

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

THOMAS DAVID JORDAN,

W2007-00436-SC-RII-CV

Plaintiff/Appellee

v.

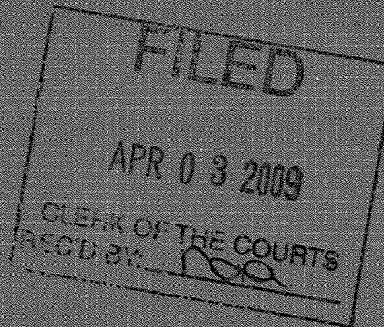
BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY,

Defendant/Appellee

and

NORFOLK SOUTHERN RAILWAY
COMPANY,

Defendant/Appellant



THOMAS DAVID JORDAN'S ANSWER IN OPPOSITION TO NORFOLK SOUTHERN'S
APPLICATION FOR PERMISSION TO APPEAL

Robert M. Frey MB 5531
BUTLER, SNOW, O'MARA, STEVENS &
CANNADA, PLLC
Post Office Box 22567
Jackson, Mississippi 39205
Phone: (601) 985-4624
Fax: (601) 985-4500
Email: bob.frey@butlersnow.com

ATTORNEY FOR THOMAS DAVID JORDAN

OF COUNSEL:

Stephen R. Leffler
Law Office of Stephen R. Leffler, P.C.
707 Adams Avenue
Memphis, Tennessee 38105
Phone: 901-527-8830

Christopher A. Keith
Wettermark Holland & Keith, LLC
2101 Highland Avenue South, Suite 750
Birmingham, Alabama 35205
Phone: 205-933-9500

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707 Adams Avenue
Memphis, Tennessee 38105
Phone: 901-527-8830

Christopher A. Keith³
Wettermark Holland & Keith, LLC
2101 Highland Avenue South, Suite 750
Birmingham, Alabama 35205
Phone: 205-933-9500

¹ Per Tenn.R.A.P. 30(a) this brief has been produced on Office Depot brand "EnviroCopy" paper, which has a post-consumer waste content of 35%.

² Admitted *pro hac vice* by Court of Appeals April 3, 2007; *Pro hac vice* application to this Court being submitted with this Answer.

³ Trial Counsel. Admitted *pro hac vice* by Trial Court. 4 R. 470 (January 24, 2006 Order).

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STATEMENT OF RELEVANT FACTS

Norfolk Southern says that the Court of Appeals got the facts correct with “one exception,” but Norfolk Southern is wrong about the “one exception.” The record contained testimony that it was the practice of Mr. Jordan and other experienced Conductors to work on the Engineer's side, so as to be able to give and receive visual signals if necessary. 15 R. 639, 643 (Phillips); 18 R. 1104-06 (Jordan). The jury was entitled to credit this testimony, and to reject any conflicting testimony. At this stage of the proceedings the point is conclusively settled in favor of Mr. Jordan.

ARGUMENTS AND AUTHORITIES

I. The Court of Appeals was entirely right to reject Norfolk's Southern's *Sorrell*-based attack on the jury instructions.

A. Over twenty Courts have reached the same conclusion that the Court of Appeals reached, to wit, that *Sorrell* left *Rogers* intact. Not one Court has bought Norfolk Southern's argument.

The Court of Appeals carefully and exhaustively analyzed the jury instructions, and Norfolk Southern's attacks on same. Rejecting the argument that Norfolk Southern presses now -- that three words (“even the slightest”), taken directly from the U.S. Supreme Court's *Rogers* case, were improper in light of one of two conflicting concurring opinions in *Norfolk Southern R. Co. v. Sorrell*, 549 U.S. 158 (2007) -- the Court of Appeals cited three cases,⁴ but it

⁴ The Southern District case, *Medwig v. Long Island R.R.*, 2007 WL 1659201 (S.D.N.Y.), summarizes the thinking very nicely:

could have cited many more. Every single one of the courts that have addressed the subject have agreed, expressly or impliedly, that *Sorrell* left *Rogers* intact. See *In re GlobalSanteFe Corp.*, 275 S.W.3d 477, 489 & n. 79 (Tex. 2008) (acknowledging Justice Souter's concurring opinion in *Sorrell*, but also quoting Justice Ginsberg's admonition that *Sorrell* "leaves in place precedent solidly establishing that the causation standard in FELA actions is more 'relaxed' than in tort litigation generally," and holding that "even the slightest" remains the law); *Johnson v. Cenac Towing, Inc.*, 544 F.3d 296, 302 & n. 4 (5th Cir. 2008) (acknowledging Justice Souter's opinion that *Rogers* ought to be overruled, but holding, correctly, that it hasn't been); *Morefield v. Grand Trunk Western R.R., Inc.* 2008 WL 786613 *2 (Mich. App.) (same); *McNeel v. Union Pacific R. Co.*, 276 Neb. 143, 150, 753 N.W.2d 321, 329 (Neb. 2008) (correctly observing that *Sorrell* "did not articulate what the proper [causation] standard should be inasmuch as it did not grant certiorari on that issue"); *Kennedy v. Norfolk Southern Ry. Co.*, 553 F.Supp.2d 516, 523 (W.D. Pa. 2008) (citing *Sorrell*, and stating that "even the slightest" is still the law);

(footnote continued)

The [Railroad] maintains that Justice Souter's concurrence is "highly instructive" and that its "teaching" should "trump [the Second Circuit's holdings in] *Williams* and *Ulfik*." (Def.'s Reply Mem. at 6, 7). However, the concurring opinion clearly does not establish that a majority of the Justices would be willing to revisit-much less overturn- *Rogers* if the opportunity arose. Indeed, in her own concurrence, Justice Ginsburg concludes the opposite: that the majority opinion "leaves in place precedent solidly establishing that the causation standard in FELA actions is more 'relaxed' than in tort litigation generally." *Id.* at 812 (Ginsburg, J., concurring); see also *id.* at 814 ("Nothing in today's opinion should encourage courts to use 'proximate cause' or any term like it, in jury instructions."). There consequently is no reason for this court to conclude, as the LIRR urges, that the legal principles applicable to a railroad worker's FELA claim have changed.

Medwig, 2007 WL 1659201 at *3.

Waggoner v. Ohio Central R.R., Inc., 2007 WL 4224217 *10 (S.D. Ohio) (same); *Montgomery v. NLR Co.*, 2007 WL 3243838 **2-3 (D. Vt.) (same); *Hall v. Norfolk Southern Ry. Co.*, 2007 WL 2765540 *6 (N.D. Ga.) (same); *Danko v. Union Pacific R. Co.*, 2007 WL 1854059 *2 (N.D. Tex.) (same); *Sieczka v. Canadian Pacific Ry. System*, 2008 WL 4369389 *4 (N.D. Ill.) (citing *Sorrell*, and nevertheless acknowledging “the relaxed standard for causation in FELA actions”); *Wilkins v. CSX Transp., Inc.*, 669 S.E.2d 784, 786 (N.C. App. 2008) (citing *Sorrell*, accurately stating its holding, and then, in the very next sentence, quoting *Rogers*’ “even the slightest” language as the law; no hint that *Sorrell* has undermined *Rogers*); *Romero v. CSX Transp., Inc.*, 2008 WL 5156677 *3 (D. N.J.) (quoting *Rogers*’ “even the slightest” language as the law; immediately thereafter citing *Sorrell*; no hint that *Sorrell* has undermined *Rogers*); *Murphy v. Metropolitan Transp. Authority*, 548 F.Supp.2d 29, 37 (S.D. N.Y. 2008) (citing *Sorrell*, then, immediately thereafter, re-stating *Rogers*’ “even the slightest” test; no hint that *Sorrell* has undermined *Rogers*); *Coffey v. Northeast Illinois Regional Commuter R. Corp.*, 479 F.3d 472, 476 (7th Cir. 2007) (same); *Jarrett v. CSX Transp., Inc.*, 2008 WL 4239148 *5 (N.D. Ohio) (*Sorrell* did not change “the relaxed standard of causation”) (dicta).⁵

Not one single case supports Norfolk Southern’s suggestion that *Sorrell* overruled *Rogers*.

⁵ The only Tennessee case on *Sorrell* that Mr. Jordan has been able to locate is *Hensley v. CSX Transp., Inc.*, 2008 WL 683755 *14 (Tenn. Ct. App.), but the issue in *Hensley* was different, and in any event the *Hensley* Court held that the railroad had failed to preserve it.

B. Even if Norfolk Southern were right about *Rogers* it would be wrong in the case at bar.

1. Norfolk Southern's argument is addressed to the wrong Court.

Norfolk Southern can not truthfully contend that Justice Souter's concurrence in *Sorrell* overruled *Rogers*. Obviously, three votes out of nine is not a majority. No, what Norfolk Southern really contends is that *Rogers* ought to be overruled.

There is only one Court to which such an argument may properly be addressed. In *Khan v. State Oil Co.*, 93 F.3d 1358 (7th Cir. 1996), one party argued that a particular U.S. Supreme Court case, *Albrecht*, "is no longer the view of the Supreme Court," and ought therefore not to be followed. *Id.* at 1363. The Seventh Circuit, per the well-respected Judge Richard Allen Posner, wrote "We have considerable sympathy with the argument that *Albrecht* is inconsistent with the [subsequent] cases. . . . In fact, we think the argument is right and that it may well portend the doom of *Albrecht*." *Id.* Judge Posner acknowledged "all its infirmities, [and] its increasingly wobbly, moth-eaten foundations," adding "*Albrecht* was unsound when decided, and is inconsistent with later decisions by the Supreme Court. It should be overruled. Someday, we expect, it will be." *Id.* "But all this," Judge Posner concluded,

is an aside. We have been told by our judicial superiors not to read the sibylline leaves of the *U.S. Reports* for prophetic clues to overruling. It is not our place to overrule *Albrecht*; and *Albrecht* cannot fairly be distinguished from this case.

Khan, 93 F.3d at 1364. *Id.* at 1363 (“the Supreme Court has told the lower federal courts, in increasingly emphatic, even strident, terms, not to anticipate an overruling of a decision by the Court; we are to leave the overruling to the Court itself”).

The Seventh Circuit, therefore, followed the unsound, wobbly, moth-eaten *Albrecht*. Then the U.S. Supreme Court took the case. It agreed with Judge Posner and overruled *Albrecht*, but it made a point of saying that the decision to do so belonged to it alone:

Despite what Chief Judge Posner aptly described as *Albrecht's* “infirmities, [and] its increasingly wobbly, moth-eaten foundations,” 93 F.3d, at 1363, there remains the question whether *Albrecht* deserves continuing respect under the doctrine of *stare decisis*. The Court of Appeals was correct in applying that principle despite disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents.

State Oil Co. v. Khan, 522 U.S. 3, 20, 118 S.Ct. 275, 284 (1997).

Norfolk Southern has absolutely no ground for suggesting that this Court ought to take a different course.⁶

2. The Court to which Norfolk Southern's argument ought to be addressed rejected it just last Fall.

It is worth noting that in November of 2008 the U.S. Supreme Court denied a petition for cert that made exactly the same arguments that Norfolk Southern is now making. See *CSX Transportation, Inc. v. Rivenburgh*, Petition for a Writ of Certiorari, on line at [http://www.appellate.net/briefs/Rivenburgh Cert Petition.pdf](http://www.appellate.net/briefs/Rivenburgh%20Cert%20Petition.pdf); petition denied

⁶ Norfolk Southern cites (*Application* pp. 14-15) *Khan* and *Rodriguez v. Shearson/American Express, Inc.*, 490 US 30, 44 (1989), but simply does not understand them. Norfolk Southern is asking this Court to do the very thing that *Kahn* and *Rodriguez* forbid.

November 3, 2008, [http://origin.www.supremecourtus.gov/docket/08-](http://origin.www.supremecourtus.gov/docket/08-269.htm)

[269.htm](http://origin.www.supremecourtus.gov/docket/08-269.htm).⁷ Denial of such a petition is not, of course, “precedent” in the sense that it represents approval of the decision below. It is, however, precedent for denial of what is essentially the very same petition. Only by supposing that the U.S. Supreme Court believed the *Rivenburgh* petition to be well taken, but was simply too busy to attend to it, and would welcome assistance from this Court, can Norfolk Southern suggest that its petition ought to be granted.

3. Even overruling *Rogers* would avail Norfolk Southern nothing in the case at bar.

Even if Justice Souter had managed to command a majority in *Sorrell*, the instructions given in the case at bar would have remained entirely correct.⁸

⁷ From the *Rivenburgh* Petition:

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QUESTIONS PRESENTED

Under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, railroad employees may recover for workplace injury or death “resulting in whole or in part from the negligence” of the railroad. *Id.* § 51. This case presents two related questions on which the lower courts are deeply divided:

1. Whether there is a relaxed standard of causation under FELA.
2. Whether there is a relaxed standard of negligence under FELA.

⁸ It is worth noting even Justices Souter, Alito and Scalia did not purport to question *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994) (“a relaxed causation standard applies under FELA”), or *Crane v. Cedar Rapids & Iowa City R.*, 395 U.S. 164 (1969) (a FELA plaintiff need prove “only that his injury resulted in whole or in part from the railroad's violation”), or, indeed, any case other than *Rogers*. See *Sorrell*, 127 S.Ct. at 812 (Souter, J. concurring) (“The state court may [on remand] likewise need to address post-*Rogers* cases (including some of our own); I do not mean to suggest any view of them except for the misreading of *Rogers* expressed here and there”); *id.* at 813 & n. 1 (Ginsberg, J., concurring) (“I do not read Justice SOUTER's concurring opinion as taking a position on the appropriate causation standard as expressed in” *Gottshall* and *Crane*).

The issue that Norfolk Southern tried to “smuggle” into *Sorrell*, 127 S.Ct. at 804-05, was whether “even the slightest” *causation* is sufficient. The instruction in the case at bar referred to “even the slightest” *negligence*. This distinction is vast.

This point, which eluded Norfolk Southern in its briefs to the Court of Appeals, it now concedes. *See Application* p. 15. Rather than dropping the whole argument, however, Norfolk Southern morphs it, claiming now that (*Application* p. 10 & n. 5; p. 15) that instructing that the employer is liable when the “defect or insufficiency is due to negligence, even the slightest, on the part of the employer” suggested a standard of care more demanding than “ordinary” negligence. Beyond the fact that Norfolk Southern waived this argument by waiting until now to make it, the simple answer is that it does not so suggest. Logically, grammatically, and in every other way, in order to find that “X, even the slightest” was present, one must find that X was present.

Norfolk Southern admits, as it must (*Application* p. 18), that a FELA jury may return a plaintiff’s verdict even when the railroad is only one percent at fault. That is what the Jury in the case at bar was told when it heard the words “negligence, even the slightest.” And that is all that it was told. Especially when considered as a whole,⁹ the instructions, which clearly and

⁹ *See Cook v. Wilson*, 1987 WL 7333 *4 (Tenn. Ct. App) (“Instructions need not be perfect in every detail. A single erroneous statement will not necessarily invalidate an otherwise proper charge if the instructions, as a whole, clearly define the issues and do not mislead the jury. . . . This Court reviews the trial court’s jury instructions as a whole, the same way a jury would, when the adequacy of the instructions is challenged on appeal”).

correctly defined the term “negligence,” made it plain to the Jury that they could not find for Mr. Jordan without finding a failure on the part of Norfolk Southern to use reasonable care.

4. In any event, the alternative instruction that Norfolk Southern tendered was “not legally correct.”

Finally, and in any event, there is no error in refusing a tendered instruction that was “not legally correct,”¹⁰ and the instruction that Norfolk Southern supposedly tendered was incorrect, both because it failed to express the correct standard for negligence in a FELA action, and because it was peremptory (ironically, in favor of Mr. Jordan) as to causation.¹¹

II. Norfolk Southern completely misunderstands *Tyrrell v. Norfolk Southern Ry. Co.*, 248 F.3d 517 (6th Cir. 2001), and the effect of T.C.A. §65-6-205(d).

Norfolk Southern asserts that it “complied with” T.C.A. §65-6-205(d), *Application* p. 25, and that the legal effect of this “compliance,” under *Tyrrell v. Norfolk Southern Ry. Co.*, 248 F.3d 517 (6th Cir. 2001) is that Mr. Jordan loses, as a matter of law. Norfolk Southern asserts (*Application* p. 26) that “the Court

¹⁰ *State v. Kennamore*, 604 S.W.2d 856, 859 (Tenn. 1980) (“Since the tendered instruction in this case was not legally correct, there was no error in its refusal”).

¹¹ The instruction that Norfolk tendered says “You need not find that the railroad’s negligence was the sole cause [of Plaintiff’s injury], but you must find that it was a proximate cause of Plaintiff’s injury.” *Norfolk Southern Court of Appeals Brief* p. 23 (emphasis supplied). Of course what Norfolk Southern meant was “before you can return a verdict against Norfolk Southern you must find” etc., but that is not what the tendered instruction said.

of Appeals misunderstood Norfolk Southern's argument." "The issue," Norfolk Southern tells us,

is not whether the Tennessee track clearance statute has **preemptive effect**, to the same extent as federal regulation, but whether it, in the absence of a governing federal regulation, is entitled to **deference** as an important part of and to be given effect in setting the safety standard to be met within the overall regulatory scheme. *Tyrrell* establishes that the answer is yes.

Application p. 26 (emphasis supplied).

Respectfully, Norfolk Southern is confused. The pretended contrast between "preemptive effect" – which Norfolk Southern knows full well is indefensible – and "deference," is entirely illusory. To give the State statute "preemptive effect" in the case at bar would be to say that, as a matter of law, that Mr. Jordan has no FELA rights. To give the State statute the "deference" suggested by Norfolk Southern would be to say the very same thing.

Here again Norfolk Southern can not cite a single case that supports its position. *Tyrrell* certainly doesn't. Norfolk Southern says that *Tyrrell* "held" that "absent a federal regulation on the subject matter the [State] statute is **incorporated into or** serves as a permissible gap filler in the Federal Rail Safety Scheme." *Application* p. 26 (emphasis supplied). This is highly misleading. What *Tyrrell* held was that the FRSA did not preempt the Ohio statute. *Tyrrell*, 248 F.3d at 525. This is all that it meant by the term "a permissible gap filler" -- it was permissible, under the Supremacy Clause, for the State to occupy with State law a niche left unoccupied by the federal statute. Nothing in *Tyrrell* suggests that the State law became a part of the FRSA, a suggestion that would have been a gross *non sequitur*, and pure dicta.

The State law in *Tyrell* was and remained State law. The Court of Appeals understood this perfectly.

No case – not *Tyrell*, nor *Waymire*, *Thirkill*, *Denson*, *Coon*, nor *Chandler* – no case offers any support for Norfolk Southern’s pretended distinction between “preemption” and “deference.” *Waymire*, *Thirkill*, and *Denson* merely stand for one side of the question, on which courts are divided,¹² as to whether FELA claims can be “precluded” by another federal statute, the FRSA. As for *Coon* and *Chandler*, so irrelevant that Norfolk Southern did not even cite them to the Court of Appeals: neither of these have anything to do with the FELA. In both the plaintiff was proceeding under State-law theories. They have literally nothing relevant to say in the case at bar.

Assume, however, for the sake of argument, that T.C.A. 65-6-205(d) should be given the force of federal law. Assume, even, that T.C.A. 65-6-205(d) had been enacted by Congress as chapter one of the FRSA. Assume, too, that *Waymire* is the law, so that the FRSA can, indisputably, preclude an FELA claim. All of these assumptions taken together would leave Norfolk Southern precisely where it is. Even under *Waymire* the FELA gives way to the FRSA, only under circumstances similar to those in which State law would give way to a federal statute, i.e., where permitting the FELA claim to go forward would

¹² Norfolk Southern speaks of “the established preclusion doctrine,” *Application* p. 26, but more careful scholarship would have compelled them to admit what the Court of Appeals correctly noted, that *Waymire*’s holding “is by no means universally adopted.” *Jordan v. Burlington Northern Santa Fe R.Co.*, 2009 WL 112561 * 9 (Tenn.Ct. App.).

make the FRSA provision “virtually meaningless.”¹³ Enforcing Mr. Jordan’s FELA rights on these facts has no tendency to strip T.C.A. 65-6-205(d) of meaning. Norfolk Southern remains perfectly free to “maintain” the tracks on Broadway just as they are.¹⁴ It need only do what its attorney told the Jury it always has done, that is, be “vigilant in its safety measures” when it “operate[s] in an old location like this, where tracks are closer together than they are at most locations. . . .” 14 R. 553.

Norfolk Southern has identified no case, and Mr. Jordan’s research has identified no case, in which the FRSA nullified a railroad’s FELA obligation to provide safe working conditions for its employees on facts anything like those presented herein. To the contrary, the instant case is much like *Tufariello v. Long Island R.R. Co.*, 364 F.Supp.2d 252 (E.D.N.Y. 2005). Mr. Tufariello suffered hearing damage from the locomotive horns in his work area. When he brought a FELA claim the railroad pointed to FRSA regulations that required the horns to be loud, and argued that these regulations barred the FELA claim. The District Court agreed, *id.* at 260-261, but the Second Circuit reversed:

The FRSA regulations here, though, do not address the circumstances under which railroad employees must be provided hearing protection. Thus, irrespective of whether, in order to establish uniform national standards as to minimum train horn volumes, the FRSA precludes a negligence action brought under FELA based on excessive volume of the locomotive horns-something we need not and do not decide-the FRSA does not preclude a suit based on the alleged failure to equip an employee with hearing protection. We think that the

¹³ See, e.g., *Lane v. R.A. Sims, Jr., Inc.*, 241 F.3d 439, 443 (5th Cir. 2001).

¹⁴ To “maintain” means merely to keep “in the same general state of being, repair, or efficiency as initially constructed.” *Swieckowski v. City of Ft. Collins*, 934 P.2d 1380, 1385 (Colo. 1997).

district court was therefore mistaken in concluding that the FRSA precludes Tufariello's cause of action based on the LIRR's failure to provide him with safety equipment. . . .

Tufariello v. Long Island R. Co., 458 F.3d 80, 86 (2nd Cir. 2006) (footnote omitted). Just as the Long Island Railroad could provide Mr. Tufariello with a reasonably safe place to work without changing anything about its horns, so too the Norfolk Southern could, by providing adequate communication, and/or lighting, and/or a lookout, and/or another location for this task, have provided Mr. Jordan with a reasonably safe place to work without changing anything about its tracks.

Norfolk Southern complains that it “complied” with State law, but was cast in judgment nevertheless. The errors lurking in here begin with the word “comply.” To speak of “comply[ing] with” T.C.A. 65-6-205(d) is to propagate a fundamental misconception. One can not “comply” with section 65-6-205(d) because it does not mandate anything. It does not set any “standard” (much less the “controlling standard”). All it does is excuse conduct that is otherwise illegal under 65-6-201 & 205(a), and that is subject to fines and mandatory injunctions under 65-6-208. It is, in short, as Norfolk Southern’s counsel incessantly termed it below, 9 R. 50, 56, 65, 69, 72, 77, 86, a “grandfather” statute, a grudging concession to undesirable circumstances that are too deeply entrenched to be changed. The only right that 65-6-205(d) gives Norfolk Southern is the right to tell a Tennessee Department of Transportation’s enforcement agent (*see* T.C.A. 65-6-207) to put away his citation book.

Erroneous, too, is Norfolk Southern's conception as to the effect of compliance. Compliance, even with a controlling standard, never establishes due care as a matter of law. At most it is simply evidence of due care.¹⁵ And this brings us back to the fundamental issue, negligence. Norfolk Southern would have this Court believe that it was subjected to liability for having close clearances. The truth is that Norfolk Southern was cast into judgment because it failed to use reasonable care in light of the close clearances and other factors.¹⁶ Norfolk Southern now sniffs (*Application* p. 28) at this distinction,

¹⁵ See, e.g., 63 Am.Jur.2d, Products Liability § 387 ("A manufacturer's compliance with a statute, regulation, standard, or the like, designed to protect against product-caused injury is not, in itself, sufficient to immunize the manufacturer from negligence liability for such an injury").

¹⁶ "Broadway," the stretch of tracks where Mr. Jordan was injured, is unusual, not merely in the close clearance, but also in: [1] the fact that there are tracks on both sides of the Norfolk Southern track, making it impossible for the Conductor to work without placing himself between his train and another track, 15 R. 598 (Phillips); 16 R. 786 (Kirk); [2] the tracks that are adjacent to the Norfolk Southern tracks are not themselves Norfolk Southern tracks, 20 R. 1455 (Wickwire), depriving the Conductor of the usual radio warnings of approaching Norfolk Southern trains, 15 R. 586-88, 604 (Phillips) 17 R. 956-57 (Bussell) (in other yards "we're able to control the movements" of approaching trains, communicate with them, and receive notification of their approach; not so on Broadway, where "we don't have communications with [the other railroads] and we can't judge anything coming"); 17 R. 972 (White) (Norfolk Southern Yardmaster) (no communication with Burlington Northern trains); 21 R. 1623-24 (Adams) (radio communication is "very, very important on the railroad," in part to give "notice if another train is going to come up behind"); [3] the lighting is very poor. 17 R. 957 (Bussell) ("real dark"); 15 R. 598 (Phillips) ("really dark"); 17 R. 970 (White) ("dark"); 14 R. 548 (Norfolk Southern opening statement: "[i]t was dark" at the time of the accident); and [4] a nearby curve in the track makes it possible for trains to "sneak up" on a man doing the job that Mr. Jordan was doing, "in a matter of seconds." 16 R. 794 (Kirk).

The close clearances and the other factors had led Norfolk Southern officially to proclaim Broadway "unsafe," 20 R. 1536-37 (Murphy) & Ex. 101 - so unsafe that Norfolk Southern banned some on-ground activities there, 17 R. 910-14 & Exs. 10 & 11 (Rhodes) (hanging EOT device, testing brakes); so unsafe that when a Norfolk Southern police officer refused to walk out there simply to close a container door his

(footnote continued)

but it understood it well enough in its opening statement, when it told the Jury: "Now, the way you operate when you have to operate in an old location like this where tracks are closer together than they are at most locations, **you have to be particularly vigilant in safety measures.**" 14 R. 553 (emphasis supplied).

When the jury in a motor vehicle accident case finds that the defendant was driving too fast for conditions, the defendant is not being blamed for the conditions themselves. No one has suggested that he ought to have made the rain stop, the ice melt, or the fog roll away. When the Jury subjects him to liability it is for his behavior in light of those conditions -- not turning on his wipers, not slowing down, etc. The close clearances on Broadway were, likewise, a given. No one suggested that Norfolk Southern was obliged to re-lay those tracks. What the Jury condemned was Norfolk Southern's failure to act reasonably in light of those close clearances -- its failure to be "vigilant in safety measures" -- not the clearances themselves.

(footnote continued)

boss, despite the obvious and immediate risk of pilferage, told him his refusal was justified. 21 R. 1573 (Haynes). Despite all of this, and despite the availability of alternatives, 17 R. 972-77, 983 (White), 21 R. 1624-34 (Adams), Norfolk Southern directed Mr. Jordan to work on the ground at Broadway, 15 R. 590, 597, 609 (Phillips); 17 R. 966-67 (White), wearing, as he was required to wear, ear plugs and safety goggles, 15 R. 649 (Phillips).

III. Mr. Jordan takes no position on Norfolk's Southern's dispute with Burlington Northern, but pleads with this Court, if it undertakes to review this dispute, to sever Mr. Jordan and allow his judgment to become final and collectible.

Mr. Jordan has no interest in the indemnity dispute between Norfolk Southern and Burlington Northern, but he does have a very keen interest in avoiding any further delay. The five years that have already elapsed since Norfolk Southern's negligence shattered his body and ruined his career amount to about a fifth of his then-remaining projected lifespan. To allow his judgment against Norfolk Southern to be carried along with the inter-railroad dispute would be unjust, and would add injury to injury. Should this Court undertake to review the indemnity question it should sever Mr. Jordan's judgment against Norfolk Southern, and allow it to become final and collectible.

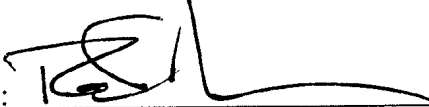
CONCLUSION

The Court of Appeals studied this case with manifest professionalism and scholarship. It carefully examined, and rightly rejected, Norfolk Southern's unsupported and illogical attacks on the Jury's verdict. Nothing in Norfolk Southern's Application begins to establish that further review would or ought to change the result. This Court ought to deny *in toto* Norfolk Southern's Application for Permission to Appeal. At an absolute minimum, if This Court

chooses to review Norfolk Southern's dispute with Burlington Northern, it ought to sever Mr. Jordan's judgment and make it final and collectible.

Respectfully submitted,

THOMAS DAVID JORDAN

By: 

Robert M. Frey MB 5531
BUTLER, SNOW, O'MARA, STEVENS
& CANNADA, PLLC
Post Office Box 22567
Phone: (601) 985-4624
Fax: (601) 985-4500
Jackson, Mississippi 39205
Email: bob.frey@butlersnow.com

OF COUNSEL:

Christopher A. Keith
WETTERMARK HOLLAND & KEITH, LLC
2101 Highland Avenue South, Suite 750
Birmingham, Alabama 35205
Phone: 205-933-9500

Stephen R. Leffler
LAW OFFICE OF STEPHEN R. LEFFLER, P.C.
707 Adams Avenue
Memphis, Tennessee 38105
Phone: (901) 527-8830
Fax: (901) 525-3084

CERTIFICATE OF SERVICE

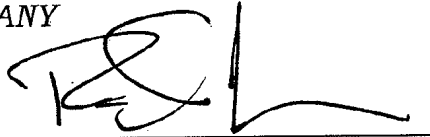
I hereby certify that a true and correct copy of the foregoing document was served this 2nd day of April, A.D. 2009, via U.S. Mail, first-class postage prepaid, on the following counsel of record:

S. Camille Reifers
Everette B. Gibson
BATEMAN GIBSON, LLC
Post Office Box 3351
Memphis, TN 38173

*ATTORNEYS FOR NORFOLK SOUTHERN
RAILROAD*

William C. Spencer
William C. Spencer, Jr.
MITCHELL, McNUTT & SAMS, P.A.
105 South Front Street
Post Office Box 7120
Tupelo, MS 38802-7120

*ATTORNEYS FOR BURLINGTON NORTHERN
SANTA FE RAILWAY COMPANY*



Robert M. Frey