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

RULE 11 APPLICATION FOR PERMISSION TO APPEAL

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES, REGULATIONS, AND RULES

JURISDICTION

The judgment of the Court of Appeals, Eastern Division, was entered on December 27, 2013. A timely petition for rehearing was filed on January 6, 2014. The petition for rehearing was denied on January 23, 2014.

QUESTIONS PRESENTED FOR REVIEW

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 accordingly 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 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.

2. 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.

3. 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.

4. 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.

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; R.52:141-42, 229-31.[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; R.52:141-42, 230.

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[1] "App." refers to the Appendix submitted along with CSXT's proposed opening brief, which has been filed contemporaneously with this petition. For the Court's convenience, CSXT also includes corresponding citations to the pertinent volume and page numbers in the record.

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; R.51:108, 135, R.66:2305-08, 2318-25, R.67:2328-29, 2351-55. He was diagnosed with lung cancer in 2005 and died in 2010. App. 20, 24-26; R.51:128, R.52:144-46. 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; R.54:453-55, R.56:742-49, R.66:2304-06, R.67:2369-71. Moreover, Payne's treating physician 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; R.56:748-73, R.66:2300-06, R.67:2351-71. Indeed, Payne's treating physician testified that 88-90% of lung cancers like Payne's are caused by smoking. App. 84; R.56:744. 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; R.56:772-73, R.67:2351-54. 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; R.56:765-69; *see also* App. 225-28, 247-56; R.66:2300-03, R.67:2354-63.

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; R.52:247-52, R.67:2328-29. Payne did not visit Witherspoon at all from 1975 to 1983, but began infrequent visits again in 1983. App. 49-50; R.52:241-42. 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; R.52:255-56, 268, R.56:829, R.57:1008-09.

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; R.58:1075-76, R.61:1500. Witherspoon stopped receiving contaminated scrap altogether in 1972. App. 142; R.58:1076. 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. 135-38, 143-44, 157, 166-76; R.57:1023-26, R.58:1083-84, R.61:1500, 1551-53, 1561-64, 1581-83.

CSXT's radiation expert, Dr. David Dooley—who oversees radiation dose reconstruction for the National Institute of Occupational Safety and Health (App. 285; R.27:3872)—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; R.27:3874-79. 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; R.27:3880-940. 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; R.63:1859-94.

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; R.57:972-80. Instead, Mantooth simply chose "to assume" that Payne was exposed to harmful levels of radi-

ation because "we don't know he wasn't." App. 119-24; R.57:982-87. Nevertheless, he conceded that adverse health effects cannot be attributed to exposures below 10 REM (App. 127-31; R.57:994-98) and that Payne's exposure was "unlikely to have been 10 REM" (App. 122-26; R.57:985-89).

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; R.52:170-78. 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; R.62:1757-67. Based on studies relating to the ACMs Payne ***claimed*** were present in his workspace (App. 358-67; R.27:3946-55), 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; R.27:3960-61). 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, "I doubt if [Payne] had any days where he ever had a measurable exposure to asbestos." App. 191; R.62:1767.

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; R.52:214-23. 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; R.55:674.

CSXT's expert, Liukonen, testified that CSXT, other railroads, and the Federal Railroad Administration have conducted hundreds of air sampling tests onboard locomotives 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; R.62:1767-78, R.27:3955-60. 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; R.62:1778; *see also* App. 373; R.27:3961 (Payne's exposure would have been approx-

imately 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; R.62:1778. 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; R.68:2563-65. 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; R.68:2565-66. 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; R.68:2567. Because the jurors had not yet been discharged, Judge Wimberly granted their request. *Id.* After a short time, the ju-

rors returned with a revised verdict awarding Plaintiff $3.2 million, which they thereafter unanimously affirmed. App. 277-78; R.68:2567-68.

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; R.70:3-4. 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; R.70:3-4, R.25:3570-71.

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; R.25:3570-71. 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; R.41:5765) and this Court (App. 284[2]).

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

[2] This Court's denial of Plaintiff's application for extraordinary appeal is not included in the record.

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; R.39:5605-08, 5618-20, 5626-28, R.40:5681-82.

Having excluded all evidence of specific causation, Judge Workman then granted CSXT's motion for summary judgment. App. 439-42; R.40:5683-86. 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." Slip op. 14-17 & 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 (slip op. 27-28), 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; R.70:3-4).

- 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. Slip op. 29.

- 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. Slip op. 30.

- 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." Slip op. 24-25.

- 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. Slip op. 26.

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." Slip op. 32.

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. Slip op. 30-32. 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; R.25:3570-71).

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." Order, Jan. 23, 2014.

REASONS SUPPORTING REVIEW

I. The Court Should Grant Further Review To Bring The Court Of Appeals Back Into Line With This Court's Precedents Holding That Judgment May Be Entered Only On A Jury's Final Verdict And To Ensure That The Statutory Right To Poll The Jurors Remains Sacrosanct.

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 fundamental rules regarding jury verdicts. This Court's review is required to bring the Court of Appeals back into line with these bedrock principles of Tennessee law.

A. The Court of Appeals' decision is irreconcilable with prior decisions of this Court and the Court of Appeals holding that courts may enter judgment only on a jury's 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 v. State*, 227 S.W.2d 32, 34 (Tenn. 1950) (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 discretion 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 II, *infra*), 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. 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."[3] 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." Slip op. 17. 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 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. Moreover, even if the Court of Appeals were right that *George* and *Riley* did not involve a situation like the one that confronted

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[3] 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 Plaintiff's contributory 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.

Judge Wimberly, making the question presented here an open one, that is a reason for granting, not denying, review.

B. The Court of Appeals' decision eviscerates Tennessee's statutory right to poll the jurors.

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). In so doing, the Court of Appeals nullified CSXT's statutory right

to have the verdict confirmed by a poll of the jury before entry of judgment on the verdict.[4]

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. Both the jury's right to revise its verdict and the parties' right to a poll of the jurors are fundamental to the fair operation of the jury system. They are principles worth protecting, and accordingly this Court's further review is warranted.

II. The Court Should Grant Further Review To Clarify That Trial Courts May Give Additional Instructions After The Jury Has Returned A Verdict If Those Instructions Correctly State The Law, Are Not Duplicative, And Are Necessary To Correct A Prior Misstatement 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

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[4] 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.

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; R.68:2564-65. And, as Judge Wimberly noted, this aspect of the law was not covered by any other instruction. App. 275-77; R.68:2565-67.

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; R.68:2540. 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; R.68:2513-14. 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 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. Both raise important issues related to a trial court's obligation to correctly instruct the jury and deserve further review by this Court.

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." Slip op. 14-15. 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 the decedent's compara-

tive 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 decided to do 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 in all situations. 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; R.68:2543.

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" (slip op. 14-15) is beside the point when, as here, the jury may be making a decision based on a false assumption about the actual effect of its findings.[5]

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[5] 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").

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." Slip op. 17 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*, for example, the jury returned a verdict of guilty and assessed a fine against the defendant but did not impose a sentence of imprisonment. 227 S.W.2d 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 instructions 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 ju-

rors, further instructing them, and sending them back for further deliberations. *Id.* The Court of Appeals' decision here is irreconcilable with that holding.

In support of its contrary holding, the Court of Appeals cited only the general obligation of trial courts to enter judgment consistent with the jury's verdict. Slip op. 15. 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.[6] Specifically, neither those cases nor any other authority of which CSXT is aware limits the obligation or authority of a court to correctly 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

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[6] *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").

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 statement 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. This Court should grant review to resolve this important question of law and reassure trial courts that they still may act—indeed, are obliged to act—whenever they recognize an error in prior instructions, or the need for additional instructions, so long as the jury has not been discharged.

III. The Court Should Grant Further Review To Clarify The Proper Standard For Appellate Review Of An Order Deciding A New-Trial Motion Under The FELA, Restore Consistency Between Tennessee Courts And Other Courts On This Issue, And Prevent Substantial Injustice.

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).[7] Accordingly, "***a court of appeals will only rarely reverse a [trial] judge's 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 injus-

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[7] 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 manifest abuse of discretion.").

tice to Defendant"—is irreconcilable with this deep and consistent body of case law explicating the high degree of deference owed to a trial court's decision to grant a new trial. Although the Court of Appeals' analysis of individual errors at trial is consistently wrong on both the law and the facts, the more fundamental problem is that the court systematically overreached. 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. Because the appropriate level of deference that appellate courts should exhibit when reviewing a trial court's decision to grant or deny a new trial is a recurring issue of great importance to litigants—and because the Court of Appeals has staked out a position that is flatly inconsistent with an extensive body of law on this issue—this Court should grant further review.

A. The Court of Appeals deviated from a consistent body of case law that requires appellate courts to afford great deference to a trial court's decision to grant a new trial.

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." *See* pages 13-14, *supra*. The Court of Appeals' opinion devoted substan-

tial space to instructional issues that CSXT had not pursued, and it summarily rejected several evidentiary arguments that CSXT had raised on appeal. *Id.* 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's approach.

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; R.70:3-4. 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; R.51:15. Plaintiff's counsel agreed that "[n]o one in here says he had thyroid cancer." App. 5; R.51:16. 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.[8] *See* App. 234-35; R.66:2318-19.

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[8] 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 re-

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; R.67:2325. 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; R.70:3-4. 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.[9]

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

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newed its motion at the end of trial. App. 235-40, 265-66; R.66:2319-24, R.67:2380-81.

[9] 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." App. 239-40; R.66:2323-24.

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; R.66:2318-19. 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. Slip op. 28. 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 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 reference to 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.

This Court's review is required because the Court of Appeals fundamentally misunderstood its proper role as an appellate court—and deviated from a long and consistent body of law on this subject—by impermissibly substituting its own interpretation of events at trial for Judge Wimberly's conscientious determination (based on his first-hand experience with all relevant events) that this incident was profoundly unfair to CSXT and contributed to a trial that was "an injustice to Defendant."

B. The Court of Appeals failed to even consider other grounds that support the trial court's new-trial decision.

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. If this Court grants further review, CSXT intends to show that the Court of Appeal's analysis of each of the other individual evidentiary and instructional errors CSXT raised below (*see* pages 13-14, *supra*) is mistaken. However, the Court of Appeals did not 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. In addition to counsel's egregious violation of Judge Wimberly's order on the thyroid-cancer issue, Plaintiff's counsel also violated Judge Wimberly's order excluding a misleading photograph, which is reproduced below, of a malfunc-

tioning locomotive that was belching black clouds of smoke. App. 15[10], 62-66; R.53:322, 366, 393, R.443-44.

And Plaintiff's counsel violated an agreement between the parties and Judge Wimberly that he would not introduce evidence of cesium contamination at the notorious local Oak Ridge Y-12 weapons facility. App. 9[11], 74a-74b, 158, 267-68; R.54:559-60, R.61:1512, R.67:2421-22.

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*,

[10] Exhibit 571 for Identification; Power Point Slides used during cross-examination of Maynard at Slide 48.

[11] *Id.* at Slide 7.

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 FELA case due to prejudice from repeated instances of attorney misconduct). The Court of Appeals did not even consider this as a possible basis for affirming Judge Wimberly's order and, indeed, consistently elided the misconduct when it described the errors at 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)).

This Court should grant review to bring the Court of Appeals in line with other courts that have applied the federal standard for reviewing a new-trial order. When the trial judge makes the courageous decision to look back over the entire context of a trial, reconsider his own rulings, take into account the conduct of the parties, and recognize that justice has not been done and a new trial should be held, appellate courts applying the federal standard of review should defer to that decision and affirm in all but the most "egregious cases." *Alston*, 974 F.2d at 1212.

IV. The Court Should Grant Further Review To Reaffirm Both The Gatekeeping Role This Court Has Held Tennessee Courts Must Play Before Admitting Expert Testimony And The Deference Owed To Trial Courts That Have Fulfilled That Role.

The Court of Appeals' one-sentence ruling reversing Judge Workman's extensive effort to satisfy his gatekeeping obligation under *McDaniel* requires further review 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 evalua-

tion of the reliability of the experts' proffered testimony. Because the admissibility of expert testimony is a recurring issue of great importance to litigants, this Court's guidance is urgently needed.

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; R.27:3872-3940, 3842-62, R.76:124-49, R.77:150-61, R.78:32-45, R.39:5605-08, 5618-20, 5626-28, R.40:5681-86.

In the end, after giving Plaintiff every opportunity to meet her burden of proving admissibility, 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; R.77:157-60 (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*. [12]

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[12] *See, e.g.*, App. 390; R.76:139 ("Where in [the report] can you cite to me he discusses the science that supports his opinion ...?"); App. 392; R.76:141 ("But he never mentions science here. I just read it all, and he doesn't mention science ...."); App. 394; R.76:143 ("What was the basis of how [he] got there is what I'm looking for."); App. 397; R.76:146 ("And what I want to know is, what science did he use?"); App. 399; R.76:148 ("Where is the medical science he followed? That's what I'm ask-

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] witnesses, both of whom had testified, over the objection of CSX, to causation at [the first] trial." Slip op. 32. 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.[13] Judge Workman diligently applied that law after protracted

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ing."); App. 401; R.77:150 ("[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; R.77:160 ("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.").

[13] *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)).

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. 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 amount to bare *ipse dixit* was one of the errors he had in mind when he decided to grant a new trial.

B. In affording no deference to Judge Workman's discretionary decision on this issue, the Court of Appeals disregarded this Court's precedents.

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"). As this case demonstrates, the standard for reviewing discretionary decisions regarding the admissibility of expert testimony is a recurring issue of great importance to litigants as to which this Court's continued guidance is sorely needed.

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").

In light of these cases (and other similar cases cited in CSXT's brief below), 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.[14] As the proponent of challenged expert testimony, Plain-

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[14] 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

tiff 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; R.76:124-49, R.77:150-61, R.78:32-45. As a result, there is nothing in the record establishing that Plaintiff's experts used reliable scientific principles when formulating their specific-causation opinions. Instead, the record shows that these experts simply assumed that, because 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; R.57:994-98) and that Payne's exposure was "unlikely to have been 10 REM" (App. 122-23; R.57:985-86).[15] Nevertheless, without offering any legitimate alternative methodology, Plaintiff's experts opined that radiation exposure caused Payne's lung cancer. This irreconcilable

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any exposure Payne had while working for CSXT was minimal and harmless. *See* pages 6-9, *supra*.

[15] 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; R.57:988-89.

conflict highlights the speculative nature and absence of any methodological underpinning for the specific-causation opinions offered by Plaintiff's experts.

The circular, speculative, and unsupported opinions offered by Plaintiff's experts have no place under Tennessee law—and excluding such opinions certainly was not arbitrary or a clear abuse of discretion. This Court's guidance is needed, once again, to remind the Court of Appeals that it owes significant deference to the trial court's decisions with respect to the admissibility of expert testimony and may not simply substitute its own judgment for that of the trial court.

V. The Court Should Grant Further Review To Clarify That Appellate Courts Must Give Trial Courts Discretion To Resolve Pending Issues When They Reverse And Remand A Case.

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 jurisdiction 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

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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.

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; R.25:3570-71 (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; R.24:3482.
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; R.24:3482-83.
3. Whether CSXT is entitled to a new trial because the verdict is against the clear weight of the evidence. *See* App. 278d; R.24:3484.

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. Accord-

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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.").

ingly, 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 for entry of judgment in favor of plaintiff. Slip op. 30-32. 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. Slip op. 31-32. 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." Order, Jan. 23, 2014.

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

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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

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 implicitly resolved" these other issues against CSXT *sub silentio* is 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

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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.

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 raised in this petition, 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. This Court's review is urgently required both to provide guidance on this recurring procedural issue and to prevent substantial injustice to CSXT.

CONCLUSION

The petition should be granted.

Addendum 1

Judgment of Court of Appeals

Opinion of Court of Appeals

Correction of Opinion of Court of Appeals

Order on Petition for Rehearing

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 16, 2013 Session

ANNE PAYNE v. CSX TRANSPORTATION, INC.

Circuit Court for Knox County
No. 2-231-07

No. E2012-02392-COA-R3-CV

JUDGMENT

This appeal came on to be heard upon the record from the Circuit Court for Knox County and briefs filed on behalf of the respective parties. Upon consideration thereof, this Court is of the opinion that the judgment of the trial court should be reversed and this cause remanded with instructions.

It is, therefore, ORDERED and ADJUDGED by this Court that the judgment of the trial court ordering a new trial is reversed. The judgment of the trial court granting CSX summary judgment is reversed as moot. This case is remanded to the trial court with instructions to the first trial judge to review the evidence at trial and enter judgment in accordance with our directions. Costs on appeal are assessed to the appellee, CSX Transportation, Inc.

PER CURIAM

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 16, 2013 Session

ANNE PAYNE v. CSX TRANSPORTATION, INC.

Appeal from the Circuit Court for Knox County
No. 2-231-07 Harold Wimberly, Judge

No. E2012-02392-COA-R3-CV

Winston Payne brought this action against his former employer, CSX Transportation, Inc., under the Federal Employers' Liability Act ("FELA"), alleging that CSX negligently exposed him to asbestos, diesel fumes, and radioactive materials in the workplace causing his injuries.[1] The jury returned a verdict finding (1) that CSX negligently caused Payne's injuries; (2) that CSX violated the Locomotive Inspection Act or safety regulations regarding exposure to asbestos, diesel fumes, and radioactive materials; and (3) that Payne's contributory negligence caused 62% of the harm he suffered. The jury found that "adequate compensation" for Payne's injuries was $8.6 million. After the jury returned its verdict, the trial court, *sua sponte*, instructed the jury, for the first time, that, under FELA, its finding that CSX violated a statute or regulation enacted for the safety of its employees meant that plaintiff would recover 100% of the damages found by the jury. The court sent the jury back for further deliberations. It shortly returned with an amended verdict of "$3.2 million @ 100%." Six months after the court entered judgment on the $3.2 million verdict, it granted CSX's motion for a new trial, citing "instructional and evidentiary errors." The case was then assigned to another trial judge, who thereafter granted CSX's motion for summary judgment as to the entirety of the plaintiff's complaint. The second judge ruled that the causation testimony of all of plaintiff's expert witnesses was inadmissible. We hold that the trial court erred in instructing the jury, *sua sponte*, on a purely legal issue, *i.e.*, that the jury's finding of negligence per se under FELA precluded apportionment of any fault to the plaintiff based upon contributory negligence, an instruction given after the jury had returned a verdict that was complete, consistent, and based on the instructions earlier provided to it by the trial court. We further hold that, contrary to the trial court's statements, the court did not make any prejudicial evidentiary rulings in conducting the trial, and that its jury instructions, read as a whole, were clear, correct, and complete. Consequently, the trial court erred in granting a new trial. We remand to the trial court. We direct the first trial judge to

[1] The primary illness was lung cancer from which the original plaintiff died. We refer in this opinion to his health issues as "injuries" or "injury."

review the evidence as thirteenth juror and determine whether the jury verdict in the amount of $8.6 million is against the clear weight of the evidence. If it is not, the trial judge is directed to enter judgment on that verdict. If, on the other hand, the trial judge finds that the larger verdict is against the clear weight of the evidence, the court is directed to enter a final judgment on the jury's verdict of $3.2 million. The trial court's grant of summary judgment is rendered moot by our judgment. However, in the event the Supreme Court determines that our judgment is in error, we hold that the grant of summary judgment was not appropriate.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; Case Remanded with Instructions

CHARLES D. SUSANO, JR., P.J., delivered the opinion of the Court, in which THOMAS R. FRIERSON, II, J., and D. KELLY THOMAS, SP.J, joined.

Richard N. Shapiro, Virginia Beach, Virginia; Sidney W. Gilreath and Cary L. Bauer, Knoxville, Tennessee, for the appellant, Anne Payne.

Randall A. Jordan, Karen Jenkins Young, and Christopher R. Jordan, St. Simons Island, Georgia; Evan M. Tager and Carl J. Summers, Washington, D.C.; John W. Baker, Jr. and Emily L. Herman-Thompson, Knoxville, Tennessee, for the appellee, CSX Transportation, Inc.

OPINION

I.

Payne worked for CSX as a trainman and a switchman from 1962 until his retirement in 2002. In 2005, he was diagnosed with lung cancer. He underwent extensive medical treatment, including 43 rounds of chemotherapy and 44 radiation treatments. He filed this FELA action in 2007, alleging that CSX was negligent in exposing him to asbestos, diesel fumes, and radioactive material in the course of his employment, resulting in his injuries, particularly his lung cancer. He also alleged that CSX was guilty of negligence per se when it violated several statutes or regulations enacted for the safety of its employees. CSX denied liability and alleged that Payne's contributory negligence, specifically his cigarette smoking, caused his injuries. Payne started smoking in 1962, smoked a pack a day on average for approximately 26 years, and quit in 1988. After Payne died on February 24, 2010, his widow, Anne Payne, was substituted as plaintiff.

A ten-day jury trial took place over the course of two weeks in November 2010. After the close of proof, the trial court instructed the jury and provided it with a verdict form

including special interrogatories. To aid the reader, the jury verdict form is hereinafter set forth in its entirety, with the jury's handwritten answers in italics:

> 1. Was the defendant negligent as defined in these instruction[s]? *Yes*
>
> 2. If you answered yes to question one, did that negligence cause in whole or in part the harm suffered by plaintiff? *Yes*
>
> 3. If negligent, was the defendant negligent with regard to:
>
> Asbestos exposure? *Yes*
> Diesel exposure? *Yes*
> Radiation exposure? *Yes*
>
> If your answer to any of these is yes, did negligence of the defendant cause in whole or in part the harm suffered by plaintiff as a result of:
>
> Asbestos exposure *Yes*
> Diesel exposure *Yes*
> Radiation exposure *Yes*
>
> 4. A. Did the defendant violate the Locomotive Inspection Act or any regulation concerning locomotives read to you regarding asbestos and was any such violation a legal cause of plaintiff's harm? *Yes*
>
> B. Did the defendant violate the Locomotive Inspection Act or any regulation concerning locomotives read to you regarding diesel fumes and was any such violation a legal cause of plaintiff's harm? *Yes*
>
> C. Did the defendant violate any regulation read to you regarding the operation of railroad cars and transportation of radioactive materials read to you and was any such violation a legal cause of harm suffered by plaintiff? *Yes*
>
> 5. If you answered yes to question two, was plaintiff negligent with regard to harm he suffered and did his negligence cause in whole or in part the harm he suffered? *Yes*

6. If your answer to question five is yes, to what extent, expressed in percentage, did plaintiff's negligence cause in whole or in part the harm he suffered? *62%*

7. What amount of money do you find, without deduction for any negligence which you may find on plaintiff's part, will fairly represent adequate compensation? $ *8.6 million*

When the jury returned to the courtroom following its deliberations, the following colloquy took place between the trial court and the jury foreman:

THE COURT: If you will refer to the verdict, you can tell me briefly. Question No. 1, was the defendant negligent as defined in these instructions?

JURY FOREMAN: Yes.

THE COURT: Question No. 2, did that negligence cause, in whole or in part, the harm suffered by the plaintiff?

JURY FOREMAN: Yes.

THE COURT: Question No. 3, was the defendant negligent with regard to asbestos exposure?

JURY FOREMAN: Yes.

THE COURT: With regard to diesel exposure?

JURY FOREMAN: Yes.

THE COURT: With regard to radiation exposure?

JURY FOREMAN: Yes.

THE COURT: Did the negligence of the defendant cause, in whole or in part, the harm suffered by plaintiff as a result of asbestos exposure?

JURY FOREMAN: Yes.

THE COURT: Diesel exposure?

JURY FOREMAN: Yes.

THE COURT: Radiation exposure?

JURY FOREMAN: Yes.

THE COURT: Did the defendant violate the Locomotive Inspection Act or any regulation concerning locomotives regarding asbestos, and was any such violation a legal cause of the plaintiff's harm?

JURY FOREMAN: Yes.

THE COURT: Did the defendant violate the Locomotive Inspection Act or any regulation concerning locomotives regarding diesel fumes, and was any such violation a legal cause of the plaintiff's harm?

JURY FOREMAN: Yes.

THE COURT: Did the defendant violat[e] any regulation regarding the operations of railroad cars and transportation of radioactive materials, and was any such violation a legal cause of harm suffered by the plaintiff?

JURY FOREMAN: Yes.

THE COURT: Question 5, was the plaintiff negligent with regard to the harm he suffered?

JURY FOREMAN: Yes.

THE COURT: Your answer was yes. To what extent, expressed in percentages, did the plaintiff's negligence cause, in whole or in part, the harm that he suffered?

JURY FOREMAN: 62 percent.

THE COURT: *And finally, what amount of money do you find, without deduction for any [of] the negligence, that would fairly represent adequate compensation in this case?*

JURY FOREMAN: 8.6 million.

(Emphasis added.)

Immediately after the jury foreman confirmed the jury's written responses establishing the plaintiff's total damages at $8.6 million, the following took place:

THE COURT: Okay. Now, let me further inform you that by answering yes to questions listed on this form in Part 4 about the Inspection Act or any regulations, by answering yes to all of those questions, the concept of contributory negligence may not apply in this case. In that situation, the plaintiff would receive the entire amount of money that you have listed on the answers to the seventh question. If that is what you intend in this particular case, please indicate by raising your right hand?

(Jury foreman raised hand).

THE COURT: Okay. That is something that we hadn't talked about before, but . . . we need to know if that is your intention. Again, by answering yes to the questions listed under Part 4 of the verdict form, the effect of yes answers there is that the recovery would be 100 percent of the amount listed on the response to Question 7.

* * *

THE COURT (to the jury): What is your feeling now?

JURY FOREMAN: Could we have a moment to discuss that?

THE COURT: All right.
(Jury dismissed from courtroom at 4:05 p.m.)
(Jury returned to courtroom at 4:13 p.m.)

> THE COURT: Based on a previous discussion, [jury foreman] Mr. Alexander, it is the intention of the jury that the plaintiff recover a total amount of what?
>
> JURY FOREMAN: $3.2 million.
>
> THE COURT: If everyone agrees with that, raise your right hand. The jury has raised their right hand indicating that's their feeling in this particular case.

The amended verdict form returned by the jury after the jury's eight-minute further deliberation had a handwritten line through the "8.6 million" amount and a handwritten notation of "3.2 million @ 100%."

On March 7, 2011, the trial court entered judgment against CSX in the amount of $3.2 million in compensatory damages. CSX moved under Tenn. R. Civ. P. 50.02 for judgment notwithstanding the verdict, or, in the alternative, for a new trial. The trial court conducted a hearing on CSX's motion on August 19, 2011. At the end of the hearing, the court stated as follows:

> The Court has come to this conclusion, that the motion for new trial is warranted. I hate to admit this because a lot of the problems come back to me, but in particular the jury instructions I feel were incomplete, therefore insufficient and inadequate and incorrect. This was illustrated graphically by their response and what we had to do to try to understand what they meant.
>
> During 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, and probably the worst of those was when we started talking about this thyroid cancer which he apparently didn't have. The Court took it upon itself to make a comment about that and made a comment which 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 that and it was not being considered now.
>
> I deeply regret what I just said because, you know, I like to get cases over with, but at the same time I feel that this one was

> probably not handled appropriately and needs to be handled again, whether by me or somebody else. So that's the extent of what I want to say today.

The trial court entered an order on September 6, 2011, granting CSX a new trial and stating, "[t]he Court makes this decision 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." (Emphasis added.) The case was subsequently transferred to a second Knox County circuit court judge, the Honorable Dale C. Workman. Judge Workman granted CSX's motion to exclude the causation testimony of all of the plaintiff's expert witnesses – the same testimony that had earlier been found to be admissible by the first trial judge, Judge Wimberly, and had been thereafter presented to the jury. Judge Workman then granted CSX's motion for summary judgment on the ground that there was no expert testimony establishing causation, and dismissed the case. Plaintiff timely filed a notice of appeal.

II.

Plaintiff raises the issues of whether the trial court erred in: (1) further instructing the jury and permitting it to further deliberate after it had returned a proper verdict; (2) granting CSX a new trial; and (3) granting CSX summary judgment and dismissing the complaint. CSX does not raise any separate issues. The sufficiency of the evidence to support the jury's verdict(s) is not before us.

III.

We first address the trial court's jury instructions. The trial court instructed the jury in accordance with FELA, the federal statute that provides a cause of action for employees of railroads engaged in interstate commerce who are injured on the job. *See* 45 U.S.C.A. § 51; *see also* ***Spencer v. Norfolk S. Rwy. Co.***, No. E2012-01204-COA-R3-CV, 2013 WL 3946118 at *1, n.1 (Tenn. Ct. App. E.S., filed July 29, 2013). In ***Spencer***, this Court recently reiterated the following background and principles governing a FELA claim:

> "The impetus for the [Federal Employers' Liability Act ("FELA"), 45 U.S.C.A. §§ 51–60] was that throughout the 1870's, 80's, and 90's, thousands of railroad workers were being killed and tens of thousands were being maimed annually in what came to be increasingly seen as a national tragedy, if not a national scandal." *CSX Transp., Inc. v. Miller*, 159 Md. App. 123, 858 A.2d 1025, 1029 (Md. Ct. Spec. App. 2004). "In

response to mounting concern about the number and severity of railroad employees' injuries, Congress in 1908 enacted FELA to provide a compensation scheme for railroad workplace injuries, pre-empting state tort remedies." *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 165, 127 S.Ct. 799, 166 L.Ed.2d 638 (2007) (citing *Second Employers' Liability Cases*, 223 U.S. 1, 53-55, 32 S.Ct. 169, 56 L.Ed. 327 (1912)). FELA was passed to extend statutory protection to railroad workers because of the high rate of injury to workers in that industry. *Blackburn v. CSX Transp., Inc.*, No. M2006-01352-COA-R10-CV, 2008 Tenn. App. LEXIS 336, 2008 WL 2278497, at *8 (Tenn. Ct. App. May 30, 2008); *Reed v. CSX Transp., Inc.*, No. M2004-02172-COA-R3-CV, 2006 Tenn. App. LEXIS 620, 2006 WL 2771029, at *2 (Tenn. Ct. App. Sept. 26, 2006). "In adopting FELA, Congress created a remedy that 'shifted part of the human overhead of doing business from employees to their employers.' " *Pomeroy v. Ill. Cent. R.R. Co.*, No. W2004-01238-COA-R3-CV, 2005 Tenn. App. LEXIS 294, 2005 WL 1217590, at *9 (Tenn. Ct. App. May 19, 2005) (quoting *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994)). Congress recognized that the railroad industry was better able to shoulder the cost of industrial injuries and deaths than were injured workers or their families. *Miller*, 159 Md. App. at 131, 858 A.2d 1025 (citing *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 431-32, 78 S.Ct. 394, 2 L.Ed. 2d 382 (1958)). "[FELA] was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations." *Pomeroy*, 2005 Tenn. App. LEXIS 294, 2005 WL 1217590, at * 17 (quoting *Wilkerson v. McCarthy*, 336 U.S. 53, 68, 69 S.Ct. 413, 93 L.Ed. 497 (1949) (Douglas, J., concurring)). The Federal Employers' Liability Act provides, in relevant part:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in

> its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C.A. § 51. The statute is broad and remedial, and it is to be liberally construed in order to accomplish the aforementioned purposes. ***Blackburn***, 2008 Tenn. App. LEXIS 336, 2008 WL 2278497, at *8; ***Reed***, 2006 Tenn. App. LEXIS 620, 2006 WL 2771029, at *2.

"Unlike a typical workers' compensation scheme, which provides relief without regard to fault, Section 1 of FELA provides a statutory cause of action sounding in negligence. . . ." ***Sorrell***, 549 U.S. at 165. Under FELA, the railroad-employer's liability is premised upon its negligence. ***Reed***, 2006 Tenn. App. LEXIS 620, 2006 WL 2771029, at *2. In order to recover, an employee must show:

> (1) that an injury occurred while the employee was working within the scope of his employment;
>
> (2) that the employment was in the furtherance of the railroad's interstate transportation business;
>
> (3) that the employer railroad was negligent; and
>
> (4) that the employer's negligence played some part in causing the injury.

Id. (*citing* ***Jennings v. Ill. Cent. R.R. Co.***, 993 S.W.2d 66, 69-70 (Tenn. Ct. App. 1998)). . . . FELA does not define negligence. ***Id.*** When considering whether an employer was negligent under FELA, "courts are to analyze the elements necessary to establish a common law negligence claim." ***Id.*** (*citing* ***Adams v. CSX Transp., Inc.***, 899 F.2d 536, 539 (6th Cir. 1990); ***Davis v. Burlington Northern, Inc.***, 541 F.2d 182 (8th Cir. 1976), cert. denied, 429 U.S. 1002, 97 S.Ct. 533, 50 L.Ed. 2d 613 (1976)). The issue of negligence is to be determined "by the common law principles as established and applied in federal courts." ***Reed***, 2006 Tenn. App. LEXIS 620, 2006 WL 2771029, at *2

> (citations omitted). Thus, the plaintiff must prove the traditional elements of negligence: duty, breach, foreseeability, and causation. *Id.* (citing ***Robert v. Consol. Rail Corp.***, 832 F.2d 3, 6 (1st Cir. 1987)). However, FELA deviated from the common law by abolishing the railroad's common law defenses of assumption of the risk, § 54, and it rejected contributory negligence in favor of comparative negligence, § 53. ***Sorrell***, 549 U.S. at 166, 168. In FELA cases, an employee's negligence does not bar relief, but the employee's recovery is diminished in proportion to his fault. *Id.* at 166.
>
> "Under FELA, the employer railroad has a duty to provide a reasonably safe workplace." ***Reed***, 2006 Tenn. App. LEXIS 620, 2006 WL 2771029, at *3 (citing ***Bailey v. Cent. Vt. Ry.***, 319 U.S. 350, 352, 63 S.Ct. 1062, 1062, 87 L.Ed. 1444 (1943); ***Ulfik v. Metro-North Commuter R.R.***, 77 F.3d 54, 58 (2d Cir.1996); ***Adams***, 899 F.2d at 539). This does not mean that the railroad has the duty to eliminate all workplace dangers, but it does have the "duty of exercising reasonable care to that end." ***Van Gorder v. Grand Trunk W. R.R., Inc.***, 509 F.3d 265, 269 (6th Cir. 2007) cert. denied, 555 U.S. 994, 129 S.Ct. 489, 172 L.Ed. 2d 356 (2008) (citing ***Baltimore & Ohio S. W.R. Co. v. Carroll***, 280 U.S. 491, 496, 50 S.Ct. 182, 74 L.Ed. 566 (1930)). "A railroad breaches its duty to its employees when it fails to use ordinary care under the circumstances or fails to do what a reasonably prudent person would have done under the circumstances to make the working environment safe." *Id.* (citing ***Tiller v. Atl. C.L.R. Co.***, 318 U.S. 54, 67, 63 S.Ct. 444, 87 L.Ed. 610 (1943); ***Aparicio v. Norfolk & W. Ry.***, 84 F.3d 803, 811 (6th Cir. 1990)). In other words, "a railroad breaches its duty when it knew, or by the exercise of due care should have known that prevalent standards of conduct were inadequate to protect the plaintiff and similarly situated employees." *Id.* at 269-70 (internal quotations omitted).

Spencer, 2013 WL 3946118 at *1-2 (footnotes omitted) (quoting ***Jordan v. Burlington N. Santa Fe R.R. Co.***, No. W2007-00436-COA-R3-CV, 2009 WL 112561 at *5-6 (Tenn. Ct. App. W.S., filed Jan. 15, 2009)).

As already stated, CSX asserted the defense of contributory negligence. FELA provides as follows regarding contributory negligence:

> In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C.A. § 53 (italics in original). Plaintiff did not argue that decedent Payne was not contributorily negligent to some extent by virtue of his years of smoking. Rather, the plaintiff asserted that the FELA's proviso quoted above, allowing for a full recovery notwithstanding contributory negligence if the defendant violated "any statute enacted for the safety of employees," applied because CSX violated the Locomotive Inspection Act[2] and

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[2] The Locomotive Inspection Act is codified at 49 U.S.C.A. § 20701 and provides in pertinent part:

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances–
>
> (1) are in proper condition and safe to operate without unnecessary danger of personal injury;
>
> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
>
> (3) can withstand every test prescribed by the Secretary under this chapter.

various safety regulations[3] enacted or promulgated for employees' safety. The United States Supreme Court recognized nearly a century ago that, under FELA,

> contributory negligence on the part of the employee does not operate even to diminish the recovery where the injury has been occasioned in part by the failure of the carrier to comply with the exactions of an act of Congress enacted to promote the safety of employees. In that contingency the statute abolishes the defense of contributory negligence, not only as a bar to recovery, but for all purposes.

Grand Trunk W. Ry. Co. v. Lindsay, 233 U.S. 42, 49-50 (1914). The federal courts have referred to a violation of a statute or regulation enacted for the safety of employees as "negligence per se." *See, e.g.*, ***Ries v. Nat'l R.R. Passenger Corp.***, 960 F.2d 1156, 1158-59 (3rd Cir. 1992); ***Walden v. Ill. Cent. Gulf R.R.***, 975 F.2d 361, 364 (7th Cir. 1992).

In this case, the trial court instructed the jury with respect to the issue of contributory negligence prior to its initial deliberations; but the court did not inform the jury of the legal effect of a finding that CSX was guilty of negligence per se. Neither side requested a jury instruction on negligence per se, and neither side objected at any time to the lack of such an instruction. On appeal, neither side has provided any legal authority suggesting that a jury instruction is required on the FELA's provision regarding negligence per se, *i.e.*, that, as a matter of law, "no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 45 U.S.C.A. § 53. Plaintiff, noting that the jury's second damage award of "$3.2 @ 100%" is reduced by roughly 62% of its initial damage award of $8.6 million, argues that the trial court, by its instruction after the jury returned its verdict, essentially invited the jury to nullify FELA's 45 U.S.C.A. § 53 provision ("Section 53"). Plaintiff cites ***Shepard v. Grand Trunk W. R.R.***, No. 92711, 2010 WL 1712316 (Ohio Ct. App., filed Apr. 29, 2010),

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[3] FELA provides that certain safety regulations are deemed to be statutory authority for FELA purposes:

> A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of Title 49, or by a State agency that is participating in investigative and surveillance activities under section 20105 of Title 49 is deemed to be a statute under sections 53 and 54 of this title.

45 U.S.C.A. § 54a.

a FELA case involving a fact pattern similar in many respects to the case at bar,[4] in which the Ohio Court of Appeals stated the following:

> Here, the jury was specifically instructed that Shepard alleged that two statutory violations were at issue: (1) the FELA, which requires negligence and provides for comparative negligence and (2) the [Locomotive Inspection Act], which imposes absolute liability. Under FELA, the jury found Grand Trunk negligent and also found Shepard comparatively negligent. But because the jury further found that the railroad had violated the LIA, under well-settled law, it was not entitled to apportionment of damages under a comparative negligence defense.
>
> * * *
>
> Grand Trunk's contention that the *post-verdict discussions with the jury demonstrated that they believed the award was going to be reduced* is not persuasive – a party may not challenge the validity of the verdict using post-verdict discussions with jurors. The jury was properly instructed and is presumed to have followed those instructions.

Id., 2010 WL 1712316 at *13-14 (emphasis added; internal citations omitted). The implication of the italicized language is clear – the jury in ***Shepard*** was not instructed on the legal effect of its finding of negligence per se, and the court there found no error in the trial court's failure to advise the jury of this legal effect.

We 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. As the Tennessee Supreme Court has stated, "[i]t is for the jury to determine the facts and the trial judge to apply the appropriate principles of law to those facts." ***Smith Cty. Educ. Ass'n v. Anderson***, 676 S.W.2d 328, 338 (Tenn. 1984) (holding that "it was improper and unnecessary to submit questions which required the jury to determine whether or not the Board negotiated in good faith" because "[w]hether the Board committed acts that amount to a failure to negotiate in good faith was a question for the trial judge and not the jury."). Section 53 of the FELA eliminating contributory negligence when a defendant is guilty of

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[4] The plaintiff in ***Shepard*** alleged injuries resulting from negligent exposure to diesel fumes and asbestos. The plaintiff in that case "admitted to a long history of heavy cigarette smoking." 2010 WL 1712316 at *2.

negligence per se provides a principle of law to be applied by the trial court after the jury has determined the facts. "We entrust the responsibility of resolving questions of disputed fact, including the assessment of damages, to the jury." ***Meals ex rel. Meals v. Ford Motor Co.***, No. W2010-01493-SC-R11-CV, 2013 WL 4673609 at *3 (Tenn., filed Aug. 30, 2013) (citing Tenn. Const. art. I, § 6; ***Spence v. Allstate Ins. Co.***, 883 S.W.2d 586, 594 (Tenn. 1994)). Regarding the jury's resolution of factual questions and its verdict, we have observed that

> [t]he jury's verdict is the foundation of the judgment in civil cases where the parties have invoked their constitutional or statutory right to a jury trial. It represents the jury's final statement with regard to the issues presented to them. The verdict, whether general or special, is binding on the trial court and the parties unless it is set aside through some recognized legal procedure. Accordingly, neither the trial court nor the parties are free to disregard a jury's verdict once it has been properly returned.

Ladd ex rel. Ladd v. Honda Motor Co., 939 S.W.2d 83, 94 (Tenn. Ct. App. 1996); *see also* ***Jordan***, 2009 WL 112561 at *17 (stating that "[t]he United States Supreme Court has repeatedly emphasized the preeminence of jury decisions in FELA matters.") (internal quotation marks omitted).

In this case, the jury was instructed on all of the pertinent questions upon which it was properly called to decide – whether the defendant was negligent; whether the defendant's negligence caused plaintiff's injury; whether the plaintiff was negligent and caused his own injury; the percentage of fault attributed to plaintiff by his own negligence; whether the defendant violated the Locomotive Inspection Act or regulations enacted for the safety of employees; whether any such violation caused plaintiff's injury; and the amount of damages. The jury answered these questions in a verdict form that has been reproduced in its entirety earlier in this opinion. The jury resolved all of the issues in a clear, complete, and consistent manner. There is nothing contradictory in the verdict. Under these circumstances, in keeping with the litigants' "constitutionally protected right to have the disputed factual issues in their case decided by a jury," ***Duran v. Hyundai Motor Am., Inc.***, 271 S.W.3d 178, 209 (Tenn. Ct. App. 2008), we have recognized "the well-known principle that it is the trial court's duty to enter a judgment that is consistent with the jury verdict."[5] ***Leverette v. Tenn. Farmers Mut. Ins. Co.***, No. M2011-00264-COA-R3-CV, 2013 WL 817230 at *29 (Tenn. Ct. App. M.S., filed Mar. 4, 2013).

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[5]This duty is, of course, concomitant with the trial court's duty to decide whether to approve the verdict as thirteenth juror in ruling on a motion for new trial, as further discussed later in this opinion.

In *Leverette* we noted some "narrow exceptions" to this general principle, including one that "is found at Tenn. R. Civ. P. 49.02, which gives the trial court some leeway *when there are inconsistencies between a general verdict and a special verdict.*" ***Id.*** (Emphasis added.) Rule 49.02 provides as follows:

> The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation and instruction as may be necessary to enable the jury to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. *When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers*. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict, or may return the jury for further consideration of its answers and verdict, or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but shall return the jury for further consideration of its answers and verdict or shall order a new trial.

(Emphasis added); *see also* ***Concrete Spaces, Inc. v. Sender***, 2 S.W.3d 901, 911 (Tenn. 1999) (observing that, although "[w]here a judgment is based upon inconsistent findings by a jury it is the duty of the appellate court to reverse and remand the case for a new trial, . . . [w]ell-settled law requires courts to construe the terms of a verdict in a manner that upholds the jury's findings, if it is able to do so.").

In the present case, the trial court, presented with a consistent and complete jury verdict, nevertheless and *sua sponte,* instructed the jury that the legal effect of its finding of negligence per se was that "the concept of contributory negligence may not apply in this case." The trial court then asked the jury "what is your feeling now?" We agree with plaintiff's argument that the trial court's new and unnecessary further instruction and

invitation to reconsider its verdict was a prejudicial abuse of discretion.[6] It is true, as a general principle, that "a jury may amend or change their verdict at any time before they have been discharged, or, if they bring in an informal or insufficient verdict, the court may send them back to the jury room, with directions to amend it, and put it in proper form." ***George v. Belk***, 49 S.W. 748, 749 (Tenn. 1899); *see also* ***State v. Williams***, 490 S.W.2d 519, 520 (Tenn. 1973); ***Riley v. State***, 227 S.W.2d 32, 34-35 (Tenn. 1950); ***Oliver v. Smith***, 467 S.W.2d 799, 804 (Tenn. Ct. App. 1971). But in these cases citing and applying this general rule, the jury's initial verdict was defective in some manner. There is no defect in the jury's first verdict in this case. Tenn. R. Civ. P. 49.02 mandates that "[w]hen the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers." Under these circumstances, where the jury was properly and completely instructed and returned a consistent and complete verdict in accordance with the court's instructions, we hold it was error for the trial court to *sua sponte* further instruct the jury upon an unnecessary matter and invite the jury to reconsider the amount of damages it initially awarded.

IV.

The trial court, in its memorandum opinion granting a new trial, stated that "in particular the jury instructions I feel were incomplete, therefore insufficient and inadequate and incorrect." Our review of the record and transcript leads us to the conclusion that the "incompleteness" the trial court mentions is a reference only to the initial absence of an instruction regarding the legal effect of a finding of negligence per se. This conclusion is supported by the trial court's further comment that the "incompleteness" of the jury instructions "was illustrated graphically by their response and what we had to do to try to understand what they meant." Our conclusion is further bolstered by the fact, as we are about to demonstrate, that the instructions given to the jury before they retired initially to consider their verdict were correct and complete. The trial court did not specify any other error in its jury instructions in either its order granting a new trial or its incorporated memorandum opinion. We do not believe the trial court ruled that there were any other reversible errors in its instructions. Despite this belief, we have reviewed all of CSX's objections to the jury

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[6]This is not to say, however, that a trial court's initial instruction to a jury that informs the jury of the effect of its negligence per se finding under FELA would be erroneous, and our opinion should not be construed as so holding. We merely hold that such an instruction is not required, and that the trial court's further instruction in this case after the jury deliberated and returned a verdict was unwarranted and resulted in error.

instructions. both those raised by CSX orally after the jury was instructed as well as those in the later motion for a new trial.[7]

In reviewing the trial court's disposition of a motion for new trial in a FELA case, we apply the federal standard. ***Melton v. BNSF Rwy. Co.***, 322 S.W.3d 174, 181 (Tenn. Ct. App. 2010). In ***Melton***, we observed that

> [u]nder the federal 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. 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. We review the trial court's decisions on motions for new trial on an abuse of discretion standard.

Id. (internal citations and quotation marks omitted). In this case, the trial court gave no indication that it was granting a new trial based on either misconduct affecting the jury or insufficiency of the evidence. The trial court's ruling was grounded in its perceived errors of law.

The following principles apply to our review of the trial court's jury instructions:

> "Jury instructions must be correct and fair as a whole, although they do not have to be perfect in every detail." ***Pomeroy*** [***v. Illinois Central R.R. Co.***, No. W2004-01238-COA-R3-CV], 2005 Tenn. App. LEXIS 294, 2005 WL 1217590, at *3 [(Tenn. Ct. App. May 19, 2005)] (citing ***Wielgus v. Dover Indus.***, 39 S.W.3d 124, 131 (Tenn. Ct. App.2001)). Jury instructions must be plain and understandable, and inform the jury of each applicable legal principle. ***Id.*** On appeal, we review jury instructions in their entirety and in context of the entire charge. ***Id.*** We will not invalidate a jury charge if, when read as a whole, it fairly defines the legal issues in the case and does not mislead the jury. ***Hensley v. CSX Transp., Inc.***, No. E2007-00323-COA-R3-CV, 278 S.W.3d 282, 2008 Tenn. App. LEXIS

[7]None of CSX's numerous objections to the jury instructions included an argument that the trial court should have instructed the jury on the legal effect of its finding that CSX was negligent per se. As already noted, neither party requested such an instruction, and neither party objected to the absence of such an instruction in the given instructions.

> 147, 2008 WL 683755, at *2 (Tenn. Ct. App. Mar. 14, 2008) *perm. app. denied*, 2008 Tenn. LEXIS 867 (Tenn. Nov. 17, 2008). "The trial court should give requested special jury instructions when they are a correct statement of the law, embody the party's legal theory, and are supported by the proof." ***Pomeroy***, 2005 Tenn. App. LEXIS 294, 2005 WL 1217590, at *3 (citing ***Otis v. Cambridge Mut. Fire Ins. Co.***, 850 S.W.2d 439, 445 (Tenn.1992)). "However, the trial court may decline to give a special instruction when the substance of the instruction is covered in the general charge." ***Id.*** We will not reverse the denial of a special request for an additional jury instruction where the trial court fully and fairly charged the jury on the applicable law. ***Id.***

Spencer, 2013 WL 3946118 at *3 (quoting ***Jordan***, 2009 WL 112561 at *11).

In its motion for new trial, CSX argued that the trial court's instruction on causation was erroneous, asserting that the court "erroneously failed to charge the jury on proximate causation." The trial court instructed the jury on causation as follows:

> The mere fact that a person suffered harm, injury, illness or death standing alone without more does not permit an inference that the harm, injury, or death was caused by anyone's negligence.
>
> You have heard reference to the Federal Employers' Liability Act or FELA. That law provides in part that every common carrier by railroad engaging in commerce between any of several states shall be liable for damages to any person suffering injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, and such injury would include illness or death.
>
> * * *
>
> So, again, the burden of proof in any case such as this is upon the plaintiff to establish by a preponderance of the evidence, first, that the defendant was negligent in one or more of the particulars alleged by plaintiff and, second, that the defendant's

> negligence caused or contributed in whole or in part to the harm, illness or death of the plaintiff.
>
> The purpose of this action, illness, harm or death is said to be caused or contributed to by an act or failure to act when it appears from a preponderance of the evidence the act or failure to act played any part, in whole or in part, in bringing about or actually causing illness or death.
>
> So if you should find from the evidence in the case that any negligence of the defendant contributed in any way toward illness or death suffered by the plaintiff you may find that plaintiff's illness or death was caused by the defendant's act or failure to act.
>
> Stated another way, an act or failure to act is a cause of illness or death if the illness or death would not have occurred except for the act or failure to act even though the act or failure to act combined with other causes. So this does not mean that the law recognizes only one cause of illness or death consisting of only one factor, or one thing or the conduct of only one person. On the contrary, many factors or things where the conduct of two or more persons may operate at the same time either independently or together to cause illness, harm or death, and in such a case each may be a cause for the purposes of determining liability in a case such as this.

As can be seen, CSX correctly argued that the trial court's instruction does not include the proximate cause standard. The United States Supreme Court addressed the appropriate FELA standard of causation in ***CSX Transp. v. McBride***, 131 S. Ct. 2630 (2011), stating as follows:

> We conclude that the Act [FELA] does not incorporate "proximate cause" standards developed in nonstatutory common-law tort actions. The charge proper in FELA cases, we hold, simply tracks the language Congress employed, informing juries that a defendant railroad caused or contributed to a plaintiff employee's injury if the railroad's negligence played any part in bringing about the injury.

* * *

> FELA's language on causation . . . "is as broad as could be framed." *Urie v. Thompson*, 337 U.S. 163, 181, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949). Given the breadth of the phrase "resulting in whole or in part from the [railroad's] negligence," and Congress' "humanitarian" and "remedial goal[s]," we have recognized that, in comparison to tort litigation at common law, "a relaxed standard of causation applies under FELA." *Gottshall*, 512 U.S., at 542-543, 114 S.Ct. 2396. In our 1957 decision in *Rogers* [*v. Mo. Pac. R.R.*, 352 U.S. 443], we described that relaxed standard as follows:
>
> > "Under [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S., at 506, 77 S.Ct. 443.

McBride, 131 S. Ct. at 2634, 2636. The *McBride* Court clarified that "*Rogers* announced a general standard for causation in FELA cases, not one addressed exclusively to injuries involving multiple potentially cognizable causes," *id.* at 2639, and conclusively determined that a proximate cause instruction is not required in FELA cases. In the present case, the trial court's causation instruction closely tracks, and in one instance directly quotes, FELA's causation language. We find no error in the trial court's causation instruction.

CSX also argued in its motion for new trial that the trial court erred in giving an instruction on contributory negligence that provided a different causation standard from the one applicable to the defendant. The United States Supreme Court has ruled that in a FELA case the same standard of causation applies in assessing both the negligence of a defendant railroad and the contributory negligence of a plaintiff employee. *Norfolk S. Rwy. Co. v. Sorrell*, 549 U.S. 158, 160 (2007). In this case the trial court instructed the jury on contributory negligence as follows:

> [I]n addition to denying any negligence on the part of the defendant caused harm to the plaintiff, a defendant may also allege as a further defense that some negligence on the part of the plaintiff himself was a cause of any harm that plaintiff suffered or was the sole and only cause of any harm that the

plaintiff suffered. We refer to that defense as contributory negligence.

Contributory negligence then is fault on the part of a plaintiff which corroborates in some degree with the negligence of another and so helps to bring about harm to the plaintiff or is itself the sole cause of harm to the plaintiff.

By the defense of contributory negligence, the defendant is in effect alleging that even though the defendant may have been guilty of some negligent act or failure to act which was one of the causes of harm suffered by the plaintiff, the plaintiff himself by his own failure to use ordinary and reasonable care for his own safety also contributed to one of the causes of harm suffered by the plaintiff.

With respect to the defense of contributory negligence, the burden is on the defendant claiming the defense to establish by a preponderance of the evidence the claim that the plaintiff was at fault, the negligence on the part of the plaintiff contributed to one of the causes of harm suffered by the plaintiff.

As to contributory negligence, the FELA, the law in question provides in part, "In all actions brought against any railroad to recover damages for personal injury to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the negligence attributable to the employee."] So if 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.

If you should find that the defendant was not guilty of negligence or the defendant was negligent but such negligence was not a cause in whole or in part of harm suffered by the plaintiff, then your verdict would be for the defendant.

This contributory negligence instruction given by the trial court does not suggest a different causation standard than the one applicable to the defendant's negligence. It does not define "causation" differently from the court's earlier instruction. It directly quotes the FELA's provision regarding contributory negligence. We find no error in the trial court's contributory negligence instruction.

CSX also asserted error in the trial court's foreseeability instruction, arguing that it was insufficient as a matter of law. We recently addressed a similar challenge in *Spencer*. There we stated as follows:

> "[R]easonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence." ***Gallick v. Baltimore & Ohio R.R. Co.***, 372 U.S. 108, 83 S.Ct. 659, 665, 9 L.Ed.2d 618 (1963). In ***Gallick***, the United States Supreme Court noted that the jury in that case correctly had been charged with regard to reasonable foreseeability of harm, and stated:
>
> > The jury had been instructed that negligence is the failure to observe that degree of care which people of ordinary prudence and sagacity would use under the same or similar circumstances; and that defendant's duty was measured by what a reasonably prudent person would anticipate as resulting from a particular condition – "defendant's duties are measured by what is reasonably foreseeable under like circumstances" – by what "in the light of the facts then known, should or could reasonably have been anticipated."
>
> ***Gallick v. Baltimore & Ohio R.R. Co.***, 372 U.S. 108, 83 S.Ct. 659, 665-66, 9 L.Ed.2d 618 (1963) (footnotes omitted).
>
> With regard to foreseeability and notice in FELA cases, the Sixth Circuit has explained:
>
> > The law is clear that notice under the FELA may be shown from facts permitting a jury to infer that

> the defect could have been discovered by the exercise of reasonable care or inspection:
>
> > Under familiar law, defendant could not be convicted of negligence, absent proof that such defect was known, or should or could have been known, by defendant, with opportunity to correct it. This rule is applicable to FELA actions where negligence is essential to recovery. The establishment of such an element, however, may come from proof of facts permitting a jury inference that the defect was discovered, or should have been discovered, by the exercise of reasonable care or inspection.
>
> ***Szekeres v. CSX Transportation, Inc.***, 617 F.3d 424, 430–31 (6th Cir. 2010) (quoting ***Miller v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.***, 317 F.2d 693, 695 (6th Cir. 1963)).
>
> Similarly, our own Supreme Court has stated:
>
> > To 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] and similarly situated employees."
>
> ***Mills v. CSX Transportation, Inc.***, 300 S.W.3d 627, 633 (Tenn. 2009) (quoting ***Van Gorder v. Grand Trunk W. R.R.***, 509 F.3d 265, 269-70 (6th Cir. 2007)).

Spencer, 2013 WL 3946118 at *3-4 (footnote omitted; some internal citations omitted). The trial court in this case instructed the jury on foreseeability as follows:

> [D]eciding whether ordinary care was exercised in the given case, the conduct in question must be viewed in the light of all surrounding circumstances as shown by the evidence in the case at the time.

> 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 exercise 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.

We find this instruction to be substantially similar to the one approved by the Supreme Court in ***Gallick***. We find no error in the court's foreseeability instruction.

CSX also argued that the trial court erred in failing to charge the jury with its special request that CSX was only required to provide a reasonably safe workplace, not a perfect work environment. CSX submitted the following jury instruction:

> Although the Railroad is duty-bound to provide a reasonably safe place to work, this does not mean that the Railroad must provide a perfect work environment. The Railroad Defendant is not bound to anticipate every possible incident or accident which might occur, because a railroad is necessarily attended by some danger and it is impossible to eliminate all danger. The law does not make the Defendant an insurer of the safety of its employees, nor of the safety of the places in which they work. The railroad is not held to an absolute responsibility for the reasonably safe condition of the places where the Plaintiff might work, but only to the duty of exercising reasonable care to that end, the degree of care being commensurate with the danger reasonably to be anticipated.

To the extent that this instruction incorporates a correct statement of the law, the essence of the instruction was provided to the jury in our earlier-referenced instructions on duty of care, its definitions of negligence, causation, and foreseeability, and the following additional instruction of the trial court:

> [t]he employer is required to use ordinary and reasonable care under the circumstances to maintain and keep places of work in a reasonably safe condition for the employee.

> This does not mean the employer is a guarantor or insurer of the safety of the place of work. The extent of the employer's duty is to exercise ordinary care under the circumstances then existing[.]

CSX contends that the trial court erroneously charged the jury on both a pre-1976 and post-1976 version of 49 C.F.R. § 174.700, a federal regulation governing the shipping of radioactive material. Part of plaintiff's theory presented at trial was that CSX negligently caused Payne's exposure to radioactive materials shipped in and out of a metal scrap yard in Knoxville called David Witherspoon Industries, Inc. ("DWI"). DWI was licensed to receive and recycle scrap metal contaminated with low levels of radioactivity. CSX presented testimony of a former DWI employee that DWI received contaminated metal from 1964 until 1972. The trial court instructed the jury on the pre-1976 and post-1976 versions of 49 C.F.R. § 174.700 as follows:

> A 1961 regulation provided that no person should remain in a car containing radioactive material unnecessarily, and the shipper must furnish the carrier with such information and equipment as is necessary for the protection of the carrier's employees.
>
> [A] section from 1976 provides a person may not remain unnecessarily in a railcar containing radioactive materials.

CSX argues that the court erred by instructing the post-1976 regulation because DWI "stopped receiving contaminated scrap altogether in 1972." Plaintiff responds by arguing that it was not conclusively established that no radioactive shipments went either in *or out* of DWI after 1972. We agree with plaintiff. Plaintiff presented the videotaped deposition of a corporate representative of CSX, William Bullock, who, when asked whether CSX or its corporate predecessors "did any monitoring of train cars that may have been calling in or out of" DWI prior to 1985, responded, "we didn't, but at the same time we didn't think there was a concern" that "we needed to be looking into radiation exposure of our workers." In short, 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, and consequently the trial court did not err in its instruction regarding the post-1976 federal regulation regarding the shipping of radioactive materials.

CSX raised several other objections to the jury instructions in its motion for new trial, including the court's refusal to specifically instruct the jury according to CSX's special requests (1) regarding actual or constructive notice of an alleged defective condition and

notice as to "known dangers" in the workplace; (2) to charge the jury that the "mere presence of potentially harmful substances" in the workplace is insufficient by itself to establish negligence; (3) to charge the jury that "there should be no bias against a corporate defendant"; (4) regarding the proper scope of damages, specifically that no punitive damages or loss of consortium damages for Payne's widow should be awarded; and (5) to charge the jury that it must not speculate or guess as to whether CSX's negligence caused plaintiff's damages. We have reviewed all of these objections and arguments, comparing CSX's 40 written special requests for jury instructions with the trial court's instructions. We find that, to the extent the requested instructions are relevant and correctly state the law, they were adequately covered and presented to the jury in the court's instructions. In instructing a jury, "the trial court may decline to give a special instruction when the substance of the instruction is covered in the general charge." ***Pomeroy***, 2005 WL 1217590, at *3; *see also* ***Otis***, 850 S.W.2d at 439. "The fact that a special request for jury instruction asserts a correct rule of law does not make it proper jury charge material." ***Godbee v. Dimick***, 213 S.W.3d 865, 881 (Tenn. Ct. App. 2006).

The jury instructions presented by the trial court in this case, viewed as a whole, are correct, fair and complete. The court's jury charge fairly defined the legal issues in the case. The instructions were not misleading to the jury. The jury returned a verdict in accordance with the court's clear instructions; the only indication of potential confusion came after the court's further unnecessary and erroneous instruction after the verdict. We therefore hold that none of the trial court's jury instructions provide grounds for a new trial.

V.

In its order granting a new trial, the trial court based its ruling on "specific prejudicial errors including, but not limited to, instructional and evidentiary errors." The court did not specify what evidentiary rulings it considered to be erroneous. The trial court stated the following in its oral memorandum opinion:

> During 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, and probably the worst of those was when we started talking about this thyroid cancer which he apparently didn't have.

The trial court did not make any other specific references regarding other evidentiary decisions at trial. The evidence regarding thyroid cancer was briefly presented during plaintiff's cross-examination of one of CSX's medical experts who apparently misdiagnosed Payne with thyroid cancer at some point during his treatment.

The trial in this case was lengthy.[8] The jury heard the case over a two-week period. The testimony of 26 witnesses was presented. The trial transcript is over 2,500 pages long, and the exhibits are sequentially marked up to number 574. Against this backdrop, the following is the entirety of the objected-to evidence of thyroid cancer, which came into proof by way of the cross-examination of Dr. John Craighead, a medical expert called by CSX.

> Q: Of course, you saw a thyroid cancer in Mr. Payne, didn't you?
>
> A: Yes.
>
> Q: And that's caused by radiation, isn't it?
>
> A: That's one of the contributing causes, yes. It's not the only cause. Most individuals we don't know what the cause was.

CSX objected and moved for a mistrial or a curative instruction from the trial court. The trial court provided the following curative instruction to the jury:

> Before we get to the next witness, 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.

CSX argues that a new trial was warranted because the curative instruction was insufficient in that the "court never unambiguously told the jury that Payne did not have thyroid cancer." We hold, however, that there is very little substantive difference between the statement that "the plaintiff did not suffer from thyroid cancer" and "there's no claim in this case that the plaintiff suffered from thyroid cancer." The clear import of the trial court's 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. "The jury is presumed to have followed the trial court's instructions." ***Johnson v. Tenn. Farmers Mut. Ins. Co.***, 205 S.W.3d 365, 375 (Tenn. 2006); *see also* ***Johnson v. Lawrence***, 720 S.W.2d 50, 60 (Tenn. Ct. App. 1986) ("We must assume th[at] the jury followed the trial court's [curative] instruction unless there is proof to the contrary. If error was committed . . . in

---

[8]Indeed, in its final remark to the jury, the trial court thanked the jury for serving "on the longest case that the court has had in more than 20 years" and stated, "I actually don't know of a longer case in this court, so that's something."

asking the question, it was cured by the trial court's instruction."). We hold that the trial court's curative instruction effectively cured any error in the presentation of the testimony regarding thyroid cancer. Given the court's timely and accurate curative instruction, any prejudice to CSX resulting from the improper evidence was remedied.

CSX also argues that a new trial was warranted due to the plaintiff's presentation of a powerpoint slide regarding cesium contamination of an area in Oak Ridge where Payne worked. During the 1960s, an area of railroad track near the Y-12 facility in Oak Ridge became contaminated with low levels of cesium, a radioactive element. Payne worked in that area occasionally for about a year of his career. In the 1980s, the U.S. Department of Energy undertook a remedial cleanup of the contaminated area, removing a section of track and the ballast rock from the roadbed. In this case, CSX moved in limine before trial to exclude any evidence of cesium contamination. The trial court declined to grant the motion, taking it under consideration to see how the proof developed at trial, with the intention of ruling on objections as they came up. During trial, plaintiff's counsel agreed not to present cesium evidence in his case-in-chief. During cross-examination of one of CSX's witnesses, plaintiff's counsel put up a powerpoint slide saying "Oak Ridge Y-12 spur cleanup; tracks closed down; cesium radiation contamination; tracks, ballast rock cleaned; remediated by DOE." CSX objected, and the trial court said, "sustain the objection. The jury will disregard that slide." Plaintiff did not present any other evidence of cesium exposure. CSX later presented expert testimony that there was no risk to the public or railroad employees from cesium radiation at Oak Ridge.

After the trial court sustained the objection and instructed the jury to disregard the slide, CSX moved for a mistrial. The trial court denied the motion. After the trial, CSX renewed its motion, "based upon [its] contention that it was entitled to a mistrial on the issues relating to thyroid cancer and cesium contamination at Oak Ridge." The trial court again denied the motion for mistrial.

CSX argues that the cesium evidence was so prejudicial that a new trial was warranted. We disagree. The trial court sustained CSX's objection and excluded the evidence. The court then instructed the jury to disregard the slide, and there is no reason to presume the jury did not follow the court's instruction. There was no error in the trial court's resolution of this issue.

CSX points to several other evidentiary decisions made by the trial court that it says were erroneous, and argues that the trial court *may* have agreed that it erred in ruling on some of them, and that the trial court *may* have relied upon these supposed errors in granting a new trial. These arguments include assertions that the trial court erred in allowing several lay witnesses, including Payne himself, to testify about the presence of asbestos in his

workplaces and his exposure to asbestos, and that the court erred in allowing testimony that the DWI site where Payne worked was contaminated with radioactivity from plutonium and that it was eventually designated as a Superfund site. We have reviewed these issues, and find that they address matters of admissibility upon which the trial court has broad discretion. We 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. We hold that the trial court erred in granting CSX a new trial.

VI.

A motion for a new trial made after a jury verdict triggers the trial court's duty to independently assess the evidence and either approve or disapprove the verdict. Because the trial court is reviewing and weighing the evidence as did the jury, this is generally known as the "thirteenth juror" rule. *See* ***Huskey v. Crisp***, 865 S.W.2d 451, 454 (Tenn. 1993) (observing that the thirteenth juror rule "applies only in the context of a motion for a new trial, for it is only there that the trial court has the duty to decide if the jury verdict is contrary to the weight of the evidence."). In ***Blackburn v. CSX Transp.,*** No. M2006-01352-COA-R10-CV, 2008 WL 2278497 (Tenn. Ct. App. M.S., filed May 30, 2008), this Court determined that there are significant differences between the Tennessee standard for reviewing the evidence as thirteenth juror and the federal standard, and held that the federal standard applies in FELA cases, stating as follows:

> The standard federal courts employ in deciding whether to grant a new trial is whether the verdict is against the "clear weight" of the evidence. When ruling on motions for new trials based upon sufficiency of the evidence, the Sixth Circuit Court of Appeals has stated the standard thusly:
>
> > A court may set aside a verdict and grant a new trial when it is of the opinion that the verdict is against the clear weight of the evidence; however, new trials are not to be granted on the grounds that the verdict was against the weight of the evidence unless that verdict was unreasonable. Thus, if a reasonable juror could reach the challenged verdict, a new trial is improper.
>
> The trial court may not set aside the verdict to grant a new trial if the judge would have reached a different verdict. 6A MOORE'S FEDERAL PRACTICE § 59.08[5] (1996).

> The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts; and abstain from interfering with the verdict unless it is *quite clear* that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice.
>
> *Id.* In Tennessee, the law is clear that if a motion for a new trial is filed, then the trial court is under a duty to independently weigh the evidence and determine whether the evidence "preponderates" in favor of or against the verdict.
>
> * * *
>
> [A]t a very basic level, the standards are quite different since the Tennessee standard uses "preponderance" of the evidence, while the federal standard requires that the verdict be outweighed by the "clear" weight of the evidence. Under state law if a judge is "dissatisfied" with a jury verdict then the trial court is at liberty to order a new trial. Under the federal standard, the verdict must be unreasonable. Under state law a court must make an independent decision, while under federal law if a reasonable juror could have reached the verdict, the trial court is to defer. We believe that the differences between the standards are both apparent and significant.

Id., 2008 WL 2278497 at *5-7 (internal citation, footnote and section headings omitted); *accord* ***Jordan***, 2009 WL 112561 at *17 n.12. The ***Blackburn*** Court concluded "that federal law provides the standard to determine whether to grant a new trial in a FELA case tried in state court." *Id.* at *11.

In this case, the trial court did not have an opportunity to approve or disapprove the jury verdict awarding damages in the amount of $8.6 million. We find it appropriate to remand the case for the first trial judge to conduct a review of the evidence under the above-described federal standard and determine whether the $8.6 million verdict is against the clear weight of the evidence. *See* ***Blackburn***, 2009 WL 2278497 at *17 (noting that "[a]n appellate court cannot fulfill this role" of determining "whether the verdict was against the

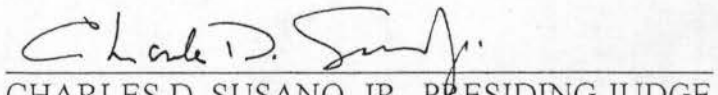
clear weight of the evidence"). If the trial court concludes that the jury's $8.6 million verdict is not against the clear weight of the evidence, then the court is directed to enter judgment in that amount. If the trial court concludes to the contrary, then the court is directed to enter judgment in plaintiff's favor in the amount of $3.2 million, because the verdict assessing damages in that amount has already been duly approved by the trial court when it entered its judgment. We note in this regard that the trial court, in its order granting a new trial, stated that it "applie[d] the appropriate Federal standard for considering motions for new trial in FELA cases" and that it was basing its ruling granting a new trial on "instructional and evidentiary errors" – matters involving questions of law – "independent of considerations regarding sufficiency of the evidence." All of this tells us that the trial court was satisfied that the $3.2 million verdict was not against the clear weight of the evidence.

VII.

Our holding and remand to the trial court with directions to enter judgment in plaintiff's favor in the amount of either $8.6 million or $3.2 million renders moot the question of whether the second trial judge erred in excluding the testimony of the plaintiff's expert witnesses and granting CSX summary judgment. Nevertheless, we have reviewed the issue and hold that the trial court erred in excluding the causation testimony of plaintiff's expert witnesses, all of whom were found to be qualified by the first trial judge in the face of the same challenge and all of whom testified at trial.

VIII.

The judgment of the trial court ordering a new trial is reversed. The judgment of the trial court granting CSX summary judgment is reversed as moot. This case is remanded to the trial court with instructions to the first trial judge to review the evidence at trial and enter judgment in accordance with our directions. Costs on appeal are assessed to the appellee, CSX Transportation, Inc.



CHARLES D. SUSANO, JR., PRESIDING JUDGE

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

ANNE PAYNE v. CSX TRANSPORTATION, INC.

Knox County Circuit Court
223107

No. E2012-02392-COA-R3-CV

Date Printed: 01/17/2014 **Notice / Filed Date: 01/17/2014**

NOTICE - Notice (Outgoing) - Corrected Page(s) to Opinion/Judgment

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The Appellate Court Clerk's Office entered a corrected page to the opinion previously released.

The Correction is as follows:

On page 8 of the opinion, the paragraph starting "The trial court entered an order on September 6, 2011, . . ." is modified.
On page 32, section VII is modified.

Michael W. Catalano
Clerk of the Appellate Courts

> probably not handled appropriately and needs to be handled again, whether by me or somebody else. So that's the extent of what I want to say today.

The trial court entered an order on September 6, 2011, granting CSX a new trial and stating that "[t]he Court makes this decision 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." (Emphasis added.) The case was subsequently transferred to another Knox County circuit court judge, the Honorable Dale C. Workman. Judge Workman granted CSX's motion to exclude the causation testimony of Dr. Arthur Frank and Dr. Ross Kerns, both of whom had testified as causation experts before the jury. When the plaintiff acknowledged that Drs. Frank and Kerns were her only witnesses on the issue of causation, Judge Workman granted CSX's motion for summary judgment on the ground that there was no expert testimony establishing causation, and dismissed the case. Plaintiff timely filed a notice of appeal.

II.

Plaintiff raises the issues of whether the trial court erred in: (1) further instructing the jury and permitting it to further deliberate after it had returned a proper verdict; (2) granting CSX a new trial; and (3) granting CSX summary judgment and dismissing the complaint. CSX does not raise any separate issues. The sufficiency of the evidence to support the jury's verdict(s) is not before us.

III.

We first address the trial court's jury instructions. The trial court instructed the jury in accordance with FELA, the federal statute that provides a cause of action for employees of railroads engaged in interstate commerce who are injured on the job. *See* 45 U.S.C.A. § 51; *see also* ***Spencer v. Norfolk S. Rwy. Co.***, No. E2012-01204-COA-R3-CV, 2013 WL 3946118 at *1, n.1 (Tenn. Ct. App. E.S., filed July 29, 2013). In ***Spencer***, this Court recently reiterated the following background and principles governing a FELA claim:

> "The impetus for the [Federal Employers' Liability Act ("FELA"), 45 U.S.C.A. §§ 51–60] was that throughout the 1870's, 80's, and 90's, thousands of railroad workers were being killed and tens of thousands were being maimed annually in what came to be increasingly seen as a national tragedy, if not a national scandal." ***CSX Transp., Inc. v. Miller***, 159 Md. App. 123, 858 A.2d 1025, 1029 (Md. Ct. Spec. App. 2004). "In

clear weight of the evidence"). If the trial court concludes that the jury's $8.6 million verdict is not against the clear weight of the evidence, then the court is directed to enter judgment in that amount. If the trial court concludes to the contrary, then the court is directed to enter judgment in plaintiff's favor in the amount of $3.2 million, because the verdict assessing damages in that amount has already been duly approved by the trial court when it entered its judgment. We note in this regard that the trial court, in its order granting a new trial, stated that it "applie[d] the appropriate Federal standard for considering motions for new trial in FELA cases" and that it was basing its ruling granting a new trial on "instructional and evidentiary errors" – matters involving questions of law – "independent of considerations regarding sufficiency of the evidence." All of this tells us that the trial court was satisfied that the $3.2 million verdict was not against the clear weight of the evidence.

VII.

Our holding and remand to the trial court with directions to enter judgment in plaintiff's favor in the amount of either $8.6 million or $3.2 million renders moot the question of whether the second trial judge erred in excluding the causation testimony of Drs. Frank and Kerns and granting CSX summary judgment. Nevertheless, we have reviewed the issue and hold that the trial court erred in excluding the causation testimony of these two witnesses, both of whom had testified, over the objection of CSX, to causation at trial.

VIII.

The judgment of the trial court ordering a new trial is reversed. The judgment of the trial court granting CSX summary judgment is reversed as moot. This case is remanded to the trial court with instructions to the first trial judge to review the evidence at trial and enter judgment in accordance with our directions. Costs on appeal are assessed to the appellee, CSX Transportation, Inc.

Charles D. Susano

CHARLES D. SUSANO, JR., PRESIDING JUDGE

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

ANNE PAYNE v. CSX TRANSPORTATION, INC.

Knox County Circuit Court
223107

No. E2012-02392-COA-R3-CV

Date Printed: 01/23/2014 **Notice / Filed Date: 01/23/2014**

NOTICE - Order - Petition to Rehear Denied

The Appellate Court Clerk's Office has entered the above action.

If you wish to file an application for permission to appeal to the Tennessee Supreme Court pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, you must file an original and six copies with the Appellate Court Clerk. The application must be filed "within 60 days after the denial of the petition or entry of the judgment on rehearing." NO EXTENSIONS WILL BE GRANTED.

Michael W. Catalano
Clerk of the Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

ANNE PAYNE v. CSX TRANSPORTATION, INC.

Circuit Court for Knox County
No. 2-231-07

No. E2012-02392-COA-R3-CV

ORDER

The appellee CSX Transportation, Inc., has filed a petition for rehearing pursuant to the provisions of Tenn. R. App. P. 39, arguing that our Opinion "overlooks or misapprehends that several post-trial issues related to the first trial remain unresolved." CSX characterizes these issues as "never-before-resolved." CSX asks us to "grant rehearing for the limited purpose of modifying [our] instructions to the trial court relating to the scope of the remand" to allow the trial court to address these issues.

Our Opinion did not overlook or misapprehend these issues. They are not "unresolved" because, in our view, the trial court considered and implicitly resolved these issues against CSX when it considered CSX's post-trial motion. We adhere to the holding in our Opinion released and filed on December 27, 2013, that "the trial court was satisfied that the $3.2 million verdict was not against the clear weight of the evidence" – a holding CSX has not challenged in its petition for rehearing.

In the Opinion filed in December 2013, we directed the trial court "to conduct a review of the evidence under the . . . federal standard and determine whether the $8.6 million verdict is against the clear weight of the evidence." This remains our directive. *See* ***Blackburn v. CSX Transportation, Inc.***, No. M2006-01352-COA-R10-CV, 2008 WL 2278497 (Tenn. Ct. App. M.S., filed May 30, 2008).

CSX's petition for rehearing is DENIED with costs taxed to CSX.

IT IS SO ORDERED.

CHARLES D. SUSANO, JR., PRESIDING JUDGE

THOMAS R. FRIERSON, II, JUDGE

D. KELLY THOMAS, SPECIAL JUDGE

Respectfully Submitted,

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March 21, 2014

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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