

**Case Name:** CSX Transportation v Richard Bickerstaff  
**Date Decided:** August 26th, 2009  
**Originally Filed in:** Maryland (State)  
**Decided by:** Maryland 1st Appellate Judicial Circuit (State)  
**Court:** Court of Special Appeals of Maryland  
**Judge:** Judge Woodward  
**Citation:** 2009 WL 2619691 (Md.App.)

**Background:**

This case involved the consolidated actions of nine railroad employees, including Richard Bickerstaff, seeking relieve under the Federal Employers' Liability Act ("FELA") for cumulative trauma injuries sustained during the course of their employment with CSX Transportation Inc ("CSX"). CSX operates rail yards throughout Maryland. The surface of CSX's rail yard consists of ballast, slag, and cinders. Railroad "ballast" (crushed rock) is the most common surface material and has many different functions depending upon its function in the yard. Ballast supports the railroad track, facilitates drainage, and provides a walking surface for railroad employees. Based upon the function, ballast comes in different sizes. Large, or mainline, ballast is composed of rocks 1" to 2 ¾" in size and supports the railroad tracks and drainage. Mainline ballast, is unstable to walk on and poses a slip and fall hazard. The employees, including Bickerstaff, are ages 52-62 and worked for CSX approximately 30-35 years. Each of the nine employees alleged knee injuries (including one who suffered back injuries) as a result of performing their duties for CSX including but not limited to, squatting, crouching, crawling, climbing rail cars, and years of walking on mainline ballast. The plaintiffs alleged that CSX negligently used significant amounts of large, mainline ballast, rather than small ballast in violation of industry standards and CSX's own rules. Following a seventeen-day trial, a jury found CSX liable and awarded the plaintiffs \$15,085,000. CSX appealed on numerous grounds.

**Issue:**

Did CSX successfully appeal the verdict?

**Overall Issues Discussed or Touched Upon in this Case:**

- *Cumulative Trauma Case*
- *Found Plaintiff Comparatively Negligent*

**Held:**

Up on appeal were several issues.

(1) *Did the Trial Court Commit prejudicial error in permitting appellees' (plaintiffs)' counsel to conduct an in-court demonstration using large ballast?*

At trial, the plaintiffs' counsel demonstrated the process by which ballast was graded in

different sizes using mainline ballast, a baseball, and a softball by passing them through a square-shaped wooden screen. CSX contended that this method was not substantially similar to replace the crushing and processing in a rock quarry. The judge allowed appellant to use the ballast but not the baseball or softball in demonstrating the grading process. CSX argued to this Court that the trial court erred in allowing a "visually arresting but highly misleading, 'demonstration' of walking on large ballast conducted by the plaintiffs' counsel". However, the decision to admit demonstrative evidence rests with the sound discretion of the trial court. Demonstrative evidence is physical evidence that helps the jurors understand the testimony but is otherwise unrelated to the case. If the pertinent conditions are substantially the same as at the time in question, and the procedure will not be unduly time-consuming, confusing, or likely to arouse unfairly emotional reactions in the jury then it will be allowed. This Court held that the trial judge erred in permitting the demonstration without requiring the plaintiffs' counsel to show ample evidence showing a substantial similarity between his in-court ballast demonstration and the reality of mainline ballast in a rail yard. Accordingly this Court held as a matter of law that the evidence was irrelevant. Moreover, CSX urges for a new trial. An Appellant Court will reverse a lower court judgment if the appellant demonstrates an error and prejudice. Prejudice will be found if a showing is made that the error was likely to have affected the verdict. This Court held that that the error committed by the trial court was not prejudicial.

*(2) Did the Trial Court abuse its discretion in propounding a jury instruction on assumption of risk? \_*

CSX contended that the court erred in propounding a jury instruction on the doctrine of assumption of risk when appellant "did not plead or argue that it could avoid liability because plaintiffs had assumed the risks of their employment". The plaintiffs responded that the jury was correctly instructed that assumption of risk is not a defense in a FELA case. At issue is whether the court's instruction on assumption of risk was applicable under the facts in this case. An instruction that directs the jury not to consider assumption of risk as a defense is not unusual. This Court found that the evidence supported the doctrine of assumption of risk and therefore an instruction informing the jury not to consider it was appropriate. Did the Trial Court err in ruling that appellees' claims were timely as a matter of law? CSX also contended that six of the nine plaintiffs were time barred under the applicable statute of limitation. FELA's statute of limitations provides that no action shall be maintained under FELA unless commenced within three years from the day the cause of action accrued. A cause of action, under FELA, accrues when the character of the condition and its cause first come together for the plaintiff. It requires a very substantial common-sense likelihood that a reasonably careful person would discover the existence of the injury and its cause. This Court held that each of the plaintiffs, based upon the evidence presented, filed a timely claim and therefore were not time barred by the statute of limitations. Did the Trial Court abuse its discretion in refusing to allow appellant to cross-examine appellees' economist with regard to railroad industry

retirement age statistics? CSX also claimed that the trial court erred in computing plaintiffs' loss of future earnings as a result of their injuries. Each plaintiff testified they intended to continue working until age 64 or 64. CSX contended the trial court abused its discretion by refusing to allow their counsel to cross-examine the plaintiff's doctor with regard to statistics showing most employees in the railroad industry retire close to 60 not 65. They argued that it was reasonable that the jury could have concluded it was 'reasonably certain' that some or all appellees would have retired earlier than they claimed during their testimony. The plaintiffs countered that there was plenty of evidence throughout the trial to aid in determining the retirement age of each plaintiffs and that the excluded evidence was entirely cumulative. Rulings on admissibility of evidence must normally be left to the sound discretion of the trial judge in actions under the Federal Employer's Liability Act . FELA Actions, in state court, will apply federal substantive law but state procedural law, including state laws of evidence. At trial, CSX's counsel asked plaintiffs' doctor if he was aware of the fact an overwhelming majority of people that retire in the railroad industry were 60 years old. The judge in the lower court sustained plaintiffs' objection on grounds that it lacks relevance. The Court found it irrelevant by narrowing the focus to the plaintiffs in the action and not the retirement age of anyone else. CSX's counsel did not attempt to admit the unidentified statistical evidence, of the majority retirement age, and therefore CSX's contention that the trial court erred in preventing the introduction of evidence of the usual retirement age for railroad employees was without merit. Furthermore this Court found that just because the evidence was withheld, it did not preclude a jury finding that any of the plaintiffs' intended to retire at the age of 60. Did the Trial Court err in declining to instruct the jury on apportionment of damages? In perhaps the most important issue on appeal, CSX contended that the trial court erroneously refused to allow the jury to apportion appellees' damages "among own negligence, contributory negligence, and other causes. The other causes including, medical conditions such as obesity, smoking, or other pre-existing medical conditions. The plaintiffs argued that the trial court correctly declined CSX's request to allow the jury to apportion damages because no evidence existed that appellees suffered incapacitation, disability, or pain prior to the time they worked for CSX. CSX requested three instructions on apportionment and provided the court with a proposed verdict sheet that allowed the jury to assign liability to "other factors" in addition to CSX's negligence and plaintiffs' contributory negligence. The instruction ordered the jury to determine if they found a pre-existing condition to determine how much of the plaintiff's injury is due to a pre-existing condition and how much his present injury is a result of CSX's aggravation of his pre-existing condition. CSX also requested that the future lost wages, if any, the plaintiffs sustains, what percentage would be a proximate cause of the negligence and what percentage that would be attributed to other causes or factors and to apportion the award of damages accordingly. Finally, CSX's third request instructed the jury to determine what percentage of the injuries were caused by the negligent condition and what percentage was caused by prior injuries, weight, age, personal lifestyle choices, hereditary, or genetic factors, plaintiff's own negligence, and to award plaintiff only the percentage of damages attributable to

the work performed for CSX. This Court found that the trial court erred in not instructing the jury as to how they were permitted to apportion damages under FELA. The proper measure of damages under the FELA is "federal in character" and therefore, "a matter governed by federal law". A FELA plaintiff's injury or illness may result from multiple causes, including the employer's negligence, the plaintiff's contributory negligence, third-party negligence, and non-negligent causes. FELA provides for diminution of damages in cases in which the employee's negligence contributed to his own injuries. A long line of cases has permitted the jury to apportion damages when the employee's damages were caused by the employer and a non-negligent factor. If sufficient evidence exists to indicate that an injury may have resulted from the aggravation of a preexisting condition, the jury should be instructed that if it finds for the plaintiff on the issue of liability, it should award damages only for the aggravation by the railroad's negligence. Failure to instruct the jury on apportionment in a FELA case may constitute reversible error. This Court determined that sufficient evidence was adduced at trial to support CSX's request for an instruction on apportionment of damages. A defendant need only produce some evidence to support its proposed apportionment instruction and is not required to demonstrate an exact percentage or a mathematical proportion. The evidence need only be sufficient to permit a rough practical apportionment. CSX introduced expert testimony establishing the possibility that plaintiffs' prior medical conditions and other factors played a role in the current injury suffered. Therefore the trial court erred in not allowing the jury to determine what portion of damages were caused by factors other than the negligence of appellants and appellees. Moreover, this Court found that the error substantially prejudiced appellant's case. The jury had no opportunity to apportion damages to any causes other than CSX's negligence and plaintiffs' contributory negligence. Because this error was substantially prejudiced the case, this Court held the award of damages reversed and remanded the case to the lower court. Were appellees' claims precluded by the Federal Railway Safety Act? CSX also argued that plaintiffs' FELA claims are precluded by the Federal Railway Safety Act and the regulations promulgated under FRSA. The particular regulation at issue deals with ballast requirements. Relying on previous precedent, under Miller, this Court found that plaintiffs' FELA claims were not precluded by the FRSA. Accordingly this Court vacated the lower court's judgment and remanded to the court for a new trial on damages.

**Comments:**

A plaintiff bringing a FELA action has always been able to recover for injuries sustained while working for a railroad company. The amount of damages will be offset by a percentage the finder of fact, usually the jury, determines the plaintiff to be contributorily negligent. In the instant case, the Court determined that damages under FELA may be apportioned not only based upon contributory negligence but also other factors such as lifestyle and other pre-existing conditions. The Court here, relying on precedent, vacated the award on damages because the trial court refused to allow the jury to be instructed, by CSX's counsel, to factor other causes into the allocation of fault for injuries suffered.

Steve Gordon