No.

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

ANNE PAYNE,

Plaintiff–Appellee

v.

CSX TRANSPORTATION, INC.,

Defendant–Appellant.

On appeal from the Circuit Court of Knox County, No. 2-231-07
Court of Appeals, Eastern Division: No. E2012-02392-COA-R3-CV

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Oral argument is requested.

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STATUTES, REGULATIONS, AND RULES

QUESTIONS PRESENTED

This is a personal-injury action under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.* Winston Payne, a railroad employee who smoked a pack of cigarettes a day for at least 26 years, sued CSX Transportation, Inc. ("CSXT") alleging that it negligently exposed him to radioactive material, asbestos, and diesel fumes, and thereby caused his lung cancer. After Mr. Payne passed away in 2010 at the age of 68, his wife, Anne Payne, was substituted as Plaintiff.

Following a trial riddled with evidentiary and instructional errors (many the result of misconduct by Plaintiff's counsel), the Honorable Harold Wimberly vacated the resulting judgment for Plaintiff because it was "an injustice to Defendant" and ordered a new trial. The case was transferred to the Honorable Dale Workman for further proceedings. After extensive briefing and two *McDaniel* hearings, Judge Workman held that Plaintiff's specific-causation evidence is inadmissible, a ruling that Plaintiff concedes required summary judgment for CSXT.

The Court of Appeals systematically reversed every decision by both trial judges. It vacated both Judge Workman's summary judgment for CSXT and Judge Wimberly's order granting CSXT a new trial. It also held that Judge Wimberly abused his discretion by providing an additional instruction to the jury after the jury foreman read the jury's initial verdict, allowing the jury to recommence deliberations after all but one of the jurors renounced their initial verdict, and then entering judgment on the jury's revised verdict, which was for a materially lower amount of damages. It accord-

ingly ordered Judge Wimberly to enter judgment on the jury's initial verdict unless he determines that it is excessive, in which case he is to enter judgment in the amount of the revised verdict. Finally, the Court of Appeals barred Judge Wimberly from considering on remand various arguments raised by CSXT in its post-trial motions that he had not expressly resolved, reasoning that he had "implicitly" rejected those arguments.

The questions presented for this Court's review are:

1. Whether, in reversing the new-trial order under the applicable federal standard of review, the Court of Appeals failed to give proper deference to Judge Wimberly's first-hand assessment of various errors at trial.

2. Whether the Court of Appeals' summary reversal of Judge Workman's rulings excluding specific-causation testimony from Plaintiff's experts is irreconcilable with the gatekeeping role courts must perform under *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997), and whether, under the proper standard of review, those rulings were within Judge Workman's discretion.

3. Whether the Court of Appeals erred in holding that, after the jury returned its initial verdict, Judge Wimberly had no discretion to give the jury an accurate, non-duplicative instruction that was necessary to correct the court's (and Plaintiff's counsel's) prior incomplete statements of the law regarding the consequences of the jury's findings.

4. Whether the Court of Appeals deviated from this Court's precedents as well as Tennessee's statutory right to poll the jurors by ordering Judge Wimberly to enter judgment on an initial verdict that was rejected by all but one juror when polled and that the jury subsequently revised after further deliberations.

5. Whether the Court of Appeals exceeded its authority by barring Judge Wimberly from considering on remand arguments made in CSXT's post-trial motions that he did not resolve when granting CSXT's motion for a new trial.

STATEMENT OF THE CASE

A. Payne's railroad career

Payne worked for CSXT and its predecessors (hereinafter, collectively, "CSXT") as a trainman and switchman from 1962 until his voluntary retirement in 2002. App. 22-23, 46-48.[1] Payne's primary job duty was to assemble and disassemble trains in CSXT's rail yard. He retired after a 40-year career in good health. App. 22-23, 47.

B. Payne's smoking history and lung cancer

Payne smoked an average of one pack of cigarettes per day for at least 26 years. App. 19, 21, 230-48. He was diagnosed with lung cancer in 2005 and died in 2010. App. 20, 24-26. All experts for both sides agreed that Payne's smoking history was sufficient to cause lung cancer and was either a significant or the exclusive cause of his disease. App. 67-69 82-89, 229-31, 262-64. Moreover, Payne's treating physician

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[1] "App." refers to the Appendix submitted with this brief.

and CSXT's experts all testified that Payne had "smoker's cancer" (squamous-cell carcinoma) accompanied by emphysema and chronic bronchitis, both of which are associated with smoking. App. 88-102, 225-31, 244-64. Indeed, Payne's treating physician testified that 88-90% of lung cancers like Payne's are caused by smoking. App. 84. All experts also agreed that Payne did not have ***any*** indicators of exposure to other carcinogenic agents. Specifically, Payne did not have small-cell or "oat cell" carcinoma, which is "more likely" to be the cancer caused by radiation exposure. App. 101-02, 244-47. Payne also did not have asbestosis, a disease that often accompanies asbestos-induced cancer, and did not have pleural plaques in his lungs, which usually are present even with "exposure to low amounts of asbestos." App. 94-98; *see also* App. 225-28, 247-56.

C. Payne's workplace exposures

Despite compelling evidence that Payne's smoking was the sole cause of his cancer, Plaintiff alleged that Payne's cancer was caused, at least in part, by his exposure to dangerous levels of radioactive materials, asbestos, and diesel exhaust while working for CSXT.

1. Radiation

Plaintiff alleged that Payne was exposed to radioactive materials when dropping off and picking up railcars at a scrap-metal facility owned by David Witherspoon Industries, Inc. Between 1962 and 1975, Payne's work involved "infrequent[]" travel to local industries, and Witherspoon was only one of many industries to which he

traveled. App. 51-56, 242-43. Payne did not visit Witherspoon at all from 1975 to 1983, but began infrequent visits again in 1983. App. 49-50. On the rare occasions when Payne visited Witherspoon, he worked inside a half-acre corner of the property known as the Candora Triangle, staying "within a few feet of [the] tracks" the whole time that he was on site. App. 57-59, 103, 132-33.

Witherspoon was licensed to receive and recycle scrap metal contaminated with low levels of radioactivity, but this accounted for only 5-10% of its business, and most contaminated scrap was received by truck rather than rail. App. 141-42, 157. Witherspoon stopped receiving contaminated scrap altogether in 1972. App. 142. Although Tennessee health officials repeatedly told CSXT that it was safe for its employees to work along the spur track inside of the Witherspoon facility, CSXT stopped allowing them to do so in 1985. App. 135-24, 143-44, 157, 166-76.

CSXT's radiation expert, Dr. David Dooley—who oversees radiation dose reconstruction for the National Institute of Occupational Safety and Health (App. 285)—conducted a dose reconstruction of Payne's potential exposure to radiation. Dooley reviewed air, soil, and smear testing in the areas where Payne allegedly was exposed, as well as testing on railcars that entered and exited the Witherspoon facility. App. 287-92. He also reviewed personal air monitoring tests performed on railroad switch crews in 1985 at the Witherspoon facility. *Id.* He reconstructed every possible radiation-exposure pathway for Payne and concluded that the very highest exposure Payne could have received during his career was 1.44 REM (the standard unit for

measuring cumulative radiation dosage). *Id.*; *see also* App. 293-353. Dooley opined that this is an exceedingly low dose and that adverse health effects cannot be attributed to doses below 10 REM. *Id.*; *see also* App. 203-12.

Payne's radiation expert, Daniel Mantooth, admitted that he had no evidence that Payne was exposed to harmful levels of radiation at Witherspoon and had made no effort to reconstruct Payne's level of exposure. App. 114-17. Instead, Mantooth simply chose "to assume" that Payne was exposed to harmful levels of radiation because "we don't know he wasn't." App. 119-24. Nevertheless, he conceded that adverse health effects cannot be attributed to exposures below 10 REM (App. 127-31) and that Payne's exposure was "unlikely to have been 10 REM" (App. 122-26).

2. Asbestos

Plaintiff alleged that Payne was exposed to various asbestos-containing materials ("ACMs") during his work for CSXT. Payne personally believed that he was exposed to asbestos in various locomotive components as well as in buildings at CSXT's West Knox Yard, but admitted that he is not qualified to identify ACMs and offered no corroborating proof that they were present. App. 27-35. Plaintiff's experts simply took Payne at his word, never verifying whether ACMs actually were present in Payne's workspace. Nor did they attempt to reconstruct Payne's alleged exposure to friable (*i.e.*, breathable) asbestos from whatever ACMs may have been present. As discussed above (at 4), Payne did not have any of the clinical markers of asbestos exposure.

CSXT's industrial hygienist, Larry Liukonen, reviewed Plaintiff's allegations about exposure to ACMs and assessed Payne's possible levels of exposure to friable asbestos. App. 181-91. Based on studies relating to the ACMs Payne ***claimed*** were present in his workspace (App. 358-67), Liukonen concluded that the upper limit of Payne's exposure would have been 0.001 fibers/cc, which results in a maximum exposure of 0.04 cumulative fiber years over Payne's 40-year career (App. 372-73). That is well below current OSHA-approved exposure levels of 0.1 fiber/cc or 5.0 cumulative fiber years and is only a miniscule fraction of the permissible exposure levels that were in effect during Payne's career. *Id.* As Liukonen testified, because Payne did not actually manipulate the ACMs he purported to identify in his workplace, "I doubt if [Payne] had any days where he ever had a measurable exposure to asbestos." App. 191.

3. Diesel exhaust

Plaintiff alleged that Payne was exposed to harmful levels of diesel exhaust while riding on locomotives. Payne and his coworkers testified that they could frequently smell diesel exhaust, which would enter the cab of the locomotive through an open window or a crevice in the door. App. 36-45. Payne's expert admitted, however, that smelling diesel exhaust does not establish a harmful level of exposure and made no other effort to estimate Payne's exposure. App. 77.

CSXT's expert, Liukonen, testified that CSXT, other railroads, and the Federal Railroad Administration have conducted hundreds of air sampling tests onboard lo-

comotives over many years (Liukonen himself had collected "in excess of a thousand samples"), all of which have shown that diesel exhaust is not a health risk to railroad employees. App. 191-202, 367-72. Liukonen concluded that Payne would have had "very low levels of exposure, similar to working in an urban area, probably not much different than driving down the interstate." App. 202; *see also* App. 373 (Payne's exposure would have been approximately 2.5 $\mu g/m^3$ per eight-hour time-weighted average). That is well below OSHA's current proposed permissible exposure level for constituents of diesel combustion. App. 202. Plaintiff presented no medical or scientific evidence that such low-dose exposures are harmful, let alone that they cause lung cancer.

D. The trial and Judge Wimberly's order granting a new trial

The case was tried to a jury before Judge Wimberly in November 2010. After the court instructed the jury that any damages would be reduced to account for Payne's contributory fault, and Plaintiff's counsel emphasized during closing arguments that there would be a reduction for contributory fault, the jury returned a verdict finding CSXT liable, finding that Payne bore 62% of the responsibility for his injuries, and awarding $8.6 million in damages. App. 273-75. The verdict also found that CSXT had violated certain railroad-safety regulations. Because, under the FELA, that finding precluded reducing the damages to account for Payne's fault—notwithstanding the court's instructions and the representations of Plaintiff's counsel during closing argument—Judge Wimberly felt compelled to instruct the jury that

there would be no reduction for contributory negligence and "the plaintiff would receive the entire amount of money that you have listed." App. 275-76. When he then polled the jurors as to whether "that is what you intend in this particular case," only the foreman responded in the affirmative. *Id.* On their own initiative, the jurors asked to deliberate further. App. 277. Because the jurors had not yet been discharged, Judge Wimberly granted their request. *Id.* After a short time, the jurors returned with a revised verdict awarding Plaintiff $3.2 million, which they thereafter unanimously affirmed. App. 277-78.

Plaintiff submitted a proposed judgment in the amount of the original verdict, but Judge Wimberly entered judgment on the amended verdict.

CSXT moved for JNOV or a new trial. In addition to arguing that the verdict was against the weight of the evidence, CSXT's new-trial motion raised numerous evidentiary errors, instructional errors, and instances of prejudicial misconduct by Plaintiff's counsel. After extensive briefing and oral argument, Judge Wimberly granted CSXT a new trial, holding that "the jury instructions I feel were incomplete, therefore insufficient and inadequate and incorrect" and that "[d]uring the trial itself I agree that there were too many things that had been ruled improperly for the jury to consider that were considered and … presented to the jury." App. 279-80. He drew particular attention to the fact that Plaintiff's counsel had violated the court's pre-trial order by introducing false and extremely prejudicial evidence that Payne had thyroid cancer (a cancer that can be caused by radiation exposure, but not by smoking). *Id.* As Judge

Wimberly noted, he had attempted to give a corrective instruction after this misconduct, but the instruction failed to convey the most relevant information: that Payne did not have thyroid cancer. *Id.* In any event, Judge Wimberly made clear that his ruling was based on the cumulative effect of "too many things" that went wrong at trial, most of which he did not specify. Plaintiff did not request further elaboration of Judge Wimberly's reasoning and specifically did not ask Judge Wimberly to enumerate the errors underlying his decision. App. 279-82.

Judge Wimberly then entered an order, emphasizing that he was "appl[ying] the appropriate Federal standard for considering motions for new trial in FELA cases" and granting a new trial "based upon specific prejudicial errors including, but not limited to, instructional and evidentiary errors that resulted in an injustice to Defendant and, independent of considerations regarding sufficiency of the evidence, warrant a new trial." App. 281-82. Judge Wimberly expressed no opinion about CSXT's arguments seeking JNOV on all claims, JNOV on Plaintiff's regulatory-violation claims only, or a new trial based on the weight of the evidence.

Plaintiff's applications for an extraordinary appeal under Rule 10 were denied by the Court of Appeals (App. 283) and this Court (App. 284).

E. Subsequent proceedings, Judge Workman's exclusion of Plaintiff's specific-causation testimony, and entry of summary judgment for CSXT

The case was transferred to Judge Workman for further proceedings. CSXT then moved to exclude the specific-causation testimony of Plaintiff's experts because

those experts deviated substantially from the acceptable methodology in their fields by opining that Payne's exposures to various substances while working for CSXT caused his lung cancer without (i) making any effort to estimate the amount of those exposures (and willfully ignoring available dose-reconstruction estimates showing that Payne's workplace exposures were harmless) or (ii) offering a legitimate scientific basis on which to conclude that Payne's alleged exposures at CSXT caused his lung cancer, particularly when all experts agreed that Payne's smoking history was sufficient to cause his stereotypical "smoker's cancer." Following extensive briefing, the submission of numerous affidavits, and two *McDaniel* hearings in which CSXT presented several live witnesses (and Plaintiff presented none), Judge Workman granted CSXT's motions and then denied Plaintiff's motions for reconsideration. App. 427-38.

Having excluded all evidence of specific causation, Judge Workman granted CSXT's motion for summary judgment. App. 439-42. Plaintiff appealed.

F. The Court of Appeals' decision

The Court of Appeals systematically turned back the clock to the jury's initial $8.6 million verdict. First, the court held that Judge Wimberly abused his discretion by instructing the jury on the effect of its regulatory-violation findings. While admitting that the instruction accurately stated the law and could have been given at the outset, the court held that giving this instruction after the jury had returned a verdict "was unwarranted and resulted in error." App. 456-59 & n.6.

The Court of Appeals then overturned Judge Wimberly's new-trial order. To reach that result, the court rejected each of the individual instructional and evidentiary grounds explicitly cited by Judge Wimberly or identified in CSXT's brief:

- The court did not dispute that it was error for Plaintiff's counsel to introduce false testimony that Payne had thyroid cancer (although the court minimized the prejudicial effect of this evidence and omitted that it came into the case through Plaintiff's violation of Judge Wimberly's pre-trial order). But the court held that Judge Wimberly's curative instruction was adequate to prevent prejudice to CSXT (App. 469-70), rejecting Judge Wimberly's contrary conclusion that his curative instruction did ***not*** prevent prejudice to CSXT because it failed to tell the jury that Payne did not have thyroid cancer (App. 279-80).

- The court held that Plaintiff's presentation of a slide on cesium contamination at the Oak Ridge Y-12 facility—which Plaintiff had represented to the court would be kept out of the case—was not prejudicial because Judge Wimberly gave a curative instruction and CSXT (out of fear that the notorious reputation of that facility would prejudice its case) presented evidence that there was no risk to railroad workers from cesium contamination. App. 471.

- The court summarily rejected, without analysis, three other evidentiary errors identified in CSXT's brief—one of which involved Plaintiff's counsel, again, interjecting evidence that Judge Wimberly had ruled out of the case. App. 472.

- With respect to instructional issues, the court first recognized that "[t]o prove a breach of duty under the FELA, an employee must show that the railroad "'knew, or by the exercise of due care should have known'" about the danger (quoting *Mills v. CSX Transp., Inc.*, 300 S.W.3d 627, 633 (Tenn. 2009)), but held that this element of Plaintiff's claim was sufficiently explained by Judge Wimberly's instruction that "if any danger that should be reasonably foreseen increases[,] so the amount of care required by law increases." App. 466-67.

- The court held that it was appropriate to instruct the jury on a 1976 regulation that materially expanded the railroad's obligations related to the hauling of radioactive materials—even though all evidence showed that

> no radioactive material was shipped into or out of the Witherspoon facility by rail after 1972—reasoning that CSXT did not monitor its railcars and thus could not conclusively prove that Payne was not exposed to radiation from Witherspoon after 1976. App. 468.

Notably, the Court of Appeals did not even consider whether misconduct by Plaintiff's counsel—who violated an order from, or an agreement with, Judge Wimberly on at least three occasions—could support the new-trial order. The court also did not give any consideration to the cumulative effect of repeatedly putting inadmissible evidence in front of the jury (sometimes with a curative instruction, sometimes with an ineffective curative instruction, sometimes with no curative instruction at all).

Although the Court of Appeals recognized that its ruling on Judge Wimberly's new-trial order rendered moot any issues related to Judge Workman's exclusion of expert testimony, it nevertheless stated perfunctorily that "we have reviewed the issue and hold that the trial court erred in excluding the causation testimony of [Plaintiff's] witnesses, both of whom had testified, over the objection of CSX, to causation at [the first] trial." App. 474.

The Court of Appeals' holding that Judge Wimberly abused his discretion by instructing the jury about the effect of its regulatory-violation findings created a quandary: According to the Court of Appeals, the revised verdict rendered after Judge Wimberly gave this instruction is null and void, yet the jury's initial verdict was never endorsed by the jurors (indeed, it was rejected by the jurors when polled). Neverthe-

less, the Court of Appeals directed Judge Wimberly to enter judgment on the jury's initial verdict of $8.6 million unless he determines that it is excessive, in which case he is directed to enter judgment on the revised $3.2 million verdict. App. 472-74. In sum, the Court of Appeals ordered entry of judgment on a supposed verdict that was rejected by the jurors when they were polled and that arose out of a trial that the presiding judge considers to be "an injustice to Defendant" (App. 281-82).

Because the Court of Appeals' instructions did not authorize Judge Wimberly to address unresolved arguments in the post-trial motions that were pretermitted by the new-trial order, CSXT filed a petition for rehearing requesting that Judge Wimberly be allowed to address any remaining unresolved issues. The Court of Appeals denied CSXT's petition, stating: "[I]n our view, the trial court considered and implicitly resolved those issues against CSX when it considered CSX's post-trial motion" and "the trial court was satisfied that the $3.2 million verdict was not against the clear weight of the evidence." App. 475.

SUMMARY OF ARGUMENT

The unfortunate truth of this case is that Payne, like over 100,000 people every year,[2] got lung cancer and died because he was a heavy cigarette smoker for decades. Everyone on both sides of this case agreed that Payne had precisely the type of lung cancer that one would expect to see in a smoker, that smoking is the cause of that type

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[2] *See* American Cancer Society, *Tobacco-Related Cancers Fact Sheet*, available at http://www.cancer.org/cancer/cancercauses/tobaccocancer/tobacco-related-cancer-fact-sheet.

of cancer nine out of ten times, that Payne suffered from other smoking-related illnesses, and that he had no signs of any other carcinogenic exposure. Moreover, reliable dose-reconstruction estimates proved that any workplace exposure Payne had to radiation, asbestos, or diesel exhaust was *de minimis* and far below the threshold for causing adverse health effects (let alone lung cancer). Nevertheless, through a series of prejudicial evidentiary and instructional errors, blatant misconduct by Plaintiff's counsel, and experts who attributed causation to workplace exposures based on rank speculation rather than any reliable scientific methodology, Plaintiff managed to prevail at trial (although the jury still found that Payne bore most of the responsibility for his disease).

Judge Wimberly, who oversaw the trial from beginning to end, recognized that the outcome was "an injustice to Defendant." And Judge Workman, diligently carrying out his gatekeeping function under *McDaniel* during further proceedings, identified the fatal flaw in Plaintiff's case: The specific-causation opinions given by Plaintiff's experts, connecting Payne's supposed workplace exposures to his disease, were nothing but *ipse dixit*, and lacked any valid methodological foundation. Reaching the only just result in this case, Judge Workman entered summary judgment for CSXT.

In overturning both trial judges, the Court of Appeals systematically got the facts wrong, misunderstood the applicable law, or both. More fundamentally, however, the Court of Appeals demonstrated a consistent lack of appropriate deference to the first-hand discretionary decisions of Judges Wimberly and Workman. Instead, time

and again, the Court of Appeals substituted its own (mistaken) view for that of the trial court on issues that were entrusted to the trial court's discretion. Judge Wimberly's new-trial order and Judge Workman's ruling on the admissibility of expert testimony both should be reinstated, and judgment should be entered for CSXT.

At minimum, the Court should substantially alter the Court of Appeals' instructions regarding further proceedings. Because Judge Wimberly had the authority—and the obligation—to correct a prior incomplete and misleading statement of the law, even after the jury had returned an initial verdict, the Court should remand for entry of judgment on the jury's revised verdict (if it does not order a new trial). And if the Court remands for entry of judgment in Plaintiff's favor (in any amount), the Court should instruct Judge Wimberly to consider any arguments raised in CSXT's post-trial motions that were pretermitted by the new-trial order.

Finally, if the Court holds that Judge Wimberly should not have given a further instruction after the jury returned the initial verdict, and the revised verdict is therefore invalid, the Court should order a new trial. Judgment may not be entered on the jury's original verdict because the jury exercised its right to revise its verdict before being discharged and, in any event, the initial verdict was rejected by all but one jurors when they were polled.

ARGUMENT

I. Judge Wimberly Did Not Act Arbitrarily Or Abuse His Discretion By Ordering A New Trial.

In previous cases, the Court of Appeals has held that Tennessee courts "are to apply the federal standard to determine whether to grant a new trial in a FELA case." *Melton v. BNSF Ry.*, 322 S.W.3d 174, 181 (Tenn. Ct. App. 2010). Neither party contests that holding here.

Under the federal new-trial standard, "the trial court has the power and duty to order a new trial whenever, in its judgment, this action is required to prevent an injustice." *Melton*, 322 S.W.3d at 181 (internal quotation marks omitted). "Common grounds for granting a new trial include the verdict is against the clear weight of the evidence, a prejudicial error of law, or misconduct affecting the jury." *Id.* (internal quotation marks omitted). Appellate courts "review the trial court's decisions on motions for new trial on an abuse of discretion standard," meaning that an appellate court may reverse an order granting a new trial only if it has "a definite and firm conviction that the trial court committed a clear error of judgment." *Id.* (internal quotation marks omitted).

The degree of deference that is owed to the trial court's decision under the federal abuse-of-discretion standard varies and "depends upon the reason why that category or type of decision is committed to the trial court's discretion in the first instance." *Gasperini v. Ctr. for Humanities, Inc.*, 149 F.3d 137, 141 (2d Cir. 1998) (internal quotation marks omitted). When the trial court decides a motion requesting a

new trial, deference is at its highest. As Judge Friendly explained in his seminal article on the topic, "the grant or denial of a motion for a new trial" should be afforded substantial deference because it "hinge[s] on ... the trial judge's observation of the witnesses and his superior opportunity to get the feel of the case." Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 761 (1982) (alterations and internal quotation marks omitted). Expanding on that observation, the Second Circuit has instructed that:

> Deference is traditionally accorded to trial judges in ... such post-trial matters as the grant or denial of a motion for a new trial because such decisions turn on factors so numerous, variable and subtle that the fashioning of rigid rules would be more likely to impair the trial judge's ability to deal fairly with a particular problem than to lead to a just result. Deference is justified because the [trial] judge is closer to the evidence .... Thus, unless the [trial] court's decision to deny or grant a motion for a new trial results from an erroneous view of the law or clearly erroneous findings of fact, or unless its decision is arbitrary, unsupported by the facts, unreasonable, based on its failure to consider all relevant factors, unfair, beyond the range of its authority, or otherwise manifests a clear error of judgment, the district court has not abused its discretion.

Gasperini, 149 F.3d at 141-42 (alterations, citations, and internal quotation marks omitted).[3] Accordingly, "***a court of appeals will only rarely reverse a [trial] judge's***

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[3] Other federal courts of appeals—including the Sixth Circuit—are in accord. *See, e.g., Holmes v. City of Massillon*, 78 F.3d 1041, 1045 (6th Cir.1996) (reversal of the trial court's decision to grant a new trial is appropriate only when an appellate court has "a definite and firm conviction ... that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors") (internal quotation marks omitted); *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir.1980) ("Corresponding to the district court's broad discretion [over motions for new trial] is the limited scope of our review: we will reverse the district court's ruling on the motion for new trial only if we find that ruling to be a clear and

grant of a defendant's motion for a new trial, and then only in egregious cases." *United States v. Alston*, 974 F.2d 1206, 1212 (9th Cir. 1992) (emphasis added).

The Court of Appeals' opinion reversing Judge Wimberly's new-trial order—directing Judge Wimberly to rubberstamp a verdict that he considers to be "an injustice to Defendant"—is irreconcilable with this deep and consistent body of case law explaining the high degree of deference owed to a trial court's decision to grant a new trial. It is not the role of appellate courts to second-guess the judge who experienced the trial first-hand on basic questions such as the extent of prejudice caused by a particular piece of inadmissible evidence, how the jury might have interpreted a curative instruction given by the trial judge, and whether Plaintiff's counsel tainted the proceedings by repeatedly violating the court's rulings and interjecting evidence that should never have been put before the jury. Yet that is exactly what the Court of Appeals did here.

CSXT's brief in the Court of Appeals identified a number of examples of evidentiary and instructional errors that support Judge Wimberly's conclusion that "too many" things went wrong at trial, resulting in a proceeding that was "an injustice to Defendant." The Court of Appeals' opinion devoted substantial space to instructional issues that CSXT had not pursued, and it summarily rejected several evidentiary arguments that CSXT had raised on appeal. As we show below (*see* Part I.B, *infra*), the Court of Appeals' analysis of each individual error was wrong on the law, the facts, or

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manifest abuse of discretion.").

both. But the way that the Court of Appeals handled the error that Judge Wimberly singled out as "probably the worst" exemplifies the fundamental flaw in the Court of Appeals' analysis. That error alone is more than sufficient to support Judge Wimberly's new-trial order—particularly when reviewed under the proper deferential standard.

A. The decision to order a new trial was justified because Plaintiff's counsel violated Judge Wimberly's pre-trial order and elicited false testimony that Payne had radiation-induced thyroid cancer.

When granting CSXT's motion for a new trial, Judge Wimberly stated that, among "too many" evidentiary errors, "probably the worst ... was when we started talking about this thyroid cancer which [Payne] apparently didn't have." App. 279-80. During pre-trial proceedings, CSXT moved to exclude any mention of thyroid cancer because "in this case initially it was believed that this man had thyroid cancer and thyroid cancer is something that is in the literature believed to be related to exposure to radiation, but as it turned out, ... apparently he did not have thyroid cancer." App. 4. Plaintiff's counsel agreed that "[n]o one in here says he had thyroid cancer." App. 5. Accordingly, Judge Wimberly sustained CSXT's objection, held that the mistaken diagnosis of thyroid cancer "really doesn't have anything to do with anything," and instructed Plaintiff's counsel to "leave that out." *Id.* Nevertheless, during his cross-examination of one of CSXT's medical experts, Plaintiff's counsel willfully violated

Judge Wimberly's instruction, eliciting false testimony that Payne had radiation-induced thyroid cancer.[4] *See* App. 234-35.

Following CSXT's motion for a mistrial, Judge Wimberly instructed the jurors that "in the cross examination of the last witness, mention was made of the term thyroid cancer. As you previously heard, there's no claim in this case that the plaintiff suffered from thyroid cancer or that that caused him anything that is the subject matter of this case." App. 241. As Judge Wimberly later recognized, however, that instruction "could well have been misinterpreted. I just made—did not express what I tried to express by saying that is not part of this lawsuit. It could be understood that he actually had [radiation-induced thyroid cancer] and it was not being considered now." App. 279-80. In other words, Judge Wimberly never unambiguously told the jury that the testimony elicited by Plaintiff's counsel was false and that Payne did not have thyroid cancer (indeed, the instruction did not even tell the jurors that they were to disregard the testimony), which left in place all of the inferences that Plaintiff's counsel created by eliciting this testimony.[5]

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[4] Plaintiff's counsel was able to elicit this false testimony because the expert had reviewed medical records containing the original misdiagnosis and CSXT had not corrected the expert's misunderstanding, believing that the misdiagnosis of thyroid cancer had been ruled out of the case. CSXT immediately moved for a mistrial and renewed its motion at the end of trial. App. 235-40, 265-66.

[5] Notably, CSXT had requested the following curative instruction: "I instruct you that Mr. Payne did not have thyroid cancer. I remind you that [Plaintiff's] own expert, Dr. Frank, testified that [Payne] did not have thyroid cancer. I instruct you to disregard plaintiff's line of questioning regarding thyroid cancer and radiation. This was an improper line of questioning by plaintiff's counsel and is not at all a part of this case."

Although this was a brief incident, it was severely prejudicial. CSXT's entire defense was based on the proposition that Payne's smoking history was the sole cause of his "smoker's cancer" and that any occupational exposure was too minimal to have any negative health effects. By violating Judge Wimberly's order and eliciting this false testimony, Plaintiff's counsel made it seem that CSXT's own expert had conceded that Payne also had "thyroid cancer ... that's caused by radiation." App. 234-35. That "admission" was devastating to CSXT's case, appearing to prove that Payne's health problems could ***not*** be attributed to his smoking alone and that he ***was*** exposed to sufficient radiation to cause cancer. Moreover, because CSXT was forced to object to this line of questioning—and Judge Wimberly never told the jurors that the answer Plaintiff had elicited was false—there is a very real possibility that the jury thought that, by objecting, CSXT was trying to hide information about Payne's health condition that contradicted its theory of the case. This event alone was sufficient to render the trial "an injustice to Defendant" and warrant a mistrial or new trial.

When analyzing this issue, the Court of Appeals began by minimizing the error, emphasizing that this was a brief occurrence in a long trial. App. 470. The court did not in any way acknowledge the uniquely prejudicial impact of this testimony and failed to even mention that this series of events was the result of misconduct by Plaintiff's counsel. Instead, the court simply held that Judge Wimberly's curative instruction was sufficient to prevent prejudice to CSXT: "The clear import of the trial court's

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App. 239-40.

curative instruction was that thyroid cancer was not a part of the case and that the jury should disregard the brief evidence of Dr. Craighead's misdiagnosis of thyroid cancer." *Id.*

As an initial matter, that is not what the curative instruction said. It did ***not*** tell the jurors to disregard the testimony and it did ***not*** tell them that the testimony was based on a ***misdiagnosis*** of thyroid cancer. Instead, it told them only that there is no claim for thyroid cancer in this case (which implies that Payne had thyroid cancer but that Plaintiff just was not pursuing damages based on that condition).

More fundamentally, however, the Court of Appeals' analysis exemplifies an appellate court substituting its own judgment for that of the trial court. Because he presided over the trial and saw the impact of the evidence and instructions on the jury first-hand, Judge Wimberly was in the best position to understand the true prejudicial effect of this incident, how the jury was likely to have interpreted the curative instruction he gave to them, and whether that instruction was sufficient to ensure that CSXT would not be prejudiced by the improper testimony about thyroid cancer. It is precisely situations like this—where "decisions turn on factors so numerous, variable and subtle that the fashioning of rigid rules would be more likely to impair the trial judge's ability to deal fairly with a particular problem than to lead to a just result" (*Gasperini*, 149 F.3d 141-42 (alterations and internal quotation marks omitted))—that the trial court's discretion and the appellate court's deference both should be at their highest. The Court of Appeals, reading (and misinterpreting) parts of a cold record,

effectively said "we see things differently than Judge Wimberly," but that is not the correct standard of review for overturning a trial court's discretionary decision to grant a new trial. Under the proper standard, there can be no doubt that Judge Wimberly's decision—based on his superior vantage point—that this incident was so profoundly unfair to CSXT as to warrant a new trial was within his broad discretion. That conclusion becomes all the more clear when the various other errors that caused Judge Wimberly to conclude that a new trial was necessary to avoid "an injustice to Defendant" are taken into account.

B. Numerous other errors support the new-trial order.

Although counsel's misconduct and the resulting false testimony about radiation-induced thyroid cancer are sufficient to support the grant of a new trial, Judge Wimberly indicated that this was only "probably the worst" of "too many" things that went wrong at trial. CSXT's brief below identified six other examples of evidentiary and instructional errors at trial. The Court of Appeals' analysis of those errors was consistently wrong on the facts, the law, or both.

1. Violation of agreement excluding cesium evidence

For one year of his career, Payne sometimes serviced a spur track approximately one mile from the Y-12 nuclear weapons facility at Oak Ridge. Years later, it was discovered that a seven-by-seven foot area of the roadbed near the tracks was contaminated with extremely low levels of cesium, a radioactive element.

During Plaintiff's case-in-chief, the parties and Judge Wimberly agreed that references to cesium should be kept out of the case because Plaintiff had produced no evidence or expert opinions related to cesium exposure. App. 74a-74b, 267-68. During cross-examination of one of CSXT's witnesses, however, Plaintiff's counsel went back on his word and, without first showing it to CSXT or Judge Wimberly, published to the jury a slide detailing the cesium contamination at the Y-12 facility. App. 158; *see also* App. 9, 163 (describing content of slide). CSXT immediately objected, but Judge Wimberly allowed another question before sustaining the objection as to the slide and instructing the jury not to consider it. *Id.* When Plaintiff's counsel finished his cross-examination, CSXT moved for a mistrial. Judge Wimberly said that he was "under the impression we agreed we weren't going to talk about that," but he would "take[] no action on [CSXT's] motion at this time" because "I guess I have to sort of make allowances because that's the only way we are going to get through this case." App. 162-65.

Despite the curative instruction, CSXT decided that it could not safely ignore the connection Plaintiff's counsel had created between Payne's work and the locally notorious nuclear weapons facility at Oak Ridge. Accordingly, CSXT called the scientist who led the investigation into the cesium contamination, who testified that it created no risk to a railroad employee or the public. App. 213-24.

The Court of Appeals dismissed CSXT's contention that the detour into evidence about cesium supported Judge Wimberly's decision to grant a new trial because

Judge Wimberly gave a curative instruction. App. 471. But the Court of Appeals gave no weight to the fact that this was only one of at least three instances in which Plaintiff's counsel poisoned the well with evidence he knew was supposed to be kept out of the case. The trial judge should have discretion to conclude that, at some point, curative instructions are not enough and that too much inadmissible evidence has been shown to the jury through misconduct by one party. Further, the Court of Appeals appeared to hold against CSXT the fact that it was able to produce a witness who testified that there was no risk to Payne. *Id.* Instead, the court should have recognized that forcing CSXT to devote part of its defense to rebutting the spurious inferences created by Plaintiff's misconduct—and, perhaps, only reinforcing the supposed connection between Payne's work and the Oak Ridge facility—was part of the prejudice CSXT suffered.

2. Violation of court order excluding misleading photograph

During Plaintiff's case-in-chief, Judge Wimberly sustained CSXT's objection to a photograph of a malfunctioning locomotive emitting a cloud of dark black smoke. App. 62; *see also* App. 15, 65-66. There was no evidence that Payne regularly worked around malfunctioning locomotives, and the picture thus misrepresented the facts related to Plaintiff's diesel-exhaust claim. In violation of the circuit court's ruling, and without first showing the photograph to CSXT or Judge Wimberly, Plaintiff's counsel published the same photograph to the jury during cross-examination of a one of CSXT's witnesses. App. 161-62. As Judge Wimberly noted, this photograph

"shouldn't have been gone into" because "there's not even a claim by plaintiff he was ever exposed to that sort of thing." App. 165.

Although CSXT briefed this issue (and displayed the photograph during oral argument), and although Judge Wimberly obviously was disturbed by it during trial, the Court of Appeals did not even mention it. Because Judge Wimberly's ruling on the admissibility of this photograph is entitled to deference and because this was yet another instance in which Plaintiff's counsel willfully violated Judge Wimberly's rulings during trial, this incident strongly supports the new-trial order.

3. Allowing lay-witness testimony purporting to identify asbestos in Payne's workspace

As Plaintiff's industrial hygienist conceded, "[i]n order for asbestos to injure a person, the person has to breathe the fibers into the lung," which means that an asbestos containing material ("ACM") in the workplace does not result in any level of exposure "unless the asbestos is friable, frayed, damaged in some way, and there's an air current that's coming toward" the person. App. 81-82; *see also, e.g.*, *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424 (1997) (presence of ACM alone does not entitle a FELA claimant to recovery); *Roberts v. Owens-Corning Fiberglas Corp.*, 878 So. 2d 631, 642 (La. Ct. App. 2004) ("'Exposure' has been defined in asbestos cases as 'inhalation of asbestos fibers into the lungs.' ... Evidence of the mere physical presence of asbestos-containing material is insufficient to find a manufacturer liable to a plaintiff."). Plaintiff's expert also acknowledged that the only way to discern wheth-

er asbestos fibers are present in the air or whether an ACM is producing respirable asbestos fibers is through microscopic testing conducted by an expert. App. 78-80.

But Plaintiff did not produce a witness qualified to identify ACMs in Payne's workplace, let alone one qualified to testify that Payne was exposed to harmful levels of friable (*i.e.*, respirable) asbestos fibers. Instead, over CSXT's repeated objections, Plaintiff was allowed to fill this gap in her evidence with speculative and unreliable testimony from lay people about the alleged presence of asbestos in Payne's work environment. *See, e.g.*, App. 27-35, 60-61, 145-56. For example, Payne was allowed to testify that he worked around asbestos, even though he had no relevant expertise and, for example, erroneously believed that every pipe covered with white tape contained asbestos. App. 27-33, 78, 190. Similarly, despite uncontroverted expert testimony that the application of railroad brakes releases forsterite (an inert and harmless compound) and not asbestos, the court permitted one of Payne's coworkers to testify that employees were exposed to asbestos when air brakes were applied. App. 60-61, 63, 177-81.

In Tennessee, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Tenn. R. Evid. 602. Further, a lay witness may offer an opinion only when that opinion is rationally based on the perception of the witness. Tenn. R. Evid. 701. Lay testimony may not be relied upon to prove matters requiring scientific or technical knowledge. *Pellicano v. Metro. Gov't of Nashville & Davidson Cnty.*, 2004 WL 343951, at *9-*10 (Tenn. Ct. App. Feb. 23, 2004) (citing *Am. Enka Corp. v. Sutton*,

391 S.W.2d 643, 648 (Tenn.1965)). Although Tennessee's appellate courts have not directly addressed the admissibility of lay-witness identification of ACMs or testimony about exposure to respirable asbestos, courts in other states have rejected such evidence. *See, e.g., Gibson v. Workers' Comp. Appeal Bd.,* 861 A.2d 938, 946 n.8 (Pa. 2004); *McGuire v. Mayfield*, 1991 WL 261831, at *5-6 (Ohio Ct. App. Dec. 9, 1991); *Goldman v. Johns-Mansville Sales Corp.*, 514 N.E.2d 691, 693-95 (Ohio 1987). This Court should do so as well.

The Court of Appeals did not discuss the merits of this issue, but summarily rejected it as a possible basis for Judge Wimberly's new-trial order, along with other evidentiary issues, stating that "the trial court *may* have agreed that it erred in ruling on some of them," but "[w]e have reviewed these issues, and find that they address matters of admissibility upon which the trial court has broad discretion" and "[w]e have discerned no error in the trial court's rulings on these evidentiary matters, and certainly nothing that would warrant a new trial under the circumstances." App. 471-72.

As an initial matter, the Court of Appeals expressed deference for the wrong ruling by stating that Judge Wimberly had "broad discretion" when making his original ruling at trial. Because Judge Wimberly obviously reconsidered many of his rulings at trial when he stated that "too many" things had mistakenly been allowed into the case—and because Plaintiff never asked him to enumerate the rulings he had reconsidered when granting CSXT's new-trial motion—the proper question when reviewing the new-trial order is whether it was within Judge Wimberly's broad discre-

tion to ***reconsider*** these rulings and conclude that he should not have allowed the lay testimony on exposure to asbestos into the case.

In any event, Plaintiff has never identified any sound basis for allowing unqualified lay witnesses to provide speculative (and false) testimony about alleged exposure to asbestos. Allowing this testimony was error, and it contributed to a trial that was unfair to CSXT.

4. Allowing evidence of plutonium at the Witherspoon site

Over CSXT's objection, the jury heard repeated references to plutonium at the Witherspoon facility, which Plaintiff's counsel described as "the world's most dangerous element." App. 105; *see also, e.g.*, App. 107. But Plaintiff adduced no evidence that Payne was exposed to plutonium while working for CSXT.

Payne identified two documents that referenced the presence of plutonium at the Witherspoon facility—(i) an April 21, 1969 memorandum from Union Carbide, which states that a shipment to Witherspoon should be marked as ***potentially*** contaminated with plutonium (App. 111-13), and (ii) a remediation assessment of the Witherspoon site conducted in 2007 that lists plutonium as a "Contaminant Of Potential Concern" in the groundwater and certain areas of the soil (App. 108-09).

Plaintiff's industrial hygienist conceded, however, that there is no evidence that CSXT hauled material contaminated with plutonium, Payne never would have encountered the groundwater, and "we don't have any evidence that says that Mr. Payne was exposed to plutonium at Witherspoon." App. 75-76. Plaintiff's radiation expert

also admitted that there was no concern about plutonium in the small Candora Triangle area where Payne worked. App. 132-34. Nevertheless, he speculatively implied that Payne's cancer could have been caused by plutonium because the possibility of a low-level exposure cannot be ruled out and, even though an expert cannot medically attribute adverse health effects to low-level exposures, that "[d]oesn't mean it doesn't happen ... you just don't know," because "one atom [of plutonium] could cause cancer." App. 139-40.

Inferences like this, based solely on speculative possibility—and not scientific or medical probability—have no place in a Tennessee courtroom. *See, e.g., Pittenger v. Ruby Tuesday, Inc.,* 2007 WL 935713, at *4 (Tenn. Ct. App. Mar. 28, 2007) ("A probative inference for submission to a jury can never arise from guess, speculation or wishful thinking.") (internal quotation marks omitted); *Martin v. Washmaster Auto Ctr., U.S.A.*, 946 S.W.2d 314, 317 (Tenn. Ct. App. 1996) ("An inference is reasonable and legitimate only when the evidence makes the existence of the fact to be inferred more probable than the nonexistence of the fact.") (internal quotation marks omitted).

The Court of Appeals, again, did not discuss the merits of this issue, but summarily dismissed it along with other evidentiary matters. For the reasons discussed above, that method of analysis was improper. Judge Wimberly would have been well within his discretion to recognize in hindsight that he should not have allowed evidence of plutonium contamination at the Witherspoon facility because there was noth-

ing to connect that contamination to Payne's lung cancer. This error too supports Judge Wimberly's decision to grant a new trial.

5. Failure to give an appropriate instruction on foreseeability

"[R]easonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence." *Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108, 117 (1963). Accordingly, this Court has held that "[t]o prove a breach of duty under the FELA, an employee must show that the railroad knew, or by the exercise of due care should have known that prevalent standards of conduct were inadequate to protect [the employee]."[6] *Mills v. CSX Transp., Inc.*, 300 S.W.3d 627, 633 (Tenn. 2009) (internal quotation marks omitted). Consistent with these cases, CSXT requested an instruction defining foreseeability and stating that "Plaintiff must ... prove the requirement of 'reasonable foreseeability of harm.'" App. 6-7. Judge Wimberly declined to give that instruction.

The only reference to foreseeability in the instructions was a single confusing statement in the middle of the ordinary-care instruction:

> Because the amount of care exercised by reasonably prudent and careful persons varies in proportion to the dangers known to be involved in what is being done, it follows that the amount of caution required in the exer-

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[6] The United States Supreme Court recently reiterated the importance of a foreseeability instruction in a FELA case, holding that a FELA jury should be told that "'[the railroad's] duties are measured by what is reasonably foreseeable under like circumstances'" and that, "'[i]f a person has no reasonable ground to anticipate that a particular condition ... would or might result in a mishap and injury, then the party is not required to do anything to correct [the] condition.'" *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2643 (2011) (quoting *Gallick*, 372 U.S. at 118 n.7).

> cise of ordinary care will vary with the nature of what is being done and all the surrounding circumstances shown by the proof in the case. ***To put it another way, if any danger that should be reasonably foreseen increases[,] so the amount of care required by law increases.***

App. 269-70 (emphasis added). The Court of Appeals held that this was sufficient to inform the jury about Plaintiff's obligation to prove foreseeability as an element of her claim under the FELA. App. 466-67.

On the contrary, this instruction, at most, told the jurors that there is a direct relationship between the extent of the danger that is reasonably foreseeable and the amount of care required of the defendant. That does not inform the jury that Plaintiff had an affirmative obligation to prove, as an element of her claim, that CSXT "knew, or by the exercise of due care should have known that prevalent standards of conduct were inadequate to protect [Payne]."[7] *Mills*, 300 S.W.3d at 633 (internal quotation marks omitted).

The instruction given by Judge Wimberly was far from adequate. This was a particularly prejudicial error because Plaintiff's workplace-safety allegations date back to 1962. Since then, advances in science and medicine have resulted in greater understanding about carcinogenic disease processes. As a result, occupational safety practices are much different now than they were fifty years ago. The jury should have

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[7] This is not the first time that the Court of Appeals for the Eastern Section has misconstrued the obligation to correctly instruct the jury in the context of a FELA case. *See, e.g., CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 841 (2009) (reversing Eastern Section and holding that its reasons for upholding the trial court's failure to instruct jury on standard for recovering fear-of-cancer damages reflected a "serious misunderstanding of the nature and function of the jury").

been advised that it was required to judge CSXT's conduct in light of contemporaneously available information, not 20/20 hindsight, and that it was Plaintiff's affirmative obligation to prove that the harm she claimed CSXT caused Payne was reasonably foreseeable at the time of his alleged exposures.

6. Improper instruction on federal regulations

Judge Wimberly erroneously charged the jury on both a pre- and post-1976 version of 49 C.F.R. § 174.700, a federal regulation governing the shipping of radioactive material. App. 271-72. Uncontroverted evidence showed that Witherspoon stopped shipping radioactive material in 1972. App. 141-142d. Accordingly, the court's instruction on the 1976 version of the regulation—in addition to creating confusion—invited the jury to apply a legal standard that did not exist during the time that Payne could conceivably have been exposed to radioactive materials being transported by CSXT.

The Court of Appeals held that instructing the jury on the 1976 version of the regulation was not error because CSXT did not monitor rail cars leaving the Witherspoon facility and thus, "there was evidence from which the jury could have reasonably concluded that plaintiff was exposed to radioactivity from railcar shipments out of DWI after 1976." App. 468.

But the absence of monitoring is not evidence that exposure was possible, particularly when there was no affirmative evidence of shipments containing radioactive materials into or out of Witherspoon after 1972 and all other evidence in the case in-

dicated that Witherspoon stopped receiving or shipping radioactive materials in 1972. *See, e.g.*, App. 141-142d. Moreover, the Court of Appeals improperly placed the burden on CSXT to disprove the possibility of exposure in order to avoid an instruction on the 1976 regulation, when the correct question is whether Plaintiff had introduced evidence sufficient to justify giving such an instruction. Plainly she had not, and it would have been well within Judge Wimberly's discretion to recognize that his erroneous decision to instruct on the 1976 version of the regulation contributed to a trial that was unfair.

C. The Court of Appeals failed to even consider other grounds that support a new trial.

In addition to getting the law, the facts, or both wrong on each of the individual errors described above, the Court of Appeals failed to even consider two more generalized factors that also support Judge Wimberly's discretionary decision to order a new trial.

1. The Court of Appeals did not consider whether Judge Wimberly would have been within his discretion to order a new trial in response to misconduct by Plaintiff's counsel. Indeed, when describing the three errors involving misconduct discussed above, the court consistently omitted any mention of the misconduct.

Under the federal standard, "[m]isconduct by an attorney that results in prejudice may serve as a basis for a new trial. The burden of showing prejudice rests with the party seeking the new trial, and district courts have broad discretion in deciding

whether to grant a motion for a new trial." *Fuhr v. Sch. Dist. of City of Hazel Park*, 364 F. 3d 753, 759 (6th Cir. 2004) (internal quotation marks omitted). Tennessee courts also recognize that "[t]he allowance or denial of mistrial (new trial) on grounds of misconduct of counsel is discretionary with the trial judge, and that discretion will be reviewed only in exceptional cases." *McConkey v. Laney*, 1996 WL 735234, at *3 (Tenn. Ct. App. Dec. 24, 1996) (internal quotation marks omitted); *see also, e.g.*, *Melton*, 322 S.W.3d at 181-88 (ordering new trial under federal standard in a FELA case due to prejudice from repeated instances of attorney misconduct). In this case, the repeated instances of misconduct by Plaintiff's counsel—willfully infecting the jury's deliberations with evidence he knew was supposed to be kept out of the case—is alone a sufficient grounds for a new trial.

2. The Court of Appeals concluded that Judge Wimberly's new-trial order was not supported by the individual instructional and evidentiary errors identified by CSXT, but the court did not consider whether the cumulative impact of numerous evidentiary mistakes, instructional errors, and repeated misconduct by Plaintiff's counsel reasonably could leave the judge who oversaw the case with the sense that this was not a fair trial because too many things had gone wrong. Judge Wimberly's decision clearly was motivated by the cumulative effect of errors over the course of the trial, and the federal standard requires exceptional deference to that type of decision because it is based on "factors so numerous, variable and subtle" (*Gasperini*, 149 F.3d 141-42) (internal quotation marks omitted) that appellate courts are not equipped to

second-guess it, given the trial judge's "superior opportunity to get the feel of the case" (Friendly, 31 EMORY L.J. at 761 (internal quotation marks omitted)).

Judge Wimberly's courageous decision to look back over the entire context of the trial, reconsider his own rulings, take into account the conduct of the parties, and recognize that justice had not been done and a new trial should be held deserves deference. He should not be required to enter judgment on a trial that he oversaw and considers to be an injustice. His new-trial order should be reinstated.

II. Judge Workman Did Not Abuse His Discretion When Excluding The Specific-Causation Testimony Offered By Plaintiff's Experts.

The Court of Appeals' one-sentence ruling reversing Judge Workman's extensive effort to satisfy his gatekeeping obligation under *McDaniel* was wrong for two reasons. First, by treating the issue in such a dismissive fashion and implying that expert testimony must be admissible if it has been admitted at a prior trial, the Court of Appeals undermined this Court's prior decisions emphasizing that courts must play an active gatekeeping role before admitting expert testimony at trial. Second, the Court of Appeals failed to afford the required deference to Judge Workman's exercise of discretion on this issue following his extensive and diligent evaluation of the reliability of the experts' proffered testimony. Under the proper standard of review, Judge Workman was well within his discretion to exclude the specific-causation testimony offered by Plaintiff's experts.

A. The Court of Appeals disregarded the gatekeeping function that this Court has instructed courts to perform before admitting expert testimony.

Under Tennessee Rules of Evidence 702 and 703, trial courts "act as gatekeepers when it comes to the admissibility of expert testimony." *State v. Scott*, 275 S.W.3d 395, 401 (Tenn. 2009). The rules impose "a duty upon trial courts to determine whether scientific evidence will substantially aid the trier of fact," "whether the underlying facts and data relied on by the expert witness indicate a lack of trustworthiness," and "whether the reasoning or methodology underlying the scientific evidence is sufficiently valid and reliable, and whether it can properly be applied to the facts at issue." *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 258 (Tenn. 1997).

The trial court "'must assure itself that the [expert's] opinions are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation.'" *Scott*, 275 S.W.3d at 402 (quoting *McDaniel,* 955 S.W.2d at 265). "Just because an expert is speaking does not make what he or she is saying sufficiently reliable to be admitted into evidence." *Id.* (citing *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 274 (Tenn. 2005)). As Tennessee courts have often noted, *ipse dixit* assertions—relying only on the expert's say-so—are an insufficient basis for expert testimony. *Id.* at 402-03 (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 144-46 (1997)).

Further, once a party challenges the admissibility of expert testimony, the proponent of the challenged testimony has the burden of establishing that it is reliable through objective and independent means. *See, e.g., Smelser v. Norfolk S. Ry.*, 105

F.3d 299, 303 (6th Cir. 1997) ("The party seeking to have the testimony admitted bears the burden of showing 'that the expert's findings are based on sound science, and this will require some objective, independent validation of the expert's methodology.'"); *In re Se. Milk Antitrust Litig.*, 2012 WL 947106, at *11 (E.D. Tenn. Mar. 20, 2012) ("The plaintiffs, as the parties seeking to have [the expert's] testimony admitted, bear the burden of showing 'that the expert's findings are based on sound science' and this requires an 'objective, independent validation of the expert's methodology,' ... 'The expert's bold assurance of validity is not enough.'").

Here, Judge Workman took his role as gatekeeper very seriously. He considered extensive briefing and numerous affidavits addressing the admissibility of the specific-causation testimony offered by Plaintiff's experts. He had access to the transcript of the first trial and thus could review the experts' actual proposed testimony, not just a vague summary in a report. And he conducted two hearings at which he heard testimony from numerous live witnesses and argument from both parties. Further, after ruling on the admissibility of this evidence, Judge Workman considered additional briefing and affidavits submitted by Plaintiff in support of her motion to reconsider. *See* App. 285-437.

In the end, Judge Workman excluded the proposed testimony because Plaintiff's experts failed to make ***any*** effort to assess Payne's exposures to radiation, asbestos, or diesel fumes (quantitatively or qualitatively) and, having failed to do so, could not provide any scientifically legitimate basis for concluding that Payne's exposures

at work—rather than his smoking alone—caused his cancer. As Judge Workman explained:

> [T]his doctor is saying, as I understand his opinion, that this gentleman had some exposure—which he doesn't know how much—to asbestos, diesel fumes, radiation at the railroad. And he says that causes his cancer, without differentiating that versus the smoking, which he says also could have caused [the cancer]. Well, how does a jury decide? If he doesn't know and can't differentiate between the potential causes, how is this jury supposed to differentiate and make a decision? ***It's pure, absolute speculation unless you can show them something … other than speculating, to say it more likely contributed to—what he got at the railroad versus what he got anywhere else. … And there's just no proof to show what the science is, how he goes from he got some everywhere to this exposure at this railroad caused his cancer. It's just not there.***

App. 408-11 (emphasis added). Despite repeated prompting, Plaintiff never offered a legitimate scientific basis for the expert's opinions, which thus amounted to nothing but speculation and *ipse dixit*.[8]

The Court of Appeals dismissed Judge Workman's extensive work and exercise of discretion on this issue in a single sentence: "[W]e have reviewed the issue and hold that the trial court erred in excluding the causation testimony of [Plaintiff's] wit-

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[8] *See, e.g.*, App. 390 ("Where in [the report] can you cite to me he discusses the science that supports his opinion …?"); App. 392 ("But he never mentions science here. I just read it all, and he doesn't mention science …."); App. 394 ("What was the basis of how [he] got there is what I'm looking for."); App. 397 ("And what I want to know is, what science did he use?"); App. 399 ("Where is the medical science he followed? That's what I'm asking."); App. 401 ("[A]nd I keep saying show me the record where he talks about what science or something that you've put on today, what his science is, other than 'I say so.'"); App. 411 ("So he will not be allowed to say that exposure at the railroad caused this gentleman's cancer, based upon the record before me today. Because he's got no science to back it up whatsoever.").

nesses, both of whom had testified, over the objection of CSX, to causation at [the first] trial." App. 474. That perfunctory ruling eviscerates the gatekeeping function that this Court has required Tennessee courts to perform in at least two ways.

First, the Court of Appeals made no effort to analyze the factors relevant to the admissibility of expert testimony. This Court has promulgated a significant body of case law explaining the criteria that courts should apply when deciding whether to admit expert testimony.[9] Judge Workman diligently applied that law after protracted investigation into the opinions offered by Plaintiff's experts. The Court of Appeals gave that effort the back of its hand.

Second, the Court of Appeals implied that testimony is admissible if it has been admitted in a previous trial. But that is wrong for a number of reasons. As a legal matter, "[w]hen a new trial is granted, the case proceeds de novo as if there had never been a previous trial." *Dickey v. Nichols*, 1991 WL 169618, at *4 (Tenn. Ct. App.

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[9] *See, e.g.*, *Scott*, 275 S.W.3d at 402 (the gatekeeping role "has four general inter-related components: (1) qualifications assessment, (2) analytical cohesion, (3) methodological reliability, and (4) foundational reliability"); *McDaniel*, 955 S.W.2d at 265 (courts should consider "(1) whether scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether, as formerly required by *Frye*, the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation"). Trial courts "must analyze the science and not merely the qualifications of the expert." *Scott*, 275 S.W.3d at 402 (internal quotation marks and alterations omitted). "Analyzing the science requires the trial court to consider whether the 'basis for the witness's opinion, *i.e.*, testing, research, studies or experience-based observations, adequately supports that expert's conclusions.'" *Id.* (quoting *State v. Stevens*, 78 S.W.3d 817, 834-35 (Tenn. 2002)).

Sept. 4, 1991); *see also, e.g.*, 66 C.J.S. New Trial § 331 ("Where a motion for a new trial has been sustained, the issues stand as though they had never been tried. The cause is to be tried de novo"). Thus, Judge Workman was in no way bound to adopt Judge Wimberly's ruling on this issue. That is particularly true here both because Judge Wimberly neither conducted a *McDaniel* hearing nor performed the type of rigorous investigation and analysis that Judge Workman subsequently undertook and because Judge Wimberly ordered the new trial precisely because he had reservations about a number of his evidentiary rulings. There is every reason to believe that Judge Wimberly's admission of specific-causation testimony from Plaintiff's experts that amounted to bare *ipse dixit* was one of the errors he had in mind when he decided to grant a new trial.

B. The Court of Appeals failed to afford proper deference to Judge Workman's discretionary decision on this issue.

When a trial court has made a determination on the question of admissibility, appellate review is limited. This Court has emphasized that "questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court" and "[t]he trial court's ruling in this regard may only be overturned if the discretion is arbitrarily exercised or abused." *McDaniel*, 955 S.W.2d at 263-64.

Here, the Court of Appeals afforded no deference at all to Judge Workman's discretion. It did not ask whether Judge Workman acted arbitrarily or had abused the

discretion given to him. Instead—as it consistently did with other issues—the Court of Appeals substituted its own view for the discretionary first-hand decision of the trial court. This Court has had to correct this same error by the Court of Appeals before, explaining that the appellate "function is only to determine whether the trial court abused its discretion in excluding the testimony and not to substitute our view for that of the trial court." *Hunter v. Ura*, 163 S.W.3d 686, 703 (Tenn. 2005) (reversing Court of Appeals' determination that trial court erred by excluding expert testimony); *see also Seffernick v. St. Thomas Hosp.*, 969 S.W.2d 391, 392-93 (Tenn. 1998) (trial court struck affidavit of the plaintiff's expert as lacking a scientific basis and entered summary judgment for defendant; Court of Appeals reversed; this Court reinstated trial court's decision, emphasizing that "[t]he trial court's ruling on these matters may only be overturned if the discretion is arbitrarily exercised or abused").

C. Judge Workman did not abuse his discretion on this issue.

Courts applying Tennessee (or similar) standards in toxic-exposure cases regularly exclude expert testimony on specific causation when the expert fails to base his opinion on a legitimate scientific assessment of the plaintiff's exposure. For example, in *Nelson v. Tennessee Gas Pipeline Co.*, 1998 WL 1297690 (W.D. Tenn. Aug. 31, 1998), *aff'd,* 243 F.3d 244 (6th Cir. 2001), a class of plaintiffs alleged exposures to polychlorinated biphenyls (PCBs), a lubricant used at a natural-gas pumping station. The magistrate judge granted the defendants' motion to exclude causation testimony from the plaintiffs' expert, explaining:

> [The expert] failed to establish that the ... plaintiffs actually received a dose of PCBs from the Tenneco pumping station sufficient to make them ill. One of the three central tenets of toxicology is that "the dose makes the poison." Reference Manual on Scientific Evid. at 185. ... In this case, [the expert] admitted in deposition that he made no attempt to determine the dose received by any of the 98 Lobelville residents tested or to determine the existence of a dose-response relationship. He has been perfectly willing to assume that plaintiffs had a sufficient dose of PCBs to cause their illnesses and to give an opinion devoid of any information concerning dosage. An appropriate methodology requires evidence from which the trier of fact could conclude that the plaintiff was exposed to levels of toxin sufficient to cause the harm complained of.

1998 WL 1297690, at *6 (citing *Wintz v. Northrop Corp.*, 110 F.3d 508, 513 (7th Cir. 1997); and *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1107 (8th Cir. 1996)). Referencing the impropriety of *ipse dixit* expert testimony, the court concluded that "'there is simply too great an analytical gap between the data and the opinion proffered.'" *Id.* at *9; *see also id.* at *11 (citing *Claar v. Burlington N. R.R.*, 29 F.3d 499, 502-03 (9th Cir. 1994); *Mancuso v. Consol. Edison Co.*, 967 F. Supp. 1437, 1450 (S.D.N.Y. 1997); and *In re TMI Litig. Cases Consol. II*, 911 F. Supp. 775, 826 (M.D. Pa. 1996), *aff'd in part, rev'd in part,* 193 F.3d 613 (3d Cir. 1999)).

The Sixth Circuit affirmed, reasoning:

> With respect to the question of dose, plaintiffs cannot dispute that [their expert] made no attempt to determine what amount of PCB exposure the Lobelville subjects had received and simply assumed that it was sufficient to make them ill. On appeal, plaintiffs argue only that because PCBs were present in the environment in excess of allowable limits and plaintiffs lived and worked in the area, they must have been exposed at a level that could cause neurological and lung impairments. This is a significant flaw in [the expert's] methodology. ... Without any factual basis from which a jury could infer that the plaintiffs were in fact exposed to PCBs from [the station], the reasoning and methodology underlying the

testimony is not scientifically valid.

Nelson, 243 F.3d at 252-53; *see also id.* at 254 (similar for plaintiffs' other expert); *see also, e.g.*, *Downs v. Perstorp Components, Inc.*, 126 F. Supp. 2d 1090, 1093-94, 1124 (E.D. Tenn. 1999) (excluding expert because he "had no idea of the amount of the chemical to which plaintiff was exposed, nor did he have any idea if the dose received by the plaintiff was sufficient to cause a medical condition").

Courts assessing proposed causation testimony in FELA cases regularly come to the same conclusion. *See, e.g.*, *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 46-50 (2d Cir. 2004) (affirming summary judgment following exclusion of causation experts in Jones Act toxic-exposure case); *Claar*, 29 F.3d at 500 (affirming summary judgment following exclusion of causation experts in FELA toxic-exposure case); *Aurand v. Norfolk S. Ry.*, 802 F. Supp. 2d 950, 959-60 (N.D. Ind. 2011) (excluding causation expert because toxic-tort claims are "usually supported by evidence of the plaintiff's exposure to a particular causative agent and the dose or amounts thereof," and the expert's testimony was "not shown to be supported by the necessary facts and data as to the plaintiffs' exposure to sufficient amounts of any particular chemicals"); *Savage v. Union Pac. R.R.*, 67 F. Supp. 2d 1021, 1032-33 (E.D. Ark. 1999) (excluding causation experts who failed to present evidence of both the amount of the plaintiff's alleged exposure and the level of exposure necessary to cause skin cancer); *Schmaltz v. Norfolk & W. Ry.*, 878 F. Supp. 1119, 1122 (N.D. Ill. 1995) (excluding causation expert who conceded that he was "unaware of the concentration to which [the plaintiff] was

allegedly exposed"); *Richardson v. Union Pac. R.R.*, 386 S.W.3d 77, 99 (Ark. Ct. App. 2011) (excluding causation expert, because he "produced no reliable data of [the plaintiff's] actual exposure to diesel exhaust"); *McNeel v. Union Pac. R.R.*, 753 N.W.2d 321, 331 (Neb. 2008) (excluding causation expert because "scientific knowledge of the harmful level of exposure to a chemical plus knowledge that plaintiff was exposed to such quantities are minimal facts necessary to sustain the plaintiff's burden in a toxic tort case") (alterations and internal quotation marks omitted); *Norfolk S. Ry. v. Rogers*, 621 S.E.2d 59, 66 (Va. 2005) (reversing judgment in favor of plaintiff because causation expert's opinion that the plaintiff "was exposed to silica dust in an amount that exceeded a reasonably safe level was founded upon assumptions that had no basis in fact," given expert's admission that he had no knowledge of plaintiff's level of exposure) (alterations and internal quotation marks omitted); *cf. Myers v. Ill. Cet. R.R.*, 629 F.3d 639, 643 (7th Cir. 2010) (affirming summary judgment following exclusion of causation experts in FELA cumulative-trauma case); *Abraham v. Union Pac. R.R.*, 233 S.W.3d 13, 23-24 (Tex. Ct. App. 2007) (excluding causation expert, because he relied on studies linking occupational exposure to creosote to cancer, where there was no evidence that the plaintiff's exposure was similar to the exposure in the studies).

Further, numerous state and federal appellate courts have held generally that medical-causation testimony in a toxic-exposure case must account for the extent of exposure. *See, e.g., Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1339 (11th Cir. 2010)

("The expert who avoids or neglects the dose-response principle of toxic torts without justification casts suspicion on the reliability of his methodology.") (internal quotation marks and alterations omitted); *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir. 2005) ("[W]here a plaintiff relies on proof of [asbestos] exposure to establish that a product was a substantial factor in causing injury, the plaintiff must show a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural.") (internal quotation marks omitted); *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 278 (5th Cir. 1998) (excluding expert who "had no accurate information on the level of [plaintiff's] exposure to ... fumes"); *Wright*, 91 F.3d at 1108 (reversing jury verdict for plaintiffs because the jury "could ... only have speculated about ... the amount of formaldehyde" to which the plaintiffs were exposed given that the plaintiffs' experts had failed to offer proof of exposure "at levels capable of causing injury"); *In re Zicam Cold Remedy Mktg., Sales Practices, & Prods. Liab. Litig.*, 797 F. Supp. 2d 940, 945-46 (D. Ariz. 2011) (holding that some assessment of exposure is necessary in toxic-tort case because "plaintiffs may allege injury caused by a substance with which many people interact harmlessly at lesser degrees of exposure" and "[w]ithout requiring this kind of evidence, the door is open to meritless claims based on generally harmless levels of exposure"); *Sherwin-Williams Co. v. Gaines ex rel. Pollard*, 75 So. 3d 41, 46-47 (Miss. 2011) (en banc) (reversing jury verdict because causation expert's opinion was based on "a classic logical fallacy" that the plaintiff must have been exposed to harmful levels of lead paint in home

simply because he lived in the home and lead paint was present).

In light of this significant body of cases supporting his decision, it should be beyond dispute that it was well within Judge Workman's discretion to exclude the specific-causation testimony offered by Plaintiff's experts. In particular, Plaintiff's experts made no effort to assess Payne's actual exposure levels to radiation, asbestos, or diesel exhaust.[10] As the proponent of challenged expert testimony, Plaintiff was obliged to show, through objective and independent means, that her experts' specific-causation methodologies were reliable. *See, e.g., Smelser*, 105 F.3d at 303. Despite repeated prompting from Judge Workman, Plaintiff was unable to do so. *See* App. 375-426. As a result, there is nothing in the record establishing that Plaintiff's experts used reliable scientific principles when formulating their specific-causation opinions.[11] Instead, the record shows that these experts simply assumed that, because

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[10] This is in contrast to CSXT's experts, who relied on dose-reconstruction estimates—based on standardized methods in their fields of expertise—that proved that any exposure Payne had while working for CSXT was minimal and harmless. *See* pages 5-8, *supra*.

[11] In particular, contrary to Plaintiff's argument below, her experts did not base their opinions on a "differential etiology," a methodology that involves two steps: (i) ruling in all possible causes and then (ii) ruling out causes "until … one arrives at the most likely cause." *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 673-74 (6th Cir. 2010). Plaintiff's experts bypassed the second step by failing to rule out the possibility that Payne's cancer was caused by his smoking alone. *See, e.g., Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 156 (3d Cir. 1999) ("where a defendant points to a plausible alternative cause and the doctor offers no explanation for why he or she has concluded that was not the sole cause, that doctor's methodology is unreliable") (internal quotation marks omitted). The failure to rule out smoking as the sole cause was a particularly egregious failing here, where all experts agreed that smoking was sufficient to cause Payne's disease, Payne suffered from stereotypical "smoker's cancer," 88-90% of

Payne ***may*** have had some exposure to substances that can cause cancer (at sufficient exposure levels), the exposure must have been a cause of his cancer (even while admitting that smoking alone was sufficient to cause the cancer).

Particularly egregious was the specific-causation opinions offered by Plaintiff's experts with respect to radiation. Plaintiff's own radiation health physicist ***conceded*** that accepted scientific methodology does not allow an expert to attribute adverse health effects to exposures below 10 REM (App. 127-31) and that Payne's exposure was "unlikely to have been 10 REM" (App. 122-23).[12] Nevertheless, without offering any legitimate alternative methodology, Plaintiff's experts opined that radiation exposure caused Payne's lung cancer. This irreconcilable conflict highlights the speculative nature and absence of any methodological underpinning for the specific-causation opinions offered by Plaintiff's experts.

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lung cancers like Payne's are caused by smoking, and Payne had other markers of injury from smoking but no markers at all of exposure to radiation, asbestos, or diesel exhaust. *See* pages 3-4, *supra*. In a similar context, the Seventh Circuit has held that, when an expert "did not 'rule in' any potential causes or 'rule out' any potential causes," but "simply treated [the plaintiff] and assumed his injuries stemmed from his work," the expert's causation opinion "is properly characterized as a hunch or an informed guess," which has no place in the courtroom. *Myers*, 629 F.3d at 645. The Sixth Circuit similarly has stated that "[s]imply claiming that an expert used the 'differential diagnosis' method is not some incantation that opens the *Daubert* gate": If the expert's "efforts to 'rule in' … exposure as a possible cause or to 'rule out' other possible causes turned on speculation, not a valid methodology," then "the testimony does not satisfy Rule 702" and must be excluded. *Tamraz*, 620 F.3d at 674.

[12] Indeed, Plaintiff's expert agreed that CSXT's expert "used standard methodology for doing dose reconstructions" when concluding that Payne's lifetime exposure from his work at CSXT would not have exceeded 1.44 REM. App. 125-26.

The circular, speculative, and unsupported opinions offered by Plaintiff's experts are improper under Tennessee law—and excluding such opinions certainly was not arbitrary or a clear abuse of discretion. Judge Workman's determination is entitled to deference—and is correct in any event—and should be reinstated. Further, because, as Plaintiff has conceded (App. 439-42), this ruling left Plaintiff unable to prove her case, Judge Workman's entry of summary judgment for CSXT also should be reinstated.

III. Judge Wimberly Did Not Abuse His Discretion By Further Instructing The Jury After It Returned A Verdict Based On A Prior Incomplete Statement Of The Law.

This Court has held that trial courts must instruct the jury on the law whenever the instruction is accurate, relevant to the facts of the case, and would not be redundant of other instructions. *See, e.g., Johnson v. Tenn. Farmers Mut. Ins. Co.*, 205 S.W.3d 365, 372 (Tenn. 2006). Here, after the jury returned with an initial verdict, Judge Wimberly gave an additional instruction that indisputably satisfied all three of those criteria. The instruction accurately stated the law by informing the jurors that there would be no reduction of damages for Payne's contributory negligence in light of their findings that CSXT had violated safety regulations. *See* 45 U.S.C. § 53; *Grand Trunk W. Ry. v. Lindsay*, 233 U.S. 42, 49-50 (1914). It was relevant to the facts of this case because the jury was presented with verdict questions on both contributory negligence and regulatory violations. App. 274-75. And, as Judge Wimberly noted, this aspect of the law was not covered by any other instruction. App. 275-77.

Indeed, the further instruction given by Judge Wimberly not only was accurate, relevant, and non-duplicative, it was necessary to correct a prior incomplete statement of the law by both Judge Wimberly and Plaintiff's counsel. During his initial instructions, Judge Wimberly told the jury:

> [I]f you should find from a preponderance of the evidence that the defendant was guilty of negligence but the plaintiff was also guilty of negligence and such negligence on the part of the plaintiff caused any harm to the plaintiff, then the total award of damages to the plaintiff must be reduced by an amount equal to the percentage of fault or contributory negligence chargeable to the plaintiff.

App. 272a. And during the rebuttal phase of Plaintiff's closing argument, her counsel told the jury:

> So in your verdict form, if you say Mr. Payne is guilty of contributory negligence after the railroad is guilty of negligence, then you put the percentage down of his contributory negligence. If you take 25 percent, that reduces his verdict by 25 percent.
>
> If you take 35 percent, that reduces his verdict by 35 percent. Whatever responsibility you put on him, he has to accept some, I agree. That reduces the verdict. The judge will do that for you, but you can assign whatever responsibility that you think he deserves on Mr. Payne.

App. 268a-268b. Both of those statements left the misimpression that the damages would be reduced to account for Payne's contributory negligence ***no matter what*** and failed to apprise the jury that there would be no reduction if it also found a regulatory violation. Judge Wimberly's further instruction simply completed, and corrected, his and Plaintiff's counsel's prior incomplete statements of the law.

Nevertheless, the Court of Appeals held that it was an abuse of discretion for Judge Wimberly to give this further clarifying instruction. The Court of Appeals offered two rationales for that counterintuitive holding. Neither has merit.

A. Courts have an obligation to correct a prior incomplete instruction, whether or not they should have given that instruction in the first place.

The Court of Appeals initially indicated that "[w]e do not find any reason for the jury to be instructed regarding the legal consequences of a finding that an employer railroad violated a safety statute or regulation" because that is "a principle of law to be applied by the trial court after the jury has determined the facts." App. 456-57. But that also is true of Judge Wimberly's initial instruction—and Plaintiff's counsel's statement (which he doubtless knew was misleading)—that the damages would be reduced by Payne's contributory negligence. If it was appropriate to tell the jurors that the court would reduce the damages to account for Payne's comparative fault, it can hardly be reversible error to accurately describe the circumstances under which such a reduction would ***not*** occur.

Whether or not Judge Wimberly should have instructed the jury on the law related to comparative fault in the first place, once he did so, he had an obligation to correctly state the law. It would make no sense—and would be fundamentally unfair—to leave the jury with the materially false impression that the damages would be offset to account for comparative fault no matter what. Moreover, the need to correct his prior misstatement of the law was particularly acute given that Plaintiff's counsel

also misstated this aspect of the law and effectively encouraged the jury to return a higher award in anticipation of a reduction for the jury's (substantial) comparative-fault finding.

Not only was the subsequent instruction required under Tennessee law, it also was appropriate under FELA precedent. In an analogous context, the U.S. Supreme Court has noted that verdicts in FELA cases may be artificially inflated because "few members of the general public are aware of the special statutory exception for personal injury awards contained in the Internal Revenue Code" and, thus, "the members of the jury may assume that a plaintiff's recovery in a case of this kind will be subject to federal taxation, and that the award should be increased substantially in order to be sure that the injured party is fully compensated." *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490, 496-97 (1980) (internal quotation marks omitted). Accordingly, the Court has held that juries ***must*** be instructed on the non-taxability of damages. *Id.* at 497-98. Such an instruction was given here. App. 272b.

For the same reason, it was perfectly appropriate for Judge Wimberly to fully inform the jurors about the circumstances under which the damages would (or would not) be reduced to account for Payne's comparative fault. As with taxes, few jurors can be expected to know that under FELA a damages award will not be reduced to reflect comparative fault if there is a finding of a regulatory violation. Accordingly, Judge Wimberly's further instruction was required to ensure that the jurors did not assume that there would be a reduction for comparative fault and thus award inflated

damages to ensure a particular recovery for the plaintiff. *Liepelt*, 444 U.S. at 497. As *Liepelt* makes clear, the fact that the instruction relates to "a principle of law to be applied by the trial court after the jury has determined the facts" (App. 456-57) is beside the point when, as here, the jury may be acting on a false assumption about the actual effect of its findings.

B. A trial court's obligation to ensure that the jury is correctly instructed does not end until the verdict has been accepted and the jury is discharged.

The Court of Appeals eventually acknowledged that the additional instruction given by Judge Wimberly could have been given as an "initial instruction," but held that doing so "after the jury deliberated and returned a verdict was unwarranted and resulted in error." App. 459 n.6. In so holding, the Court of Appeals disregarded decisions of this Court that make plain that a court's obligation and authority to correctly instruct the jury does not end until the verdict has been accepted by the court and the jury has been discharged.

In *Riley v. State*, 227 S.W.2d 32 (Tenn. 1950), for example, this Court approved giving further instructions after the jury returned an initial verdict in a situation similar to this one. The jury in that case returned a verdict of guilty and assessed a fine against the defendant but did not impose a sentence of imprisonment. *Id.* at 33. Suspecting that something was amiss, the trial court asked the jurors whether they intended not to impose a jail sentence. *Id.* The foreman responded that the jurors did not understand that they could do so, whereupon the trial court gave additional instruc-

tions and directed the jurors to deliberate further. *Id.* The jury returned with an increased fine but still no jail sentence. *Id.* at 34.

This Court affirmed, observing that "the verdict as first reported to the court was not in fact 'defective', but was based upon an erroneous view of [the jury's] duty." *Id.* Even though the initial verdict was perfectly consistent (and the trial court could have simply entered judgment on it), this Court held that "the trial court was fully justified in declining to accept the first verdict" and instead questioning the jurors, further instructing them, and sending them back for further deliberations. *Id.*

In support of its contrary holding here, the Court of Appeals cited only the general obligation of trial courts to enter judgment consistent with the jury's verdict. App. 457. The cases cited by the Court of Appeals for this proposition merely set out the steps a court should take when a verdict is internally inconsistent; they do not purport to establish a general limit on the situations in which a court may provide further instruction after an initial verdict.[13] Specifically, neither those cases nor any other authority of which CSXT is aware limits the obligation or authority of a court to correct-

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[13] *See Leverette v. Tenn. Farmers Mut. Ins. Co.*, 2013 WL 817230, at *29 (Tenn. Ct. App. Mar. 4, 2013) (describing exceptions to rule requiring that judgment be consistent with the verdict, including when there are inconsistencies between general and special verdicts); *Concrete Spaces, Inc. v. Sender*, 2 S.W.3d 901, 911 (Tenn. 1999) (establishing guidelines for cases involving multiple claims and ordering new trial because special verdict form used by trial court was inadequate, citing proposition that "litigants are entitled to have their rights settled by a consistent and intelligible verdict").

ly instruct the jury on the law when the court realizes the need for further instruction only after the jury has returned an initial verdict.

Trial courts should be encouraged to do what Judge Wimberly did here and promptly address any recognized instructional issues while they retain jurisdiction over the case and the jury retains authority to deliberate further and reconsider its verdict. The Court of Appeals' prohibition on further instructions can result only in injustice and wasted resources when appellate courts are forced to either affirm verdicts despite errors or order new trials based on errors that could have been "fixed" while the case was still pending before the trial court.

In sum, it cannot have been reversible error for Judge Wimberly to correctly instruct the jury about the circumstances under which the damages would be reduced to account for Payne's comparative fault. The fact that this instruction described how the court would apply the law to the jury's findings is irrelevant both because such an instruction was appropriate under FELA jurisprudence and because it was necessary to correct a prior incomplete misstatement of the law by both the court and Plaintiff's counsel. Further, while courts obviously should aim to provide a complete and accurate set of instructions at the outset, their obligation and authority to correctly instruct the jury on the law continues until the final verdict is received and the jury is discharged. Trial courts should be reassured that they still may act—indeed are obliged to act—whenever they recognize an error in prior instructions, or the need for addi-

tional instructions, even after the jury has returned an initial verdict. If the Court does not reinstate Judge Wimberly's new-trial order, then the Court of Appeals' holding on this issue should be reversed, and Judge Wimberly's decision to give an additional instruction should be affirmed.

IV. Judgment May Be Entered Only On The Jury's Final Verdict.

By ordering Judge Wimberly to enter judgment on the jury's initial verdict (unless he determines that the verdict is excessive), the Court of Appeals violated two bedrock rules regarding jury verdicts.

A. When the jury exercises its right to revise its verdict, courts may enter judgment only on the final verdict.

This Court long ago held that "[t]he authorities are numerous to the effect that a jury may amend or change their verdict at any time before they have been discharged" and, when the jury has amended its verdict, a court commits reversible error if it does not "render[] judgment on th[e] last verdict." *George v. Belk*, 49 S.W. 748, 749 (Tenn. 1899); *see also, e.g.*, *Riley*, 227 S.W.2d at 34 (reaffirming *George* and holding that "the trial court was fully justified in declining to accept the first verdict" and instead further instructing the jury and sending it back for further deliberations); *Oliver v. Smith*, 467 S.W.2d 799, 804 (Tenn. Ct. App. 1971) ("[T]he jurors have the right to change their verdict or recast it or remold it until it has been received and their participation ended by discharge.") (internal quotation marks omitted).

The Court of Appeals violated this basic rule by ordering Judge Wimberly to enter judgment on the jury's initial verdict. Whether Judge Wimberly abused his dis-

cretion in providing the jurors with further instructions and allowing them to resume deliberations, as the Court of Appeals held, is beside the point. Insofar as it was an abuse of discretion (*but see* Part III, *supra*), the only permissible remedy is a new trial: The Court of Appeals was not entitled to resurrect an initial verdict that had been repudiated by the jurors and then revised. As this Court stated in *George*, an appellate court's view of the procedures leading up to the jury revising its verdict "is immaterial" because, once the verdict has been revised, the court has no choice but to "render[] judgment on th[e] last verdict."[14] 49 S.W. at 749.

The Court of Appeals maintained that *George* and *Riley* are limited to situations in which "the jury's initial verdict was defective in some manner." App. 459. To the contrary, in *Riley* this Court observed that "in the instant case the verdict as first reported to the court was not in fact 'defective', but was based upon an erroneous

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[14] That rule carries particular force when, as here, no one disputes that the allegedly improper instruction correctly stated the law. Thus, the supposed problem with the revised verdict is ***not*** that it reflects a misunderstanding of the law (as the initial verdict plainly did), but that it does not reflect what the Court of Appeals believed to be the jurors' "true" valuation of Plaintiff's injuries. In other words, the Court of Appeals assumed that the jury considered $8.6 million to be fair compensation for Plaintiff's injuries and that the revised verdict improperly reduced that amount based on Payne's negligence (even though Judge Wimberly had just instructed the jury that there should not be such a reduction). But it is equally or more likely that the jury artificially inflated its initial verdict so that Plaintiff would receive what the jury considered to be fair compensation for her injuries ($3.2 million) after an anticipated reduction for contributory negligence. In other words, it likely is the second verdict, not the first, that reflects the jurors' unfiltered valuation of Plaintiff's injuries. In any event, this only highlights why courts may not try to unravel perceived errors at trial by guessing about which version of a verdict reflects the jury's "true intent." They may either enter judgment on the final verdict or order a new trial.

view of [the jury's] duty." 227 S.W.2d at 34. In any event, the controlling principle established by these cases is ***not*** the trial court's duty to take corrective action when the verdict is defective, but the jury's right to change its verdict—for whatever reason—up to the moment it is discharged. When, as here, the jury has exercised that right, a court may not undo its actions by entering judgment on a prior version of the verdict.

B. Courts may not enter judgment on a verdict that was rejected by the jurors when they were polled.

Tennessee law gives parties the right to have the jury polled before entry of judgment. *See* T.C.A. § 20-9-508 ("The trial judges in all courts of record in which suits are tried by juries, in both criminal and civil cases, shall be required to poll the jury on application of ... either the plaintiff or the defendant in civil cases, without exception."). As this Court has stated, "[i]n no other way can the rights of the parties to the concurrence of the jurors be so effectually secured as to have each juror answer the question, 'Is this your verdict?' in the presence of a court and counsel." *Lovell v. McCullough*, 439 S.W.2d 105, 109 (Tenn. 1969) (internal quotation marks omitted).

In this case, the jury was polled, and all but one juror ***rejected*** the initial verdict. Although that poll occurred after Judge Wimberly had given the instruction that the Court of Appeals deemed improper, that does not change the decisive fact that the jurors ***never*** agreed that the initial verdict read by the foreman was their verdict. It is entirely possible that one or more of the other jurors would have renounced the initial

verdict even without the further instruction. Nevertheless, the Court of Appeals ordered Judge Wimberly to enter judgment on the initial verdict (unless he determines that it is excessive). That instruction nullified CSXT's statutory right to have the verdict confirmed by a poll of the jury before entry of judgment on the verdict.[15]

In sum, once a jury has exercised its right to change its verdict, a court may not enter judgment on anything other than the jury's final verdict (the only other option being to order a new trial). Moreover, when the jurors have renounced a verdict upon being polled, a court may not enter judgment on that verdict. Accordingly, if the Court declines to reinstate Judge Wimberly's new-trial order and agrees with the Court of Appeals that Judge Wimberly should not have further instructed the jury, it nevertheless should vacate the Court of Appeals' instructions on remand and instead order a new trial.

V. If The Case Is Remanded To Judge Wimberly, He Should Be Authorized To Decide Any Unresolved Issues That Were Pretermitted By His New-Trial Order.

It is a basic rule of appellate jurisprudence that, "[w]hen a remanded cause has ... been re-entered on the docket [of the trial court], it stands exactly as it did when the appeal was granted." *Raht v. S. Ry.*, 387 S.W.2d 781, 786 (Tenn. 1965). Accordingly, when an appellate court reverses and remands a case, the trial court has jurisdic-

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[15] Although CSXT did not formally request that the jurors be polled, that is only because Judge Wimberly already had polled the jurors of his own accord.

tion to decide any other unresolved issues in the case. *See, e.g., Tenn. Farmers Life Reassurance Co. v. Rose*, 239 S.W.3d 743, 751-52 (Tenn. 2007) (reversing summary judgment and holding that "the case should be remanded to the trial court for further proceedings concerning the pretermitted issues").[16] The Court of Appeals' order on remand here violates this principle—and is fundamentally unfair—because it prevents Judge Wimberly from addressing several unresolved issues related to the first trial that remain pending before him because they were pretermitted by the new-trial order.

Following the first trial, Judge Wimberly ordered a new trial "based upon specific prejudicial errors including, but not limited to, instructional and evidentiary errors that resulted in an injustice to Defendant and, ***independent of considerations regarding sufficiency of the evidence***, warrant a new trial." App. 281-82 (emphasis added). The new-trial order thus expressly left unresolved all pending sufficiency-of-the-evidence arguments. Those unresolved issues include:

1. Whether CSXT is entitled to judgment as a matter of law on Plaintiff's workplace-exposure claims. *See* App. 278b.

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[16] *See also, e.g., Wright v. Dixon*, 2011 WL 1648088, at *4 (Tenn. Ct. App. May 2, 2011) ("We reverse the Judgment of the Trial Court and remand for determination whether the contract was properly terminated, a question which the Trial Court pretermitted."); *Russell v. Anderson Cnty.*, 2009 WL 2877415, at *1 (Tenn. Ct. App. Sept. 8, 2009) ("On appeal, we vacate the Trial Court's Judgment and remand with instructions to rule on the pretermitted issue."); *Kerney v. Endres*, 2009 WL 1871933, at *6 (Tenn. Ct. App. June 30, 2009) ("[W]e will remand the case to the trial court for determination of issues that were pretermitted.").

2. Whether CSXT is entitled to judgment as a matter of law on Plaintiff's claims of regulatory violations related to asbestos, diesel fumes, and radiation. *See* App. 278b-278c.

3. Whether CSXT is entitled to a new trial because the verdict is against the clear weight of the evidence. *See* app. 278d.

Judge Wimberly's new-trial order did not express any opinion on those issues. Nor did Judge Wimberly issue any other order or ruling that resolves them. Accordingly, these issues—each of which was properly raised by CSXT in post-trial proceedings—remain pending and should be addressed on remand.

Nevertheless, upon vacating the new-trial order, the Court of Appeals remanded to Judge Wimberly and directed him to enter judgment in favor of plaintiff. App. 472-74. In its instructions regarding remand, the court directed Judge Wimberly to consider only whether the jury's original verdict is excessive and then to enter judgment in Plaintiff's favor on either the initial or the revised verdict. App. 473-74. Those instructions do not afford Judge Wimberly discretion to address the unresolved issues that were pretermitted by the new-trial order.

Accordingly, CSXT filed a petition for rehearing asking that Judge Wimberly be authorized to address any remaining unresolved issues when the case is remanded to him. The Court of Appeals denied CSXT's petition, stating: "[I]n our view, the trial court considered and implicitly resolved those issues against CSX when it considered

CSX's post-trial motion" and "the trial court was satisfied that the $3.2 million verdict was not against the clear weight of the evidence." App. 475.

But Judge Wimberly expressly said that his decision was "independent of considerations regarding sufficiency of the evidence"—*i.e.*, that there was no reason to reach those considerations. He accordingly never expressed ***any*** view on the sufficiency or weight of the evidence.[17] And given that Judge Workman, who had access to the entire transcript of the first trial, later entered summary judgment for CSXT in this case, there is every reason to think that Judge Wimberly would give serious consideration to CSXT's motions for JNOV or a new trial based on the weight of the evidence.[18] Judge Wimberly also did not express any view as to whether the jury's findings of regulatory violations are supported by the evidence (an issue that could restore CSXT's right to have the verdict reduced to reflect Payne's substantial comparative fault). The Court of Appeals' assertion that Judge Wimberly "considered and implicit-

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[17] Specifically, Judge Wimberly did not in any way indicate that he was satisfied with the $3.2 million verdict when he entered judgment on that verdict in response to plaintiff's motion to enter judgment on the jury's initial verdict. That motion was focused solely on the question of which verdict controlled. *See* R.24:3464-65. Indeed—consistent with normal practice—CSXT did not file its post-trial motion raising the unresolved issues identified above until approximately a month after Judge Wimberly entered judgment on the revised verdict. *See* R.24:3479.

[18] Notably, "[w]hile rather unusual, nothing in the rules prevents granting a summary judgment after granting a new trial" and "[d]oing so is substantially the same as granting a motion for judgment notwithstanding the verdict." *Dickey*, 1991 WL 169618, at *4.

ly resolved" these other issues against CSXT *sub silentio* was based on nothing but conjecture.

In any event, when there is no formal order or explicit statement reflecting a trial court's ruling on a pretermitted issue, there is no conceivable reason to limit the scope of remand as the Court of Appeals did here. If the Court of Appeals is correct that Judge Wimberly "implicitly" decided all other issues against CSXT, then Judge Wimberly will simply say so on remand—causing no prejudice or inconvenience to anyone. If, however, Judge Wimberly did ***not*** "implicitly" resolve one or more of CSXT's arguments, then the Court of Appeals has unfairly deprived CSXT of a ruling on grounds for post-trial relief that CSXT had a right to raise—and adequately presented and preserved—following the first trial. As with other issues, the Court of Appeals demonstrated a complete lack of deference to the trial court—even on an intrinsically subjective question such as whether Judge Wimberly "implicitly" decided an issue.

If the Court does not reinstate Judge Wimberly's new-trial order (or order a new trial in response to Judge Wimberly's further instruction to the jury), it should authorize Judge Wimberly on remand to consider any unresolved post-trial issues that were pretermitted by his new-trial order.

CONCLUSION

Judge Wimberly's order granting a new trial and Judge Workman's order granting summary judgment for CSXT should be reinstated. If the Court does not re-

instate the summary judgment for CSXT, it should remand for a new trial. If the Court does not remand for a new trial, it should remand for entry of judgment on the revised verdict and consideration of any arguments raised in CSXT's post-trial motions that Judge Wimberly has not already expressly resolved.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that, on this 21 day of March, 2014, I served a true and correct copy of the foregoing on:

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