norfolk & W. Ry. v. Hughes*, 247 Va. 113, 116 (1994) (FELA plaintiff may rely entirely upon circumstantial evidence to meet his burden of proof). Under binding precedent from the United States Supreme Court, causation in FELA cases is governed by a relaxed causation standard. *Id.* Accordingly, Norfolk Southern is liable if its negligence plays a part, however small, in bringing about the injury. *Rogers v. Missouri Pac. R. R.*, 352 U.S. 500, 506 (1957).

Sumner was working on a 15-inch pathway covered with ballast (rocks), which was located between the train tracks and a steep precipice. The jury could reasonably find that this walkway was too narrow and unsafe and, if Sumner lost his balance, there would be insufficient room for him to either recover his balance or fall safely on the walkway itself, rather than go over the precipice and into the ravine, as he did.

Where the evidence satisfies the lenient standards for causation that govern FELA cases, as it does here, a jury is entitled to decide the railroad's liability. *E.g., Bailey, Administratrix v. Central Vermont Ry., Inc.*, 319 U.S. 350, 354 (1943) (the right to trial by jury is "part and parcel of the remedy afforded railroad workers under the [FELA]"). "To withhold such a question from the jury is to usurp its functions."

Id. Therefore, the jury's verdict, which the trial court correctly approved, should be affirmed.

STATEMENT OF THE CASE

Norfolk Southern's statement of the case requires amplification.

First, Norfolk Southern's Preliminary Statement raises the specter of "*ipse dixit*" in characterizing the testimony of Sumner's expert witness, Raymond Duffany ("Duffany"). This term is defined by Norfolk Southern as "speculative expert testimony that is not grounded in the facts." (Brief of Appellant, p.1). To the contrary, Duffany, who was qualified without objection as an expert in railroad engineering practices, especially with respect to railroad walkways, provided a clear and proper basis for his opinion that the subject walkway was not safe: to-wit, that the 15-inch width of the subject walkway did not satisfy the industry practice of providing walkways that have a relatively flat surface that is <u>a minimum</u> of 24 inches wide. (J.A. 89-106, 118-21).

Further, Duffany explained the importance of having a walkway that is a minimum of 24 inches wide, as opposed to 15 inches: "if you do stumble or trip, it gives you that extra margin you have to recover from a possible fall or an area to fall other than over the cliff." (J.A. 122-23). Far from being speculative, this opinion is

more in the nature of a truism.[1] These opinions are not "*ipse dixit*" and the jury's ability to make inferences and draw conclusions based on the totality of the evidence, including these opinions, is protected in FELA cases by longstanding precedent.

STATEMENT OF FACTS

Norfolk Southern's Statement of Facts likewise requires amplification because Norfolk Southern does not recite the facts as the jury found them. As the jury ruled in favor of Sumner, the facts are recited in the light most favorable to him, giving him the benefit of all reasonable inferences from the evidence. *E.g., RGR, LLC v. Settle*, 288 Va. 260, 283 (2014).

Norfolk Southern built the walkway, (J.A. 221-22), and had knowledge of its condition. (J.A. 128). Under railroad inspection guidelines, a track inspector would have had the opportunity to inspect the condition of the area in question at least twice a week. (J.A. 128-29).

Sumner's liability expert, Duffany, is "familiar with the customs and practices in the railroad industry concerning the construction, inspection,

[1] Norfolk Southern did not move to exclude Duffany's opinion on the basis that it was within the common knowledge of the jury that a wider walkway would afford an extra margin to recover from a fall or a wider area on which to fall. As no timely objection was raised on that basis, (J.A. 122-23), it has not been preserved and, nevertheless, Norfolk Southern has not presented that argument in any assignment of error. Therefore, we must assume that Duffany's testimony was admissible to "assist the trier of fact to understand the evidence or to determine a fact in issue." Va. Code § 8.01-401.3(A).

maintenance and repair of walkways adjacent to railroad tracks" based on his vast experience and training in that industry. (J.A. 88-103). More specifically, Duffany is "familiar with the proper width, surface and grade [at which] a railroad walkway should be maintained in order to be safe for workers to use it" and is "familiar with the prevailing practices in the railroad industry regarding these subjects." (J.A. 103).

The minimum width for a railroad walkway to be considered safe in the railroad industry is 24 inches. (J.A. 105). For a walkway to be acceptable in the railroad industry, "you want the walkway area to be relatively flat. You don't want to have irregularities in there. But the most a walkway should slope in any direction would be [an] 8:1 slope….it equates to about seven degrees." (J.A. 106).

Duffany's testimony was based on his 40 years of experience working in the railroad industry, both as a railroad executive and as a railroad safety consultant, which has exposed him to the engineering practices at dozens of railroads throughout the United States. (J.A. 88-103). He noted that the above industry customs and practices have been expressly adopted and incorporated into engineering standards used on the Burlington Northern Railroad and Union Pacific Railroad and codified by statute in four (4) states.[2] (J.A. 133-34).

[2] While not binding on a Norfolk Southern walkway located in Virginia, the codification of these practices on other railroads and in other states supports Duffany's assertion that these practices are followed in the railroad industry. Even

Duffany performed a site inspection in June 2015, and reviewed numerous depositions of witnesses and photographs taken on the day of the accident by both the railroad and witness John Sherrill. (J.A. 113-14). He concluded that the conditions that existed at the time of the accident were substantially the same as they were during his site visit. (J.A. 114). The photographs showed no material changes to the walking conditions in the area, (J.A. 114-15), and witness Bo Blair had testified that "there had been no changes made to the walkway area from the time of the incident until the time he was deposed," which was four months after Duffany's site inspection. (J.A. 115). There was no evidence presented at trial regarding any material changes to the condition of the walkway in the location where Sumner fell between the time of the accident and the time of Duffany's site inspection.

Collan Campbell testified that he determined, as part of Norfolk Southern's investigation of the accident, that "the point at which [Sumner] went over the side of the embankment was 58.5 feet north of the derail." (J.A. 55). This was confirmed by Norfolk Southern's investigation report of the incident introduced into evidence as Plaintiff's Exhibit 6. (J.A. 338). The embankment was sloped approximately 70 degrees and was 35 feet high at this location. (J.A. 336)

John Sherrill was at the scene at the time of the incident in his capacity as an

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so, Norfolk Southern does not challenge this part of Duffany's testimony.

inspector for the Virginia State Corporation Commission. (J.A. 59-61). He was actually watching and listening to Sumner and his engineer do their work at the time Sumner fell. (J.A. 61). From his vantage point, he saw Sumner ride the rear of a cut of cars past the East Bradley switch, dismount the car, and walk toward the East Bradley switch. (J.A. 63-65). Sherrill then saw Sumner walk south beside the East Bradley track until he went out of Sherrill's sight. (J.A. 65). Sherrill places Sumner on the walk path from which the jury found Plaintiff fell immediately before he went out of Sherrill's sight. (J.A. 65-66, 69-70). Sumner did not appear to be in any distress, was not stumbling, and did not appear to be confused or unstable. (J.A. 66-67).

The next thing Sherrill heard was "a lot of commotion" over the radio. (J.A. 67). Sherrill got out of his car and walked up to the main line of railroad tracks. (J.A. 68). Sherrill observed Sumner at the bottom of the slope to the east of the walkway along the East Bradley track. (J.A. 68). Sherrill identified this area on Plaintiff's Exhibit 7, a scene photograph that he had taken on the date of the incident to show the precise location where Sumner fell. (J.A. 69-71, 348). The circle at the left center of Plaintiff's Exhibit 7, (J.A. 348), marks the precise location where Sherrill concluded Sumner went over the edge of the walkway while walking toward the derail. *Id.*

During his site inspection, Duffany took measurements of the flat portion of

the walkway in the area depicted in Plaintiff's Exhibit 7, on which Mr. Sherrill had marked the location where he determined Sumner fell from the walkway. (J.A. 118, 348). The relatively flat portion of the walkway measured 15 inches wide from the derail all the way up to a point 71 feet north of the derail, which would have included the location Sherrill marked on Plaintiff's Exhibit 7. (J.A. 118-19). Duffany testified "to a reasonable degree of engineering certainty" that the walkway at that location did not comport with industry practice and was not safe. (J.A. 119-20).

Sumner reported to the EMT who tended to him at the scene of the incident that "he was walking on the fire right away (*sic)* [right-of-way], when he lost his bance (*sic*) [balance] on the wet gravel and fell." (J.A. 354). Duffany testified that a walkway that is a minimum of 24 inches wide, as opposed to only 15 inches, "gives you that extra margin you have to recover from a possible fall or an area to fall other than over the cliff." (J.A. 123). This is especially important when walking on ballast (rocks), "which moves and tends to roll under foot traffic." *Id.* "[I]f you are trying to stay on that 15-inch wide narrow path, you place a foot … on top of that ridge, that ballast is going to move." (J.A. 127). A 24-inch minimum walkway gives "you an adequate place to walk [and] if you do stumble or trip, you have room to recover." (J.A. 128).

The ballasted area between the flat portion of the walkway and the railroad

ties of the adjacent track at this location exceeded the permissible slope that would allow it to be considered part of the "walkway." (J.A. 120-21). "That's more like 20 plus degrees on that slope coming down….it's 20-plus degrees versus what it should be, 8 degrees for a safe walkway." *Id.*

Duffany also disputed that the location marked by Sherrill on Plaintiff's Exhibit 7 was only 60 feet south of the switch at the north end of the siding. (J.A. 136, 348). Using Plaintiff's Exhibit 13 as a reference, Duffany showed the jury the area that was actually 60 feet south of the switch, and noted that this looked nothing like the location where Sherrill had indicated Sumner fell from the walkway. (J.A. 136-40, 348, 356).

Sumner has no recollection whatsoever of his hospital stay from February 26-28, 2013. (J.A. 188). He cannot remember saying anything to anyone during that time. *Id.* Sumner's wife, Natasha, was notified of the incident and arrived at the hospital "a little after 11 [a.m.]." (J.A. 176). Sumner was in and out of consciousness after she arrived, but could not carry on a conversation even when conscious. (J.A. 177). Natasha never left Sumner's side in the hospital and never heard him give an account to any of the doctors about what had happened to cause him to fall. (J.A. 179).

ARGUMENT AND AUTHORITIES

1. Under the FELA's relaxed causation standards, a jury may base its verdict on circumstantial evidence from which it may, with reason, infer that the negligence of the railroad played any part, however small, in the plaintiff's injury.

Sumner's rights against Norfolk Southern are governed by the Federal Employers' Liability Act, *45 U.S.C. § 51*, *et seq*. The FELA confers substantive rights governed by federal law that may not be limited or impaired by state procedural rules. *St. Louis Southwestern Ry Co. v. Dickerson,* 470 U.S. 409, 411 (1985). Those rights emphatically include the right to a trial by jury. *See Bailey,* 319 U.S. at 354.

The FELA "was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations." *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949). Because the FELA is a remedial statute, courts must liberally construe the statute in favor of railroad workers. *Rodriguez v. Delray Connecting R.R.,* 473 F.2d 819, 820 (6th Cir. 1973). An FELA plaintiff is entitled to a jury trial even when the evidence is "scarcely more substantial than pigeon bone broth." *Harbin v. Burlington Northern Ry. Co.*, 921 F.2d 129, 132 (7th Cir. 1990).

"The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, ***even though entirely circumstantial***, from which the jury may with reason" infer that the "negligence of the employer

played any part, however small, in the injury or death which is the subject of the suit." *E.g.*, *Ackley v. Chicago & Northwestern Trans. Co*, 820 F.2d 263, 267 (8th Cir. 1987) (emphasis supplied); *Rogers*, 352 U.S. at 506; *Norfolk & W. Ry. v. Johnson*, 251 Va. 37, 43 (1996). Ordinarily, this is a question for the jury. *Norfolk S. Ry. v. Trimiew*, 253 Va. 22, 24 (1997)*; Norfolk & W. Ry. v. Hodges*, 228 Va. 254, 260 (1994).

"Under the FELA, a railroad has a nondelegable duty, which is continuing, to exercise reasonable care in furnishing its employees a safe place to work." *Johnson*, 251 Va. at 44; *Jordan v. S. Ry. Co.*, 970 F.2d 1350, 1353 (4th Cir. 1992). Although FELA plaintiffs must show some fault by the employer, lawsuits under the federal statute differ significantly from common law negligence claims. *E.g.*, *Hughes,* 247 Va. at 116 ("the standard of proof in an F.E.L.A. action is more lenient than in a common law action"); *CSX v. Miller,* 858 A.2d 1025, 1032-33 (Md. 2004), *writ of cert. dismissed*, 875 A.2d 702 (Md. 2005). FELA negligence is "but a pale reflection of common law negligence." *Miller*, 858 A.2d at 1032. The FELA "also involves a significant watering down of the proof of causation." *Id.* at 1035. A railroad is responsible for its employee's injury if its negligence "played any part, even the slightest, in producing the injury." *Rogers*, 352 U.S. at 506.

This appeal must be evaluated in this context.

2. The trial court properly admitted Duffany's opinion testimony.

A. Standard of Review.

"The admission of expert testimony is a matter within the sound discretion of the trial court, and we will reverse the trial court's judgment only when the court has abused this discretion." *Keesee v. Donigan*, 259 Va. 157, 161 (2000).

B. Norfolk Southern has waived any error assigned to the admission of Duffany's opinion testimony on the basis that it exceeded the scope of his expertise.

Norfolk Southern's first assignment of error states: "The circuit court erred in admitting expert witness Duffany's speculative and unfounded testimony, *which also exceeded the scope of Duffany's expertise*, regarding how a wider walk path might have prevented some falls where no evidence linked Duffany's speculation to a fact-based causal mechanism for this plaintiff's fall." (J.A. 31, italics added).

Although Norfolk Southern assigned error to the trial court's ruling that Duffany's testimony did not exceed the scope of his expertise, (J.A. 123), it has not presented any argument on brief to support this contention. In its "Statement of the Case and Material Proceedings," Norfolk Southern merely notes that this objection was made at trial,[3] (Brief of Appellant, p.12-13), and mentions in a footnote the

[3] Norfolk Southern has therefore also waived its challenge to Duffany's testimony that ballast tends to roll under foot, and that the additional width of the walkway would give an "extra margin" to recover from a fall or "an area to fall in other than over the cliff." (J.A. 122-23). The objection concerning the scope of Duffany's expertise was the only contemporaneous objection to this testimony. *Id.*

topics on which Duffany was qualified at trial. (Brief of Appellant, p.13, n.5). Moreover, the brief presents no argument or authority to support the bare contention that Duffany's testimony exceeded his expertise. Consequently, Sumner cannot prepare a meaningful response to this part of the first assignment of error.

The failure to present argument on an assignment of error in an opening brief, as required by Rule 5:27(d), "results in waiver of the arguments the party failed to make." *Palmer v. Atl. Coast Pipeline, LLC*, 293 Va. 573, 580 (2017) (quoting *John Crane, Inc. v. Hardick*, 283 Va. 358, 376 (2012)); *Howard v. Commonwealth*, 281 Va. 455, 461 (2011); *see also Coward v. Wellmont Health Sys.*, 812 S.E.2d 766, 774 (2018) ("Lack of an adequate argument on brief in support of an assignment of error constitutes a waiver of that issue.") (quoting *Andrews v. Commonwealth*, 280 Va. 231, 252 (2010), *cert. denied*, 564 U.S. 1008 (2010)). Therefore, under Rule 5:27(d), any challenge that Duffany's testimony exceeded the scope of his expertise has been waived.

C. <u>Duffany's testimony regarding the rationale for providing a walkway that complied with railroad industry practice had an adequate foundation.</u>

On appeal, Norfolk Southern does not challenge Duffany's testimony that Norfolk Southern failed to comply with industry practice because its track-side walkway where Sumner fell was less than 24 inches wide, (J.A. 119-21, 134), or that "the purpose" of a 24-inch minimum walkway is to "give you an adequate

place to walk if you do stumble on the ballast or trip, you have room to recover." (J.A. 128, 150).[4] Rather, it challenges Duffany's "causation" testimony – that if there had been at least a 24-inch walkway, it would have prevented some falls by giving the railroad employee room to recover or an area to fall onto rather than going over a cliff. (*E.g.*, J.A. 122-23).

These observations from Duffany hardly lacked foundation in light of Duffany's extensive railroad background and expertise concerning walkway safety. If anything, his explanation constituted unimpeachable common sense. *See* Footnote 1. Indeed, the jury was instructed to use its common sense in considering the issues before it. (Transcript 8/9/17, p.134). Duffany essentially explained to the jury, based on his years of experience in supervising the construction, inspection and maintenance of railroad walkways, (J.A. 93-94, 96-97), that wider is better.

The cases cited by Norfolk Southern in its Brief for the proposition that Duffany's testimony lacked an adequate foundation include *Holiday Motor Corp. v. Walters,* 292 Va. 461 (1983), *Hyundai Motor Company v. Duncan,* 289 Va. 147 (2015), *CHN Am. LLC. v. Smith,* 281, Va. 60 (2011), *Toraish v. Lee,* 293 Va. 262

[4] Plainly Norfolk Southern's two assignments of error address only the question of causation. If there is any doubt, though, Norfolk Southern confirms on brief that it is not challenging Duffany's negligence opinions. (Brief of Appellant, p.10-11 and 11, n.4). Therefore, Duffany's negligence opinions must be considered in determining whether there is ample evidence to create a jury issue on Norfolk Southern's negligence.

(2017), and *Dixon v. Sublett,* 295 Va. 60 (2018). Each of these cases was either a medical malpractice action or a products liability action involving the admissibility of highly technical medical or scientific opinions. The empirical and methodological rigor required to offer such opinions is simply not warranted when evaluating the admissibility of Duffany's truisms[5] in the context of this case.

It was ultimately for the jury to decide, based on the evidence it had seen and heard, whether the negligent failure of Norfolk Southern to provide a walkway of sufficient width to satisfy prevailing industry custom and practice contributed, even in the slightest, to causing Sumner's injuries. Duffany was merely facilitating the jury's understanding of why railroads follow this practice with respect to their walkways.

3. The evidence was more than sufficient to permit the jury to determine that Norfolk Southern's negligence contributed, even in the slightest, to cause Sumner injuries.

A. Standard of Review.

In determining whether the trial court erred in denying Norfolk Southern's motion to strike, this Court will reverse the trial court "only if plaintiff proved no cause of action against the defendant or if no evidence existed to support the verdict." *Owens-Illinois, Inc. v. Thomas Baker Real Estate, Ltd.*, 237 Va. 649, 651 (1989);

[5] The trial court correctly observed that reliance on cases like *Walters* and *Duncan* to evaluate the admissibility of Duffany's opinions in the case at bar is like "comparing apples to gorillas." (J.A. 324-25).

Wilkerson v. McCarthy, 336 U.S. 53, 57 (1949) ("in passing upon whether there is sufficient evidence to submit an issue to the jury, we need look only to the evidence and reasonable inferences which tend to support the case").

Armed with a jury verdict in his favor, Sumner is entitled to have the evidence, and all inferences that may reasonably be drawn from it, viewed in the light most favorable to him. *RGR, LLC ,* 288 Va. at 283; *Norfolk & W. Ry. Co. v. Keeling*, 265 Va. 228, 232 (2003). As the trial court approved the jury verdict, Sumner occupies the "most favored position known to the law." *RGR, LLC*, 288 Va. at 283 (quoting *Bennett v. Sage Payment Solutions, Inc.*, 282 Va. 49, 54 (2011)). The trial court's judgment, including its refusal to set aside the verdict, is presumed correct and will not be reversed unless plainly wrong or without evidence to support it. *Norfolk S. Ry. v. Rogers*, 270 Va. 468, 480 (2005) (stating that the standard of review under Code § 8.01-680 applies to an assignment of error challenging the sufficiency of the evidence)*; Keeling*, 265 Va. at 232 (citing Va. Code § 8.01-680).

Whether there is "sufficient evidence to submit a case to a jury and to support its verdict" is a question of federal law governed by the FELA. *Roberts v. CSX Transp., Inc.*, 279 Va. 111, 120 (2010) (citing *Lavender v. Kurn*, 327 U.S. 645, 652-53 (1946)); *see also Keeling*, 265 Va. at 232 ("Whether negligence has been established in a FELA claim is a matter of federal law.") (citation omitted). Under

the FELA, "negligence must be shown by more than a scintilla of evidence" and is normally an issue for the jury. *Keeling*, 265 Va. at 232.

B. Under the FELA standards that govern this case, Norfolk Southern is liable if the jury can infer from the evidence that Norfolk Southern's negligence played even the slightest role in causing Sumner's injury.

Under the FELA, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes." *Rogers*, 352 U.S. at 506. The plaintiff may rely entirely upon circumstantial evidence to meet his burden of proof. *Hughes*, 247 Va. at 116.

Unlike the standards that apply in a traditional tort case applying Virginia law, FELA cases apply a relaxed standard of causation. *CSX Transport., Inc. v. McBride*, 564 U.S. 685, 691-92 (2011). Under the FELA, a railroad is liable to its employee if that railroad's negligence played **any part, even in the slightest**, in producing the injury. *Id*. The relaxed causation standard reflects the remedial goals of the FELA:

> FELA's language on causation…'is as broad as could be framed.'…Given the breadth of the phrase 'resulting in whole or in part from the [railroad's] negligence,' and Congress' 'humanitarian' and 'remedial goal[s],' we have recognized that, in comparison to tort litigation at common law, 'a relaxed standard of causation applies under FELA'…

Id. (citations omitted); *see also Conrail v. Gottshall*, 512 U.S. 532, 542-43 (1994) (the FELA is to be liberally construed to further its remedial goal of compensating

railroad workers who are injured "in whole or in part from the negligence of . . such carrier").

Accordingly, if the railroad's negligence played even the slightest part in producing the injury, the railroad is liable even though a jury "may also with reason, on the grounds of probability, attribute the result to other causes." *Rogers,* 352 U.S. at 506; *see also Dennis v. Denver & Rio Grande Western R. Co.*, 375 U.S. 208 (1963) (railroad responsible for frostbite injury to employee who was permitted to continue working where a foreman was aware that the employee's fingers might get cold); *Gallick v. Baltimore & Ohio R. R.*, 372 U.S. 108 (1963) (insect bite from stagnant water); *Harrison v. Missouri Pacific R. Co.*, 372 U.S. 248 (1963) (criminal assault by co-worker); *Fletcher v. Union Pac. R. Co.*, 621 F.2d 902 (8th Cir. 1980) (railroad responsible for returning plaintiff to work following previous back injury); *Patterson v. N & W Railway Co.*, 489 F.2d 303 (6th Cir. 1974) (railroad responsible for tuberculosis contracted from plaintiff's fellow employee who exhibited signs of illness).

Further, it has been recognized that there need not be direct evidence of negligence or causation to create a triable issue for the jury. Courts have repeatedly held that in FELA cases **the element of causation may be established through circumstantial evidence or common knowledge**, and that direct or expert testimony is not required. *E.g.*, *Hughes*, 247 Va. at 116; *Lynch*, 700 F.3d at 916 (citing

Missouri Pacific R.R. Co. v. Kansas Gas and Elec. Co., 862 F.2d 796, 800 (10th Cir. 1988) (a case can rest entirely on circumstantial evidence and still be sufficient to reach the jury under FELA); *Gibson v. Elgin, Joliet & Eastern Ry. Co.*, 246 F.2d 834, 837 (7th Cir. 1957) (burden met if there is proof, though entirely circumstantial, from which a jury may with reason make the inference).

As recognized by the United States Supreme Court, "[j]urors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn." *Schulz v. Pennsylvania R. Co*., 350 U.S. 523, 526 (1956). "And a jury should hold a master 'liable for injuries' attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances," bearing in mind that "the standard of care must be commensurate to the dangers of the business." *Wilkerson*, 336 U.S. at 61 (quoting *Tiller v. Atlantic C.L.R. Co.,* 318 U.S. 54, 67 (1943)).

Gallick, which was recently reaffirmed in *McBride*, 564 U.S. at 697, is one of three seminal cases from the United States Supreme Court that illustrates the extent to which circumstantial evidence will suffice to support an FELA cause of action. Gallick was working on the railroad's right of way when he allegedly was bitten by an insect. The wound from the bite became infected, and the infection spread,

resulting in the amputation of both of his legs. None of the doctors who treated Gallick could explain the etiology of his condition, but some of them characterized it as secondary to an insect bite. 372 U.S. at 109-10.

Gallick filed suit against the railroad under FELA, claiming that the insect bite occurred as he was working near a fetid pool containing dead and decaying rats and pigeons, which condition had existed for many years and of which the railroad had knowledge. *Id.* He argued that the pool of stagnant water attracted insects and resulted in the bite and subsequent infection. *Id.*

The jury returned a verdict for Gallick. *Id.* at 109. However, the appellate court held that a jury could not reasonably find the railroad liable because there was no direct evidence that the insect had any connection with the pool of water or evidence which would negate alternative possibilities that the insect "had emanated from 'the nearby putrid mouth of the Cuyahoga River, or from the weeds, or unsanitary places situated on property not owned or controlled by the railroad.'" *Id.* at 112. Therefore, the court concluded that the evidence was merely a series of guesses and speculations – a chain of causation too tenuous to support liability. *Id.*

The Supreme Court reversed, holding that the appellate court improperly invaded the function and province of the jury, and that there was sufficient evidence to warrant the jury's conclusion that the injuries were caused by the railroad's acts or omissions. *Id.* at 113. Specifically, the Supreme Court held that the appellate court

erred in requiring either direct evidence that the insect had a connection to the fetid pool, or more substantial circumstantial evidence than that the pool created conditions that furnished an environment to attract and infect such insects. *Id.* at 114. The Court noted that in FELA cases, the role of the court is not to search the record for conflicting circumstantial evidence and to take the case from the jury because the evidence equally supports inconsistent and uncertain inferences. *Id.* at 114-15. Instead, it is the function of the jury, not the court, to select among conflicting inferences and conclusions.[6] *Id.* at 115.

The United States Supreme Court reached a similar conclusion in another FELA case where it was alleged that a switchtender's death was attributable to the railroad's negligence. In *Lavender v. Kurn,* a switchtender was found unconscious near the track and died as a result of a fractured skull. 327 U.S. at 648. An autopsy revealed an injury to the back of his head made by a fast moving small, round object. *Id.* at 648-49. The plaintiff's theory was that the switchtender was struck by the end of a mail hook hanging down loosely on the outside of a mail car on a backing train. *Id.* at 649. The plaintiff introduced circumstantial evidence that the mail hook could have hit the decedent if he were standing on a mound of dirt. *Id.* The railroad contended that the mound was too far away from the track for the hook to have

[6] This Court has cited *Gallick* for the legal principle that a FELA plaintiff does not have to show that the railroad's negligence "would cause a specific injury." *Keeling*, 265 Va. at 233.

reached the switchtender's head. *Id.* at 649-50. Instead, the railroad theorized that the man had been murdered by tramps in the area. The Court held that there was sufficient evidence of causation to justify submitting the case to the jury because there was evidence from which a jury could infer that the mail hook struck the switchtender. *Id.* at 652.

Further, the Supreme Court acknowledged that there was evidence indicating that it was physically and mathematically impossible for the hook to strike the switchtender, and that there were facts from which one could infer that he had been murdered. *Id.* However, the evidence indicating that the hook could have reached him was sufficient to allow the case to go to the jury. *Id.* The Court explicitly rejected the notion that the speculative nature of the inquiry should prevent submission of the case to the jury. *Id.* at 653 ("It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.")

Finally, in *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29 (1944), the Supreme Court approved a similar jury verdict involving another unwitnessed accident. There, the Supreme Court noted "there was no direct evidence as to [decedent's] precise location at the time he was killed," acknowledging conflicting

circumstantial evidence on that point. *Id.* at 31. Pointedly, the Court observed that it is not the appellate court's function "to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." *Id.* at 35 (citations omitted).

C. Even excluding Duffany's testimony on causation, there was ample evidence from which the jury could find that Norfolk Southern played a role in Sumner's injury.

Duffany's testimony was not necessary to create a jury issue on the question whether Norfolk Southern's negligence contributed to the slightest degree in producing Sumner's injury. There was ample evidence from which the jury could reasonably infer that it did.

Duffany's testimony on the standards in the industry regarding trackside walkways is not challenged on appeal. The jury accepted Duffany's testimony that the walkway was not safe and that Norfolk Southern failed to comply with industry standards by providing a track-side walkway that was only 15 inches wide. (J.A. 119-21). From this testimony, the jury could reasonably find that Norfolk Southern was negligent in failing to maintain a safe walkway, particularly when that walkway was covered with large ballast and was located next to a steep embankment.

Further, the jury could find that Norfolk Southern's negligence in failing to maintain a safe walkway contributed in some part to Sumner's fall. The evidence, and inferences from that evidence, showed that the narrow walkway on which Sumner fell – which was barely wide enough for a small adult – was covered with rocks and was adjacent to the railroad track on one side and a 35-foot embankment on the other. (J.A. 336, 347-48). Norfolk Southern built the walkway, (J.A. 221-22), and knew that its employees would be working in this area. (J.A. 128). Indeed, Sumner had been directed to perform work in that area – and was performing that work when he fell. (J.A. 180-83). The jury could also credit the evidence that Sumner lost his balance and fell, (J.A. 354), rolling down the steep embankment where he was later found. (J.A. 350).

From this evidence, the jury could reasonably find that the narrow walkway contributed to Sumner's injury. It was not wide enough to permit safe passageway under the circumstances, and provided no room for Sumner to recover if he lost his balance (as he did) or to fall on the path itself. Thus, there was evidence from which the jury could find that Norfolk Southern's negligence in failing to maintain a safe walkway played a part, "even in the slightest," to producing Sumner's injury. *See McBride*, 564 U.S. at 703-4.

Duffany's unchallenged "negligence" testimony established Norfolk Southern's negligence, and the jury could infer – without Duffany's "causation"

testimony – that Norfolk Southern's negligence played a role in producing Sumner's injury. "If negligence is proved, however, and is shown to have played any part, even the slightest, in producing the injury, then the carrier is answerable in damages even if the extent of the [injury] or the manner in which it occurred" was not "[p]robable or foreseeable." *McBride*, 564 U.S. at 703-4 (internal and external citations omitted for ease of reading; alterations in the original).

D. Norfolk Southern cannot contest the jury's findings about the circumstances of Sumner's fall, which were based upon conflicting evidence.

There was far more evidence available to this jury to support causation than was available to the juries in *Lavender, Gallick* or *Tennant,* all of which make clear that circumstantial evidence can be used to support reasonable inferences that establish causation in FELA cases. Even so, Norfolk Southern complains that there was insufficient proof about the circumstances of Sumner's fall.

Norfolk Southern's efforts to contest the jury's findings about how or why Sumner fell must fail. It is well established that it is **not** the appellate court's function "to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." *Tennant*, 321 U.S. at 35 (citations omitted); *Bly v. Southern R. Co.*, 183 Va. 162, 175 (1944) (citing *Tennant*). Regardless of whether the jury's conclusions relate to "negligence, causation or any other factual matter," the Supreme Court has held that appellate courts "[a]re not free to re-

weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant*, 321 U.S. at 35; *see also Gallick,* 372 U.S. at 114.

Indeed, in *Bly*, this Court rejected a similar argument from the railroad in an FELA case. In *Bly*, the decedent employee fell from a bridge to his death in an unwitnessed accident. The plaintiff's theory was that the railroad was negligent in failing to have a walkway on the bridge and, if there had been a walkway, the decedent would not have fallen to his death. 183 Va. at 168-69. Like Norfolk Southern here, the railroad in *Bly* argued that there was insufficient proof of the circumstances of the injury to create a jury question on the issue of causation. Specifically, the railroad complained that there was no evidence how or why the decedent fell. This Court summarized the railroad's complaints as follows:

> The defendant says there is an entire lack of proof as to how he was killed. It admits that he fell and was killed, but claims there was no evidence of from what point on the bridge he fell, or what caused him to fall, or what he was doing when he fell. Its counsel suggests that he may have lost his balance and fallen from the rear platform of the caboose, or that he may have safely alighted on the bridge and later lost his balance and fell, or he may have attempted to light a cigarette and lost his balance, or he may have been looking at his watch while walking and missed his footing, or he may have been deprived momentarily of his mental faculties and fell. The defendant claims that all of these suggestions are speculation, and no one can say just what happened or just exactly how the decedent met his death.

Id. at 174-75. This Court rejected the railroad's arguments and concluded that the

circumstantial evidence was sufficient to create a jury issue on the question whether there was a causal connection between the railroad's negligence and the plaintiff's death. *Id.*

As in *Bly*, the facts viewed in the light most favorable to Sumner created a jury question on causation and, further, support the jury's finding that the railroad contributed to Sumner's injury. In determining whether the negligent walkway contributed, even in the slightest, to cause Sumner's accident, the jury was permitted to credit the evidence from John Sherrill, who placed Sumner on the subject walkway shortly before he fell, (J.A. 60-67), and identified the precise location where Sumner left the walkway. (J.A. 67-71, 348). The flat portion of the walkway was a mere 15 inches wide at this location. (J.A. 117-19). Further, unlike the plaintiff in *Bly*, Sumner introduced expert testimony establishing that the walkway was unsafe, and that testimony is not challenged on appeal.

Perhaps more importantly, the jury could also rely upon Sumner's own account of the incident that he gave to the EMT at the scene before his head injury erased his memory of the event. The EMT report, which came into evidence without objection, (J.A. 87), placed Sumner on the subject right of way when he lost his balance on the wet gravel and fell. (J.A. 354). Based on this evidence and the reasonable inferences to be drawn from it in the context of an FELA action, the

jury was entitled to find that the width of the walkway contributed, even in the slightest, to cause Sumner's accident.

The trial court correctly decided to send this case to the jury. The United States Supreme Court has recognized that the right to a trial by jury is sacrosanct in FELA actions. *E.g., Bailey,* 319 U.S. at 353-54. Even in close and doubtful cases, a jury trial is necessary:

> The right to trial by jury is "a basic and fundamental feature of our system of federal jurisprudence." *Jacob v. New York City*, 315 U.S. 752. It is part and parcel of the remedy afforded railroad workers under the Employers Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries...**To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them…To withdraw such a question from the jury is to usurp its functions.**

Id. (emphasis supplied). Therefore, there is no error.

CONCLUSION

Viewing all of the evidence in the light most favorable to Sumner, the verdict and judgment should be affirmed. Norfolk Southern is not entitled to judgment as a matter of law.

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CERTIFICATE OF SERVICE

I certify that on this 6th day of July, 2018, I complied with Rule 5:26(e) and caused this Brief of Appellee to be filed with the Supreme Court of Virginia, and for one copy to be sent by email to counsel of record for Norfolk Southern Railway Company, the appellant:

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