



SUPREME COURT OF KENTUCKY  
No. 2012-SC-000750-D

JEFFREY T. CANIFF,

APPELLANT,

v.

CSX TRANSPORTATION, INC,

APPELLEE.

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APPEAL FROM COMMONWEALTH OF KENTUCKY  
COURT OF APPEALS  
No. 2011-CA-000178

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BRIEF FOR APPELLANT  
JEFFREY T. CANIFF

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 15<sup>th</sup> day of October, 2013, copies of this Brief for Appellant were served by U.S. Mail, postage prepaid, on: **Linsey W. West, Esquire and Kara M. Stewart, Esquire, DINSMORE & SHOHL, LLP, 250 West Main Street, Suite 1400, Lexington, Kentucky 40507; Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and The Honorable William Engle, III, Circuit Judge, Perry County Hall of Justice, 545 Main Street, Hazard, Kentucky 41701.**

  
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One of the Counsel for Appellant

## **INTRODUCTION**

This is a Federal Employer's Liability Act ("FELA") case in which the trial court granted Defendant/Appellee, CSX Transportation, Inc.'s summary judgment on the grounds that Plaintiff/Appellant, Jeffrey T. Caniff ("Caniff"), failed to support his negligence claim with expert testimony. Mr. Caniff appeals the Court of Appeal's opinion affirming the Perry Circuit Court's Order granting Summary Judgment

## **STATEMENT CONCERNING ORAL ARGUMENT**

Plaintiff/Appellant desires oral argument and believes that oral argument will assist this Court in reaching a full understanding of the issues and underlying facts. Oral argument will also allow the attorneys for both parties to address any factual and/or legal issues that this Court deems relevant.

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## I. STATEMENT OF THE CASE

### A. Procedural History

This is a case filed pursuant to the Federal Employers' Liability Act, 45 U.S.C. §§ 51 - 60, ("FELA") wherein the Plaintiff, Jeffrey T. Caniff ("Caniff"), seeks damages for personal injuries that resulted from his being "required to carry a knuckle for a substantial distance without adequate manual and/or mechanical assistance" while working for his employer, CSX Transportation, Inc. ("CSXT"). (Record on Appeal, Complaint at ¶ 7, pp. 1 - 5). (A knuckle is a mechanism which connects rail cars together and allows them to be pushed or pulled as one unit. There are various types of knuckles which can weigh from approximately 75 lbs. to 90 lbs.) CSXT filed an Answer denying negligence in this case. (R.A., pp. 7 - 10).

On May 18, 2010, CSXT filed a Motion for Summary Judgment and a Memorandum of Law in Support of the Motion. (R.A., pp. 486-506). In its Motion, CSXT argued that Mr. Caniff's deposition testimony did not provide any evidence to support his negligence claims and that he did not present any expert testimony to support his claims that CSXT was negligent. (*Id.*) In response, Mr. Caniff argued that his deposition and his Answers to Interrogatories sufficiently allege negligence under FELA in order to defeat summary judgment. (R.A., pp. 539 - 546). Mr. Caniff also argued that he is not required to produce expert testimony under the facts of this case. (*Id.*) On October 14, 2010, the trial court entered summary judgment for CSXT. (R.A., pp. 560 - 564). A copy of the Order is attached in the Appendix, tab 2.

On October 19, 2010, Mr. Caniff filed a Motion to Vacate Summary Judgment together with his Affidavit (R.A., pp. 565 - 580). Mr. Caniff filed a Memorandum of Law in Support of his Motion to Vacate (R.A., pp. 583-587). CSXT filed a Response to the Motion to Vacate Summary Judgment (R.A., pp. 588 - 593). On January 7, 2011, the trial court entered an Order denying Plaintiff's Motion to Vacate Summary Judgment (R.A., pp. 608 - 610). A copy of the Order is attached in the Appendix tab 7. In its Order, the trial court held that whether or not CSXT was negligent in requiring Mr. Caniff to carry a 75 pound knuckle by himself for a distance of approximately 200 feet requires expert testimony to prove industry practice and that this is outside the common knowledge of the jury. (Id.) On January 24, 2011, Mr. Caniff timely filed his Notice of Appeal. (R.A., pp. 611 -612).

On October 19, 2012, a panel of the Court of Appeals handed down an Opinion, to be published, affirming the Summary Judgment entered by the Perry Circuit Court. (Appendix Tab 1). Mr. Caniff filed a Motion for Discretionary Review by this Honorable Court. On August 21, 2013, an Order was entered granting Discretionary Review.

**B. Factual Background**

**Jeffrey T. Caniff**

Mr. Caniff began his railroad career for the Defendant in July 1979 when he started with the Chessie System at the Raceland Car Shop in Raceland, Kentucky. (Caniff Deposition, 3/6/09, p. 6). At that time, he was hired as a blacksmith helper. (Id.) Eventually, Mr. Caniff worked for CSXT at their Russell Yard in Russell, Kentucky. (Id. at p. 18). At that time, Mr. Caniff was working as a carman and spent approximately 80% of his time working in the rail yards as opposed to the car shops, (Id. at p. 22).

In an unrelated accident, Mr. Caniff injured his neck in 1999 or 2000. (Id. at p. 35). Dr. Phillip Tibbs of Lexington, Kentucky performed a cervical fusion surgery and eventually released him to return to work. (Id. at p. 44). Even though he returned to work, he did not regain all of his strength in his left hand. (Id.) After returning to work, Mr. Caniff had to ask for help to perform certain tasks more frequently than prior to this unrelated accident. (Id. at pp. 48 - 49).

The accident which is the subject of this lawsuit occurred on December 10, 2004. (Id. at p. 52). At the time of the accident, Mr. Caniff's regular job was inspecting trains which required him to check the air on the train, to make sure that the hoses are laced (i.e., attached together) and to release the hand brakes. (Id. at p. 50). However, on December 10, 2004, Kevin Frasure, who was the lead man, asked him to find out what was wrong with a train that was blocking a crossing. (Id. at pp. 58 and 60). Since the high rail man who would have normally done this job was not available, Mr. Caniff was instructed to perform the task. (Id. at p. 59). Mr. Caniff asked Mr. Frasure if L.A. Smith could help him on this job. He was simply told to "[d]o what you can do." (Id. at p. 95). In his second deposition, Mr. Caniff testified that "I really needed help, because it's not a, it's not really a one-man job." (Caniff Depo., 4/12/10, p. 25). Also, prior to this accident, Mr. Caniff never carried a knuckle by himself on mainline ballast. (Caniff Depo., 4/12/10, p. 28). He stated that two workers could have carried a knuckle using a steel pipe. (Id. at p. 27).

Mr. Caniff was only able to get the truck to within 200 feet of the train. (Caniff Depo., 3/6/09, p. 61). He was not able to get close to the train because of all the water

holes and the area was muddy. (Id. at pp. 64 and 111). He testified that it had been raining and it was muddy. (Id.) Moreover, when there were problems in the yard with mud, water or excess ballast, CSXT was not good about trying to correct the problem. (Id. at p. 40). Mr. Caniff stated in his Answers to Interrogatories that if the road had been better maintained he would have been able to get closer to the train. (R.A., pp. 539 - 546). He exited the truck and took a hammer and Carter [sic] key knockout bar with him. (Id. at p. 64). Upon seeing that the knuckle was broken, Mr. Caniff removed the broken knuckle and then went back to his truck to retrieve a new knuckle. (Id. at p. 65). However, there was not a new knuckle in the truck so he drove back to the shop and got two knuckles. (Id. at p. 66). Upon returning to the train, he was in the process of carrying the knuckle back to the train when the accident occurred. (Id. at pp. 67 - 68). This was the first time that Mr. Caniff ever carried a knuckle by himself on the mainline. (Caniff Depo., 4/12/10, p. 28). He stated that the knuckle weighed approximately 75 pounds. (Id. at p. 19). He carried the knuckle by himself at least 200 feet but possibly farther than 300 feet. On his first trip to the scene, he estimated that he got his truck within 200 feet of the train. (Caniff Depo., 3/6/09, p. 61). However, in his Affidavit which is attached as Exhibit A to Plaintiff's Motion to Vacate Summary Judgment, he estimated that on his second trip he would have had to carry the knuckle by himself more than 300 feet. (R.A., pp. 565 - 580). (See Appendix Tab 3). He was required to walk on ballast and the accident occurred when he stepped over the second rail of the second track. (Caniff Depo., 4/12/10, p. 10). His view of his feet was obstructed because he was carrying the knuckle waist high by himself. (Caniff Depo, 4/12/10, pp.

9-10, 23). He testified that where he was at the time of the accident was not designed for foot traffic. (Id. at p.13). He stated that it felt like something slipped under his foot. (Caniff Depo., 4/12/10 at p. 22). Since he did not want to drop the knuckle on his feet, he twisted to his right and fell to the ground. (Caniff Depo., 3/6/09, p. 68). He heard a pop and felt a tingling sensation, and initially was worried about his prior neck injury. (Caniff Depo, 3/6/09 at p. 69).

In his second deposition, Mr. Caniff was questioned about how two people would have carried the knuckle in 2004 when he was injured. He testified in his second deposition that carrying a knuckle is not a one-man job. (Caniff Depo. 4/12/10, p. 25). Mr. Caniff explained how two men back in 2004 would have carried the knuckle. "Well, we'd use a piece of pipe or something like that , so we could stick it through the knuckle, and that way we could still carry it at waist-high, like we're supposed to." (Caniff Depo. 4/12/10, p. 27).

After the accident, the conductor carried the knuckle and put it on the train. (Caniff Depo., 3/6/09 at p. 70). Mr. Caniff then finished the job of securing the knuckle. (Id.) Mr. Caniff finished the shift as he thought he pulled something. (Canif Depo., 3/6/09 at p. 73). Mr. Caniff told Mr. Frasure about the accident later that shift. (Caniff Depo., 3/6/09 at p.74.) He also reported the accident to one of his supervisors, Ken Morgan, prior to January 3, 2005 when he last worked. (Id. at p. 81).

As a result of this accident, Mr. Caniff has a severe back injury causing numbness, weakness, and tremors. (Caniff Depo., 3/6/09 at pp. 81 - 82). Moreover, Mr. Caniff was unsteady on his feet and his gait is off. (Id. at p. 81). Also, one of his

treating doctors told Mr. Caniff that he should not lift over twenty pounds and that he should not sit, stand, or walk for extended periods of time. (Id. at p. 82).

In Mr. Caniff's Response to CSXT's Motion for Summary Judgment, counsel attached CSXT's Interrogatory No. 10 and Mr. Caniff's answer to this Interrogatory regarding negligence as follows:

**INTERROGATORY NO. 10** : Describe in detail each and every fact that supports Plaintiff's contention that CSXT was negligent for "requiring Plaintiff to carry excessive weight for a substantial distance without providing proper manual and/or mechanical assistance, as set forth in numerical paragraph 9(f) of Plaintiff's Complaint.

**ANSWER:** I got as close to the car with the broken knuckle as I could in a vehicle. The only way to get access to the location was to come in on the north side of the track on a dirt road. The road was poorly maintained, with standing water. If the road had been better maintained, I could have gotten closer to the car that needed the knuckle repair. I was carrying the knuckle by myself and the area of the yard made it difficult for one person to carry the knuckle.

(R.A., pp. 539-546).

Following entry of Summary Judgment in favor of CSXT, Mr. Caniff filed a Motion to Vacate Summary Judgment (R.A., pp. 565-580). (A copy of Plaintiff's Motion to Vacate Summary Judgment with exhibits is included in the Record on Appeal at 565-580. For the convenience of the Court, Appellant has placed the various exhibits at separate tabs in the Appendix. The motion and Affidavit to Vacate Summary Judgment are at Tab 3; the Safe Job Procedure for Handling End-of-Train Devices is at Tab 4; the CSX Safety Rule for Carrying EOT's is at Tab 5; the Safe Job Procedure concerning a knuckle is at Tab 6). In support of the Plaintiff's Motion to Vacate Summary Judgment,

Plaintiff filed an Affidavit of Mr. Caniff, and attached to his Affidavit a copy of a written Safety Policy of CSXT dated August 1, 1995 entitled "Maximum Distance to Carry EOT Devices". (An EOT is an abbreviation for end- of-train device, which is a metal, rectangular battery-operated light which is attached to the rear of the train to emit a flashing red light. A CSXT safe job procedure, including photographs of an EOT device, is attached to Mr. Caniff's Affidavit at Tab 4.)

Mr. Caniff also stated in his Affidavit that a knuckle weighs between 80 to 90 pounds Also attached to Plaintiff's Motion to Vacate Summary Judgment is a CSXT Safe Job Procedure for installing a knuckle. Although the Safe Job Procedure is dated February 1, 2009, Mr. Caniff swore in his Affidavit and his second deposition that replacement of a knuckle was a two-man job as of the date of his accident, on December 10, 2004. When Mr. Caniff returned from retrieving the knuckle on the night of the accident, he would have had to carry the replacement knuckle from where he parked the company truck to where the broken knuckle was located at a distance of more than 300 feet. (Appendix, Tab 3). (R.A., pp. 565-580).

#### **John D. Quillen**

Mr. Quillen is a co-worker of Mr. Caniff. Both men worked for CSXT at Russell Yard. (Quillen Depo., pp. 6 - 7). At the time of his discovery deposition, taken January 13, 2010, Mr. Quillen had been employed by CSXT at Russell Yard for 31 years. (Quillen Depo., pp. 6 - 7).

Mr. Quillen provided testimony on issues relevant to this Appeal. He corroborated Mr. Caniff's testimony that there had been issues at Russell Yard when he testified:

I mean, we've had drainage problems, mud, water standing over the tracks; we -- I mean, we've got multiple problems, and that's been ongoing since I hired in with the railroad. I mean, it's just -- you know, you just try to pick out, "Can you fix this for me" or, "Can you fix that for me," and, you know, in six months you ask them to fix something else or -- it just seems like they don't have the time or the -- don't want to put the money in or something to fix it.

(Quillen Depo., pp. 20 - 21).

Mr. Quillen testified that on one occasion he recalled Mr. Caniff complaining about "the walking conditions in the yard, the mud and ballast and stuff like that." These complaints were made by Mr. Quillen during a CSXT safety conference call. (Quillen Depo., p. 31).

Mr. Quillen also addressed an issue in this Appeal concerning adequate manual assistance to perform various jobs.

- Q. Okay. Do you have any information from any source that Mr. Caniff was ever told to work a job after he had told somebody he thought it was unsafe?
- A. I've heard him say that, yeah.
- Q. What had he said about that?
- A. I've heard -- well, he's not the only one. I mean, I've heard different people, you know, tell the boss, you know, "This is a two-man job," you know, "I should be having help," and the answer was always the same, "We don't have the man power," you know, "and that's a one-man job, and go do it."

(Quillen Depo., p. 30).

Mr. Quillen also testified that while CSXT training videos would show two men doing a job, at times he would have to do the job by himself. He further testified "you asked for help and they don't get you nobody, everybody's busy." (Quillen Depo., p. 39).

Mr. Quillen was also asked about carrying a knuckle by himself for 200 ft. on mainline ballast. In this regard, he testified as follows:

- Q. Okay. Do you believe that you could safely carry a knuckle 200 feet on main line ballast, you yourself?  
A. By myself?  
Q. Yes, sir.  
A. First of all, I wouldn't do it by myself, not unless I was just flat ordered to do it or threatened to be fired for insubordination.

(Quillen Depo., p. 44).

## II. ARGUMENT

### A. Statutory Background

The FELA was enacted by Congress in 1908. Section 1 of the FELA provides that a railroad will be “liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting **in whole or in part** from the negligence of any of the officers, agents, or employees of such carrier.” 45 U.S.C. §51 (emphasis added). It is important to note that the FELA contains significant features including the creation of liability for any injury “resulting in whole or in part” from the employer’s negligence. 45 U.S.C. §51. This reflected the goal of Congress to shift part of the “human overhead” of conducting business from railroad workers to the railroad. See Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135, 161 (2003); Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 542 (1994). In CSX Transportation, v. Begley, 313 S.W.3d 52, 57-60 (Ky. 2010), this Court handed down an opinion which is essentially a primer on the FELA replete with extensive footnotes.

**B. The Appropriate Standard When Reviewing a Summary**

Federal decisional law governs what constitutes negligence in a FELA claim and requires a plaintiff to prove the traditional common-law elements of negligence, including duty, breach, foreseeability, causation, and injury in order to prevail." Begley, *supra* at 58. (footnotes omitted). However, "[t]he law of the forum governs procedural matters when a FELA claim is tried in state court." *Id* at 59 (footnote omitted.)

The relevant Kentucky law concerning summary judgment practice is based upon C.R. 56.03, which authorizes the court to enter summary judgment "...if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving part is entitled to a judgment as a matter of law." The seminal case of Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S W.2d 476 (Ky. 1991) sets forth various criteria that a trial court should follow when faced with a motion for summary judgment. In this regard, the Court in Steelvest held:

this Court has also repeatedly admonished that the rule [C.R.56] is to be cautiously applied....The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact. The trial judge must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists.

Id. at 480 (internal citations omitted).

The party moving on a motion for summary judgment should not succeed unless the right to judgment is shown with such clarity that there is no room left for controversy,

and it appears impossible for the party against whom the motion is made to produce evidence at trial which would warrant a judgment in his favor. Id.; Capitol Cadillac Olds, Inc. v. Roberts, 813 S.W.2d 287 (Ky. 1991) (when facts or reasonable inferences to be drawn from those facts are in dispute, summary judgment is improper and the issue should be tried).

This Court continues to follow the principle that summary judgment "is to be cautiously applied." Lipsteuer v. CSX Transportation, Inc., 37 S.W.3d 732, 735 (Ky. 2001), citing Steelvest at 480. In Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. 1996), the Court held that "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." In 3D Enterprises Contracting Corporation v. Louisville & Jefferson County Metropolitan Sewer District, 174 S.W.3d 440, 445 (Ky. 2005), this Court held that "[b]ecause summary judgments involve no fact finding, this Court will review the circuit court's decision de novo." Working within this framework, the Courts below improperly granted and affirmed summary judgment as the record is replete with genuine issues of material fact.

**C. The Courts below failed to apply the proper standard for Summary Judgment under FELA.**

A determination of whether or not a FELA plaintiff has produced sufficient evidence to overcome summary judgment must begin with Rogers v. Missouri Pac. R. Co., 352 U. S. 500, 77 S.Ct. 443, L.Ed. 2d 493 (1957). The Supreme Court, in a

passage that has been cited innumerable times, set forth the quantum of proof a FELA plaintiff must present in order to submit a case to a jury:

Under this statute 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. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or *in part*" to its negligence.

352 U.S. 506-507, 77 S.Ct. 448-449, L.Ed. 2d 499-500 (*emphasis original (footnotes omitted)*).

Furthermore, the Rogers court specifically addressed the role of juries in deciding FELA cases.

The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury.

352 U.S. 510, 77 S.Ct. 450-451, 1 L.Ed. 2d 501-502. (*footnotes omitted*).

In Begley, this Court left open "for another day" the question of whether a proximate cause instruction is proper in a FELA case following Rogers. Begley, *supra* at

63. That question was answered in CSX Transportation v. McBride, 564 U.S. \_\_\_, 131 S.Ct. 2630, 180 L.Ed. 2d 637 (2011). A majority held:

In accord with the text and purpose of the Act, this Court's decision in Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1957), and the uniform view of federal appellate courts, we conclude that the Act 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.

131 S.Ct. at 2634, 180 L.Ed. 2d. at 643. See also Page v. National R. Pass. Corp., 200 Md. App. 463, 475; 28 A.3d 60, 67 (2011). ("The Supreme Court reaffirmed the appropriate standard for causation in FELA actions in McBride. In doing so, it held that the *Coray/Rogers* standard continues to displace common law rules of proximate causation in FELA cases.")

In another post-McBride opinion, the 11<sup>th</sup> Circuit reviewed a trial court's grant of summary judgment in a FELA case. The plaintiff was a switchman with over 30 years of experience. His duties required him to mount and climb rail cars to release hand brakes. On the day in question, one particular car's hand brake was difficult to release. The plaintiff had to use more force than usual to release the brake. After his shift that day, his shoulder began to hurt. The district court granted summary judgment because the plaintiff could not identify the specific rail car with the defective hand brake. The 11<sup>th</sup> Circuit reversed the summary judgment and observed that while granting summary judgment, the trial court recognized the "featherweight" burden of a FELA claim to

withstand summary judgment . . . .” Strickland v. Norfolk Southern Rwy. Co., 692 F.3d 1151, 1157 (11<sup>th</sup> Cir. 2012). In reversing the trial court, the court observed that

. . .the legislative purpose behind the FELA and the FSAA also weighs against summary judgment for Norfolk Southern. As the Supreme Court noted in McBride, The FELA was enacted to counteract the “harsh and technical” rules of state common law. McBride, 564 U.S. at \_\_\_\_\_, 131 S.Ct. at 2638 (internal quotation omitted). Permitting summary judgment to Norfolk Southern would fly in the face of that forgiving standard.

Id. At 1159. See also Grogg v. CSX Transportation, 659 F. Supp. 2d. 998, 1005 (N.D. Ind. 2009). (“ . . .the featherweight standard of proof required for claims brought under the FELA.”; summary judgment denied).

In Harbin v. Burlington Northern R. Co., 921 F.2d. 129 (7<sup>th</sup> Cir. 1990), the court reviewed a summary judgment in a FELA case. The plaintiff was employed by the railroad as a boilerman. One of his duties required him to clean heating boilers once a year. He did this “by pushing and pulling a vibrating brush mounted upon a long pole” to dislodge soot, rust, and other grit that was inside the boilers. Id. at 129. He spent several days cleaning boilers and after the third day he began to experience chest pain. He was later diagnosed with a heart attack. The building in which the cleaning took place lacked adequate ventilation according to the plaintiff. Despite complaints, the railroad failed to correct the problem. Harbin filed suit and alleged the railroad was negligent due to inadequate ventilation, inadequate equipment to clean the boilers and inadequate respiratory protection while stirring up soot and other debris.

The district court granted the railroad's Motion for Summary Judgment based on insufficient proof of negligence, including the lack of expert testimony addressing "the precise quantity or composition of soot present in the air. . . ." Id. at 130.

Upon appeal, the court reversed the summary judgment and held

Harbin need not identify the specific composition and density of soot present in his work environment to survive a summary judgment motion. While expert testimony documenting the hazards posed by the presence of so many parts per million of soot in the air could certainly enhance Harbin's case, it is not essential under the regime of the statute. We decline the Railroad's invitation to constrict the generous provisions of the statute by imposing upon FELA claimants burden to produce such technical scientific evidence.

Id. at 132.

Further, the court emphasized the relaxed standard trial judges should employ when considering a Motion for Summary Judgment in a FELA case. In this regard the court held:

Although we discern no case presenting identical facts, numerous FELA actions have been submitted to a jury based upon far more tenuous proof – evidence scarcely more substantial than pigeon bone broth.

Id. at 132.

In Aparicio v. Norfolk & Western Rwy. Co., 84 F.3d 803 (6<sup>th</sup> Cir. 1996), abrogated on other grounds by Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149; 120 S.Ct. 2097; 147 L.Ed. 2d 105 (2000), the 6<sup>th</sup> Circuit addressed the question of the amount of evidence a FELA plaintiff must show to successfully defend a Motion for Judgment as a matter of law. The plaintiff in Aparicio worked for the railroad as a track maintenance laborer and filed a FELA lawsuit as a result of suffering carpal tunnel

syndrome. At the close of the plaintiff's case, the trial court directed a verdict in favor of the railroad. On appeal, the plaintiff raised issues regarding the statute of limitations, which is not an issue in this case, as well as the amount of evidence concerning the railroad's negligence necessary to defeat a directed verdict. Regarding the latter issue, the court made the following observation:

While the Supreme Court has made it clear on more than one occasion since Rogers that an employer subject to the Federal Employers' Liability Act need be only *slightly negligent* in order to be liable to a plaintiff, Gottshall, 114 S.Ct. at 2404, the question has remained as to the *quantum of evidence* a Federal Employers' Liability Act plaintiff must present to overcome a motion for judgment as a matter of law. Specifically, courts have struggled with the question of whether a Federal Employers' Liability Act plaintiff need present only *slight* evidence or a *scintilla* of evidence as to each element of his or her claim in order to withstand a motion for judgment as a matter of law, or whether a plaintiff must present something more than that.

Id. at 808. (emphasis original).

The court concluded its analysis of this issue by stating:

Thus, we hold that Brady and Rogers require a Federal Employers' Liability Act plaintiff to present more than a scintilla of evidence in order to create a jury question on the issue of employer liability, but not much more.

Id. at 810.

Other courts have also applied a relaxed standard when reviewing summary judgments or judgments as a matter of law in FELA cases. In Ulfik v. Metro-North Commuter R., 77 F.3d 54 (2<sup>nd</sup> Cir. 1996), the court reviewed a judgment as a matter of law entered at the end of the plaintiff's case-in-chief. The court reversed the trial court and expressed the following regarding the lax standard of negligence under FELA:

The Supreme Court has not expressly held that a relaxed standard for negligence, as distinguished from causation, applies under FELA. Cf. Gallick, 372 U.S. at 117. Yet numerous appellate courts, including ours, have construed the statute, in light of its broad remedial nature, as creating a relaxed standard for negligence as well as causation. See Mullahon v. Union Pacific Railroad, 64 F.3d 1358 1364 (9<sup>th</sup> Cir. 1995); Syverson v. Consolidated Rail Corp., 19 F.3d 824, 825 (2d Cir. 1994); Hines v. Consolidated Rail Corp. 926 F.2d 262, 267 (3d Cir. 1991).

Id. at 58. n.1.

In Mullahon v. Union Pacific R., 64 F.3d 1358 (9<sup>th</sup> Cir. 1995), the court noted that there is a relaxed standard in FELA cases for “both negligence and causation determinations.” Id. at 1364.

The 3<sup>rd</sup> Circuit addressed the amount of evidence a plaintiff must present in a FELA case to defeat summary judgment. In Hines v. Consolidated Rail Corp., 926 F.2d 262 (3<sup>RD</sup> Cir. 1991), the court held “that a FELA plaintiff need only present a minimum amount of evidence in order to defeat a summary judgment motion.” Id. at 268.

Another 2<sup>nd</sup> Circuit case addressing this issue is Syverson v. Consolidated Rail Corp., 19 F.3d 824 (2<sup>nd</sup> Cir. 1994). Here, the court stated that “the case must not be dismissed at the summary judgment phase unless there is absolutely no reasonable basis for a jury to find for the plaintiff.” Id. at 828. The summary judgment was reversed.

Against this backdrop of the law to be applied by a trial court considering a motion for summary judgment in a FELA case or an appellate court’s review of summary judgment, Mr. Caniff begins his analysis of the evidence adduced by him at the time the summary judgment below was granted.

**D. Failure of CSXT to provide assistance to Plaintiff constituted evidence.**

In his Complaint, Mr. Caniff alleged that CSXT negligently “required him to carry a knuckle for a substantial distance without adequate, manual and/or mechanical assistance.” (R.A., Complaint at ¶ 7, pp. 1-5). Mr. Caniff testified in his first discovery deposition that he asked for assistance in replacing the broken knuckle. This assistance was refused, and he was told to “[d]o what you can do.” (Caniff depo., 3/6/09 at 95). He testified in his second deposition that the job procedure is “not really a one-man job.” (Caniff depo., 4/12/10 at 25). CSXT refused his request for assistance even though it knew of his prior unrelated injury which required surgery.

In Blair v. Baltimore & Ohio R. Co., 323 U.S. 600, 65 S.Ct. 545, 89 L.Ed. 490 (1945), the plaintiff was told to unload a rail car. When he came across “three 10-inch seamless steel tubes, approximately 30 feet long and weighing slightly more than a 1,000 pounds each,” he told his superior that the pipes should be sent to the consignee’s place of business for unloading. 323 U.S. at 602, 65 S.Ct at 547, 89 L.Ed. at 493. The consignee had the proper equipment to perform the task. However, the plaintiff’s supervisor rejected his recommendation and told him to get two other railroad employees to assist with the unloading. When plaintiff objected, he was told to do the job or else the railroad “would get somebody else that would.” 323 U.S. at 602-603, 65 S.Ct. At 547, 89 L.Ed. at 493. During the process of unloading the pipes, the plaintiff was injured. After a jury verdict in favor of the plaintiff, the trial court granted a new trial. Both sides appealed to the Pennsylvania Supreme Court, which held that plaintiff assumed the risk of injury and that he failed to prove negligence.

The U. S. Supreme Court granted certiorari. The Court noted that:

the suitability of the tools used in an extraordinary manner to accomplish a novel purpose, the number of men assigned to assist him, their experience in such work and their ability to perform the duties and the manner in which they performed those duties – all of these raised questions appropriate for a jury to appraise in considering whether or not the injury was the result of negligence as alleged in the complaint. We cannot say as a matter of law that the railroad complied with its duties in a reasonably careful manner under the circumstances here, nor that the conduct which the jury might have found to be negligent did not contribute to petitioner's injury "in whole or in part." Consequently we think the jury, and not the court, should finally determine these issues.

323 U.S. at 604-605, 65 S.Ct. at 548, 89 L.Ed. at 494.

Thus, Blair makes clear that inadequate assistance is a factor a jury should consider in determining whether or not a railroad negligently assigned employees job tasks beyond their capability.

In the same vein, is Stone v. New York, Chicago, & St. Louis R.Co., 344 U.S. 407, 73 S.Ct. 358, 97 L.Ed. 441 (1953). Here, the plaintiff was removing old track ties. If a rail spike was driven through the tie into the ground, three or four men were normally assigned to remove the tie. The plaintiff and another employee encountered difficulty in removing a tie. The straw boss kept telling the plaintiff to "pull harder", and if he did not, ". . .I will get that somebody that will." 344 U.S. at 408, 73 S.Ct. at 359, 97 L.Ed. at 444. The plaintiff then pulled harder and hurt his back. A jury awarded damages to the plaintiff, but the Missouri Supreme Court reversed, holding that the plaintiff had not proven negligence or causation. The U.S. Supreme Court reversed and held that the facts were for a jury to decide. In this regard the Court held:

We think the case was peculiarly one for the jury. The standard of liability is negligence. The question is what a reasonable and prudent person would have done under the circumstances. Wilkerson v. McCarthy, 336 U. S. 53,61. The straw boss had additional men to put on the tongs. He also had three alternative methods for removing stubborn ties. This was not the first difficult tie encountered by the section crew in this stretch of track. The likelihood of injury to men pulling or lifting beyond their capacity is obvious. Whether the straw boss in light of the risks should have used another or different method to remove the tie or failing to do so was culpable is the issue. To us it appears to be a debatable issue on which fair-minded men would differ. Cf. Bailey v. Central Vermont R. Co., 319 U.S. 350, 353; Urie v. Thompson, 337 U.S. 163, 178. The experience with stubborn ties, the alternative ways of removing them, the warning by petitioner that he had been pulling as hard as he could, the command of his superior to pull harder, the fact that more than two men were usually used in these circumstances – all these facts compromise the situation to be appraised in determining whether respondent was negligent. Those circumstances were for the trier of facts to appraise.

344 U.S. at 409, 73 S.Ct. at 359, 97 L.Ed. at 445.

It is clear beyond dispute that under the FELA, a railroad has certain non-delegable duties to provide a safe work place. In Kalanick v. Burlington Northern R.Co. 242 Mont. 45, 788 P.2d 902 (1990), the Montana Supreme Court considered a case in which the plaintiff and a co-worker were assigned the task of loading rail ties onto a high-rail truck and then unloading them. Without any lifting equipment, the plaintiff and his co-worker performed this task of loading and unloading about 900 rail ties before the plaintiff's back gave out.

On appeal from a jury verdict in favor of the plaintiff, the Court set forth certain duties the FELA imposes upon a railroad:

There are duties imputed to the carrier under the Act, including: the duty to provide a safe workplace, Tiller v. Atlantic Coast R.R. (1943), 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed.. 610; the duty to furnish employees with suitable equipment to enable the employee to perform work safely, St. Louis Southwestern Ry. Co. v. Greene, (Tex. 1977), 552 S.W.2d 880, 884; the duty to provide sufficient manpower to complete work in a reasonably safe manner, Blair v. Baltimore & O.R. Co., (1945), 323 U.S. 600, 65 S.Ct. 545, 89 L. Ed. 490; and the duty to assign workers to jobs for which they are qualified and to avoid placing them in jobs beyond their physical capabilities, Fletcher v. Union Pac. R.R. 8<sup>th</sup> Cir. 1980, 621 F.2d 902, 909, cert. denied 449 U.S. 1110, 101 S.Ct.918, 66, L.Ed..2d 839.

Id. at 905.

The Sixth Circuit has also dealt with the issue of a railroad failing to provide adequate manpower to perform a job. In Ross v. Chesapeake & Ohio Rwy. Co., 421 F.2d 328 (6<sup>th</sup> Cir. 1970), the plaintiff was working as a machinist servicing a locomotive engine. He determined that oil needed to be added to the engine. He looked around for someone to help him perform this task but no-one was available. He then went to retrieve a 55-gallon barrel of oil. While moving the barrel, he injured his back. A jury ruled in favor of the plaintiff but the trial court entered a judgment n.o.v. and stated that the plaintiff had failed to prove negligence. The 6<sup>th</sup> Circuit disagreed and reinstated the jury verdict. In reversing the trial court, the Court held:

We hold that the reasonableness of appellant's actions in searching for help and in moving the oil drum, and the alleged failure of the appellee to supply this oil where needed, or the necessary help, or the equipment to move the oil by himself created questions which were properly submitted to the jury.

Id. at 330 (emphasis added).

Another 6<sup>th</sup> Circuit opinion addressing the issue of inadequate assistance is Southern Rwy. Co. v. Welch, 247 F.2d 340 (6<sup>th</sup> Cir. 1957), a case in which a machine-grinder operator was charged with grinding reclaimed rails to smooth off sharp burrs. The plaintiff was required to pull rails across rollers supported by tables. In this process he injured his back. The railroad appealed a judgment in favor of the plaintiff following a bench trial. The railroad argued on appeal that the plaintiff failed to prove negligence. The plaintiff argued that the railroad failed to provide adequate assistance to the plaintiff. On this point, the 6<sup>th</sup> Circuit held:

Defendant urges first that no negligence on its part was shown. As to the principal negligence alleged, which was that defendant contends that plaintiff was performing 'what was always a one-man job.' However, it appears by substantial evidence that upon the day of the injury circumstances of particular difficulty existed. The grit, grime, tar and dirt on the rails were excessive and required additional force to pull the rails into proper position. Under such circumstances it had been defendant's previous practice to assign an extra man to assist grinder. This is not denied.

Id. at 341.

The Court further addressed the railroad's duty to assign sufficient employees to perform a task. "The employer is under the nondelegable obligation of providing sufficient help for the particular task." Id. at 341. Moreover, "[w]hether the employer has failed to perform his duty is a question of fact for the jury or, on trial without jury, for the court." Id.

A FELA case from the 5<sup>th</sup> Circuit in accord with these duties is Yawn v. Southern Rwy. Co., 591 F.2d 312 (5<sup>th</sup> Cir. 1979). In this case, several clerical employees sued

their employers under FELA. Among their allegations was a claim that the railroads negligently failed to provide adequate help to do their jobs. The district court dismissed the claims reasoning that the allegations were essentially work conditions grievances rather than FELA claims. On appeal, the 5<sup>th</sup> Circuit disagreed and held:

As a corollary to this duty to maintain safe working conditions, the carrier is required to provide its employee with sufficient help in the performance of the work assigned to him. Blair v. Baltimore & O. R.R., 323 U.S. 600, 65 S.Ct. 545, 89 L.Ed. 490 (1945). Where the failure to provide sufficient help proximately causes injury to the employee, the carrier is liable for negligence under the provisions of the FELA. Deere v. Southern Pac. Co., 123 F.2d 438 (9<sup>th</sup> Cir. 1941), Cert. denied, 315 U.S. 819, 62 S.Ct. 916, 86 L.Ed. 1217 (1942); Reynolds v. Atlantic Coast Line R., 251 Ala. 27, 36 So.2d 102 (1948); Louisville & N. R.R. v. Crim, 273 Ala. 114, 136 So. 2d 190 (1961).

Id. at 315. See also Beeber v. Norfolk Southern Corp., 754 F. Supp. 1364, 1362 (N.D. Ind. 1990) (“An employer’s failure to provide adequate assistance to its employees can constitute breach of the employer’s duty under the FELA and will provide grounds for the employee to recover if such failure is the proximate cause of the injury.”)

**E. The Courts below erred in holding that the Apellant failed to prove negligence due to the lack of a liability expert.**

Both the Court of Appeals and the Circuit Court ruled that Caniff’s failure to utilize a liability expert was fatal to his case. On page 6 of its Opinion, the Court of Appeals observed that the trial court held that an expert testimony was required to establish “. . .whether Caniff was required to carry too much weight for too far of a distance necessitated a showing that CSXT’s standards were outside the generally accepted railroad standards at the time. The trial court, believing this was a matter

beyond the common knowledge of a jury, held that expert testimony was required and Caniff's failure to procure such an expert was fatal to his claim." Appendix, Tab 1, p6. The Court of Appeals upheld the Circuit Court. Respectfully, the lower courts erred in holding that Mr. Caniff could only prove negligence under these facts with a liability expert witness.

In Harbin, supra discussed above, the court reviewed the trial court's summary judgment. The 7<sup>th</sup> Circuit refused to require the plaintiff to present expert testimony concerning the composition of the soot to which plaintiff was exposed. The summary judgment was reversed even though the plaintiff failed to present a liability expert witness.

In Tufariello v. Long Island R. Co., 458 F.3d 80 (2<sup>nd</sup> Cir. 2006), the plaintiff filed a FELA lawsuit alleging a permanent hearing loss as the result of being exposed to locomotive horns. The trial court granted the railroad's motion for summary judgment on the grounds, inter alia, that the plaintiff did not make out a negligence case, because "he did not offer expert testimony or objective measurements of the horns' decibel levels necessary to establish either that the train horns caused his hearing loss or that the LIRR breached its duty of care to him." Id. at 82-83. The Court held that the plaintiff's hearing loss claim ". . . may be decided by a fact finder even in the absence of expert testimony." Id. at 88.

Another 2<sup>nd</sup> Circuit case dealing with experts in a FELA case Ulfik v. Metro-North Commuter R., 77 F.3d 54 (2<sup>nd</sup> Cir. 1996). The plaintiff was ". . . a lever man in an underground tower" in New York City. Id. at 55. His duties included operating a switch

that allowed trains to enter and leave Grand Central Terminal. On the day in question, the plaintiff and other employees experienced headaches and dizziness “. . . due to their inhalation of fumes from either paint or solvent being sprayed in the railroad tunnel.” *Id.* at 55. The employees were not allowed to leave work due to their symptoms until their replacements arrived.

After being relieved by his replacement, the plaintiff went to a hospital emergency room to be seen by a physician. He was given various tests and told to see his own physician if the symptoms persisted. He did see his physician and was told to rest for a week. He again saw his physician who told him to not return to work at that time. The railroad directed the plaintiff to see a company physician. As the plaintiff and another employee, who also suffered the same symptoms, were on their way to see the railroad’s physician, the plaintiff experienced dizziness and fell down some stairs and injured himself. The plaintiff filed a FELA lawsuit for the injuries resulting from the fall down the stairs resulting from the dizziness from the fumes. The trial court granted the railroad’s motion for directed verdict after the plaintiff rested his case-in-chief. The trial judge ruled that the plaintiff failed to prove either negligence or causation.

On appeal, the railroad argued that plaintiff failed to present any medical evidence of the toxicity of the paint. The Court rejected this argument and noted that the railroad knew that paint was being sprayed in the vicinity of the plaintiff’s work station. “If Metro-North knew or should have known that this paint could cause injury to one of its employees, then Metro-North could be held liable for its negligence for failing to take reasonable precautions.” *Id.* at 58.

The Court stated that two co-workers also complained about being sick from the paint fumes. The Court held that this evidence was sufficient to establish foreseeability concerning the lack of expert testimony on causation, and that “. . .the trier of fact could reasonably determine, without expert testimony, that prolonged exposure to paint fumes would cause headache, nausea, and dizziness.” Id. at 59-60.

Just last month, the 6<sup>th</sup> Circuit addressed the issue of whether expert testimony is required to support allegations of negligence in a FELA case. In Szekeres v. CSX Transp., slip opinion No. 12-3689 (Sep. 25, 2013 6<sup>th</sup> Cir.) (A copy of this slip opinion is in the Appendix at Tab 8). The plaintiff was a brakeman for CSXT at a particular location, the plaintiff’s job was to operate a ground switch back and forth in order to align the railroad track to allow the locomotive engine to move the train into an industrial yard. The plaintiff performed this task for “approximately ten to fifteen times for 30 minutes to an hour.” Szekeres, slip opinion p. 2, Tab 8. As a background to the 6<sup>th</sup> Circuit’s review of the case, the Court discussed the following facts:

Plaintiff had to urinate while operating the Valley City switch. Plaintiff testified that he planned to urinate outside – rather than in the toilet compartment of the locomotive assigned to their job - because he had looked at the toilet compartment earlier that day and found it to “dirty”, “smelly,” “filthy,” and “unusable.” Plaintiff testified that, had the toilet compartment had not been dirty and unusable, he would have used it. Instead, once plaintiff completed his tasks at the Valley City switch, he began to walk from the Valley City switch to a more private outdoor location in the field behind the tracks. The path Plaintiff close led him up a slight incline. Within steps of the Valley City switch, plaintiff slipped and twisted his right knee. Plaintiff was diagnosed with a torn right meniscus and underwent surgery to repair the cartilage in his knee.

Id. at p. 3, Appendix Tab 8.

The plaintiff filed a lawsuit against CSXT under the FELA as well as the Locomotive Inspection Act for the injuries to his knee. The district court granted the railroad's motion for summary judgment and dismissed both claims. On appeal, the 6<sup>th</sup> Circuit reversed and held that there were disputes of material fact. Szekeres v. CSX Transp., Inc., 617 F.3d 424 (6<sup>th</sup> Cir. 2010). Upon remand, the case was assigned to another district judge who held a jury trial. The jury ruled in favor of the plaintiff and awarded damages. The railroad filed a motion for judgment as a matter of law as to both the FELA claim and the Locomotive Inspection Act claim. (The LIA claim was based upon the toilet being defective). On appeal for the second time the 6<sup>th</sup> Circuit again reversed the trial court. First, the Court recognized "that McBride simply reaffirmed Rogers and the causation standard that has governed FELA cases for over 50 years." Slip Opinion p. 7, Appendix Tab 8. Next, pertinent to this case, the Court considered the testimony of an expert witness presented by the plaintiff at trial. In ruling on the motion for judgment as a matter of law, the trial court concluded that the expert should not have been allowed to testify at the trial. On appeal for the second time, the issue of expert testimony was considered by the Court. In this regard, the Court held:

Contrary to Defendant's argument and as this court has recognized, expert testimony is not necessary to support allegations of negligence. See e.g., Richards, 330 F.3d at 433 (plaintiff's testimony alone was sufficient to show that an appliance failed to function properly). See also Ulfik v. Metro-North Commuter R.R., 77 F.3d 54, 59 (2d Cir. 1996)(it was within the common knowledge of the jury to determine whether there was a link between exposure to paint fumes and claimed headaches); Lynch v. METRA, 700 F.3d 106, 915 (7<sup>th</sup> Cir. 2012) (no expert testimony needed on "easily

understood” concept of improper installation of equipment). For the reasons discussed above, including the testimony of Whittenberger that mud is a recognized hazard in the railroad industry, this court finds that, even without the testimony of Arton, [the expert] there was sufficient evidence upon which a reasonable trier of fact could conclude that the muddy conditions and/or lack of ballast in the area behind the Valley city switch was a cause of plaintiff’s injury under FELA and LIA. Thus, this court need not decide whether Arton’s testimony should have been considered in deciding the Rule 50(b) motion.

Slip Opinion p. 13, Appendix Tab 8. (*emphasis added*).

**F. Failure of CSXT to enforce its own safety rules is evidence of negligence.**

Attached to Mr. Caniff’s Motion to Vacate Summary Judgment, is a CSXT Safety Rule issued August 1, 1995, which states in part:

Mechanical Department employees shall not be required to carry an EOT device more than five (5) car lengths (300 feet) from the end of a train or locomotive to the vehicle used to transport it or the storage rack/service site that it is to be delivered to. This maximum distance also will apply when the EOT device is picked up at the service site/storage rack and transported to the train or locomotive. Appendix, Tab 5.

On the night in question, Mr. Caniff stated in his Affidavit attached to his Motion to Vacate Summary Judgment that on the second trip to replace the broken knuckle, he would have had to carry a replacement knuckle more than 300 feet to the location of the repair. Appendix Tab 3.

In Ybarra v. Burlington Northern, Inc., 689 F.2d 147 (8<sup>th</sup> Cir. 1982), the plaintiff was a laborer. While he and a co-worker were servicing a locomotive switch engine, the plaintiff injured his back while lifting a bucket of oil weighing 40 to 50 pounds. The

plaintiff had to lift and twist while performing this task. A jury awarded the plaintiff damages, and the railroad appealed. On appeal, the railroad complained about various jury instructions. One such instruction informed the jury “that the railroad must publish and enforce adequate safety rules in the exercise of its duty to use reasonable care in protecting its employees.” *Id.* at 150 (*footnote omitted*).

The plaintiff conceded that the railroad had issued a safety rule for lifting which required an employee to keep the object close to the body and to avoid twisting the body as the weight is released. However, the plaintiff argued on appeal that the railroad failed to enforce its lifting rules. The court noted that there was evidence that the railroad failed to enforce its lifting rules during the locomotive switch-engine servicing involved in the case. That said, the court held that “[w]hen the evidence shows that the railroad customarily does not enforce a safety rule, the jury is entitled to consider whether that custom constituted negligence and whether it caused, in whole or part, the plaintiff’s injury.” *Id.* at 150. Accord Baltimore and Ohio R. Co. v. Taylor, 589 N.E.2d 267, 272 (Ind. App. 1992)(The court recognized a railroad’s “. . .duty to promulgate and enforce safety rules. . .”).

#### **G. Discussion**

This is not a complicated FELA case which involves complex equipment or job procedures. There is nothing relevant to Mr. Caniff’s claim that is beyond the comprehension of the average juror. The record before the Circuit Court was replete with evidence of CSXT’s negligence.

First, CSXT violated its non-delegable duty to provide Mr. Caniff with a safe place to work by failing to maintain its own roads at Russell Yard in serviceable condition. As Mr. Caniff testified and in his answer to Interrogatory No. 10 detailed above, he could not drive over CSXT's dirt road in a work truck due to the mud holes. As he said in his answer to Interrogatory No. 10, "[t]he road was poorly maintained, with standing water. If the road had been better maintained, I could have gotten closer to the car that needed the knuckle repair." CSXT did not offer any evidence below to dispute Mr. Caniff's description of the poorly maintained road. Just as the brakeman in Szekeres, supra, was unable to use the toilet on the locomotive engine but for lack of maintenance, Mr. Caniff was compelled to carry the knuckle for the distance that he did but for CSXT's failure to maintain its own road. As in Szekeres and the cases cited above, CSXT was negligent in maintaining its own facility in serviceable condition. A jury in a FELA case could justifiably conclude that if CSXT had maintained its road in good condition, Mr. Caniff would not have had to carry the knuckle in an area not designed for foot traffic. (Caniff Depo. 4/1210, p. 13). This evidence of negligence was sufficient alone to defeat summary judgment.

Second, the courts below erroneously held that Mr. Caniff could not defeat summary judgment without a liability expert witness. As the cases cited above at pages 23 to 28 establish, a FELA plaintiff is not required to hire an expert witness to prove negligence. Mr. Caniff has cited cases where courts have held expert testimony is not necessary to prove negligence. E.g. Szekeres. Courts have also held that there are certain FELA cases in which a causation expert is not necessary. Tufariello, supra

(hearing loss claim); Ulfik, supra (headaches and dizziness from paint fumes); Harbin supra (composition of the soot to which plaintiff was exposed). Respectfully, the courts below erred in holding that Mr. Caniff failed to establish negligence under the facts of this case because he did not offer expert testimony. Moreover, the circuit court abused its discretion by requiring an expert in this case.

Third, once CSXT issued its safety rule regarding carrying of a EOT, it was obligated to enforce the rule. Ybarra, supra. In this case the average juror can understand that if it is a violation of a safety rule to require an individual to carry an object weighing approximately 45 to 55 pounds for a distance of 300 feet, it stands to reason that it is also a violation of that same safety rule to require an individual to carry an object weighing considerably more than the EOT for 200 or 300 feet. An expert witness should not be necessary to establish that point.

Lastly, CSXT had a clearly delineated duty under the FELA to provide Mr. Caniff with adequate assistance to perform his job. The railroad was aware of his prior surgery from an unrelated accident. Nevertheless, Mr. Caniff was directed to perform a two-man job by himself. He had to carry the knuckle close to his body in a manner which obstructed his view of where he was placing his feet. If he had assistance with a co-worker to help carry the knuckle, he could have seen where he was placing feet and performed his task in a safer manner.

The effect of the Court of Appeal's opinion affirming the Circuit Court is that what should have been an uncomplicated FELA traumatic injury case has morphed into a situation in which now a plaintiff must not only prove that his or her railroad employer

was negligent in causing an injury, but also that the plaintiff must prove that the railroad's negligence exceeds some industry-wide standard which can only be established by a liability expert. This result is manifestly erroneous and is not supported by Rogers and its progeny.

**III. Conclusion**

The Appellant respectfully requests that the Opinion of the Court of Appeals be reversed and that this case be remanded for a jury trial.

Respectfully submitted,

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**APPENDIX**

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Plaintiff's Motion to Vacate Summary Judgment with Plaintiff's Affidavit ..... Tab 3

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Depicting an EOT ..... Tab 4

CSX Safety Rule for Carrying End-of Train Devices -August 1, 1995 ..... Tab 5

Safe Job Procedure Concerning a Knuckle with Illustrations  
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