IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO.: 1D17-4581

CSX TRANSPORTATION, INC.,

Appellant,

vs. L.T. Case No.: 2012-CA-01343

SAMUEL F. BELCHER,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Contents i

Table of Citations iv

Statement of the Case and Facts 1

I. Background. 1

II. Facts pertaining to Mr. Belcher's previous stroke. 3

III. Facts pertaining to Mr. Belcher's experts and treating physicians. 4

a. Mr. Timko: Mr. Belcher's railroad liability expert. 5

b. Dr. Starkman: Mr. Belcher's stroke expert 7

i. The basis for Dr. Starkman's opinion. 7

ii. CSX's challenges to Dr. Starkman. 8

iii. Dr. Starkman's trial testimony. 9

c. Mr. Belcher's treating physicians. 10

IV. Facts pertaining to the jury instructions. 11

a. Introduction 11

b. Duty-to-monitor instruction. 13

c. Reasonable-foreseeability instruction. 13

d. Duty-to-mitigate instruction 14

e. Assumption-of-risk instruction. 15

Summary of Argument 16

Argument 18

I. The trial court did not abuse its discretion in admitting the testimony of Mr. Belcher's experts and treating physicians. 18

A. Though the *Daubert* statute is unconstitutional, this Court may affirm without deciding the constitutional question. 19

B. The trial court did not abuse its discretion in admitting Mr. Timko's testimony. 20

1. Mr. Timko was qualified to opine on whether CSX breached its duty to procure prompt medical assistance for Mr. Belcher. 20

2. Mr. Timko provided expertise in railroad operations. 22

3. Mr. Timko's testimony satisfied *Daubert*. 24

4. Mr. Timko's "credibility" testimony was not before the jury. 26

C. The trial court did not err in admitting CSX's policies. 28

D. The trial court did not abuse its discretion in admitting Dr. Starkman's testimony. 30

1. Dr. Starkman's opinions are reliable under this Court's *Daubert* precedent. 30

2. CSX's stroke expert used the same methodology as Dr. Starkman. 32

3. Dr. Starkman could consider Mr. Belcher's past medical history. 33

E. The trial court did not abuse its discretion in admitting the testimony of Mr. Belcher's treating physicians. 34

II. The trial court did not abuse its discretion in instructing the jury. 36

A. CSX's duty-to-monitor instruction was neither supported by the facts nor necessary for the jury to resolve the case. 37

B. CSX's reasonable-foreseeability instruction was inaccurate, misleading, and unnecessary. 39

C. CSX's last-minute medical-mitigation instruction was an unfair surprise, which the trial court properly denied.....42

D. The assumption-of-the-risk instruction was appropriate.....46

III. The trial court did not abuse it discretion in concluding the jury's verdict was not against the manifest weight of the evidence.....48

Conclusion.....50

Certificate of Service.....51

Certificate of Compliance.....51

TABLE OF CITATIONS

Cases

Adkins v. CSX Transp., Inc., 2010-CA-001139-MR,
2011 WL 2935399 (Ky. Ct. App. July 22, 2011) 23

Allen v. State,
365 So. 2d 456 (Fla. 2d DCA 1996).....21

Baan v. Columbia County,
180 So. 3d 1127 (Fla. 1st DCA 2015) ..... passim

Binger v. King Pest Control,
401 So. 2d 1310 (Fla. 1981)..... 43, 45

Booker v. Sumter County Sheriff's Office/North Am. Risk Servs.,
166 So. 3d 189 (Fla. 1st DCA 2015) 31, 34

Bridger v. Union Ry. Co.,
355 F. 2d 382 (6th Cir. 1966) 23

Brim v. State,
695 So. 2d 268 (Fla. 1997).....18

Brown v. Estate of Stuckey,
749 So. 2d 490 (Fla. 1999)..... 48, 49

Castillo v. E.I. du Pont de Nemours & Co.,
854 So. 2d 1264 (Fla. 2003)..... 18, 25

Chavez v. State,
12 So. 3d 199 (Fla. 2009).....21

Clark v. Burlington Northern, Inc.,
726 F. 2d 448 (8th Cir. 1988) 48

CSX Transp., Inc. v. McBride,
564 U.S. 685 (2011).....40

CSX Transp., Inc. v. Miller,
46 So. 3d 434 (Ala. 2010).....42

CSX Transp., Inc. v. Moody,
313 S.W. 3d 72 (Ky. 2010) 41, 42

Daubert v. Merrell Dow Pharms., Inc.,
509 U.S. 579 (1993) 5

Doctors Co. v. State, Dept. of Ins.,
940 So. 2d 466 (Fla. 1st DCA 2006) 18

Edenfield v. Crisp,
186 So. 2d 545 (Fla. 2d DCA 1966) 43

Fashauer v. N.J. Transit Rail Operations, Inc.,
57 F. 3d 1268 (3d. Cir. 1995) 47

Frye v. United States,
293 F. 1012 (D.C. Cir. 1923) 5

Fulk v. Ill. Cent. R. Co.,
22 F. 3d 120 (7th Cir. 1994) 37

Gallick v. Baltimore & O. R. Co.,
372 U.S. 108 (1963) 41

Golian v. Wollschlager,
893 So.2d 666 (Fla. 1st DCA 2005) 36, 37, 39

Gross v. Lyons,
721 So.2d 304 (Fla. 4th DCA 1998) 39

Gutierrez v. Vargas,
239 So. 3d 615 (Fla. 2018) 32, 35, 36

Hamrock v. Consolidated Rail Corp.,
501 N.E. 2d 1274 (Ill. App. Ct. 1986) 48

Herskovitz v. Hershkovich,
910 So. 2d 366 (Fla. 5th DCA 2005) 24

In re Amendments to Florida Evidence Code,
210 So. 3d 1231 (Fla. 2017) 19

Jacksonville Terminal Co. v. Hodge,
260 So. 2d 521 (Fla. 1st DCA 1972) 47

Jones v. Nat'l R.R. Passenger Corp.,
942 A. 2d 1103 (D.C. Ct. App. 2008).....23

Kellner v. David,
140 So. 3d 1042 (Fla. 5th DCA 2014).....45

Livingston v. Dept. of Corr.,
481 So. 2d 2 (Fla. 1st DCA 1985) 44, 45

Lockwood v. Baptist Reg'l Health Servs., Inc.,
541 So. 2d 731 (Fla. 1st DCA 1989) 42, 44

Maines v. Fox,
190 So. 3d 1135 (Fla. 1st DCA 2016) 31, 32

Massey v. David,
979 So. 2d 931 (Fla. 2008).....19

Maxfly Aviation, Inc. v. Gill,
605 So. 2d 1297 (Fla. 4th DCA 1992).....46

Mortimer v. State,
100 So. 3d 99 (Fla. 4th DCA 2012).....19

Northrop Grumman Sys. Corp. v. Britt,
241 So. 3d 208 (Fla. 3d DCA 2017).....31

Partin v. State,
82 So. 3d 31 (Fla. 2011)..... 42, 46

Pena v. Vectour of Fla., Inc.,
30 So. 3d 691 (Fla. 1st DCA 2010) 48, 49

Price v. Fla. East Coast Ry. Co.,
186 So. 2d 261 (Fla. 3d DCA 1966).....48

Rhodes v. State,
986 So. 2d 501 (Fla. 2008)..... 26, 35

RJ Reynolds Tobacco Co. v. O' Hara,
228 So. 3d 1168 (Fla. 1st DCA 2017) 36

Sanchez v. Hussey Seating Co.,
698 So. 2d 1236 (Fla. 1st DCA 1997) 39

SDI Quarry v. Gateway Estates Park Condo. Assoc.,
Case No. 1D17-1086, 2018 WL 3090784 at *, __ So. 3d ___ (Fla. 1st DCA June 22, 2018) 21

Sells v. CSX Transp., Inc.,
170 So. 3d 27 (Fla. 1st DCA 2015) 21, 37

Shutter v. CSX Transp., Inc.,
130 A.3d 1143 (Md. Ct. Spec. App. 2016).....23

Sikes v. Overholser,
7 So. 2d 348 (Fla. 1942).....35

Special v. W. Boca Med. Cntr.,
160 So. 3d 1251 ..... 30, 36, 39, 42

Stager v. Florida E. Coast Ry. Co.,
163 So. 2d 15 (Fla. 3d DCA 1964).....47

Terry v. State,
668 So. 2d 954 (Fla. 1996).....18

Union Pacific R. Co. v. Estate of Gutierrez,
446 S.W. 3d 478 (Tex. App. Ct. 2014).....47

Univ. of Fla. Bd. Of Trustees v. Stone,
92 So. 2d 264 (Fla. 1st DCA 2012) 29

Wages v. Snell,
360 So. 2d 807 (Fla. 1st DCA 1978) 40

Statutes

§ 90.702, Fla. Stat 26

Fla. Const. Art. I § 22.....49

Fla. Const. Art. V § 4(b) 49

Rules

Fla. R. App. P. 9.210(a)(2).....51

Fla. R. Civ. P. 1.010.....43

Fla. R. Civ. P. 1.330.....6

Fla. R. Civ. P. 1.470(b) 43, 44

STATEMENT OF THE CASE AND FACTS

This is a straightforward case under the Federal Employers' Liability Act ("FELA"). A jury determined that Appellant, CSX Transportation ("CSX"), was negligent when it delayed transporting Appellee, Samuel Belcher, to the hospital despite his stroke symptoms. CSX's assertion that its negligence did not contribute to his stroke is incorrect; Mr. Belcher presented extensive evidence that had CSX promptly called for medical attention, his injuries likely would have been less severe. Further, CSX's primary defense at trial—that Mr. Belcher himself was negligent in failing to recognize his symptoms—was, in large part, successful, as the jury found him 50 percent responsible for his damages. CSX received a fair trial. Mr. Belcher rejects CSX's incomplete presentation of the facts and re-states them below.

I. Background.

On January 29, 2012, while working as a CSX conductor, Mr. Belcher began showing stroke symptoms. (R. 10642-48.) Mr. Belcher, who had more than thirty years of experience with CSX, had worked approximately ten hours that day without incident. (R. 11548, 10627-35.) However, around 10:05 p.m., he threw the wrong switch and exhibited a physical and mental deterioration. (R. 10642-48.)

A CSX employee, Shane Brown, had spent the most time with Mr. Belcher that day and observed his condition change that evening. (R. 10642-48.) After Mr. Belcher threw the wrong switch, Mr. Brown noticed him staggering around and

acting dazed. (R. 10646-47) He later spoke very quietly and seemed confused, and he was slumped over with his head down. (R. 10663-65.)

Mr. Brown reported that something was wrong with Mr. Belcher to three supervisors: the trainmaster, Jacob Vetsch; the foreman, Chris Garner; and the assistant superintendent, Bobby Franklin. (R. 10649-50, 10657-58, 10666, 10681.) Mr. Vetsch had also observed Mr. Belcher walking like he was confused, and Mr. Belcher told him he had a blood-sugar issue. (R. 10668, 11918-11919.) Mr. Vetsch also got real close to Mr. Belcher as if he was trying to smell his breath. (R. 10651.) Mr. Garner, who knew Mr. Belcher before the incident, observed that "something ain't right" if he had thrown a wrong switch. (R. 12053-54, 10680-81, 12182).

Despite Mr. Belcher's observable symptoms and Mr. Brown's report to his supervisors that something was wrong with Mr. Belcher, CSX failed to seek prompt medical attention. (R. 10682.) Instead, an employee gave him a coke, and CSX kept him on duty until 1:30 a.m. (R. 10682.) CSX then transported him to a yard office and required him to take a drug and alcohol test. (R. 10678-79, 10682.) Mr. Belcher was finally released from drug testing at 3:30 a.m.—approximately five hours after his observable symptoms manifested at work. (R. 10712.)

At that point, Mr. Belcher and Mr. Brown were placed in a CSX van to be driven to their home city several hours away. (R. 10715-16.) Two hours into the trip, the van stopped to swap drivers, and Mr. Brown observed Mr. Belcher's condition

had worsened. (R. 10718.) Mr. Belcher's face had begun to droop, and he was favoring his left side. (R. 10717.) At some point thereafter, Mr. Brown called Mr. Belcher's wife, and she asked that he be brought to the hospital. (R. 10719.)

Mr. Belcher arrived at the emergency room around 8:30 a.m. on January 30th—more than 10 hours after his stroke symptoms manifested, and well after he could have received preventative treatment. (R. 10720, 11318.) He has a limited memory of the incident (R. 11654-1161), and he was confused and thought he was at the hospital because his blood sugar had dropped (R. 11319). He was later diagnosed with a carotid artery dissection/stroke on his brain's right side. (R. 11325.)

CSX's ten-hour delay in providing medical attention caused Mr. Belcher to suffer irreversible brain damage and other injuries, for which the jury awarded $2,089,480 in damages. (R. 8379, 12336, 12457-58.) The jury found both CSX and Mr. Belcher negligent and assigned them equal responsibility. (R. 8378.) The trial court entered a final judgment in favor of Mr. Belcher for $1,044,740. (R. 8391.)

II. Facts pertaining to Mr. Belcher's previous stroke.

In December 2009, Mr. Belcher suffered a carotid artery dissection/stroke on his brain's left side. (R. 11093, 11098.) He was taken to the hospital in a timely manner and received appropriate treatment, including a stent, bed rest, and anticoagulant therapy. (R. 11099.) Mr. Belcher made a full recovery from his 2009 stroke. (R. 11278.) As his counsel explained to the jury, the 2009 stroke did not

"suggest that the outcome of one event will determine the outcome of another event," but it "demonstrate[d] in a carotid dissection what prompt, careful, appropriate treatment will accomplish in this type of stroke." (R. 12334.)

At trial, CSX drew a parallel between the 2009 and 2012 strokes to argue Mr. Belcher could have prevented his 2012 stroke by seeking treatment instead of coming to work on January 29th. (R. 10608, 11207, 11507, 11576-78, 11693-94, 12382-85.) Before his 2009 stroke, Mr. Belcher had various symptoms, including blurry vision, numbness, and weakness. (R. 11098-11100.) The day before his 2012 stroke, Mr. Belcher had a headache, visual changes, and pounding in his right ear while out with his wife. (R. 11318-19.) Had Mr. Belcher sought treatment at the time of these initial symptoms instead of coming to work, CSX argued he would not have suffered the 2012 stroke. (R. 10608. 11207, 11507, 11576-78, 11693-94, 12382-85; IB 9.) CSX blamed Mr. Belcher for not recognizing the stroke symptoms and for telling his supervisors he was suffering from low blood-sugar. (R. 10592-93, 10599, 10996, 11919, 11937-38, 12069; IB 9.) The jury apparently agreed with CSX, as it found Mr. Belcher fifty percent responsible for his damages. (R. 8378.)

III. Facts pertaining to Mr. Belcher's experts and treating physicians.

At trial, Mr. Belcher presented testimony from Mr. Timko, a railroad liability expert, and Dr. Starkman, a stroke expert. Mr. Belcher also presented testimony from

three treating physicians—Drs. Gray, Burnett, and Warner. CSX has presented a distorted selection of facts on these witnesses.

a. Mr. Timko: Mr. Belcher's railroad liability expert.

Mr. Timko testified that CSX failed to follow railroad operating procedures by failing to seek prompt medical attention. (R. 325-26, 6038-6044.) He did not testify as a medical expert or opine on any medical aspect of CSX's delay. (R. 10937-11013.) Similarly, CSX offered a competing railroad expert, Dr. Bullock, a Ph.D. and industrial hygienist, who testified that CSX complied with railroad standards and protocols. (R. 12069.) Dr. Bullock, like Mr. Timko, was not a medical expert. (R. 12059-12061.)

Mr. Timko had developed his expertise in railroad management practices through a 49-year career in the industry. (R.128-30, 9972.) He specialized in operating rules and safety procedures. He had planned and developed policies in safety and operations fields, trained employees on rule books and safety rules, developed rule books, and investigated rule violations. (R. 5806-5808, 5875.)

CSX did not challenge Mr. Timko under *Daubert*[1] or *Frye*.[2] (R. 5790-96.) Rather, it challenged Mr. Timko's lack of medical expertise and argued his testimony was irrelevant and prejudicial. (R. 5790-96.) Although the trial court held

[1] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).
[2] *Frye v. United States*, 293 F. 1012 (D.C. Cir. 1923).

a hearing on CSX's motion to exclude Mr. Timko, CSX rested on its written motion. (R. 9971.) The trial court denied the motion. (R. 10171.)

Mr. Timko did not testify live at trial. (R. 10935.) His expert testimony was presented by deposition, which had been taken by CSX's former counsel during discovery. (R. 10935, 10225-30.) CSX's new counsel sought to preclude the use of Mr. Timko's deposition at trial, but the trial court overruled this objection based on the notice of deposition and Fla. R. Civ. P. 1.330. (R. 10225-30, 10234.)

The trial court held a hearing to determine the portions of Mr. Timko's deposition testimony that would be read at trial. (R. 10222-10308.) The parties did not designate any portion of his testimony opining on the credibility of a witness. (R. 10233-34.) When CSX's former counsel asked Mr. Timko about the credibility of witnesses, Mr. Belcher's counsel stated those questions elicited inadmissible evidence. (R. 5821, 5831.) In other words, CSX's counsel– not Mr. Belcher's counsel – elicited the objectionable portions of Mr. Timko's testimony, and <u>they were not read at trial per the parties' agreement</u>:

> THE COURT: …Obviously, this testimony contained on page 82 of Mr. Timko wherein he is opining about the credibility or lack thereof of the witnesses, obviously inappropriate. But I don't see where either the plaintiff or the defense have designated that portion of his testimony to be read, because that I would not permit to be read to the jury. That being the case – let me confirm. Is that the case?
>
> [CSX COUNSEL]: That is, yes, Your Honor.
>
> [PLAINTIFF'S COUNSEL]: Yes, it is.

> [CSX COUNSEL]: And I believe [Plaintiff's counsel] and I have pretty much tried to eliminate most any reference to that.

(R. 10234.) Mr. Timko never told the jury which witness he thought was credible.

b. Dr. Starkman: Mr. Belcher's stroke expert

Dr. Starkman, a neurologist and stroke expert, testified on causation—that is, whether Mr. Belcher's outcome would have been better if he had received prompt medical attention. (R. 326, 11112-11215.) He had a wealth of experience and training in strokes and emergency medicine, including: director of UCLA's Stroke Study Network; co-director of UCLA's Stroke Centers; and multiple research fellowships for the National Stroke Association and other similar organizations. (R. 2037-141.) Indeed, Dr. Starkman is "the only person in th[e] country who's both trained and board certified in emergency medicine and neurology." (R. 11115.)

CSX did not challenge Dr. Starkman's expertise. Rather, twice before trial, it challenged the reliability of his opinion that earlier treatment, more likely than not, would have improved Mr. Belcher's outcome from his 2012 stroke. (R. 437, 6600.)

i. The basis for Dr. Starkman's opinion.

CSX wrongly claims "Dr. Starkman based his conclusions solely on the depositions of Belcher's treating physicians, accounts from witnesses at the scene, and Belcher's medical records." (IB 25.) CSX has ignored the voluminous studies and medical literature that Dr. Starkman relied on to form his opinions.

Dr. Starkman provided a sworn declaration and extensive medical literature to support his ultimate opinion that, had CSX promptly sent Mr. Belcher to the hospital, he would have received appropriate treatment and achieved a better outcome. (R. 2325-2641). As stated in the sworn declaration, the bases for Dr. Starkman's opinions included the following:

- To support his opinion that Mr. Belcher's outcome would have improved with the administration of antiplatelet or anticoagulant medication, which he did not receive in a timely fashion, Dr. Starkman provided a study comparing antiplatelet treatment with anticoagulation treatment for patients, like Mr. Belcher, with a cervical artery dissection, as well as published guidelines for treatment. (R. 2329.)
- To support his opinion that Mr. Belcher's outcome would have improved had he been placed in a supine position early on, Dr. Starkman relied on his "Heads Up" testing, conducted on acute stroke patients with his colleagues at UCLA, and multiple articles recommending the supine position for stroke patients. (R. 2329-31.)
- To support his opinion that Mr. Belcher's outcome would have improved had he been stented, Dr. Starkman provided an article discussing the effectiveness of early stenting and published guidelines recommending the same. (R. 2331-32.)

Dr. Starkman also attested his opinions were based on his education, training, clinical practice, research, and involvement with medical trials on strokes. (R. 2332.)

ii. CSX's challenges to Dr. Starkman.

The reliability of Dr. Starkman's opinion was litigated extensively. (*E.g.*, R. 438-48, 6601.) Ironically, CSX's stroke expert, Dr. Silliman, agreed at trial that "earlier treatment impacts better outcome from stroke." (R. 11828.). Dr. Silliman also agreed, before trial, that he and Dr. Starkman had used the same methodology

– personal experience and knowledge, the medical literature, and prevailing standards of care – to reach their opinions. (R. 822.)

CSX filed a motion in limine to exclude testimony from Dr. Starkman (and Mr. Belcher's treating physicians) that earlier transportation to the hospital would have allowed for a better outcome. (R. 437-48.) Mr. Belcher filed multiple responses and provided the court with the scientific evidence discussed above, *supra* at 8. (R. 2291, 3038, 3146.) The trial court then conducted a lengthy evidentiary hearing on the motion and entered a written order denying it. (R. 5676-5682, 9610.)

Closer to trial, after retaining new counsel, CSX filed a "renewed" motion to exclude Dr. Starkman's testimony. (R. 6600-10.) Following a hearing and briefing from both sides, the trial court denied CSX's renewed motion. (R. 7736, 10079).

iii. Dr. Starkman's trial testimony.

The gist of Dr. Starkman's trial testimony was that "time is brain;" that is, "when a stroke first happens … there are things that we can do in the first minutes to hours to make a difference to save the brain from the injury that's going on and reduce the likelihood of having a disability from the stroke." (R. 11116, 11153.) Even CSX's own stroke expert, Dr. Silliman, could not dispute that patients should "seek medical care as quickly as possible should they have the symptoms of stroke." (R. 11825.) In fact, Dr. Silliman had appeared in a video for UF Health and stated: "Earlier treatment impacts better outcome from stroke." (R. 11825-28.)

Dr. Starkman also discussed Mr. Belcher's 2009 stroke. He did not use the 2009 stroke as a "baseline." (R. 11134.) Rather, he pointed out that Mr. Belcher had received timely and appropriate treatment for his 2009 stroke, including a stent, and achieved an excellent recovery as a result. (R. 11134.) He also observed that, for the 2012 stroke, it was too late for Mr. Belcher to receive a stent by the time he arrived at the hospital. (R. 11196-97.) Dr. Starkman opined that, had the 2012 stroke been treated quicker, Mr. Belcher likely would have had a better outcome. (R. 11134-35.)

On cross-examination, CSX elicited testimony from Dr. Starkman that, had Mr. Belcher sought treatment for his headache and blurred vision the day before the incident at work, he could have avoided a stroke. (R. 1120407.) CSX's counsel also elicited testimony that the 2009 stroke would have assisted in the evaluation of Mr. Belcher's 2012 stroke had he taken himself to the doctor instead of coming to work. (R. 11204-06.) On cross-examination, CSX could have pointed out that Dr. Starkman had not examined Mr. Belcher, but it chose not to do so. (R. 11201-26.)

c. Mr. Belcher's treating physicians.

Mr. Belcher presented testimony from Dr. Burnett, an internal medicine physician who treated him during his 2012 hospital admission and thereafter; Dr. Gray, an internist and vascular interventionist who treated him for his 2009 stroke and until August 2014; and Dr. Warner, a neurologist who treated him during his 2012 hospital admission and thereafter. (R. 326-27.)

CSX filed two motions to exclude the treating physicians' testimony. First, it filed the previously mentioned *Daubert* motion, which also challenged Dr. Starkman's testimony and which the trial court denied after an evidentiary hearing. (R. 437-48, 5676-5682, 9610.) This first motion did not argue the treating physicians' testimony was cumulative to Dr. Starkman's testimony. (R. 437-48.) CSX's second motion, filed by new counsel, was directed only to the treating physicians and largely parroted the first motion. (R. 5731-53.) The second motion, unlike the first motion, also argued the treating physicians' testimony was cumulative to Dr. Starkman's testimony. (R. 5731-32, 5736-37, 5740, 5742, 5744.) In its brief, CSX has not cited any oral or written order denying its second motion.

At trial, Mr. Belcher's treating physicians testified, via depositions, on his treatment. For example, Dr. Gray testified that Mr. Belcher had a complete recovery from his first stroke and a 50-60 percent functional recovery from his second stroke. (R. 11248.) Dr. Burnett testified that Mr. Belcher was ineligible for certain treatments for his 2012 stroke because it was too late and that Mr. Belcher had recovered from his 2009 stroke. (R. 11319-20.) Drs. Gray and Warner also testified that, had Mr. Belcher received treatment sooner, he likely would have had a good outcome like he did in 2009. (R. 11253, 11503.)

IV. Facts pertaining to the jury instructions.

a. Introduction

The trial court ordered counsel to meet seven days before the pre-trial conference "to agree to the extent possible on the use of jury instructions and verdict form at trial." (R. 6685 (emphasis in original).) It also ordered, "Typed proposed jury instructions and verdict forms shall be filed with the [c]ourt at the Pretrial Conference and may be supplemented prior to the Jury Instruction Conference." (R. 6686 (emphasis in original).) Before the June 2, 2017 conference (R. 6840), the parties filed a few hundred pages of competing proposed instructions (preliminary and closing) and objections thereto. (R. 6226-87, 6547-99, 6924-7093, 7124-7178.) Based on the court's rulings at the conference, CSX filed, after the conference, the preliminary instructions to be given. (R. 7683-7728, 7763-65) A couple days after Mr. Belcher had concluded his case-in-chief (R. 11858) and on the same day that CSX rested its case (R. 12224), both parties filed their requested closing instructions (R. 8281-8305, 8351-53). With this very last set of requested instructions (filed after Mr. Belcher had rested), CSX proposed for the first time its medical-mitigation instruction. (R. 8553); *see infra* subpart d, at 14-16.

The trial court declined three closing instructions, requested by CSX, that: (i) it had "no duty to monitor an employee's health or healthcare treatment;" (ii) it was liable only if Mr. Belcher established a "further requirement" of foreseeability; and (iii) Mr. Belcher had a duty to mitigate his damages by following his physicians' recommendations. (R. 8334, 8324, 8353, 12258, 12272, 12276.) The court also

overruled CSX's objection to an assumption-of-risk instruction. (R. 12252, 12284.)

b. Duty-to-monitor instruction.

CSX claimed the duty-to-monitor instruction was required because its witness, Mr. Franklin, had been cross-examined on Mr. Belcher's blood sugar. (R. 12283, 12180-99.) Mr. Franklin testified that, in his own experience with low blood-sugar symptoms, he never experienced anything more than a headache. (R. 12180, 12189. 12192.) He also testified that: his doctor had told him to seek medical attention if his blood sugar was too low (R. 12193); and Mr. Belcher's blood sugar could have been tested at the hospital but Mr. Belcher was not sent there. (R. 12191.)

Mr. Belcher agreed CSX had no duty to monitor his health, but he objected to the instruction because it did not apply to his case and would confuse the jury. (R. 12279.) That is, Mr. Belcher did not argue that CSX was required to regularly check his blood sugar; rather, he argued that, once his emergency arose, CSX had a duty to provide medical attention. (R. 12279.)

c. Reasonable-foreseeability instruction.

CSX requested a nonstandard jury instruction on "reasonable foreseeability." (R. 8324.) The court refused to give this instruction as a preliminary instruction and instead used the standard instruction. (R. 10143.) CSX requested the instruction again, at the final charge conference, arguing the other instructions did not "completely explain" reasonable foreseeability. (R. 12274-75.) Mr. Belcher again

objected. He argued that CSX's instruction "incorrectly asserts that the plaintiff must establish a further requirement of reasonable foreseeability" and that the standard instruction for negligence "tells [the jury] what they need to know." (R. 12275.)

d. Duty-to-mitigate instruction.

In its answer, CSX pled, "Plaintiff has failed to mitigate his damages." (R. 22.) The parties' pretrial stipulation identified a disputed factual issue on "[w]hether Plaintiff failed to mitigate damages." (R. 8171.) Before the pretrial conference, the parties proposed, objected to, and argued about multiple mitigation-of-damages instructions (preliminary and closing) that addressed only economic mitigation – that is, whether Plaintiff had made reasonable efforts to resume his employment so as to reduce his damages. (R. 6277-78, 6585, 6924-27, 6951, 6977-78, 7029, 7033, 7062, 7066-67, 7082, 7084, 7132-33, 7147-48, 7707, 8286-87, 8317, 8321-22.) The court, at the pretrial conference, heard extensive arguments on, and resolved, the parties' competing instructions on economic mitigation. (R. 10126-1043.) Not once during the conference did CSX request an instruction on, or suggest that it planned to argue, medical mitigation – that is, whether Mr. Belcher had made reasonable efforts to comply with his physicians' recommendations. (R. 10079-10219.) In addition, before trial, the parties litigated a motion in limine on economic (not medical) mitigation. (R. 2015-19, 2245-48, 7014, 7770.)

At the onset (and end) of the trial, the court instructed the jurors on economic (not medical) mitigation. (R. 10535, 12317-18.) In his opening statement, Mr. Belcher's counsel discussed economic mitigation. (R. 105801-81.) In response, CSX's counsel also discussed economic mitigation; specifically, he told the jury that, according to CSX's expert, Mr. Belcher was "employable" and that he had "not done anything to try to find work anywhere since 2011." (R. 10613.) CSX's counsel did not mention in his opening medical mitigation; that is, he did not state that Mr. Belcher had failed to follow his physicians' recommendations. (R. 10585-10617.)

At the charge conference (after Mr. Belcher had rested), CSX raised for the first time medical mitigation; that is, it requested a nonstandard instruction that Mr. Belcher had a duty to mitigate his damages by following his physicians' recommendations. (R. 8353, 12265-66.) Though CSX claimed the evidence at trial warranted this instruction (R. 12267), it admitted such evidence had "been in discovery for years." (R. 12269.) Though Mr. Belcher acknowledge CSX had "pled a general mitigation defense," he objected because: (i) CSX never before had argued a medical mitigation defense; (ii) he did not have an opportunity to rebut the defense with evidence; (iii) an instruction would prejudice him and confuse the jury; and (iv) it was an unfair surprise. (R. 12266-67, 12270-71.) When asked why it had not requested the instruction previously, CSX acknowledged "an oversight." (R. 12271.)

e. Assumption-of-risk instruction.

Mr. Belcher requested an assumption-of-risk instruction that the jury should not find comparative negligence because he acceded to his employer's request to work at a dangerous job, in a dangerous place, or under unsafe conditions. (R. 12252-56.) He requested the instruction in light of the trial testimony that CSX had required him to stay at work for a drug test. CSX conceded Mr. Belcher had argued "unsafe conditions," but argued the instruction would confuse the jury and that it had not pled an assumption-of-risk defense. (R. 12253, 12256.) The trial court agreed to give a modified assumption-of-risk instruction. (R. 12257.) It found the "dangerous job" and "dangerous place" language inapplicable, but left the "unsafe conditions" language because, as CSX had acknowledged, "that's what was alleged." (R. 12258.)

SUMMARY OF ARGUMENT

CSX received a fair trial. It is not entitled to a second trial. Its three grounds seeking a new trial are without merit.

First, the trial court did not abuse its discretion in admitting testimony from Mr. Belcher's witnesses. Mr. Timko neither testified on any medical issue nor opined on witness credibility before the jury. Given his years of relevant training and experience, Mr. Timko was qualified to testify on CSX's adherence to standard railroad procedures. His testimony assisted the jury because, as courts have recognized in FELA cases, the standards that govern workplace safety for railroads are not something ordinary people would know.

Nor did the trial court abuse its discretion in admitting testimony from Dr. Starkman and the treating physicians. This Court's precedent – which CSX has ignored – compelled the admission of Dr. Starkman's testimony because it was based on, among other things, extensive medical literature and research – which CSX has also ignored. Indeed, CSX's competing stroke expert used the same methodology as Dr. Starkman to reach his opinions. Moreover, there was nothing improper about Dr. Starkman considering Mr. Belcher's past medical history in forming his opinions, or about Mr. Belcher's treating physicians discussing the same in, at most, confirmatory testimony.

Second, the trial court did not abuse its discretion on the jury instructions. CSX's duty-to-monitor instruction did not address an issue before the jury, and CSX mischaracterizes the trial testimony. CSX's reasonable- foreseeability instruction was inaccurate, misleading, and unnecessary given the instruction on negligence. CSX's medical-mitigation instruction was an untimely, unfair surprise. The trial court's assumption-of-risk instruction was appropriate considering CSX required Mr. Belcher to remain at work for hours while he was tested for drugs and alcohol.

Third, the verdict was consistent with the evidence. Mr. Belcher presented ample evidence to support a verdict that CSX's supervisors could have foreseen he would suffer an injury if they did not procure medical attention for him in light of his symptoms. CSX's argument to the contrary suggests it was required to foresee

the particular injury suffered by Mr. Belcher. That is not the law under FELA. This Court should affirm the final judgment on the jury verdict.

ARGUMENT

I. The trial court did not abuse its discretion in admitting the testimony of Mr. Belcher's experts and treating physicians.

Standard of review. A *de novo* standard of review does not apply to the trial court's admission of expert testimony. (*Contra* IB 12.) The "acceptance or rejection of expert testimony is a matter within the sound discretion of the lower tribunal." *Doctors Co. v. State, Dept. of Ins.*, 940 So. 2d 466, 469 (Fla. 1st DCA 2006). This Court will not disturb a trial court's decision on the admissibility of expert testimony absent an abuse of discretion. *Id.* at 469; *see also Terry v. State*, 668 So. 2d 954, 960 (Fla. 1996) (determination of expert's qualifications is a matter "peculiarly within the discretion of the trial judge whose decision will not be reversed absent a clear showing of error").

The *de novo* standard of review, claimed by CSX, applies only to *Frye* challenges, which CSX has not raised. *See Castillo v. E.I. du Pont de Nemours & Co.*, 854 So. 2d 1264, 1268 (Fla. 2003) (cited at IB 12) ("The standard of review of a *Frye* issue is de novo."). Because *Frye*'s "general acceptance" test "transcends any particular dispute," the *de novo* standard to review *Frye* challenges is a limited exception to the general rule that an abuse-of-discretion standard applies to review a trial court's decision admitting expert testimony. *See Brim v. State*, 695 So. 2d 268,

274 (Fla. 1997). The general rule applies here: this Court must review the trial court's decision to admit expert testimony under the abuse-of-discretion standard.

A. Though the *Daubert* statute is unconstitutional, this Court may affirm without deciding the constitutional question.

CSX has devoted pages of its brief to defend the constitutionality of the *Daubert* statute. (IB 14-18.) This Court need not resolve that constitutional question. If the *Daubert* statute is substantive and constitutional, Mr. Belcher's expert witnesses have satisfied *Daubert* as argued herein. Practically, before this Court decides this case, the Florida Supreme Court likely will decide the constitutional issue in *Delise v. Crane*, No. SC16-2182, which was argued on March 6, 2018.

Regardless, the *Daubert* statute is procedural, not substantive, and thus unconstitutional because it governs the admissibility of expert testimony. *See, e.g.*, *Mortimer v. State*, 100 So. 3d 99, 103 (Fla. 4th DCA 2012) ("Changes in laws regarding the admission of evidence … are typically held to be procedural."). That is, the statute altered how a party could admit evidence, as opposed to how a party could use evidence to prove his or her case. *See Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008) ("Practice and procedure may be described as the machinery of the judicial process as opposed to the product thereof. It is the method of conducting litigation involving rights and corresponding defenses.") (internal quotes omitted). The statute is thus unconstitutional because it has provided "a contrary practice or procedure" to the Florida Supreme Court's rules. *See id.*; *see also In re Amendments*

to Florida Evidence Code, 210 So. 3d 1231, 1238-39 (Fla. 2017) (declining "to adopt the *Daubert* Amendment to the extent that it is procedural, due to the constitutional concerns raised, which must be left for a proper case or controversy").

Most of CSX's arguments on the admissibility of expert testimony hinge on the *Daubert* statute's validity. (IB 18 n.3.) Specifically, most of Argument I.A.1, Argument I.A.3, and Argument I.A.4 depend on *Daubert.* (IB 18-28.) Thus, if the Florida Supreme Court or this Court declare the Daubert statute unconstitutional, CSX's *Daubert* arguments automatically fail.

B. The trial court did not abuse its discretion in admitting Mr. Timko's testimony.

The trial court properly admitted the designated portions of Mr. Timko's deposition testimony to address a critical issue in this case: whether CSX failed to follow standard railroad procedures in failing to seek prompt medical attention for Mr. Belcher. Mr. Timko did not testify on any medical aspect of CSX's delayed treatment. Rather, his expert testimony, which was properly based on his training and forty-nine years of railroad experience, assisted the jury's understanding of railroad operations in general and how railroads implement their safety. Finally, the "credibility" testimony to which CSX now objects – and which CSX itself elicited – was never presented to the jury.

1. Mr. Timko was qualified to opine on whether CSX breached its duty to procure prompt medical assistance for Mr. Belcher.

CSX's primary objection to Mr. Timko – that he is not a medical doctor – is meritless. This is not a medical negligence case. This is a railroad negligence case on CSX's duty, under federal law, to procure prompt medical assistance for its employee. *See Sells v. CSX Transp., Inc.*, 170 So. 3d 27, 35 (Fla. 1st DCA 2015) (agreeing CSX had breached a duty "to promptly summon medical treatment"). Thus, the core issue on CSX's breach of this duty is whether its employees –who were not medical professionals – negligently delayed in transporting Mr. Belcher to the hospital after he exhibited signs of a medical emergency. Mr. Timko's expertise in railroad operations aligns with this core question.

"A witness may be qualified as an expert through specialized knowledge, training, *or* education, which is not limited to academic, scientific, or technical knowledge. An expert witness may acquire this specialized knowledge through an occupation or business or frequent interaction with the subject matter." *Chavez v. State*, 12 So. 3d 199, 206 (Fla. 2009); *see also SDI Quarry v. Gateway Estates Park Condo. Assoc.*, Case No. 1D17-1086, 2018 WL 3090784 at *, __ So. 3d ___ (Fla. 1st DCA June 22, 2018) (ALJ did not abuse his discretion in finding unlicensed engineer qualified as causation expert based on engineer's education and experience garnered over 50-plus-year career); *Allen v. State*, 365 So. 2d 456, 458 (Fla. 2d DCA 1996) (expert may be qualified by "practical experience"). As the trial court properly concluded, Mr. Timko obtained his specialized knowledge through his forty-nine

years of railroad experience. (R. 10171.) Specifically, throughout his lengthy career, he had planned and developed policies in safety and operations fields, trained employee on rule books and safety rules, and investigated rule violations. (R. 5806-08, 5875.) He was thus qualified to render an opinion on whether CSX followed standard railroad procedures, including its own rules and regulations, when it failed to seek prompt medical attention for Mr. Belcher.

Mr. Timko's medical knowledge is thus irrelevant because he was not proffered as a medical expert and did not opine on any medical issue. (R. 10934-11012.) His testimony to the jury, elicited by CSX, was clear on this point:

> Q: Mr.Timko, you are not a medical doctor, correct?
>
> A: That is correct.
>
> Q: Do you have any medical training in your background?
>
> A: None whatsoever.
>
> Q: I assume you're not offering any medical opinions or medical testimony in this case; is that fair?
>
> A: You are correct that I will not be offering any.

Mr. Timko was proffered as a standard-of-care expert to testify what a reasonable railroad and its employees should have done based on railroad protocol, not medical protocol. He was qualified to do so.

2. Mr. Timko provided expertise in railroad operations.

Mr. Timko's testimony went beyond "safety first." He explained workplace safety in the context of the railroad industry in general, and CSX's policies in

particular. (R. 10963-65.) As courts applying FELA have recognized, the average juror does not understand how railroads are operated, or how they implement their policies. *See, e.g., Bridger v. Union Ry. Co.*, 355 F. 2d 382, 389 (6th Cir. 1966) (citing cases) ("What these cases teach us is that the business of operating a railroad entails technical and logistical problems with which the ordinary layman has little or no experience."); *Shutter v. CSX Transp., Inc*., 130 A.3d 1143, 1154–55 (Md. Ct. Spec. App. 2016) ("The standards that govern proper staffing and workplace safety for railroads simply are not something that ordinary people would know.").

CSX's contention that Mr. Timko's testimony was unnecessary to understand workplace safety is belied by the fact that it offered a competing expert on the same subject. (R. 12059-12106.) In fact, had Mr. Belcher not proffered Mr. Timko's expert testimony, CSX presumably would have moved for a directed verdict and argued that his failure to provide a standard-of-care expert was fatal to his claims. Ample FELA case law would have supported this argument. *See, e.g. Shutter*, 130 A. 3d at 1154-555 (expert testimony was required to prove standard of care of railroad in the context of workplace safety); *Jones v. Nat'l R.R. Passenger Corp.*, 942 A. 2d 1103, 1108 (D.C. Ct. App. 2008) (plaintiff's "failure to proffer expert testimony establishing the applicable standard of care also entitles Amtrak to judgment as a matter of law"); *Adkins v. CSX Transp., Inc.*, 2010-CA-001139-MR, 2011 WL 2935399, at *4 (Ky. Ct. App. July 22, 2011) (determining "the failure to

provide expert testimony regarding the applicable standard of care" was fatal to plaintiff's FELA claims). Mr. Timko's testimony assisted the jury, and it also may have been essential for Mr. Belcher to avoid a directed verdict in CSX's favor.

3. Mr. Timko's testimony satisfied *Daubert.*

CSX did not raise a *Daubert* challenge before the trial court and has waived this argument on appeal. (R. 5790-5797, 9971-9980); *see, e.g., Herskovitz v. Hershkovich*, 910 So. 2d 366, 367 (Fla. 5th DCA 2005) (holding "reviewing courts will not consider claims of error which are raised for the first time on appeal"). Regardless, if CSX's *Daubert* challenge is preserved, it still fails.

CSX's brief fails to mention <u>any</u> of this Court's cases applying *Daubert*. (IB 20-24.) Most egregiously, CSX fails to cite *Baan v. Columbia County*, 180 So. 3d 1127 (Fla. 1st DCA 2015), which was argued extensively before the trial court. (R. 9978-79.) CSX's failure to cite this case is telling. Though *Baan* involved the admission of medical expert testimony, it shows the admission of Mr. Timko's testimony here was not an abuse of discretion.

In *Baan*, the plaintiff's expert, an ER physician, testified as to the standard of care by EMT personnel responding to a 911 call involving an infant struggling to breathe. 180 So. 3d at 1129. The EMT crew did not take the child to the hospital, resulting in a second 911 call fifty minutes later, and the infant died the next day. *Id*.

The plaintiff's expert testified, among other things, that the EMT crew breached the standard of care by failing to take the infant to the hospital. *Id.* at 1130-31.

The defendant moved under *Daubert* to exclude the expert on the ground that his testimony was purportedly unreliable because he had assumed the infant was experiencing a detectable respiratory problem at the time of the first call. *Id.* at 1131. The trial court agreed, finding the EMT records showed no respiratory problem at the time of the first call and that the expert should have accepted those records as true notwithstanding eyewitness testimony to the contrary. *Id*. Finding the expert's opinions "speculative," the trial court struck them. *Id*.

This Court reversed, holding an expert is "entitled to rely on any view of disputed facts the evidence will support." *Id.* at 1332. It concluded the expert's testimony was reliable under *Daubert* because he had reviewed the infant's medical records, the autopsy report, the EMT records, and statements from witnesses. *Id.* at 1333. The expert also had relied on "EMS's own protocol requiring transport to a hospital in the event an infant was experiencing respiratory distress" as a "reliable principle" in support of his opinion. *Id.* at 1134. This Court concluded his opinions "amounted to much more than *ipse dixit*" and were the "product of reliable principles and methods." *Id.* at 1333-34.

Baan shows that CSX's "*ipse dixit*" argument here is without merit. Like the expert in *Baan*, Mr. Timko was entitled to rely on his experience, training, "any view

of disputed facts the evidence will support," and CSX's own written policies, which included a requirement that it provide prompt medical attention where it is "desired and necessitated by circumstances." (R. 10961-65.) The record makes clear that Mr. Timko's testimony was "the product of reliable principles and methods" that were applied "reliably to the facts of the case." § 90.702, Fla. Stat. Thus, like in *Baan*, his opinions are admissible under *Daubert*, "whose gatekeeping function was not intended to supplant the adversary system or role of the jury." 180 So. 3d at 1134.

4. Mr. Timko's "credibility" testimony was not before the jury.

CSX's final point on Mr. Timko is misleading and misinformed. CSX's argument suggests that Mr. Timko told the jury who was more credible. (IB 21-24.) He did not. The portions of his deposition testimony cited by CSX were not presented to the jury. (IB 21 (citing R. 5821-22.)) The parties and the trial court had agreed that the credibility testimony was not designated for trial. (R. 10234.) As such, CSX does not have any adverse ruling to appeal on this point. *See, e.g.*, *Rhodes v. State*, 986 So. 2d 501, 513 (Fla. 2008) ("To be preserved, the issue or legal argument must be raised *and* ruled on by the trial court.").

Notably, CSX, not Mr. Belcher, elicited the deposition testimony of which it complains. CSX's counsel asked Mr. Timko which witness he thought was more credible. (R. 5821, 5831.) Mr. Belcher's counsel stated in response that CSX's

questions were eliciting inadmissible evidence (R. 5821), and he ensured this "credibility" testimony was not presented to the jury. (R. 10234.)

CSX's argument suggests, erroneously, that Mr. Timko relied on credibility determinations as part of his methodology. (IB 23-24.) This is not accurate. CSX interjected this credibility determination into his deposition testimony by asking whom he thought was more credible. (R. 5821-22.) As Mr. Timko explained in the testimony presented to the jury, he had relied on his training and experience, CSX's own written policies, and railroad safety standards to arrive at his opinion. (R. 10961-65.) His methodology is reliable under *Daubert*.

Regardless, it would not be improper for Mr. Timko to rely on a credibility determination as part of his methodology. In *Baan*, which CSX has ignored, this Court explicitly held: "An expert is entitled to rely on any view of disputed facts the evidence will support." *Id.* at 1133. The criminal cases CSX cites are materially distinguishable because in those cases the expert commented on the credibility of a victim in front of the jury – which never occurred here. (*See* IB 22.)

Finally, the rule that CSX suggests applies—Mr. Timko cannot testify because he formed a credibility determination about a witness—is absurd. Almost every expert will (naturally) form opinions about the credibility of testimony he or she reviews. This cannot mean the expert's opinion is unreliable; almost no expert could testify under such a rule. Indeed, a party could get an expert struck by simply

asking – as CSX's counsel did here –whether the expert has formed any opinions on the credibility of a witness. This is not, and cannot be, the law.

C. The trial court did not err in admitting CSX's policies.

CSX's argument regarding the admission of its policies is misleading and misinformed. (*See* IB 24-25.) During discovery, Mr. Belcher requested copies of "rules, policies or procedures pertaining to how superintendents, trainmasters, and/or other railroad managers are to respond to employees who have sustained on-the-job injuries and/or medical conditions which have manifested themselves while on the job." (R. 131-32.) In response, CSX produced a heavily redacted version of its policy for "personal injury/occupational illness reporting" and claimed the request was overly broad, vague, and irrelevant. (R. 132, 190, 194.) Mr. Belcher moved to compel a better response, and the trial court later ordered CSX to produce an unredacted version after a hearing and *in camera* review. (R. 7772.)

Critically, Mr. Timko's deposition testimony – which was taken on January 28, 2015 – refers only to the heavily redacted policy CSX initially had produced during discovery.[3] (R. 5805, 5816-17.) He did not, and could not have, testified on the unredacted policy, as the trial court did not order CSX to produce the unredacted policy until June 9, 2017, more than two years after his deposition. (R. 7772.)

[3] Mr. Belcher includes the redacted version in his appendix. (App. 3.)

In any event, the trial court did not abuse its discretion in admitting CSX's own policies. (R. 11836-37.) CSX has failed to state a legal ground on which its policies should have been excluded other than stating their admission (via Mr. Timko's deposition testimony on a highly redacted version) was "prejudicial" and that the policies are "irrelevant." (IB 24.) CSX did not raise a "prejudice" objection before the trial court and cannot do so now. (R. 10515, 11834.) The only thing "prejudicial" about CSX's policies is that they are adverse to CSX and advantageous to Mr. Belcher. This does not render them inadmissible.

Further, CSX is equating relevancy with applicability. CSX's policies are patently relevant to this case because they include information regarding medical care for injured workers. Even CSX's expert, Dr. Bullock, agreed on this point:

> [COUNSEL]: I guess the general catchall question is, there are instructions and suggestions in [CSX's policies] that would be a good idea for a supervisor to follow if there was a sudden illness by an employee at work as opposed to an on-the-job injury. Would you agree with that?
>
> [DR. BULLOCK]: Yes, sir.

(R. 12096.) The separate question – whether the policies are applicable – goes to the weight of the evidence, not admissibility. *See, e.g., Univ. of Fla. Bd. Of Trustees v. Stone*, 92 So. 2d 264, 272 (Fla. 1st DCA 2012) ("[I]t is the exclusive province of the jury to weigh the evidence."). CSX presented testimony from Dr. Bullock that the policies were not applicable; presumably, the jury took this testimony into account when weighing the evidence. (R. 12072.)

Alternatively, any error in admitting CSX's policy was harmless. *See Special v. W. Boca Med. Cntr.*, 160 So. 3d 1251, 1256 (beneficiary of error must prove error did not contribute to verdict). CSX has complained only about Mr. Timko's testimony, and that merely concerned a heavily redacted version of CSX's policy.

D. The trial court did not abuse its discretion in admitting Dr. Starkman's testimony.

After litigating the issue extensively in the trial court, CSX devotes minimal attention to Dr. Starkman's testimony on appeal. (IB 25-27.) CSX's argument is misleading and uninformed by this Court's precedent; it goes to the weight of the evidence, not reliability, and it provides no basis for a *Daubert* challenge.

1. Dr. Starkman's opinions are reliable under this Court's *Daubert* precedent.

As an initial matter, CSX wrongly asserts Dr. Starkman's opinions were based "solely" on the deposition of Mr. Belcher's treating physicians, accounts from witnesses at the scene, and his medical records. (IB 25.) As Mr. Belcher has explained, Dr. Starkman's opinions that earlier treatment could have resulted in a better outcome also were based on extensive medical literature, and his education, training, clinical experience, research, and medical trials. *See supra* at 7-8. CSX ignores this wealth of support for Dr. Starkman's opinions.

This Court's abundant *Daubert* precedent, which CSX has ignored, establishes that Dr. Starkman's opinions were reliable and thus admissible.[4] In fact, this Court in *Baan* reversed the trial court for doing exactly what CSX asked the trial court to do here: exclude an expert opinion as unreliable where that expert had reviewed medical records, other pertinent records, and witness statements, and where that expert was qualified by years of experience and knowledge of the medical issue. *See* 180 So. 3d at 1133-34 (opinion based on medical records, autopsy report, EMS records, and witness statements "amounted to much more than *ipse dixit*"). Under the standards set forth by this Court's recent *Daubert* caselaw, the opinions of Dr. Starkman were reliable. *See id*; *supra* note 4.

CSX has failed to cite any support for its assertion that Dr. Starkman's testimony was inadmissible under *Daubert* because he did not perform a physical examination of Mr. Belcher. (IB 25.) Dr. Starkman was not a treating physician. He was retained as an expert to opine solely on causation – i.e., whether Mr. Belcher's

[4] *See Maines v. Fox*, 190 So. 3d 1135, 1142 (Fla. 1st DCA 2016) (noting it is "not unusual for doctors to rely on anecdotal evidence of the history and severity of an accident in rendering causation opinion"); *Booker v. Sumter County Sheriff's Office/North Am. Risk Servs.*, 166 So. 3d 189, 190 (Fla. 1st DCA 2015) (testimony of medical experts was admissible despite *Daubert* challenge in workers' compensation case where the lower tribunal found the expert[] was "well-acquainted with [the claimant's] medical history and current medical condition," and had "relied on published medical studies generally accepted within the medical community," and had "applied the results of those studies to the facts of this case in reaching [his] opinions on causation"); *see also Northrop Grumman Sys. Corp. v. Britt*, 241 So. 3d 208, 214-15 (Fla. 3d DCA 2017) (relying on expert's credentials, among other things, to conclude testimony was admissible under *Daubert*).

outcome would have been better had he received quicker care. (R. 326, 11112-11215.) And, although a physical examination is a factor a court may consider in assessing an expert's methodology under *Daubert*, it is neither determinative nor required. *See Maines*, 190 So. 3d at 1141 ("Dr. Bowles was also an expert medical doctor who could presumably have given an opinion, based on medical records and patient history, as to whether this accident caused the specific injury in question."); *see also Gutierrez v. Vargas*, 239 So. 3d 615, 623-24 (Fla. 2018) (concluding doctors qualified as treating physicians even though they had never examined the patient). Vigorous cross-examination, not a *Daubert* challenge, would have been the appropriate method for CSX to critique Dr. Starkman's failure to examine Mr. Belcher. *See Baan*, 180 So. 3d at 1134 (stating that "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means" to challenge admissible evidence).

2. CSX's stroke expert used the same methodology as Dr. Starkman.

CSX's argument on the reliability of Dr. Starkman's opinion is undermined by its own stroke expert, Dr. Silliman, who used the same methodology to reach his opinion. In his deposition, Dr. Silliman testified:

> Q: Did you use any methodology in coming to your conclusions?
>
> A: My conclusions are based on my personal experience and my knowledge and the medical literature.
>
> Q: Is that it?

A: As well as prevailing standards of care, in my opinion.

Q: From the – from reading Dr. Starkman's deposition, did he – as he recounted, did he pull on his experience as a physician?

A: Yes.

Q: Did he pull – did he use his knowledge of the literature?

A: Yes.

….

Q: And so basically the two of you arrived at opinions – when I say in the same way, using personal experience, using medical literature and understanding the standard of care, you both arrived at your opinions the same way, but you ended up with a different result. Am I correct in that?

A: We arrived with different opinions regarding the pathophysiologic mechanism.

Q: Yes. But, I mean, you used the same methodology to arrive at them, but you then ended up with a different – a different opinion?

A: Yes.

(R. 822.)[5]

This testimony shows both experts used the same reliable methodology to arrive at their (different) opinions. CSX thinks Dr. Starkman's opinions were wrong. But the place to challenge his opinions was at trial before the jury, not in a *Daubert* challenge. *See Baan*, 180 So. 3d at 1134.

3. Dr. Starkman could consider Mr. Belcher's past medical history.

Nothing in the law prohibited Dr. Starkman from discussing Mr. Belcher's

[5] Another CSX medical expert, Dr. Norse, admitted that Dr. Starkman's studies and work at UCLA was a scientific methodology. (R. 2839-40.) She further agreed the medical literature supported his opinions, though at times she questioned the reliability of the supporting literature. (R. 2833, 2839.)

2009 stroke to confirm his opinion, supported by the medical literature, that effective and prompt treatment can result in a good outcome. Physicians routinely consider a patient's past medical events in reaching their opinions – indeed, consideration of a patient's medical history is an indicia of reliability, not unreliability. *See Booker*, 166 So. 3d at 190 (confirming admissibility under *Daubert* where the trial court had determined the expert was "well-acquainted with [the claimant's] medical history"). CSX's argument goes to the weight of the evidence and does not provide any ground for striking Dr. Starkman's testimony as unreliable.

CSX, not Dr. Starkman, has engaged in "double-speak." (IB 27.) CSX relied on Mr. Belcher's 2009 stroke throughout trial to argue he should have known he was suffering another stroke, and that he could have avoided or minimized the 2012 stroke. (R. 10608, 11207-97, 11507-08, 11576, 11693, 12383-86.) In fact, CSX's counsel told the jury in opening that "the stroke he had in 2009 was almost identical to the stroke he had in 201[2]." (R. 10608.) CSX cannot use Mr. Belcher's 2009 stroke as both a sword and a shield.

E. The trial court did not abuse its discretion in admitting the testimony of Mr. Belcher's treating physicians.

CSX has not cited to any adverse ruling denying its argument that the treating physicians' testimony was cumulative. (IB 6.) Rather, it cites to the hearing on CSX's motion in limine to exclude their testimony during which the trial court took CSX's motion under advisement, at the request of CSX's counsel. (IB 6 (citing R.

9953); R. 9966, 9971.) Thus, CSX has not preserved this point and has not met its burden of establishing error in the record. *See, e.g.*, *Rhodes*, 986 So. 2d at 513 ("To be preserved, the issue or legal argument must be raised *and* ruled on by the trial court."); *Sikes v. Overholser*, 7 So. 2d 348, 348 (Fla. 1942) ("The burden is on the appellant to clearly establish reversible error in the record.").

Regardless, the testimony of Mr. Belcher's treating physicians was reliable and admissible under *Daubert* for the same reasons discussed in Argument I.D, *supra* at 30-34. And, further apropos is this Court's observation in *Baan*:

> Despite the importance of evidence-based medicine, much of medical decision-making relies on judgment, a process that is difficult to quantify or even to assess qualitatively. Especially when a relevant experience base is unavailable, physicians must use their knowledge and experience as a basis for weighing known factors along with the inevitable uncertainties to make a sound judgment.

Id. at 1134 n.9. Thus, the treating physicians' testimony was reliable.

In addition, their testimony was not cumulative. The case CSX cites in support of this contention (IB 28) has since been reversed by the Florida Supreme Court in *Gutierrez v. Vargas*, 239 So. 3d 615, 626 (Fla. 2018), where it held that, although treating physicians and experts had "testified to similar conclusions, this does not render their testimony cumulative." Likewise, the testimony of Mr. Belcher's treating physicians was, at most, "confirmatory" rather than cumulative. *Id.* Their testimony was distinct from Dr. Starkman's testimony because they testified from a treatment perspective, i.e., what treatments could have been administered had they

seen Mr. Belcher earlier, and what the different results may have been. (*See, e.g.*, R. 11248 (Dr. Gray's testimony that Mr. Belcher had a complete recovery after his 2009 stroke and returned to approximately 50 to 60 percent functional recovery after is 2012 stroke.)) Moreover, CSX has made no argument, as it must, that the probative value of their testimony was "*substantially* outweighed" by the danger of "*needless* presentation of cumulative evidence." *See Gutierrez*, 239 So. 3d at 625 ("cumulativeness alone is not sufficient grounds to exclude evidence").

Alternatively, any error in admitting the treating physicians' testimony was harmless. *Special*, 160 So. 3d at 1256. As CSX itself has argued, their testimony was "inconclusive at best," and "neither Dr. Warner nor Dr. Gray squarely testified that CSX's delay caused Belcher's injuries." (IB 30.) By CSX's own analysis, no reasonable possibility exists that their testimony contributed to the verdict.

II. The trial court did not abuse its discretion in instructing the jury.

Standard of Review. The failure to give a requested jury instruction constitutes an abuse of discretion only when "(1) it is an accurate statement of the law, (2) supported by the facts of the case, and (3) necessary for the jury to properly resolve the issues." *RJ Reynolds Tobacco Co. v. O' Hara*, 228 So. 3d 1168, 1171 (Fla. 1st DCA 2017). Decisions on jury instructions rest in the trial court's "sound discretion" that should "not be disturbed on appeal absent a clear demonstration that prejudicial error has occurred." *Golian v. Wollschlager*, 893 So.2d 666, 667 (Fla. 1st

DCA 2005). Prejudicial error occurs only if "a reasonable possibility" exists "that the jury could have been misled by the failure to give the instruction." *Id.*

A. CSX's duty-to-monitor instruction was neither supported by the facts nor necessary for the jury to resolve the case.

The trial court did not abuse its discretion in declining to give CSX's duty-to-monitor instruction because it was neither supported by the facts nor necessary for the jury to resolve the case. (R. 12284.) Thus, as the trial court determined, it would have confused the jury. (R. 12284.)

This is not a duty-to-monitor case. This is a prompt-medical-attention case. In other words, this case was based on CSX's duty to provide prompt medical attention after Mr. Belcher's medical emergency arose. *See Sells v. CSX Transp., Inc.*, 170 So. 3d 27, 32-33 (Fla. 1st DCA 2015). In *Sells*, this Court held under FELA: "the worker must establish that he became ill at work, that without prompt medical treatment he faced death or serious bodily harm, that the employer had notice of his illness, that the employer failed to furnish prompt medical attention, and that his death or injury resulted in whole or in part from the employer's delay in response." *Id.* (emphasis added). Mr. Belcher's case falls squarely into this holding from this Court's FELA precedent. He has satisfied these elements established by this binding precedent.

In contrast, CSX's non-binding cases concern a railroad's duty to take "anticipatory" measures to prevent medical emergencies, not its duty to respond to medical emergencies after they arise. (IB 32-34); *see, e.g., Fulk v. Ill. Cent. R. Co.*,

22 F. 3d 120, 124 (7th Cir. 1994) (plaintiff alleged railroad, "with knowledge of decedent's high blood pressure and hypertension should have had him examined more frequently and with more detailed examinations to determine his physical ability to perform his switchman's job without danger to his life.").

In addition, CSX attempts to justify its requested instruction based on a mischaracterized snippet of Mr. Franklin's cross-examination testimony. (IB 34-35.) Tellingly, CSX does not quote the purportedly objectionable testimony. With that testimony, Mr. Belcher was not attempting to prove that CSX itself should have conducted a blood sugar test, but that CSX, consistent with its duty to provide prompt medical attention, should have called for outside medical care to do whatever tests were necessary in light of his symptoms:

> Q. <u>If you called for medical assistance</u>, would they have the ability to test sugar?
>
> A. Yes, sir.
>
> Q. But that wasn't done that night?
>
> A. No, sir. He didn't ask for it. He didn't want it. I asked him if he wanted it and he objected to it.

(R. 12191 (emphasis added); App. 12.) Mr. Franklin also testified about his own experience with low blood sugar and confirmed that he himself had never experienced anything more than a headache. (R. 12180, 12189.)

Thus, CSX is wrong when it argues "the jury walked away from [Mr. Franklin's] testimony under the false impression that [CSX] would be held liable for

not routinely checking Belcher's blood sugar." (IB 36 (emphasis added).) Rather, as Mr. Belcher argued in closing, Mr. Franklin's testimony shows CSX did not obtain prompt treatment for him in the face of severe symptoms – symptoms that were more severe than anything Mr. Franklin himself had experienced as a diabetic. (R. 12191-92.) CSX's contrary reading is misleading and unreasonable.

As such, the trial court reasonably concluded, within its discretion, that CSX's requested instruction would have confused the jury by suggesting CSX could have allowed Mr. Belcher to sit on the job without medical treatment. In fact, had the trial court given CSX's confusing instruction, it likely would have abused its discretion. *See, e.g.*, *Gross v. Lyons*, 721 So.2d 304 (Fla. 4th DCA 1998)(reversing where trial court gave confusing instruction); *see also Sanchez v. Hussey Seating Co.*, 698 So. 2d 1236, 1327-28 (Fla. 1st DCA 1997) (trial court did not abuse its discretion in denying instruction "that did not relate to an issue presented to the jury"); *Golian*, 893 So. 2d at 667-68 (concluding there was "no reasonable possibility that the jury might have been misled" by the failure to give certain standard instructions).

Alternatively, any error in failing to give CSX's requested instruction was harmless. *Special*, 160 So. 3d at 1256. No reasonable possibility exists that, based on snippets of testimony during a week-and-a-half trial, the jury thought Mr. Belcher was faulting CSX for failing to test his blood sugar. (App. at 9-16; R. 12457-58.)

B. CSX's reasonable-foreseeability instruction was inaccurate, misleading, and unnecessary.

The trial court did not abuse its discretion in denying CSX's requested nonstandard instruction on "reasonable foreseeability." (R. 8324, 12276.) The instruction did not accurately state the law and would have misled the jury. In contrast, the trial court's jury instructions, as a whole, fairly stated the law on negligence. *See Wages v. Snell*, 360 So. 2d 807, 809 (Fla. 1st DCA 1978) (holding jury instructions are not erroneous when they "as a whole fairly state the law.")

Reasonable foreseeability is a part of negligence, not proximate cause. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 703 (2011). If the railroad cannot reasonably anticipate a particular condition might result in injury, it has no duty to correct that condition. *Id.* If, however, negligence is proved "and is shown to have "*played any part, even the slightest in producing the injury*, then the carrier is answerable in damages even if the extent of the [injury] or the manner in which it occurred was not probable or foreseeable." *Id.* (internal cites and quotes omitted).

CSX's instruction incorrectly asserted that Mr. Belcher must establish the "further requirement" of reasonable foreseeability and that it could be liable only if the jury determined CSX intended to injure him, or only if it could have foreseen the specific injury suffered by him. (R. 8324.) That is not the law under FELA. The extent and manner of the injury do not have to be intended, probable, or foreseeable. *See McBride*, 564 U.S. at 703. One high court has concluded that giving an instruction similar to CSX's requested instruction here would have misled the jury,

and thus it affirmed a trial court's decision refusing to give such an instruction. *See CSX Transp., Inc. v. Moody*, 313 S.W. 3d 72, 83-84 (Ky. 2010). That court reasoned that the U.S. Supreme Court has "indicate[d] that a defendant need not foresee the particular consequences of its negligent acts but only that its conduct would reasonably be anticipated to result in harm," and "[t]hus, a defendant is liable for even the improbable or unexpectedly severe results of its negligence." *Id.* (citing *Gallick v. Baltimore & O. R. Co.*, 372 U.S. 108 (1963)).

The facts and holding in *Gallick* illustrate the concept of "foreseeability" in FELA law. There, the employee was bitten by an insect near a stagnant pool of water of which the railroad was aware; this insect bite infected the employee and eventually resulted in the amputation of his legs. 372 U.S. at 109. The railroad argued it was not negligent because, in its view, the employee's injury was not reasonably foreseeable. The U.S. Supreme Court disagreed. Id. at 117.

Here, the trial court properly instructed the jury that, under CSX's duty to provide a reasonably safe place to work, its conduct is measured by the "degree of care which a reasonably careful person would use under like circumstances." (R. 8360.) Given this instruction, an additional charge on foreseeability was not required. *See Gallick*, 372 U.S. at 118 (holding reasonable foreseeability requirement satisfied where "jury had been instructed that negligence is the failure to observe that degree of care which people of ordinary prudence and sagacity would

use under the same or similar circumstances"); *Moody*, 313 S.W.3d at 83 ("A separate foreseeability instruction is not required in FELA cases if the jury is instructed that the defendant's duty is 'measured by what a reasonably prudent person would anticipate' under the same or similar circumstances."); *CSX Transp., Inc. v. Miller*, 46 So. 3d 434, 464 (Ala. 2010) (foreseeability charge not required "because a proper negligence charge encompasses the element of foreseeability").

Alternatively, any error in failing to give CSX's requested instruction was harmless. *Special*, 160 So. 3d at 1256. The gist of CSX's requested instruction was that CSX was not required to predict the exact nature of Mr. Belcher's injury. The instructions given made this point to the jury. Moreover, CSX itself invited any error – and thus waived its appellate argument – by objecting to Mr. Belcher's proposed instruction that CSX's duty be measured by what a reasonably prudent person "would anticipate as resulting from a particular condition." (R. 6577, 10115-24); *see, e.g., Partin v. State*, 82 So. 3d 31, 41 (Fla. 2011) (defendant invites error by objecting to instruction that would have been proper).

C. CSX's last-minute medical-mitigation instruction was an unfair surprise, which the trial court properly denied.

The trial court did not abuse its discretion by rejecting CSX's eleventh-hour attempt to inject a medical-mitigation instruction and defense. (R. 12266.) CSX's delay was an unfairly prejudicial surprise. Under its discretion, the trial court could properly reject CSX's belated instruction. *See Lockwood v. Baptist Reg'l Health*

Servs., Inc., 541 So. 2d 731, 733 (Fla. 1st DCA 1989) (holding the trial court properly denied a nonstandard instruction in part because "counsel failed to comply with the pretrial order which required the exchange of proposed jury instructions prior to trial"); *cf. Binger v. King Pest Control*, 401 So. 2d 1310, 1313 (Fla. 1981) ("[The] goals of [the] procedural rules are to eliminate surprise.").

CSX's reliance on Rule 1.470(b) is unavailing. (IB 42.) Granted, that rule states, "Not later than at the close of the evidence, the parties shall file written requests that the court instruct the jury on the law set forth in such requests." Fla. R. Civ. P. 1.470(b) (emphasis added). CSX effectively reads this rule as giving a defendant an absolute, unfettered right to submit instructions during the period after the plaintiff rests but before the defendant rests. (*See* IB 42-43); *see supra* at 12. (explaining how CSX first filed its medical-mitigation instruction after Mr. Belcher rested his case and on the same day CSX rested). Such a reading would be unjust to plaintiffs and unfairly favor defendants who, of course, always rest their case-in-chief after the plaintiff. *But see* Fla. R. Civ. P. 1.010 (directing the rules "be construed to secure the just . . . determination of every action")

Fortunately, such an unjust reading of Rule 1.470(b) is neither required nor supported by the law. Rule 1.470(b) merely sets a default deadline. It does not eliminate a trial court's discretion to manage the trial process, set pretrial deadlines, and require parties to submit proposed instructions before trial. *Cf. Edenfield v.*

Crisp, 186 So. 2d 545, 549 (Fla. 2d DCA 1966) (discussing the broad discretion a trial court enjoys at a pretrial conference to narrow issues for trial). The court here ordered the parties to submit their proposed instructions at the pretrial conference. (R. 6686.) This was reasonable and a typical trial practice. *See, e.g.*, J. Allison DeFoor II et al., *Florida Civil Procedure Forms* § 200.4 (Nov. 2017) (providing a standard pretrial order that jury instructions be submitted at the pretrial conference); *Livingston v. Dept. of Corr.*, 481 So. 2d 2, 2 (Fla. 1st DCA 1985) (noting the trial court required jury instructions be submitted before the pretrial conference).

Untimely proposed instructions rarely should result in draconian sanctions, like a default judgment. *See Livingston*, 481 So. 2d at 3. And, as Rule 1.470(b) indicates, a trial court may accept a proposed instruction submitted after a pretrial conference. Indeed, the trial court's pretrial order here did not completely preclude the late submission of instructions. (*See* R. 6686 (noting instructions "may be supplemented prior to the Jury Instruction Conference").) But, just because a trial court may accept an untimely instruction does not mean that it must always accept an untimely instruction, even if the instruction accurately states the law. *See Lockwood*, 541 So. 2d at 733 (this Court's precedent affirming denial of instruction in part because counsel failed to timely submit the instruction per the pretrial order).

The trial court here acted within its discretion by denying CSX's belated request because Mr. Belcher made a compelling case for unfair surprise and

prejudice. (R. 12266-67, 12270-71.) The litigation's history preceding the final charge conference was about the distinct defense of economic mitigation, on which the jury was instructed. *See supra* at 14-16. At no time before the final charge conference did CSX ever mention medical mitigation – not in the four-and-half years of pre-trial discovery and motion practice, not in the hundreds of pages of instructions it submitted before trial, not at the pre-trial conference, and not in its opening statement. Allowing CSX to raise medical mitigation for the first time after Mr. Belcher rested his case would have been an unfairly prejudicial surprise to Mr. Belcher. *Cf. Binger*, 401 So. 2d at 1313 (discussing unfair surprise).[6]

Nor is it of any consequence that CSX raised a general mitigation defense in its answer and the pretrial stipulation, neither of which specified that CSX was relying on a medical-mitigation defense (R. 22. 8171.) Based on the litigation's history (especially the parties' pretrial instructions), Mr. Belcher, at the onset of the trial, reasonably understood CSX's mitigation defense to be economic mitigation. *See supra* at 14-16. That is, as CSX said in its own proposed pretrial instruction, CSX intended to prove at trial that Mr. Belcher purportedly "failed to seek out or

[6] Though *Binger*'s prohibition on unfair surprise applied to an undisclosed expert witness, its rationale has been extended to other circumstances where, as here, a party fails to make a timely disclosure required by a pretrial order. *See, e.g.*, *Kellner v. David*, 140 So. 3d 1042, 1049 (Fla. 5th DCA 2014) (applying *Binger* to prohibit testimony by lay witness not disclosed per pretrial order). Thus, its rationale should apply here because CSX unfairly surprised Mr. Belcher by belatedly raising, via a proposed instruction, the defense of medical mitigation.

take advantage of a business or employment opportunity that was reasonably available [to him]."[7] (R. 8317.) Mr. Belcher did not reasonably expect CSX was asserting a medical-mitigation defense where – as stated in its belated instruction – CSX intended to prove that Mr. Belcher purportedly failed to "follow[] the expert recommendations of the physicians." (R. 8353.)

Alternatively, the evidence at trial did not support CSX's instruction; its non-binding cases are different because they involved circumstances where a plaintiff's treating physician recommended a specific treatment that had been refused. (*See* IB 41.) CSX in its brief has failed to point to any such evidence here. (*See id*. at 42.) As a second alternative, any error was harmless; the jury was instructed that the amount of damages "should be fair and just in light of the evidence." (R. 8367.)

D. The assumption-of-the-risk instruction was appropriate.

The trial court did not abuse its discretion in giving an assumption-of-risk instruction. This instruction was appropriate because the jury heard testimony that Mr. Belcher was required by CSX to remain on premises for several hours while he was drug tested. (R. 10678-79.) Indeed, CSX's counsel conceded at the charge conference that the jury had heard evidence of "unsafe conditions." (R. 12256.) It

[7] CSX agreed mitigation was an affirmative defense for which it bore the burden of proof. (*E.g.*, R. 10139:15-17); *Maxfly Aviation, Inc. v. Gill*, 605 So. 2d 1297, 1300 (Fla. 4th DCA 1992) (mitigation must be specifically pled as affirmative defense).

was important for the jury to understand he did not assume the risks of untimely medical treatment by acceding to CSX's demands to stay in unsafe conditions.

CSX erroneously suggests an assumption-of-risk charge is universally condemned and amounts to *per se* reversible error. (IB at 46.) The caselaw cited by CSX dispels this notion. In *Fashauer v. N.J. Transit Rail Operations, Inc.*, 57 F. 3d 1268, 1274-75 (3d. Cir. 1995), for example, the Third Circuit stated:

> [I]f, either because of evidence introduced at trial or because of statements made by counsel in opening or closing arguments, there is a risk that the implied consent theory of assumption of the risk seeped its way into the case, the jury should be instructed that it "may not find contributory negligence on the part of the plaintiff … simply because he acceded to the request or direction of the responsible representatives of his employer that he work … under unsafe conditions."

That is exactly what the trial court did here in light of the evidence suggesting that Mr. Belcher might be responsible for his injuries by agreeing to stay at work instead of requesting medical attention. (R. 12257-58.) Giving an instruction that prevented the jury from making this finding – while in no way taking away from CSX's negligence theory – was well within the trial court's discretion. *See Stager v. Florida E. Coast Ry. Co.*, 163 So. 2d 15, 18 (Fla. 3d DCA 1964) (giving assumption of risk charge "is within the discretion of the trial judge"). Many FELA courts have given such an instruction. *See, e.g., Jacksonville Terminal Co. v. Hodge*, 260 So. 2d 521, 524 (Fla. 1st DCA 1972); *Union Pacific R. Co. v. Estate of Gutierrez*, 446 S.W. 3d 478, 490 (Tex. App. Ct. 2014). Indeed, the failure to give such an instruction, when

supported by the evidence, can constitute reversible error. *See, e.g., Hamrock v. Consolidated Rail Corp.*, 501 N.E. 2d 1274, 1280 (Ill. App. Ct. 1986).

In contrast, CSX has failed to cite any case in which a court has determined it was reversible error to give an assumption-of-risk instruction. *See, e.g., Price v. Fla. East Coast Ry. Co.*, 186 So. 2d 261, 263 (Fla. 3d DCA 1966) (finding no reversible error because the trial court *declined* to give an assumption of risk instruction); *Clark v. Burlington Northern, Inc.*, 726 F. 2d 448, 452 (8th Cir. 1988) (no reversible error where jury's finding that plaintiff was partially at fault comported with evidence in record and did not demonstrate confusion traceable to instruction). Nor can it demonstrate reversible error here. It is apparent that the jury, which apportioned 50 percent responsibility to Mr. Belcher, was not confused regarding CSX's comparative negligence defense. (R.12457-58.)

III. The trial court did not abuse it discretion in concluding the jury's verdict was not against the manifest weight of the evidence.

Standard for the trial court to grant a new trial. A trial court may grant a new trial if the verdict is "contrary to the manifest weight of the evidence." *Brown v. Estate of Stuckey*, 749 So. 2d 490, 495 (Fla. 1999). The trial judge's role is "not to substitute his or her own verdict for that of the jury" or "to deny a litigant a jury trial," *id.*, or to act "as a seventh juror with veto power." *Pena v. Vectour of Fla., Inc.*, 30 So. 3d 691, 692 (Fla. 1st DCA 2010) (internal quote omitted).

Standard of review. The appellate court reviews a trial court's denial of a motion for new trial for an abuse of discretion. *Id.* "Trial court rulings on motions for new trial are given great deference on appeal." *Id.* A "reasonable disagreement" between the trial judge and the appellate panel does not amount to an abuse of discretion. *Id*. The appellate panel must respect the trial judge's superior vantage point because of her "contact with the trial and [her] observation of the behavior of those upon whose testimony the finding of fact must be based." *Brown*, 749 So. 2d at 496. CSX itself concedes that this Court may not reverse a jury verdict unless "there is no rational basis in the evidence" to support it. (IB 13.)

Argument on the merits. CSX cannot meet these exceedingly high standards to warrant a reversal of the trial court's order denying a new trial. Its third point on appeal is full of arguments appropriate for a jury, not an appellate panel. (IB 48-50.) CSX effectively asks this Court to overstep the constitutional limitations placed on its power and to supplant the jury's role. *See* Fla. Const. Art. V § 4(b) (granting this Court appellate and review jurisdiction, subject to limited non-applicable exceptions); Fla. Const. Art. I § 22 (right to trial by jury).

Mr. Belcher presented ample evidence to support a finding that the CSX supervisors could have foreseen he would suffer an injury if they did not procure medical attention for him. Among other evidence, Mr. Brown testified he observed Mr. Belcher's symptoms that were indicative of a serious medical problem; Mr.

Brown had reported something was wrong with Mr. Belcher to multiple supervisors; Mr. Vetsch had seen Mr. Belcher walking like he was confused; Mr. Garner knew something was wrong with Mr. Belcher; and Mr. Franklin, who was himself a diabetic, admitted that Mr. Belcher's symptoms seemed more serious than a reaction to low blood sugar and that his doctor had instructed him to go to a hospital in the event of low blood sugar. (R. 10649-50, 10657-58, 10666, 10681, 10668, 11918-11919, 12053-54, 10680-81, 12182, 12193.)

CSX suggests it was required to foresee the particular injury suffered by Mr. Belcher. This is not the law under FELA, and it is not how the trial court applied the law below. *See supra* Argument II.B, at 40-42. Thus, even if "all of the evidence indicated that, from [CSX's] perspective, [Mr.] Belcher was simply experiencing an episode of low blood sugar," CSX does not explain why *some* injury would be unforeseeable based on a diabetic episode. (*See* IB 49.)

In sum, the trial court did not abuse its discretion in denying a new trial or in concluding the jury's verdict was not against the manifest weight of the evidence.

CONCLUSION

This Court should affirm the final judgment on the jury verdict. CSX received a fair trial and is not entitled to a second one.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed with the eDCA system this 22nd day of August, 2018, and an electronic copy has been furnished to the following counsel of record:

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I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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