IN THE

Supreme Court of Virginia

RECORD NO. 180121

NORFOLK SOUTHERN RAILWAY COMPANY,

Appellant,

v.

MARK SUMNER,

Appellee.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii, iii

ARGUMENT AND AUTHORITIES 1

I. Sumner effectively concedes that Duffany's causation testimony was speculative and inadmissible 1

II. The evidence was insufficient to create a jury issue on causation 5

III. The cases Sumner cites do not support his position 9

CONCLUSION 14

CERTIFICATE 15

TABLE OF AUTHORITIES

Cases

Blue Ridge Service Corp. v. Saxon Shoes, Inc.,
271 Va. 206 (2006) 2

Bly v. Southern Railway,
183 Va. 162 (1944) 9, 11-12, 13

Cassidy v. Martin,
220 Va. 1093 (1980) 3

Countryside Corp v. Taylor,
263 Va. 549 (2002) 3

CSX Transportation, Inc., v. McBride,
564 U.S. 685 (2011) 13

Gallick v. B & O Railroad,
372 U.S. 108 (1963) 9, 12, 13

Galloway v. United States,
319 U.S. 372 (1943) 10

Gilbert v. Summers,
240 Va. 155 (1990) 3

Lavender v. Kurn,
327 U.S. 645 (1946) 9, 12, 13

Lawson v. Doe,
239 Va. 477 (1990) 3

Norfolk Southern Rwy. v. Trimiew,
253 Va. 22 (1997) 6

Seward International, Inc. v. Price Waterhouse,
239 Va. 585 (1990) 3

Tennant v. Peoria & Pekin Union Railway,
321 U.S. 29 (1944) 9-11, 12, 13

Statutes

Virginia Code § 8.01-384 5

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

NORFOLK SOUTHERN RAILWAY COMPANY,	)	
	)	
Appellant/ Defendant,	)	
	)	**REPLY BRIEF OF APPELLANT**
	)	**Record No. 180121**
MARK A. SUMNER,	)	
	)	
Appellee/ Plaintiff.	)	

ARGUMENT AND AUTHORITIES

I. Sumner effectively concedes that Duffany's causation testimony was speculative and inadmissible.

Nowhere in his brief does Sumner come to grips with the ways in which Duffany's expert testimony on causation was speculative, or offer this Court any facts in evidence that would save that testimony from being speculative and inadmissible. Sumner offers only the cursory characterizations that the challenged causation testimony was "appl[ying] common sense principles" and "more in the nature of a truism." (Br. at 1, 3-4, 14.)

Duffany's testimony was not "common sense." Without a foundation in the facts in evidence, Duffany was allowed to speculate that moving or rolling ballast *might* have caused Sumner's fall, or that

stumbling or tripping on ballast *might* have been involved; that this *might* have been an incident in which Sumner *might* have been able to regain his balance or otherwise *might* have been able to mitigate his damages; and that if the flat part of the path had been nine inches wider, this *might* have enabled Sumner to take protective measures. On cross-examination, however, Duffany conceded the speculative nature of his testimony when he confirmed that he had no idea what role, if any, the walk path played in causing this incident.

Sumner dismisses the careful analysis of speculative testimony as an analysis that is appropriate only in "highly technical medical or scientific" contexts. He denies, without elaboration and without citation of authority, that it is appropriate to analyze whether Duffany's causation testimony was grounded in the facts of this case. (Br. at 14-15.) In a variety of situations not involving "highly technical medical or scientific opinions," this Court has identified, and ruled inadmissible, speculative expert testimony.[1] These cases involved simple,

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[1] For instance:

- *Blue Ridge Service Corp. v. Saxon Shoes, Inc.*, 271 Va. 206, 212-17 (2006) (testimony of fire cause-and-origin expert inadmissible because it relied on a basic factual assumption – that an employee had smoked at his work station –not supported by the facts in evidence);

straightforward gaps in the evidential basis for expert testimony. This Court identified those gaps by carefully reviewing the facts in evidence.

Sumner wrongly suggests (Br. at 4, n.1) that Norfolk Southern waived its objection to Duffany's speculation about how the walk path contributed to *this* accident because Duffany's causation testimony was within the common knowledge of the jury, and Norfolk Southern did not

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- *Countryside Corp. v. Taylor*, 263 Va. 549, 553-54 (2002) (expert damages testimony in a breach of contract case inadmissible because the testimony assumed plaintiff did not own a strip of land that, under the evidence, plaintiff in fact owned);

- *Gilbert v. Summers*, 240 Va. 155, 159-60 (1990) (surveyor's expert testimony in boundary dispute inadmissible because it was based on assumptions about two basic facts not in evidence);

- *Lawson v. Doe*, 239 Va. 477, 481-83 (1990) (trial court properly excluded speculative expert testimony on causation of a vehicle-related death because no evidence supported a key assumption about the physical circumstances of the accident; trial court properly set aside plaintiff's verdict because evidence was insufficient to move key elements of plaintiff's theory out of the realm of conjecture and guess);

- *Seward International, Inc. v. Price Waterhouse*, 239 Va. 585, 591-93 (1990) (expert testimony on breach of accountants' duty of care inadmissible because no evidence showed that the records essential to the expert's testimony existed at the required time);

- *Cassidy v. Martin*, 220 Va. 1093, 1100 (1980) (expert's testimony projecting lost income inadmissible because it assumed a stable work history not shown by the evidence).

object on this additional ground. This argument ignores the context of Dufffany's testimony, and it ignores the salient and fatal flaw in that testimony – that, whether or not it constituted common knowledge, it was speculative and lacked foundation in the facts in evidence. This was precisely Norfolk Southern's objection. (J. A. 122-23, 126-28.)

Duffany had just testified to his expert opinion that the flat part of the walk path was too narrow. His causation testimony was given in response to a question asking him to explain how, in light of that opinion, the asserted narrowness of the flat part played a causative role in *this* accident. Norfolk Southern's objection embraced all of Duffany's response to this question.[2] This is the context in which the trial court allowed Duffany, continuing to testify as an expert, to speculate without evidential basis about what *might* have occurred that *might* have involved some aspect of the walk path. That ruling was erroneous.

Norfolk Southern suggests that Sumner's failure to deal in any detail with the speculative nature of Duffany's causation testimony is a

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[2] Sumner's effort to limit the scope of this objection by citing a subsequent, subsidiary objection based on exceeding the scope of expertise is not well founded. (Br. at 12, n.4.) All of Duffany's testimony responding to Sumner's counsel's question was speculative, and was the subject of the objection. The scope of this objection was made clear, and was argued and

tacit concession that the challenged testimony was impermissibly speculative and should have been excluded.

II. The evidence was insufficient to create a jury issue on causation.

Instead of defending the admissibility of Duffany's causation testimony, Sumner argues that there was enough evidence to create a jury issue on causation without that speculative testimony. (Br. at 1, 23-25.) Duffany himself gave the most succinct response to that argument. Having reviewed all of the evidence on which Sumner relies, Duffany candidly conceded that, based on that evidence, *he had no idea what role, if any, the walk path played* in causing Sumner's accident.

> Q: You don't know what the Plaintiff, Mr. Sumner, was doing at the time he fell, do you?
>
> A: Just that he was walking. That's the only thing I know. He was walking towards a derail.
>
> Q: Therefore, you don't know what role *this path* could have had in causing *this particular incident* because you don't know what he was doing at that time, do you?
>
> A: I know he was walking and he was on what I consider an unsafe substandard walkway.
>
> Q: *You have no idea what role, if any that that walk path could have played*, he could have been looking over his shoulder, he could

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preserved, at multiple places in the trial record. (J.A. 8-12, 16-21, 25-28, 122-23, 200-25, 293-98, 312-30.) Va. Code § 8.01-384.

> have been distracted, he could have been not paying attention, you have no idea, all we know is that he was walking south somewhere; isn't that true?
>
> A: *Correct.*

(J. A. 150, emphases added.)

Duffany correctly assessed the evidence. Based on that evidence, neither he nor the jury could have any idea what role, if any, the walk path played in causing Sumner's injuries. That being the case, no jury issue existed on causation.

Sumner's argument highlights the fact that the walk path was "covered with rocks," that is, ballast. (Br. at 23-24.) Sumner did not argue below that this condition was negligence. He could not argue that, because that is the normal condition next to railroad tracks. No evidence suggested otherwise. Encountering the normal, known condition of ballast cannot be the basis for a claim of negligence under the FELA. *Norfolk Southern Rwy. v. Trimiew*, 253 Va. 22, 27-29 (1997).

Sumner argues that the jury could conclude that he fell on "the narrow walkway." (Br. at 2, 24.) No evidence permitted that conclusion. The evidence showed only that, when last seen, Sumner had crossed the main line toward the switch and had just started heading south from the rear of the cutoff, apparently on the east side of the

siding track. (J. A. 64-66.) No one saw him thereafter. Based on erroneous assumptions, Norfolk Southern's initial investigation assumed that he had left the path at the point above where he was found. No evidence, however, showed where he was within the walk path when he lost his balance on the gravel and fell, or what his actions and movements were before and as he fell. Sumner was next seen when he was found at the bottom of the embankment, lying on his back with his head pointing up hill. This evidence did not give rise to an inference that Sumner was on the narrow, flat part of the walk path when he fell, or that the narrowness played any part in his fall, or that he could have recovered from the fall if that part of the path had been nine inches wider.

At trial, Sumner disputed the reliability of the multiple post-accident records memorializing his own statements that he had blacked out or passed out. The jury, by its verdict, must have rejected those statements. The only other evidence bearing on his fall was the nature of the injuries he suffered - biting through his tongue, suffering a concussion, a broken clavicle, and multiple broken ribs. Those injuries suggested a very hard fall or falls in which he had not been able to protect himself. This evidence did not give rise to an inference that the

narrow part of the walk path was involved in any way with what happened to Sumner.

Sumner nevertheless argues that the jury could conclude, without Duffany's speculative testimony, that he was injured because the narrowness of the flat part of the path deprived him of room to recover, or to fall on the path itself as opposed to falling over the embankment. (Br. at 24.) That argument fails for the same reason Duffany's speculative proffer of that same scenario was inadmissible. No evidence suggested that the event Sumner suffered, or his position at the time of that event, was such that he could have recovered from it, or fallen in a different way, or was an event in which the narrow part of the path played any role. In effectively conceding that Duffany's testimony on this point was speculative and inadmissible, Sumner dooms his own reliance on this purely speculative idea.

On brief, Sumner argues other matters that are not in dispute. He argues repeatedly that an FELA case may be proved by circumstantial evidence. (Br. at 2, 10-11, 18-19.) That is true, and Norfolk Southern has never suggested otherwise. The point here is that no evidence in this case, circumstantial or otherwise, moved the causation question out of the realm of speculation.

Under his argument heading regarding the admissibility of Duffany's testimony (Br. at 12), Sumner does not defend the challenged causation testimony, but instead defends Duffany's opinion testimony on negligence and stresses that Norfolk Southern has not challenged that testimony on appeal. (Br. at 12-15.) Norfolk Southern expressly pointed out in its petition, and again in its merits brief, that this appeal does not include a challenge to Duffany's testimony on negligence. But that election to narrow the issues for appeal sheds no light on the issue that was appealed – the lack of facts in evidence creating a jury issue on causation.

III. The cases Sumner cites do not support his position.

Sumner principally relies on four cases: *Gallick v. B & O Railroad*, 372 U.S. 108 (1963), *Lavender v. Kurn*, 327 U.S. 645 (1946), *Tennant v. Peoria & Pekin Union Railway*, 321 U.S. 29 (1944), and *Bly v. Southern Railway*, 183 Va. 162 (1944). (Br. at 19-23, 25-27.) In its opening brief (at 30-32) Norfolk Southern set out the evidence in *Gallick* and *Lavender* that "with reason" – that is, based on a sufficient factual foundation in the evidence, and not on unfounded speculation – created jury issues on causation in those cases.

There was evidence in *Tennant* from which the jury could find causation. *Tennant*'s analysis began with this proposition:

> [The plaintiff] was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. "The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

321 U.S. at 32-33, quoting *Galloway v. United States*, 319 U.S. 372, 395 (1943). The evidence satisfied this standard. That evidence showed that the engineer of a diesel switching locomotive saw his switchman put on his cap and jacket and walk around the rear end of the locomotive, out of the engineer's sight, in preparation for performing his duty to walk ahead of the locomotive as it backed up, pulling a string of cars out of a track in the switch yard. The engineer did not know the precise location of his switchman when he began backing up. It was conceded that the engineer failed to ring the locomotive's bell before beginning to back up. There was conflicting evidence on whether the engineer was required by the operating rules to ring his bell in this situation. Physical evidence showed that the locomotive ran over the switchman as soon as it began moving. 321 U.S. at 31-32, 34.

The Court ruled that the conflicting evidence on the necessity of sounding the bell permitted the jury to find that the switchman was entitled to rely on a warning - the ringing of the bell – in this situation. 321 U.S. at 33. That finding permitted an inference that the switchman would not have been killed if he had been so warned. 321 U.S. at 34.

Likewise, there was evidence in *Bly* from which the jury could properly have found causation. There, a northbound freight train stopped after dark at a small station to add one car. When the train stopped, the caboose was on a long bridge, about 40 feet above the ground and 70 feet from the south end of the bridge. The rear flagman, who was required to be in the caboose, had to dismount and walk south on the track a sufficient distance to flag other approaching trains. The bridge surface was composed only of standard 10-foot railroad ties supporting the rails. There was no walkway or guard rail on either side of the bridge, and no lighting. The caboose was 10 feet 5 inches wide – wider than the bridge surface - and the only way off the caboose was to climb down the steps on the side of the caboose's rear platform. These steps extended beyond the edge of the bridge, so the rear flagman had to back down the steps and swing himself around the rear of the caboose to reach the ties forming the deck. 183 Va. at 165-66.

The flagman was found dead, lying at the base of a steel pier just below where the end of the caboose had been. His signal lamp was on the bridge, above his body. His broken watch had stopped just after at the time the train had stopped, and pieces of the watch's broken crystal were found on the pedestal of the pier. Obviously, the flagman had fallen from the bridge onto the pedestal while trying to dismount and gain footing on the deck behind the caboose. 183 Va. at 166.

The negligence theory was that the railroad had failed to provide a safe place to work by failing to provide a walkway or lights on the bridge so the flagman could safely exit the caboose. Because the flagman was required to be in the caboose, and was required to dismount on the bridge without a walkway or lighting, and fell while doing this, this Court ruled that the evidence permitted "a conclusion with probable certainty" that he fell from the bridge because there was no walkway. 183 Va. at 169-70, 173-76.

In *Bly*, as in *Gallick*, *Lavender*, and *Tennant*, the record contained evidence that "with reason" – based on a sufficient factual foundation in the evidence, and not on unfounded speculation – created a jury issue on causation. No such evidence exists here.

Finally, Sumner suggests (Br. at 25-28) that an inquiry into whether the evidence was sufficient to create a jury issue usurps the jury's function. Sufficiency is a question of law for the Court, not an issue of fact for the jury. *Gallick*, *Lavender*, *Tennant*, *Bly*, and every decision addressing a sufficiency issue necessarily engaged in a detailed review of the evidence in order to resolve that issue.

Here, the evidence was not sufficient to support a finding that Sumner's injuries resulted in whole or in part from the asserted narrowness – 15 inches instead of 24 inches – of the flat part of the walk path. Duffany was right: under this evidence, neither he nor anyone else could have any idea what role, if any, the walk path played in this accident. At best, the evidence showed "but for" causation – that Sumner would not have experienced these particular injuries at this particular time but for the fact that he was at work at the East Bradley Pass Track when he experienced whatever episode befell him. In *CSX Transportation, Inc., v. McBride*, 564 U.S. 685, 700 n. 9, 704 (2011), the Supreme Court expressly affirmed that "but for" causation is insufficient under the FELA.

CONCLUSION

For the reasons stated in its opening brief and in this reply brief, Norfolk Southern requests this Court to reverse the trial court's judgment and enter final judgment for Norfolk Southern.

Respectfully submitted,

NORFOLK SOUTHERN
RAILWAY COMPANY

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CERTIFICATE

The undersigned hereby certifies that the foregoing Reply Brief of Appellant complies with Rule 5:26, that the required copies were filed with the Clerk of the Supreme Court of Virginia, and that a copy was sent via electronic mail to Willard J. Moody, Jr., Esq., (will@moodyrrlaw.com), Michael R. Davis, Esq. (mike@moodyrrlaw.com), 500 Crawford Street, Suite 200, Post Office Box 1138, Portsmouth, Virginia 23705, and to Monica T. Monday, Esq. (monday@gentrylocke.com), 900 SunTrust Plaza, P. O. Box 40013, Roanoke, Virginia, 24022-0013, counsel of record for the appellee, this 20th day of July, 2018.

John D. Eure /s/
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