In The

Supreme Court of Tennessee

Eastern Division

NO. E2012-02392-SC-R11-CV

ANNE PAYNE
Widow of Winston Payne, deceased,

Appellee,

v.

CSX TRANSPORTATION, INC.,

Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF KNOX COUNTY, NO. 2-231-07
COURT OF APPEALS, EASTERN DISTRICT, NO. E2012-02392-COA-R3-CV

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

This is an appeal of a Federal Employers Liability Act ("FELA") wrongful-death case, tried under federal law, in a Tennessee state court. Anne Payne is the widow of Winston Payne and the personal representative of her late husband's estate. Winston Payne filed suit against CSX Transportation, Inc., under the FELA, alleging that he sustained personal injuries, including the onset of lung cancer. This cancer would claim his life during the pendency of this litigation. His widow was substituted as a party after her husband's death.

At the close of a two-week trial, a jury returned a verdict, based on special interrogatories, in favor of the widow. It fixed damages at $8.6 million, and found that Payne's negligence was 62% responsible for the damage. The judge asked the foreman if the jury understood that the decedent's negligence might not apply for some of the claims; the answer was in the affirmative. The court then asked the jury, over the widow's objection, to modify its verdict. The jury did so; after a few minutes, it returned with revisions on the form. The 62% figure was marked out and the damage line read, "3.2 million at 100%." [App. at 246.]

Nine months later, the court set aside the verdict and ordered a new trial on all issues. Before the second trial, a new presiding judge was appointed at CSX's request. CSX moved in limine to exclude the widow's expert witnesses on causation. Although the first trial judge had considered this motion and denied it, the second judge granted it and excluded all of the experts' causation opinions. Since the widow had no expert testimony on causation, the court granted summary judgment in favor of CSX. [App. at 336.] The widow appealed.

The Court of Appeals ("COA") unanimously reversed and ordered reinstatement of the original verdict, unless it was against the clear weight of the evidence. *Payne v. CSX Transp., Inc.*, No. E2012-02392-COA-R3-CV, 2013 Tenn. App. LEXIS 836, at *3 (Tenn. Ct. App. Sept. 6, 2013). It denied CSX's rehearing motion by a *per curiam* opinion filed January 23, 2014. This Court granted CSX's Rule 11 petition to appeal on June 24, 2014.

PRELIMINARY STATEMENT

Since this action was brought under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§51 *et seq.*, federal law provides the legal framework for this litigation. *See Chicago, M. & S.P.R. Co. v. Coogan*, 271 U.S. 472, 474 (1926). Many of the case citations here reflect decisions of federal courts, as provided in *Coogan*.

In FELA, Congress "shifted part of the human overhead of doing business from employees to their employers." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994) (citations omitted). 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. See *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 431-32 (1958). FELA shifts the burden onto the industry for "some of the cost for the legs, eyes, arms, and lives which it consumed in its operations." *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring).

There are significant differences between FELA actions and ordinary negligence cases. Four such differences are of primary importance here. First, the role of the jury is significantly broadened in FELA cases, as "trial by jury is part of the remedy." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369

U.S. 355, 360 (1962). Courts are to liberally construe FELA in favor of the employee. See *Urie v. Thompson*, 337 U.S. 163, 180 n. 20 (1949).

Second, under FELA, contributory negligence is not a defense and comparative fault by a worker is irrelevant if the railroad violated "any statute enacted for the safety of employees" and such violation "contributed to the injury or death of such employee." 45 U.S.C. §53 (addressing statutes), §54(a) (addressing regulations); *Grand Trunk W. Ry. Co. v. Lindsay*, 233 U.S. 42, 49-50 (1914).

Third, the standard of proof is dramatically reduced in a FELA claim and ordinary rules of proximate causation do not apply. An employee need only show that the employer's negligence "played any part, even the slightest, in producing the injury or death for which damages are sought." *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2636 (2011) (citations omitted).

Finally, a railroad has a non-delegable duty to provide its employees with a safe place to work, even when they must go onto the premises of a third party over which the railroad has no control. *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1, 7 (1963) (citations omitted); *Empey v. Grand Trunk W. R.R. Co.*, 869 F.2d 293, 296 (6th Cir. 1989) (citations omitted).

STATEMENT OF FACTS

Winston Payne worked for CSX for 41 years beginning in 1962. He smoked cigarettes beginning in 1962, but quit smoking in 1988. He continued to work for CSX for another 15 years thereafter.[1]

[1] Payne initially worked for the appellee's predecessor, L&N Railroad. His employers over his career are collectively referred to herein as "CSX."

For decades, Payne's job required that he assist in the train transport of radioactively contaminated scrap metal and equipment in and out of David Witherspoon, Inc. (DWI), a metal scrapyard business just outside Knoxville. [App. at 27-57.] State inspectors determined that DWI received, by train and truckload, thousands of tons of radioactively contaminated metal and materials purchased mainly from the Oak Ridge national labs and its contractors, [App. at 84-85], including plutonium-contaminated scrap. [App. at 88-91.] A litany of state inspection tests of scrap, equipment, and yellowcake uranium over 30 years revealed high levels of radiation at DWI. [App. at 101-103; App. at 145-148.]

By 1993, DWI was designated a radiation-contaminated "Superfund" site. [App. at 86-87; 101.] Official cleanup testing in 2007 confirmed the presence of contaminated soil and water at DWI, [App. at 157], despite over a decade of cleanup work, [App. at 92-93]. During Payne's work, he routinely rode inside open-top train cars beside radioactive-marked materials, [App. at 36-37; App. at 197], and regularly worked at the DWI yard close to where the metals were stored, off-loaded, crushed, moved, and baled. [App. at 48]. Twenty to thirty barrels with radioactive symbols lay beside the tracks for decades. [App. at 50-51; App. at 238.] CSX eventually forbade workers like Payne to enter the site. [App. at 67.] Soon thereafter, state regulators shut down the DWI property. [App. at 35.]

CSX knew that DWI was in the business of buying and selling **radiation**-contaminated scrap. [App. at 94.] Inhaling enriched uranium or plutonium is known to cause lung cancer; no safe level of plutonium inhalation is known.

[App. at 99-100.] Just one plutonium atom can cause lung cancer. [App. at 110-111.]

Most diesel engines that CSX used during Payne's career had **asbestos**-insulated pipes. [App. at 125-144; App. at 225-228.] A CSX official noted that this insulation would be removed only for periodic major-engine servicing. [App. at 95-98; App. at 168-171.] Terry Rhodes, a licensed asbestos-abatement contractor of railroad engines for Conrail, routinely removed asbestos pipes from the same make/model engines used by CSX and described cleaning asbestos residue in and near the metal covers of the engine-crew cab heaters. [App. at 112-124; App. at 131-132; App. at 143-144.] For decades, train-car brake shoes also contained asbestos; Payne rode in cabooses with open windows, exposed to visible clouds of brake-shoe dust. [App. at 25-26; App. at 166-167.]

Payne also described his pervasive daily exposure to **diesel engine exhaust fumes** inside the engine crew cabs, [App. at 58-61; 221-223], including its appearance, smell, and taste. [App. at 58-59.]

Despite its awareness of these health risks, CSX provided no training, warnings, monitoring, or protection to Payne as to radiation, asbestos, or diesel fumes. [App. at 66.] CSX conceded that asbestos and diesel fumes are known causes of lung cancers. [App. at 3.]

In late 2005, Payne's doctors diagnosed him with lung cancer. As of his deposition date, he had undergone 43 rounds of chemotherapy and 44 radiation treatments. [App. at 19.] Chemotherapy interfered with his sleep and caused him pain, aching bones, headaches, vision problems, fatigue, loss of sexual urge, inability to interact with his grandchildren, and interference with household

chores. [App. at 20-24.] By 2010, despite years of treatment at a cost of over $500,000, the cancer spread to his brain. He died February 24, 2010.

At trial, the widow proved that her husband's cancer was caused, in whole or part, by his occupational exposure to carcinogenic radioactive materials, asbestos, and diesel fumes. She showed that CSX knew of the hazards associated with these carcinogens for decades but took no steps to protect or warn its employees. The jury resolved any dispute about these facts in the widow's favor when it returned a plaintiff's verdict including both negligence findings and regulatory violations, set out under special interrogatories. [App. at 246.]

SUMMARY OF THE ARGUMENT

With the exception of the remand directive, which should direct entry of the original verdict, the COA correctly applied the law to this case. The court unanimously ruled that (i) the trial court erred in instructing the jury, *sua sponte*, to deliberate again after a proper verdict had been returned; (ii) jury instructions were clear, correct, and complete; (iii) the later grant of summary judgment for CSX is moot, but was incorrect; and (iv) there were no pretermitted issues because the first trial court considered all such issues. Because no legal error occurred at trial, the COA limited the remand to require the trial court to enter the original verdict, if supported by the clear weight of the evidence, or to enter the modified verdict, which reflected the decedent's 62% comparative negligence.

The widow agrees with the COA's analysis of the legal issues, but on remand, the trial court must enter the original verdict. No discretion remains with the court because legal error, rather than sufficiency of evidence, served as

the basis of the new-trial grant. This Court should not sanction the altered verdict, which directly circumvents federal law.

STANDARD OF REVIEW

By having the jury deliberate further after the rendition of a proper, complete, and consistent verdict, the trial court effectively set that verdict aside. That decision should be reviewed under the same standard governing motions for a new trial. In doing so, federal law must be applied instead of state law. *Blackburn v. CSX Transp. Inc.*, No. M2006-01352-COA-R10-CV, 2008 Tenn. App. LEXIS 336, at *29-30 (2008), *appeal denied* Jan. 13, 2010. "As a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal." *St. Louis Sw. Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985). A trial court's ruling on whether to admit expert testimony under the *McDaniel* standard is reviewed for abuse of discretion. *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 273 (Tenn. 2005).

An appellate court is required to take "the strongest legitimate view of all the evidence in favor of the verdict, assume the truth of all evidence that supports the verdict, allowing all reasonable inferences to sustain the verdict, and to discard all countervailing evidence." *Akers v. Prime Succession of Tenn., Inc.*, 387 S.W.3d 495, 501-02 (Tenn. 2012) (quoting *Barkes v. River Park Hosp., Inc.*, 328 S.W.3d 829, 833 (Tenn. 2010)).

ARGUMENT

I. The original jury verdict was proper.

A. By directing further deliberations, the trial court contravened federal law.

The defense of contributory negligence is unavailable in FELA cases if the employee shows that the employer's violation of an employee-safety statute or regulation "contributed to the injury or death of such employee." 45 U.S.C. §53 (statutes), §54(a) (regulations). In this trial, the jury responded to special interrogatories, stating on the verdict form that CSX had violated several such statutes and regulations, and that each such violation was "a legal cause of" the harm sustained by the decedent.

At that point, the jury's task was complete; it only remained for the court to apply federal statutory law by awarding the full damages to the widow, without reduction for any negligence by the decedent. *See id.* Instead, even though the jury had found that CSX had violated multiple safety regulations, the court invited the jury to ignore the statute and revise its verdict to incorporate contributory negligence. And this the jury did, speedily. In 10 minutes, it amended the verdict from $8.6 million, with 62% negligence by the plaintiff, to $3.2 million "at 100%." [App. at 246.]

The widow invites this Court to take judicial notice of the fact that $8.6 million reduced by 62% is just over $3.2 million. At the judge's suggestion, the jury overrode Congress's mandate and awarded the widow a reduced sum that corresponds exactly with the degree of fault that it had found previously. This was error.

The first verdict was entirely proper and self-contained. The judge asked the jury if it understood that contributory negligence was overcome by a finding of a statutory violation, and the foreman indicated yes. [App. 193-196.] All that remained was for the judge to apply the federal statute and award damages without a reduction for the decedent's negligence. 45 U.S.C. §53 (addressing statutes), §54(a) (addressing regulations). Instead, without employing any of the required analysis for setting aside a verdict, the court sent the jury back for unwarranted further deliberations, directly contravening a federal statute that prohibits such a reduction.

Neither party requested an instruction on the legal effect of negligence *per se* on contributory fault. *Payne*, 2013 Tenn. App. LEXIS 836, at *21. The widow has located no holding that a jury *must* be so advised.[2] This reflects the fact that the statutory mandate is an issue of law, not of fact.

CSX asserts that a jury may change its verdict before it is discharged or the court may direct it to amend the verdict and put it in proper form. *George v. Belk*, 101 Tenn. 625, 49 S.W. 748, 749 (Tenn. 1899). The COA rejected this argument because the case law cited by CSX involved a verdict that was defective in some way, but there was no defect in the original verdict here. *Payne*, 2013 Tenn. App. LEXIS 836, at *29. The trial judge asked for a different result, and he got one.

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[2] *Shepard v. Grand Trunk W. R.R.*, 2010 Ohio 1853, 2010 WL 1712316 (Ohio Ct. App. 2010), *cert. denied* 564 U.S. 10-925 (June 28, 2011), is a FELA case where the jury also had not been so instructed. *Payne*, 2013 Tenn. App. LEXIS 836, at *22. The *Shepard* court ruled that it was proper to nullify a comparative-fault reduction, since the jury found a regulatory violation. *Id.* at *22-23.

The trial court erred here when it invited the jury to contravene federal law after the return of a proper verdict. The U.S. Supreme Court has recognized the preeminence of jury decisions in FELA matters. *Jordan v. Burlington N. Santa Fe R.R. Co.*, No. W2007-00436-COA-R3-CV, 2009 Tenn. App. LEXIS 8, 2009 WL 112561 at *5-6 (Tenn. Ct. App. W.S., filed Jan. 15, 2009). "It 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). Juries, not judges, are the only proper arbiters of disputed fact issues such as the quantum of damages.

B. The trial court improperly ordered a new trial.

The trial court refused to enter judgment on the jury's original verdict after a 10-day trial. Instead, it entered judgment on the altered verdict. After initially rejecting all of CSX's mistrial arguments, [App. at 248], the court granted CSX a new trial months later.

The court cited two factors for granting a new trial. First, it stated, "I feel [the instructions] were incomplete, therefore insufficient and inadequate and incorrect." Second, it referred to "too many things that had been ruled improperly for the jury to consider that were considered . . . ." [App. 250-254.] The court gave only one example of this – an oblique reference to thyroid cancer during cross-examination of one of CSX's experts. The COA rejected each of those attempts to rationalize a new trial.

CSX did not object to the widow's instruction on contributory negligence, and offered no instruction on negligence *per se*. Immediately after charging the jury, the court asked the parties if any additional instructions were necessary.

CSX did not object to the instructions on comparative negligence or statutory violations, and offered no additional instructions; it was content to allow the jury to decide the case.

The instructions correctly set forth the parties' burdens and the issues in the case. So did the verdict form, which stated: "7. What amount of money do you find, without deduction for any alleged negligence which you may find on plaintiff's part, will fairly represent adequate compensation?" The jury unanimously responded, "$8.6 million" before the judge erroneously authorized secondary deliberations to reconsider the damage award. [App. 193-196.]

The jury was properly and completely instructed, and returned a complete verdict finding CSX guilty of regulatory violations. It was error for the court to direct the jury to deliberate further about a legal issue that is reserved to the court. More important, the judge's second-guessing of the jury directly contravened FELA's express provisions that nullify comparative fault where a railroad violates a safety statute. *See* 45 U.S.C. §§53, 54(a). No further deliberation was permissible on this issue. The hasty reduction of the verdict to $3.2 million was tainted by unmistakable error because "[a] federal right cannot be defeated by the forms of local practice." *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 296 (1949).

II. CSX's "supplemental" new trial grounds were properly rejected.

CSX raised several supplemental issues before the COA as alternative grounds for a new trial, however, it never moved for a mistrial on any of these supplemental grounds, except as to the claim that cesium-radiation evidence was permitted at trial. The trial court expressly ruled that neither cesium nor

thyroid-cancer evidence served as a basis for a mistrial. [App. at 248.] The court then partly reversed course months later, ruling that the evidence of thyroid cancer and allegedly confusing jury instructions on comparative negligence warranted a new trial on all issues.

A. No error occurred as to thyroid-cancer evidence.

The thyroid-cancer evidence was properly admitted, but if any doubt exists, the court's curative instruction ends the inquiry. CSX sought a new trial because the court "never unambiguously told the jury that Payne did not have thyroid cancer." *Payne*, 2013 Tenn. App. LEXIS 836, at *49. However, the judge unambiguously told the jury the truth:

> THE COURT: 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.

[App. 174.] This instruction addressed any alleged prejudice to CSX. *Id.* at *50. A jury is presumed to have followed a court's instructions. *Johnson v. Tenn. Farmers Mut. Ins. Co.*, 205 S.W.3d 365, 375 (Tenn. 2006).

The record does not support CSX's claim that the widow "elicited false testimony about radiation-related thyroid cancer." CSX Brief For Appellant at 20-21. This issue arose during CSX's case when the widow cross-examined CSX's expert. The cross-examination shed light on the decedent's exposure to radiation – a separate and proper triable issue. No court order prevented the widow from cross-examining CSX's doctor about his written opinion that the decedent suffered from thyroid cancer.

Competent physicians can, and do, disagree in their interpretation of medical testing. One of the widow's doctors, Dr. Frank, thought that Payne did not suffer thyroid cancer. This is why the widow elected not to offer thyroid-cancer evidence. However, CSX's pathologist, Dr. Craighead, diagnosed thyroid cancer based on his own analysis of biopsy slides. [App. at 172; App. at 239.] Dr. Frank, called by the widow, did not have Dr. Craighead's pathology report as of the date of his video deposition.

CSX has offered no support for the premise that it was harmed by this fleeting mention of thyroid cancer. No further reference to such cancer occurred after the curative instruction. The brief reference to thyroid cancer is not grounds for a new trial, especially given the curative instruction.

B. Cesium-contamination evidence and the diesel-smoke photograph.

1. *Cesium*. CSX alleges misconduct by the widow's counsel in offering evidence of cesium-radiation contamination on CSX tracks. The trial court sustained CSX's objection, excluded the evidence, and instructed the jury to disregard a slide referencing cesium-radiation exposure. *Payne*, 2013 Tenn. App. LEXIS 836, at *52. This Court should presume, as the COA did, that the jury followed the court's instruction. *See id.* at 50.

During the 1960s, cesium leached through concrete casks on railroad cars along CSX's right-of-way near Oak Ridge, down into the ballast rock lining the tracks. [App. at 162; 163.] Payne worked regularly over these tracks during his career. [App. at 28-34.] DOE cleaned up radiation along the tracks during the late 1980s, after his work there. [App. at 165.] This evidence corroborated the

decedent's overall exposure to radiation, for the same reasons stated as to thyroid-cancer evidence; the evidence was properly admissible for this purpose.

CSX moved *in limine* to prohibit any cesium-exposure evidence. The court refused to exclude the evidence after pretrial hearings. [App. at 14-16; App. at 17-18.] Even so, the widow volunteered not to offer the evidence during her case-in-chief. However, no court order barred *cross*-examination on cesium during CSX's case, as both parties were well aware that CSX's industrial hygienist, who was deposed before trial, was examined on cesium contamination.

Moreover, CSX named an expert witness, Dr. Kocher, primarily to discuss cesium contamination issues along CSX's tracks. When the widow objected to his late disclosure, CSX responded: "We told [the widow] that [Kocher] would be testifying about cesium contamination at or near CSX tracks.... [Kocher] had studied cesium there right outside of Y12 where [Payne] says that he would deliver railroad cars." [App. at 7.] During CSX's case-in-chief, its health physicist, Dr. Dooley, testified about the "very low" potential cesium-contamination exposure to Mr. Payne near the Y12 area. [App. at 156.] Thereafter, the court allowed cross-examination of CSX's industrial hygienist, [App. at 164], and of Dr. Kocher, [App. at 159-161], on this issue.

Where a party adduces evidence on an issue during its case-in-chief, it cannot be heard to complain about cross-examination on the same subject.

2. *Diesel-smoke photo.* In addition to the cesium evidence, CSX asserts that a misleading photograph was introduced at trial. In his deposition, Payne identified a picture of an engine with thick diesel smoke coming from its exhaust stack; he testified he had seen smoke like that at work from other

engines. [App. 62.] Although CSX never objected to this testimony, it later objected to the use of the picture as a demonstrative exhibit with other witnesses.

The decedent had properly authenticated the photo, pursuant to Tennessee Rule of Evidence 901(A). The jury understood that the decedent was not riding on that specific engine, but that it represented thick diesel-exhaust smoke that he had worked around on occasion. *See Shepard v. Grand Trunk W. R.R. Inc.*, No. 92711, 2010 WL 1712316 at 8 (Ohio Ct. App. Apr. 29, 2010), *cert. denied* 564 U.S. 10-925 (June 28, 2011) (not error to allow authenticated picture to show similar circumstances as suffered by worker). This was an evidentiary issue left to the broad discretion of the trial court. *Payne*, 2013 Tenn. App. LEXIS 836, at *53.

When the trial court later restricted the widow's counsel from use of the demonstrative photograph and excluded it as an exhibit to the jury, the widow – not CSX – was aggrieved. There was no error in showing the photo to any witness at the trial, so long as the witness could identify conditions substantially similar in their workplace. Of course, this issue had no effect on the jury's independent asbestos or radiation findings in the widow's favor. *Id.*

C. Lay testimony about asbestos and evidence of plutonium at DWI.

1. *Asbestos*. A witness may testify to a matter of which he has personal knowledge. This includes the witness's own testimony but may also be corroborated by other witnesses and expert testimony. Tenn. R. Evid. 602. It may be supported by the witness's familiarity with asbestos products on the railroad, like pipe insulation inside the engines of the crew cab. *See, e.g.*,

Shepard v. Grand Trunk W. R.R. Inc., 2010 WL 1712316, at *10; *Shesler v. Consol. Rail Corp.*, 151 Ohio App. 3d 462, 784 N.E.2d 725, 730-731 (Ohio 2003).

Payne and other witnesses were allowed to testify as to their personal knowledge after laborious deposition-designation hearings where the court reviewed each CSX objection, line by line. [App. 8-13] The decedent's testimony about asbestos at work was corroborated by Terry Rhodes, asbestos-engine-repair witness; Leonard Vance, industrial hygienist; and by CSX's own industrial hygienists, Mark Badders and William Bullock. CSX does not contend that Payne testified erroneously, since CSX's own industrial hygienist witnesses, Mark Badders and William Bullock both confirmed that asbestos was on its engines, in the train brakes, and on cabooses. This was a matter of admissibility on which the trial court had broad discretion. *Payne*, 2013 Tenn. App. LEXIS 836, at *53. The COA discerned no error in the trial court's rulings on this evidentiary matter, and "certainly nothing that would warrant a new trial under the circumstances." *Id.*

2. *Plutonium*. CSX also claims that it was error to allow evidence that Payne was exposed to plutonium at the DWI scrap yard. After numerous hearings, the trial court denied CSX's motions *in limine*, and plutonium-exposure evidence at the DWI scrap yard was properly admitted during both the widow's and CSX's case. Several documents corroborated that DWI purchased thousands of tons of plutonium-contaminated scrap that was handled and processed at DWI during the time Payne worked there. [*See* Statement of Facts, above.] This, too, was an issue of evidentiary admissibility where the trial court enjoyed broad discretion. *Payne*, 2013 Tenn. App. LEXIS 836, at *53. Again, the COA found no

error in the trial court's evidentiary rulings, and "certainly nothing that would warrant a new trial . . . ." *Id.*

One atom of plutonium can cause lung cancer, a surface contaminant that can travel for miles in the wind. [App. at 158.] Plutonium, not naturally found in Tennessee, was still contaminating the soil and groundwater at DWI after years of radiation cleanup. [App. at 104-107.]

Plutonium is undetectable without scientific equipment. Corroboration by circumstantial evidence was necessary, since CSX flouted its non-delegable duty of inspection at its workplaces. The widow provided that corroboration; Health physicist Mantooth calculated that 100 times more plutonium existed at DWI than CSX's physicist Dr. Dooley calculated, explaining why Dooley's "dose reconstruction" of decedent's exposure was inaccurate. [App. at 109.] The court properly admitted the plutonium-exposure evidence, and it was for the jury to determine its weight.

D. Foreseeability and radiation-regulation instructions.

1. *Foreseeability*. When the court had fully instructed the jury, it asked all counsel if any additional instructions were necessary. Despite its current position on appeal, CSX offered no instruction on negligence *per se* or comparative negligence. [App. at 175-183.]

CSX effectively asserts that its foreseeability instruction was better than what the jury was instructed. But foreseeability is irrelevant to claims based on statutory/regulatory violations. *Bevacqua v. Union Pacific R. Co.*, 960 P.2d 273, 286 (Mont., 1998). Nor has CSX suggested that it was unforeseeable that known carcinogens cause lung cancer, so its instruction on foreseeability was wholly

unnecessary. In any event, the trial court's instruction on foreseeability was correct, so whether CSX's was "better" is legally immaterial on appeal.

2. *Radiation regulations.* CSX also asserts that the court should not have instructed the jury on a particular train-transport regulation that related to inspection of any known radioactive shipments. [App. at 184-186.] But this issue was litigated at trial; CSX disputed whether DWI continued to ship radioactive metals out of the scrap yard by train car until it was closed down by 1993. The widow contended that DWI continued such shipments without any required inspections. [App. at 50, 68-69.] CSX argued that DWI received no radioactive shipments after 1976, but it admittedly never inspected any outbound train cars before 1985 despite its non-delegable duties. [App. at 94.] Both Payne and his co-worker Don Carringer confirmed that DWI cargo was removed by train until DWI was shut down in the 1990s. [App. at 50, 67, 68-69.]

A CSX supervisor confirmed that the railroad was still transferring train cars with DWI as late as 1990 or 1991, but CSX employees refused to enter DWI. [App. at 153-155.] A state inspector noted that DWI had accumulated additional contaminated radioactive material near the Candora Triangle, where railroad tracks ran, as late as 1980. [App. at 149-152.] There was ample circumstantial evidence of continuing radioactive-metal transport out of DWI after 1976, which supported the jury instruction that the trial court provided. *Payne*, 2013 Tenn. App. LEXIS 836 at *45-46 ("... 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").

Given this dispute and the conflicting evidence, the question was one for the jury, and it was wholly proper to provide the instruction.

III. The second trial judge wrongly excluded the widow's expert witnesses.

After the grant of a new trial, CSX requested a new judge, who took up CSX's challenge to the widow's expert witnesses under *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997). The first judge had considered the identical *McDaniel* challenge and denied it. [R. at 448; App. at 2, 4; App. at 5-6.] Despite the law-of-the-case doctrine, the new judge reversed that ruling and excluded the experts' causation testimony. In the absence of such evidence for the plaintiff, summary judgment followed. [App. at 336.]

But the first judge got this decision right. The relaxed standard of causation in FELA cases, combined with the decision in *Wilson v. CSX Transp., Inc.*, No. E2002-00291-COA-R9-CV, 2003 Tenn. App. LEXIS 221, *13 (2003), compels the conclusion that the experts' testimony was admissible. Exclusion of this testimony was an abuse of discretion and the grant of summary judgment to CSX was error. *Payne*, 2013 Tenn. App. LEXIS 836 at *3.

The widow offered evidence from Dr. Frank, who is board-certified in internal and occupational medicine; Dr. Kerns, a board-certified oncologist who treated Payne's cancer; certified industrial hygienist Leonard Vance; and nuclear-health physicist Daniel Mantooth. These experts were expected to testify at the retrial about Payne's exposure to radioactive material, asbestos, and diesel

exhaust; and about the health effects of such exposure. Indeed, each was permitted to so testify during the two-week jury trial in 2010.

The second judge excluded virtually all causation testimony of these experts, holding that the widow was unable to establish the precise levels of exposure to toxic materials. The widow opposed this ruling by pointing out that (1) precise measurements did not exist because the railroad had ignored its obligation to monitor its work sites, and (2) FELA's "even in the slightest degree" causation threshold made it unnecessary to prove specific dosages. This is particularly true in circumstances where causation between the harmful materials and the disease is conceded by the defense. [App at. 3.]

A. CSX refused to perform dosage monitoring.

Under FELA, a railroad must provide its employees with a reasonably safe workplace. *Bailey v. Central Vt. Ry., Inc.*, 319 U.S. 350, 352-53 (citations omitted) (1943). This duty is non-delegable. *Carter v. Union RR. Co.*, 438 F.2d 208, 210 (3d Cir. 1971). Despite this duty, CSX never conducted workplace monitoring.

CSX argues that the widow's expert evidence was insufficient because data did not exist to provide exact dosage information for the hazardous substances and radiation. Courts have justifiably chided CSX for this very argument, as it attempts to hide behind its own failure to monitor its work sites. *See, e.g.*, *Fulmore v. CSX Transp., Inc.*, 557 S.E.2d 64, 73 (Ga. App. 2001), overruled on unrelated grounds; *N&W Ry. v. Ayers*, 538 U.S. 135 (2003) ("It is ironic that CSX, who failed to follow the recommendations of the AAR in the 1930's that the air in the work environment be tested, seeks to avoid liability because the

plaintiffs cannot produce data from the very tests CSX failed to perform."); *Sanders v. CSX Transp., Inc.*, Feb. 24, 2000, NO. CV590-209, NO. CV590-216, NO. CV591-165 U.S. Dist. LEXIS 22707 at 16 (S.D. Ga. 2000) ("If a defendant failed to take air samples during the period concerned, however, it hardly makes sense to oblige a plaintiff to produce non-existing data.").

The railroad cannot insulate itself from liability by making it impossible for a claimant to prove a dosage level. No company should be rewarded for ignoring its duties to its employees.

B. FELA's relaxed causation standard is case-dispositive here.

The trial court excluded the widow's experts because they could not testify to exact dosages of exposure. Given the standard of proof in FELA claims, this ruling was demonstrably erroneous. *Gottshall*, 512 U.S. at 542-543 ("a relaxed standard of causation applies under FELA"); *see also Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 506 (1957) ("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"(emphasis added)).

If this were an ordinary tort claim, governed by principles of proximate causation, a court might consider dosage levels in evaluating a plaintiff's evidence. Where a plaintiff has the burden of proving that the exposure was a *proximate* cause of injury or death, a more-demanding standard of proof may be required.

But this is not an ordinary tort claim. This case was brought under FELA, where the burden of proving causation is dramatically reduced. Proximate

causation is not necessary. In fact, a plaintiff need only prove that the railroad defendant's acts contributed to their injury or death, *even in the slightest degree*. *McBride*, 131 S. Ct. at 2636.

This distinction is outcome-determinative here. Dr. Frank, one of the widow's experts, explained:

> What we do know, and it applies to every cancer-causing agent, be it radioisotopes, be it asbestos, be it polychromatic aromatic hydrocarbons, the cancer-causing agents in diesel fumes or in cigarettes, for example, that there is no safe level of any material.

[App. at 79.] Dr. Frank, board certified in both occupational and internal medicine, is a Professor and Chair at the Drexel University School of Public Health in Philadelphia, Pennsylvania. [App. at 70-72.] He has written more than 170 articles, abstracts or book chapters, at least half on asbestos, has written in the field of radiation, and studied the effects of diesel exhaust fumes. [App. at 73-74; App. at 198.]

Dr. Frank reviewed Payne's cancer-treatment records, personally obtained an occupational and social history from Payne, and reviewed epidemiological and industrial-hygiene reports and numerous peer-reviewed medical journal articles. [App. at 288-306.] He testified that Payne's exposures to asbestos, diesel fumes, and radiation were chronic and substantial during his career. He opined that all three were significant contributing causes – the Court will note that this testimony exceeded the FELA burden of proof – to his developing the lung cancer "for which he has treated these many years." [App. at 80-81; App. at 82.] He outlined peer-reviewed studies of uranium miners who had also been exposed to radiation resulting in lung cancer; this supported his qualitative diagnosis that

radiation exposure had contributed to the lung cancer. [App. at 75-78; T.T. 372-452.]

The trial court was unmoved by this explanation, which it expressed by stating: "There's no proof of the number of his exposure to radiation, so with that background . . . how does he reach causation when he does not show, cannot show quantitatively, a dose exposure to radiation?" [App. at 264-265.] The court repeatedly insisted that the evidence was unreliable due to the absence of dosage information. *See, e.g.*, App. at 256-257 (measurement above 10 rems; "your witness cannot say what exposure your client had"); App. at 266 ("none of them can quantify that at all"); App. at 267 ("absolutely no background whatsoever as to the quantifying measure of that exposure"); App. at 307 ("everybody agrees that there's a minimum dose that you've got to show to fit that diagnosis"; striking widow's oncologist).

The same thing happened with Payne's treating oncologist, Dr. Kerns. [App. at 232.] He based his testimony on, among other things, epidemiological studies of the cancer-causing characteristics of radioactive materials, a peer-reviewed epidemiological report on radiation and lung cancer, and his own four years of treatment of Payne during the course of his lung cancer. [App. at 309-335.] He, too, offered a differential diagnosis[3] that was consistent with the way in

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[3] A differential diagnosis is the process of "the distinguishing of a disease or condition from others presenting with similar signs and symptoms." Merriam Webster's Collegiate Dictionary (11th ed.) at 348. *See Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 673-74 (6th Cir. 2010), *cert denied*, 131 S. Ct. 2454 (2011) ("Many courts, including our own, allow experts to employ a rule-in/rule-out reasoning process for etiology as well as diagnosis.")

which he and other oncologists evaluate and treat patients, *id.*, even though they lack precise dosage data. [T.T. at 708-739.]

After the court excluded Payne's medical-expert testimony, it took up CSX's challenge to two of the widow's non-medical experts, both of whom had testified in the first trial. Radiation health physicist Daniel Mantooth, [T.T. 924-964; App. at 234], opined that Payne had been exposed to unsafe levels of radiation at DWI, based on a review of state radiological inspection records and reports, deposition testimony, and peer-reviewed materials. [App. at 284-285.] He relied on state inspection tests showing high levels of radiation at DWI while Payne called at the scrapyard. [App. 270-283.] He explained that the metal cutting, crushing, and baling processes at DWI were particularly dangerous because radioactive isotopes can travel for miles when airborne. [App. at 276; 286-287.]

Industrial hygienist Leonard Vance, [T.T. at 520-592; App. at 229], served from 1982 to 1986 as Director of Health Standards for OSHA in Washington, D.C. Based on a review of available records, his own industrial hygiene survey, deposition testimony, and railroad-industry records and reports, he stated that Payne had been exposed to injurious levels of diesel-exhaust fumes and asbestos. [App. at 268-269; 83.]

The second judge excluded Mantooth's opinion because he could not provide a specific dosage of radiation exposure. [App. at 258-259.] Vance's causation opinions were excluded for the same reason. [App. at 260-263.]

CSX never challenged the qualification of the experts, nor that they relied on materials that experts in their fields regularly rely on. Instead, it argued that a

lack of specific dosage evidence barred their opinions. For the same reasons outlined for medical-causation evidence, the second trial court judge erroneously excluded these opinions.

Even in a non-FELA case (where the "even in the slightest degree" standard does not apply to a plaintiff), federal courts recognize that qualitative medical diagnoses are perfectly valid means of determining causation. *See, e.g., Baldonado v. Wyeth*, No. 04 C 4312, 2012 U.S. Dist. LEXIS 74843 at 45-46 (N.D. Ill. 2012); *Newman v. McNeil Consumer Healthcare*, No. 10 C 1541, 2013 U.S. Dist. LEXIS 113438, 36 (N.D. Ill. Mar. 29, 2013); *Mallozi v. Ecosmart Techs., Inc.*, 11-CV-2884 (SJF) (ARL), 2013 U.S. Dist. LEXIS 77723, 31 (E.D.N.Y. May 31, 2013); *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999); *In re Paoli R.R. Yard*, 35 F.3d 717, 758 (3d Cir. 1994) (differential diagnosis has widespread acceptance in the medical community, and has been subject to peer review). And even in a non-FELA setting, an expert is not required to "rule out every alternative cause." *Schultz v. Akzo Nobel Paints, LLC*, 721 F.3d 426, 430 (7th Cir., 2013). The *Schultz* court distinguished *Myers v. Ill. Cent. R.R. Co.*, 629 F.3d 639, 641 (7th Cir. 2010), upon which CSX relies heavily:

> Unlike the expert in *Myers*, Dr. Gore considered which alternative causes should be ruled in, and which could be ruled out. He 'determined that [Schultz's] smoking history may have contributed, but [he] found no evidence that any other risk factor played a role." He further "ruled out, to a reasonable degree of medical certainty, that any other known risk factors for AML contributed to Mr. Schultz's disease.'

721 F.3d at 430-31. This distinction applies in this case as well, since the widow's medical witnesses accounted for any alternative explanations. Unlike some toxic-

tort cases, CSX has never identified any alternative cause that the widow's medical experts failed to properly consider.

The COA's ruling in *Wilson*, 2003 Tenn. App. LEXIS 221, recognized the validity of this method. There, the trial court excluded one of the plaintiff's experts. The COA reversed, approving a qualitative analysis as the foundation for an expert's diagnosis. *Id.* at *22-25. The first judge in this case recognized this principle, and permitted the testimony of all four experts. But the second judge shunned *Wilson* and the first judge's ruling, demanding a mathematical precision that simply does not exist in these cases. In doing so, the judge repeated the trial court's error in *Wilson*.

Federal appellate courts have agreed with the *Wilson* holding. An expert need not possess dosage information in order to testify about causation. *See, e.g., Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 157 (3d Cir. 1999) (medical expert may offer causation testimony even without evidence of level of exposure); *Hardyman v. N&W Ry., Co.*, 243 F.3d 255, 262 (6th Cir. 2001) (reversing trial court's requirement of a "dose/response relationship"); *Bonner v. ISP Technologies, Inc.*, 259 F.3d 924, 928 (8th Cir. 2001) (plaintiff need not produce "a mathematically precise table equating levels of exposure with levels of harm"); *accord Sunnycalb v. CSX Transp., Inc.*, 926 F. Supp. 2d 988, 994, 2013 U.S. Dist. LEXIS 23975, 17 (S.D. Ohio 2013) and *McMunn v. Babcock & Wilcox Power Generation Grp., Inc.*, 2:10CV143, 2014 WL 814878 (W.D. Pa. Feb. 27, 2014).

By turning its back on these uniform holdings, the trial court abused its discretion. If the expert testimony had been deemed admissible, the plaintiff's evidence would have presented a jury question. This is a matter for the jury; the

qualitative nature of the two doctors' diagnoses cannot defeat the admissibility of their opinions in a *McDaniel* gatekeeping motion.

IV. CSX has abandoned its objection to the jury instructions.

After the COA rejected a host of alternative trial-court-error contentions, CSX claims, for the first time in this Court, that the trial court had "an obligation to correct a prior incomplete instruction" or to "correctly instruct" the jury until the "jury is discharged." However, CSX never offered an instruction on negligence *per se*, and did not contend in its mistrial motion that any of the instructions that were given were inadequate. After the jury returned a proper verdict, there was no basis under the law to prompt the jury about comparative fault, a purely legal issue that is reserved to the court. *Payne*, 2013 Tenn. App. LEXIS 836, at *28.

The widow is aware of no FELA precedent requiring that a jury be instructed on the legal effect of negligence *per se* and its nullification of comparative negligence. *Id.* at *2-3. This reflects the legal, not factual, nature of the statutory directive. The jury's role is to ascertain (1) whether a safety violation occurred and (2) what the overall damages are. Once it resolves those two issues, the trial judge is required to apply the statute as written; he may not coach the jury into modifying its verdict.

But more fundamentally, CSX abandoned this line of argument before the COA and cannot credibly resurrect it. Nowhere in the 52-page brief that CSX filed with the COA did the railroad contend that the negligence-per-se or comparative-negligence jury instructions were inadequate or insufficient.

V. There were no pretermitted new trial issues.

CSX continues to claim that it should be able to raise yet another onslaught of previously unstated arguments if this case is remanded for a new trial. The Court may note that these arguments were not set forth in CSX's original brief in the COA; they appeared for the first time in the railroad's petition for rehearing in that court. That petition contained these alleged "pretermitted" assignments of error — arguing that the first trial judge ought to consider them now.

The COA rejected these arguments in a per curiam opinion denying rehearing. The court held that the trial court implicitly "resolved these issues against CSX when it considered CSX's post-trial motion." *Payne v. CSX*, No. E2012-02392-COA-R3-CV (January 23, 2014) (Per Curiam Order aff'd *Payne*, 2013 Tenn. App. LEXIS 836). A pretermitted issue is one "left undone," "disregarded," and "passed without notice."[4] But the trial court did consider each of the 30 or more separate alleged errors; they were raised in CSX's 61-page new-trial memorandum filed April 6, 2011. [App. at 373-375]. These issues were not pretermitted; they were considered and rejected by the trial court, and CSX did not appeal them.

VI. The original verdict was binding on the parties and the court.

Strictly speaking, the trial judge was not polling the jury after it affirmed every special-interrogatory finding in open court. To the contrary, he *questioned* the foreperson and jury members about a legal issue that is reserved to the judge

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[4] Pretermit is defined as letting pass without notice; disregard; omit; suspend. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED, 2nd Ed., p. 1534 (1987).

under federal law. The jury was not "exercising [its] right to revise a verdict," as CSX alleges – it was reacting to patent legal error initiated by the judge. The court invited the jury to contravene the express words on the verdict form, which required a gross damages calculation "without deduction for any alleged negligence which you may find on plaintiff's part." [App. at 246.]

"A federal right cannot be defeated by the forms of local practice." *Brown*, 338 U.S. at 296. Re-instructing the jury on a purely legal issue after the return of a proper verdict was error. *See id.* The court's further instructions invited the jury to override federal law, which prohibits consideration of comparative negligence where a railroad is guilty of a regulatory violation. Since the jury had already determined that CSX violated three such regulations, that issue was concluded.

VII. Any new trial should be limited to damages alone.

Where, as here, a jury returns a verdict based on special interrogatories, "error with respect to one issue will ordinarily not constitute a reason to retry an issue that was separately determined." *Crane v. Consolidated Rail Corp.*, 731 F.2d 1042, 1050 (2d. Cir. 1984) *cert. denied* 469 U.S. 854, 105 S. Ct. 179 (1984). Where the special interrogatories between liability and damages are properly delineated and not interwoven, a retrial on damages only is proper. *Crockett v. Long Island R.R.*, 65 F.3d 274, 278-279 (2nd Cir. 1995). If this Court reverses and orders a new trial, that trial should be limited to the issue of damages, since the jury's answers to the liability interrogatories foreclose contributory-fault liability issues.

VIII. The proper remedy is reversal and final judgment. (Cross-Error)

ISSUE PRESENTED FOR REVIEW

After holding that the trial court erred in directing further deliberations, the COA directed the trial court to consider whether the original verdict was supported by the evidence, giving it the option to reinstate the altered verdict. But once it determined that the trial court erroneously instructed the jury in a manner that undermined FELA, there remained no lawful basis for entry of the altered verdict on remand. The proper remedy is reversal with a directive to enter final judgment on the original verdict.

Standard of Review

By countermanding the directives of a federal statute, the trial court committed legal error. This Court reviews such issues de novo.

Discussion

The original verdict was based on valid jury deliberations where the evidence of both parties was thoroughly considered and instructions were "clear, correct, and complete." *Payne*, 2013 Tenn. App. LEXIS 836, at *3. "When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers." Tenn. R. Civ. P. 49.02.

In giving the trial judge discretion to determine if the "clear weight of the evidence" supported the original verdict, or to opt to enter the reduced verdict, the COA expressly relied on *Blackburn v. CSX Transp., Inc.*, 2008 Tenn. App. LEXIS 336, at *8, *appeal denied* Jan. 13, 2010 (applying federal new-trial

standards to FELA cases.) *Blackburn* involved only sufficiency issues supporting the verdict. This case, in contrast, involves only a trial court's perception that legal errors affected the verdict; there was no issue of sufficiency of the evidence here.

CSX never asserted excessiveness of the verdict at the trial court or appellate level. The Sixth Circuit has noted that a trial court commits an abuse of discretion when it improperly applies the law or uses an erroneous legal standard. *United States v. Blackwell*, 459 F.3d 739, 768 (6th Cir. 2006); *Tisdale v. Fed. Express Corp.*, 415 F.3d 516, 525 (6th Cir. 2005). A trial court enjoys broad discretion as to issues involving sufficiency of the evidence, which involves the weight of testimony and consideration of specific evidence. This distinction is critical here because, unlike *Blackburn*, there is nothing for the trial judge to weigh and consider on remand, after basing a new trial on an erroneous legal standard or by improperly applying the law. The only difference between the original and modified verdicts was the improper comment that the trial judge made to the jury, before they briefly deliberated further.

Allowing entry of the altered verdict would impute state comparative-negligence law to this case, violating not only FELA, but the Supremacy Clause:

> This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the . . . laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI.

In allowing the trial judge the discretion to select either verdict, the COA noted that "the trial court was satisfied that the 3.2 million verdict was *not*

against the clear weight of the evidence." *Payne*, 2013 Tenn. App. LEXIS 836, at *57. This rationale supports entry of the original verdict, since the evidence supporting both is identical. The only difference between the two was the court's improper delegation of a legal decision to a factfinding body. *Id.* at *2-3 ("We hold that the trial court erred in instructing the jury, *sua sponte*, on a purely legal issue...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").

CONCLUSION

On many occasions, this Court sees cases in which a trial judge improperly takes a factual issue away from a jury. Those appeals predictably result in reversals for new trials, to protect the parties' right to trial by jury. Here, the trial court made the opposite mistake, diverting to the jury what should have been a straightforward legal ruling: since Payne's injuries resulted in part from CSX's violation of safety regulations, the railroad was fully liable for all of his damages. The jury reported that those damages, "without deduction for any alleged negligence . . . on plaintiff's part," were $8.6 million.

This Court should remand the case to the trial court, and direct it to enter judgment for $8.6 million, with judgment interest from November 30, 2010.[5] If the Court directs a new trial, it must be limited to a damages determination, because the jury found independent negligence and regulatory violations as to asbestos, diesel fumes, and radiation.

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[5] Tenn. Code §47-14-122 (2012 Ed.) ("Interest shall be computed on every judgment from the day on which the jury... returned the verdict without regard to a motion for a new trial.")

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 2014, a true and correct copy of the foregoing pleading was served upon the following:

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