No. 1-23-0481

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ANNETTE SANDERS, Independent Administrator of the ESTATE OF JOSEPH SANDERS, Deceased, **Plaintiff-Appellee,** **vs.** **CSX TRANSPORTATION, INC.,** **Defendant-Appellant.**	**Appeal from the Circuit Court of Cook County, Law Division** **Case No. 2019 L 004599** **Honorable Clare E. McWilliams, Judge Presiding**

BRIEF OF PLAINTIFF-APPELLEE ANNETTE SANDERS

Jonathan Sternberg, IL#6331607
Jonathan Sternberg, Attorney, P.C.
2323 Grand Boulevard #1100
Kansas City, Missouri 64108
(816) 292-7020
jonathan@sternberg-law.com

Stephen F. Monroe, IL#6305823
Marc J. Bern & Partners, LLP
200 W. Monroe St., Ste. 2250
Chicago, IL 60606
Phone: (312) 894-7941
smonroe@bernllp.com

Counsel for Plaintiff-Appellee

ORAL ARGUMENT REQUESTED

Table of Points and Authorities

Statement of Facts

A. Overview

From 2002 to 2014, railroad CSX Transportation, Inc. ("CSX") employed Joseph Sanders as a plumber and pipefitter at its Barr Yard in Cook County (C. 6375-76, 6378, 6848). In 2016, he was diagnosed with colon cancer, from which he died in 2018 (C. 7107-08, 7229).

In 2019, Annette Sanders, Mr. Sanders' widow and the independent administrator of his estate, brought an action for damages against CSX stating survival and wrongful death claims under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.*, alleging his exposure to known carcinogenic toxins during his work for CSX caused or contributed to his developing his cancer (C. 48, 237-46).

The case proceeded to a jury trial in August 2022 (C. 6077). A coworker, an industrial hygienist expert, and a medical causation expert testified that during Mr. Sanders' work for CSX, he was exposed to asbestos and diesel exhaust above OSHA and industry standard exposure limits, the railroad should have foreseen this, the railroad failed to take steps to prevent this, and this caused or contributed to cause his cancer and death (C. 6384-89, 6393-6400, 6406-07, 6412-18, 6859-69, 6873-74, 6878-80, 6883-86, 6890-95, 6912-26, 7063-64, 7086, 7089, 7091-92, 7096-7127, 7123, 7188-89).

The jury found for Mrs. Sanders and against CSX and awarded her $770,000 in damages (C. 5016, 7731-32). The trial court denied CSX's post-trial motion (C. 7775), and CSX now appeals (C. 8015).

B. Proceedings and evidence below

1. Initial proceedings

In 2019, Annette Sanders, independent administrator of her husband, Joseph Sanders', estate, brought a negligence action for damages against CSX under the FELA in Cook County (C. 48).

In her second amended complaint, Mrs. Sanders stated survival and wrongful death claims alleging that during Mr. Sanders' work for CSX at its "Barr Yard" in Cook County, he was exposed to known carcinogenic toxins, which caused him to develop cancer, from which he ultimately died (C. 237-40). At trial, the toxins at issue were narrowed to asbestos and diesel exhaust (C. 5065, 7678). Mrs. Sanders alleged this was negligence because it violated CSX's duty to provide her late husband a reasonably safe place to work, which CSX breached in various ways that failed to use ordinary or reasonable care (C. 240-46).

2. Pretrial

In November 2021, the case was set for trial in May 2022, with discovery due January 2022 (C. 629-30). A week before the May date, however, the parties jointly moved to continue the trial due to pending dispositive motions and "a discovery issue" remaining between them (C. 3090). The court then reset the trial for August 2022 (C. 3899).

The "discovery issue" to which the parties referred was that through depositions, counsel for Mrs. Sanders had learned CSX failed to produce a trove of asbestos-related documents responsive to requests as early as September 2019 (C. 5197-5201). In June 2022, Mrs.

Sanders filed a motion for discovery sanctions, alleging CSX had failed to produce over 11,000 pages of these asbestos records until after the set May trial date, which "revealed facts allowing for case-changing revelations about Mr. Sanders' exposure assessment" (C. 5193, 5202).

After trial, the court granted Mrs. Sanders' motion, awarding her fees and costs incurred in obtaining a supplemental expert report based on the late-produced documents (C. 7764-65). The court stated "there was no justifiable way that this Court could deem that the late disclosure of the documents by the defendant were, in fact, seasonable. There is no reasonable explanation as to why or how the defendant failed to discover these -- the documents at a much earlier time during the pendency of the case" (C. 7764). CSX does not challenge this order.

Shortly after Mrs. Sanders filed her motion for sanctions, in late June 2022 CSX moved to sanction her counsel for "witness tampering" (C. 3672). CSX alleged her counsel had contacted Dominick Horne, a former CSX employee, to change his testimony (C. 3672). Mrs. Sanders opposed this, explaining CSX was trying to cover for its 11,000-page document dump by labeling Mrs. Sanders' counsel's lawful and proper bringing of those new documents to the witness's attention "witness tampering" (C. 4614-15). Ultimately, after trial, the court denied CSX's motion, finding there was no "witness tampering" and nothing rising to that level (C. 7747-48). CSX does not challenge that order on appeal, either. But in the meantime, this meant Mrs. Sanders' counsel could not speak with Mr. Horne before his testimony at trial (C. 6649).

3. Dominick Horne and Jason Pritchard

a. Before trial

The case then proceeded to what would be a six-day trial in August 2022 (C. 6077, 6304, 6640, 6997, 7445).

Among Mrs. Sanders' motions in limine before trial was No. 16, a request under Illinois Evidence Rule 615 to exclude all nonparty witnesses from the courtroom (C. 1769). CSX agreed, and the court granted that request (C. 5914).

Jason Pritchard had been Mr. Sanders' supervisor at the Barr Yard from 2010 onward (C. 2880-81). Mrs. Sanders deposed Mr. Prichard on March 8, 2021, at which the following exchange occurred:

> Q. Are you -- you're currently employed by the railroad; is that correct?
>
> A. Yes.
>
> Q. And in your -- what's your current position?
>
> A. Track supervisor.
>
> Q. And is that a salaried position?
>
> A. Yes.

(C. 2880). During discovery, CSX designated William Bullock as its corporate representative (C. 3359).

During jury selection, Mr. Pritchard was held out to the venire as a "representativ[e] from CSX Transportation" and was seated alongside defense counsel at their table (C. 6083, 6198, 6203). Mr. Pritchard remained seated at counsel table as trial began (C. 6364), later described as "on his computer, talking to counsel" for CSX (C. 6649).

b. Mr. Horne's testimony

Mrs. Sanders called Dominick Horne, her only Supreme Court Rule 213(f)(1) lay fact witness, as her first witness – the only witness who worked with Mr. Sanders (C. 6374). Her counsel later described Mr. Horne as wearing only a T-shirt, shorts, and a hat to court, which Mrs. Sanders' counsel would have told Mr. Horne not to do if he could have spoken with Mr. Horne before trial (C. 6649).

Mr. Horne testified he worked for CSX as the only other pipefitter and plumber at the Barr Yard from 2007-2014 alongside Mr. Sanders, who was his supervisor (C. 6375-76, 6381, 6424). He described Mr. Sanders' job as principally changing and repairing pipes throughout the yard and inside its buildings, which often involved removing existing pipe insulation and putting on new insulation (C. 6384-86). One place he performed this work was Building 42, the track department building (C. 6384-86), which was the same as Building 43, just the connected wing of the same building (C. 6895).

Mr. Horne testified Mr. Sanders found what he believed was asbestos pipe insulation in Building 42 and said he would inform Mr. Prichard (C. 6387-89). While Mr. Horne did not know if Mr. Sanders actually told Mr. Pritchard about the asbestos, he assumed so because later an asbestos removal crew appeared at that building (C. 6387-89).

Mr. Horne said he saw similar pipes with similar insulation to that Mr. Sanders suspected was asbestos in the "engine house" where CSX workers repaired locomotives (C. 6393). He and Mr. Sanders

worked inside the engine house with running locomotives beside them creating diesel exhaust he could see and smell (C. 6393-97). He and Mr. Sanders would take old insulation off the pipes and replace it with fiberglass (C. 6417). When they swept up the old insulation, they could see the dust from it, but they were never provided or trained on using masks or respirators in doing so (C. 6417).

Mr. Horne said the engine house could fit up to four locomotives, and often more than one would be running at a time (C. 6398). He described it as "filthy," "very dirty," with "soot everywhere" (C. 6399). He and Mr. Sanders were there nearly every day and helped each other with the jobs there (C. 6399-6400). Eventually, the engine house was condemned and closed (C. 6399).

Additionally, Mr. Horne described himself and Mr. Sanders having to climb up and over locomotives to get to a sand tower when it was clogged to shake the pipes and dislodge the sand; while doing this, the locomotives would be on, and Mr. Horne could smell diesel exhaust (C. 6406-07).

Mr. Horne said CSX never trained him or Mr. Sanders on asbestos, diesel exhaust, or these toxins' health risks (C. 6410-13). He said this information was not in their daily safety briefing, either (C. 6415).

c. Mr. Pritchard's testimony

After Mr. Horne was excused, Mrs. Sanders called Mr. Pritchard as an adverse witness (C. 6491). Mr. Pritchard was Mr. Sanders' supervisor and the "facilities manager" over all CSX's Chicago Division territory (C. 6502-03). Mr. Pritchard had sat through and heard all of Mr. Horne's testimony (C. 6505).

At the outset of Mr. Pritchard's testimony, the following exchange occurred with Mrs. Sanders' counsel:

Q. Please introduce yourself.

A. I'm Jason Pritchard.

Q. Mr. Pritchard, you work for the defendant; correct?

A. No.

Q. Who do you work for, sir?

A. I'm self-employed.

Q. Did you work for the defendant, CSX?

A. I did, yes.

Q. How long did you work for them for?

A. Approximately from 2009 to 2020.

(C. 6492-93). Mr. Pritchard later testified he had left CSX to start a recycling company with his brother (C. 6521). He stated CSX was paying him to be at the trial (C. 6559).

In its direct examination, CSX then used Mr. Pritchard's testimony to specifically counter Mr. Horne's testimony (C. 6526-58).

Mr. Pritchard described CSX's safety program and said he took it personally importantly; contrary to Mr. Horne's testimony, Mr.

Pritchard stated Mr. Sanders was trained in and knew about asbestos, knew what to do and who to call if it was seen, and described CSX's asbestos program (C. 6527-37, 6547). He testified safety was important to him personally, because his father was injured at work (C. 6526-27).

Further addressing Mr. Horne's testimony, Mr. Pritchard denied that workers like Mr. Sanders or Mr. Horne had to take pipe wrap off pipes and described undisturbed asbestos as being of no concern (C. 6531, 6533). He said a renovation project on the track department building showed the pipe Mr. Horne described was safe to remove and did not have asbestos (C. 6539-41). He described Mr. Horne's and Mr. Sanders' work, countering Mr. Horne's testimony about having to work next to running locomotives (C. 6542-50). He said Mr. Horne and Mr. Sanders never worked in the engine house at all, claiming it was boarded up and abandoned during that time (C. 6550-57). He also said they never worked in the actual locomotive shop (C. 6557-58).

Mr. Pritchard also testified Mr. Sanders said he might have found something dangerous in the track department building (C. 6494). But Mr. Pritchard testified differently in his deposition (C. 6497). At trial, he agreed asbestos in the track department building had been abated, meaning someone reported it, but he could not recall whether the informant was Mr. Sanders (C. 6520). Additionally, Mr. Pritchard conceded there was asbestos in pipes in some parts of the Barr Yard, though it was unlabeled (C. 6506-07, 6509). He agreed Mr. Sanders had no training about diesel exhaust (C. 6520).

d. Proceedings

Once Mr. Pritchard's testimony was over and the jury was excused, the court expressed concern that he had been sitting at counsel table during Mr. Horne's testimony as CSX's representative, but in fact no longer worked there (C. 6570-73). CSX's counsel called him a "table representative," rather than a "corporate representative," and claimed former employees, usually the plaintiff's supervisor, frequently act as this in railroad industry cases (C. 6571, 6573-74, 6576). The court remarked it sounded "like he's a 213(F)(3) almost and not a former worker the way those questions came out" (C. 6571), but CSX's counsel insisted, "he's a fact witness," whereas Dr. Bullock was their corporate designee (C. 6571-72).

The court stated the fact Mr. Pritchard was a former employee "kind of defeated the whole purpose of having Mr. Pritchard here during Mr. Horne's testimony. That's the whole reason you have the motion to exclude witnesses," as "[h]e had the direct benefit of sitting through the courtroom through that entire testimony" (C. 6572). It stated, "he doesn't even work for the corporation, and he's sitting here as your representative, and he's been sitting here the whole time?" (C. 6573). When CSX's counsel defended this by stating Mr. Pritchard "was a supervisor at that time" and "Mr. Sanders doesn't work there anymore either," the court responded, "This is a death case. Come on. That's not a fair statement" (C. 6573).

Mrs. Sanders' counsel noted that at the time they took Mr. Pritchard's deposition in March 2021, he had stated he was a CSX employee, but CSX's counsel said that was not true (C. 6574, 6579). Mrs. Sanders' counsel stated, "We were led to believe that he was a current employee of CSX, and that's why he had that role. So his deposition, he's an employee," and CSX's counsel's representation "on the record he was not an employee at the time of his deposition" was "incorrect" (C. 6580).

The court stated, "I've never seen anything like this before in my career of doing jury trials for 18 years. Never" (C. 6574). "For him to come and say I'm like volunteering my time because I love safety. … But, you know, this witness had the benefit of sitting in the courtroom, which flies in the face of the motion to exclude witnesses" (C. 6575). It noted, "This was an (F)(1) witness, the main (F)(1) witness to your case" (C. 6576). The court said it was "shocked to hear" Mr. Pritchard was "being paid to be here," and said this meant he would have "the benefit of every witness's testimony in the trial and ends up being a very specific fact witness, almost a characterization of an (F)(2) witness in this case" (C. 6576-78).

The court remarked:

> This guy goes to the crux of your defense in so many ways. I mean, this is an important witness to you.
>
> This would have been a witness that I would think would have had to have been excluded from the courtroom during at least the testimony of the (F)(1) that took the stand, Mr. Horne, this morning.

(C. 6582).

Counsel for Mrs. Sanders said they would have raised exactly that issue if they had known Mr. Pritchard was no longer working for CSX, but this came to their attention for the first time "when he got on the stand" (C. 6582). They told the court Mr. Pritchard had stated he was a "track supervisor" for CSX during his deposition testimony, and CSX had never supplemented that response (C. 6582). The court stated it would take up this issue the next day (C. 6583).

Before the next day of trial began, both parties filed memoranda making arguments about this issue (C. 4830, 4887), and CSX later filed a supplemental memorandum (C. 4893). The next morning, before the jury was called in, the parties and the court engaged in more discussion about what had happened (C. 6643).

CSX argued Mr. Pritchard was a Rule 213(f)(1) witness, Rule 206(a)(1) allowed them to designate people other than officers or directors to represent them, and this dovetailed with Evidence Rule 615 and allowed them to have him sit at counsel table during Mr. Horne's testimony (C. 6646, 6652-53). Mrs. Sanders' counsel argued Mr. Pritchard was not a valid Rule 615 representative because he was not an officer or employee of the corporation, and he might as well have been a Rule 213(f)(3) witness (C. 6649). They argued his presence during Mr. Horne's testimony prejudiced Mrs. Sanders, as while they could not even speak with Mr. Horne before his testimony, the jury saw Mr. Prichard on his computer talking with CSX's counsel throughout

(C. 6649). Mrs. Sanders requested either striking Mr. Pritchard's testimony, a curative instruction, or to allow her expert to sit through CSX's corporate representative's testimony (C. 6649-51).

The court said Mr. Pritchard's testimony that "I was there. I saw Mr. Horne and Mr. Sanders listening to those safety meetings. I was there," was "direct confrontation with a witness that shouldn't have had that availability. This is the sole reason that we have a motion to exclude witnesses, and I think the plaintiff's point is well-taken" (C. 6656). It asked CSX's counsel for "a case that defines a table representative? That's a term I've never even heard" (C. 6656). It also asked him for other Cook County cases where a former employee was a Rule 615 representative, because she asked her colleagues, and no one had heard of it (C. 6668). The court stated Mr. Pritchard was "on his computer, he's conferring with counsel. He's … acting and sitting in front of this jury as if he was an employee of CSX, and now you have another corporate representative that's going to come in, and I don't know if that person's going to be sitting here" (C. 6660-61). "The prejudice is he sat here during Mr. Horne's entire testimony, and he took the stand, and he was able to assess, judge, based on your questions, and comment about Mr. Horne's credibility" (C. 6662).

The court stated it would take this matter under advisement (C. 6668-69). The parties stipulated Mr. Pritchard would not be recalled, and Mr. Sanders' expert would sit outside during CSX's corporate representative's testimony (C. 6669-72).

e. Ruling

Days later, after both parties had rested, the court gave its decision on what to do about the issue with Mr. Pritchard (C. 7400-08). It stated it would not strike his testimony, but it would admonish the jury about what had occurred (C. 7400). It noted it had reviewed Mr. Pritchard's deposition and trial testimony, and while in his deposition in March 2021 he stated he worked for CSX, his trial testimony was that he left in 2020 (C. 7401-02). It rejected CSX's argument that Rule 206(a)(1), which addressed representative deponents for discovery, impacted Rule 615, because if the representative does not work for the company, "that fact must be known and available to the other side; so that the other side is fully informed and can make appropriate objections thereon" (C. 7405).

The court found:

> Mr. Pritchard was the supervisor of the decedent and the only (f)(1) witness, Mr. Horne, who testified in this case. Their relationship is seminal to both the prosecution of this case and the defense in this case. Mr. Horne testified extensively for over two hours in court and was the first witness to take the stand.
>
> During that testimony Mr. Pritchard was in the courtroom and had the benefit of hearing all of Mr. Horne's testimony. Thereafter, Mr. Pritchard took the stand, and for the first time, it was discovered through his testimony that he hadn't worked for CSX for two years.
>
> At the conclusion of his testimony, the Court expressed concern over the violation of the agreed motion in limine to exclude witnesses from the Court, particularly in my role as a gatekeeper in all trials.

> I was further concerned over having one witness over another gaining an unfair advantage by hearing the testimony of another witness.
>
> This happened in the case given the -- this the Court gives great consideration to, given the relationship between Mr. Horne and Mr. Pritchard.
>
> The plaintiff, thereafter, represented to the Court that Mr. Pritchard's discovery deposition was taken in March of 2021, and it was the plaintiff's understanding from Mr. Pritchard's testimony that he was still employed by the defendant corporation.
>
> It was further reviewed, his trial testimony, in this Court three days ago, where he indicated he left CSX in 2020. So apparently that is conflicting evidence that was presented in this regard.

(C. 7405-06).

The court noted this was not normal, as ordinarily a corporate representative "should be working for the corporation and should be a person that is bound by the corporate acts," it was not "convinced this was something that happens on a regular basis, if, really, at all," and corporate representatives ordinarily are not significant fact witnesses like Mr. Pritchard (C. 7406-07). The problem was the plaintiffs did not know this, and "[h]ad the plaintiffs known, they would have been able and given the benefit of making an objection to Mr. Pritchard sitting in the courtroom during Mr. Horne's testimony, and the Court would have been able to consider that fact. They were deprived of that opportunity based on the misrepresentation that was made by Mr. Pritchard" (C. 7407).

Therefore, while the court believed striking Mr. Pritchard's testimony was "too draconian a remedy under the circumstances," an admonishment to the jury was appropriate (C. 7407-08).

The court then brought the jury back in and read this admonition to it before they left for the weekend to return the following Monday:

> The second witness in case was Jason Pritchard. It was represented to you that Mr. Pritchard was a corporate representative of the defendant, CSX Transportation. We learned later, during his testimony and at the first time during trial, that he was no longer employed by CSX and had left the corporation approximately two years earlier. Had the Court known this fact, Mr. Pritchard would have been excluded from the courtroom, like all the other witnesses during the trial, and would not have been able to testify about Mr. Horne's in-court testimony. You may consider this fact when evaluating the credibility of this witness.

(C. 7410). CSX then moved for mistrial, which Mrs. Sanders opposed and the court denied (C. 7412-13).

f. Post-trial proceedings

Later on, after judgment, CSX timely moved the court for a new trial (C. 7789). One of CSX's arguments was that the court improperly instructed the jury on Mr. Pritchard's credibility, because Mr. Pritchard was proper representative for it at trial and his presence did not prejudice Mrs. Sanders (C. 7789-7800).

In denying CSX's motion (C. 8005), the court stated,

> the use of Mr. Pritchard as a railroad corporate representative given the facts and under these circumstances was an attempt by the Defendant to

> circumvent this Court's rulings on excluding witnesses from the courtroom. The instruction given by the Court was a way to ensure that the trial was not further tainted by this violation and helped to lessen the prejudicial effect that it may have had.

(C. 7997).

4. Negligence and causation

a. Opening arguments

As noted above, in her Second Amended Complaint Mrs. Sanders alleged CSX failed to use ordinary care in breaching its duty to provide Mr. Sanders a safe workplace, exposing him to asbestos and diesel exhaust that caused his cancer, which killed him (C. 237-46).

In his opening argument, Mrs. Sanders' counsel stated, "What we're saying is Joe's exposure was above background, well above background, at times above permissible exposure limits. When it is above permissible exposure limits, that's negligence. When you violate an OSHA PEL, that's negligence" (C. 6343). CSX did not object (C. 6343). Later in opening, when Mrs. Sanders' counsel made a statement about the expected evidence to which CSX's counsel did object, the court told the jury, "Ladies and gentlemen, what counsel says is not the evidence. You will decide what the evidence is" (C. 6346).

b. William Bullock's testimony

William Bullock, Ph.D., an industrial hygienist and CSX employee, testified as CSX's corporate designee (C. 6675). He had testified for CSX many times, and always had said the plaintiff was provided a reasonably safe place to work (C. 6739).

Dr. Bullock admitted a 1991 CSX report from Illinois stated asbestos exposure was known to cause colon cancer (C. 6833-34). He also admitted a 1958 Association of American Railroads report noted cancer among plumbers who work with asbestos, which meant railroads could foresee asbestos exposure is a potential hazard for plumbers (C. 6850-52).

Dr. Bullock testified the Occupational Safety and Health Administration ("OSHA") has permissible exposure limits for asbestos, and employers must ensure workers' exposure is below that level for eight hours per day, five days per week, 52 weeks per year for their work lifetime (C. 6687-88). He said employers had the ability to take samples to determine asbestos levels since the 1960s (C. 6691), and railroads had been concerned about employee exposure to asbestos since the 1930s (C. 6692-96).

Dr. Bullock said CSX performed qualitative assessments and monitoring of the Barr Yard for air quality, but never inside the locomotive shop or engine shop, and never for plumbers or pipefitters like Mr. Sanders (C. 6714-16). He had no data for asbestos assessments at the Barr Yard either, and none for plumbers or pipefitters there, because it was his "opinion" that "plumbers like Joe Sanders don't have any exposure" (C. 6728). CSX had a database of asbestos reports that was supposed to be used whenever someone suspected asbestos in a location, but Dr. Bullock had never looked at it

(C. 6749-50). He admitted there was some friable asbestos found at the Barr Yard during the time Mr. Sanders was there (C. 6815-16).

Dr. Bullock testified OSHA's permissible exposure limit for asbestos is .1 fibers per cubic centimeter for eight hours per day, five days per week, 52 weeks per year for a work lifetime (C. 6744). OSHA's short-term exposure limit is "30-minute excursion limit" of "1 fiber per cc" (C. 6744).

Dr. Bullock said diesel engine exhaust is a lung carcinogen (C. 6798), and railroads had known about the dangers of diesel exhaust since the 1950s (C. 6701-02). The measure of diesel exhaust exposure is called "elemental carbon" (C. 6756-57). The National Institute for Occupational Safety and Health ("NIOSH") had developed a method in 1995 to assess diesel exhaust exposure by using elemental carbon testing (C. 6758-59). This became an OSHA issue later on, though while OSHA itself never mandated a limit, the railroads adopted a maximum exposure level of 20 micrograms per cubic meter eight hours per day, five days per week, 52 weeks per year as their industry standard (C. 6761-62). He conceded a study had found exposure to a running locomotive inside an engine house was double, triple, or even quadruple that level (C. 6764-65).

c. Hernando Perez's testimony

Hernando Perez, Ph.D., a board-certified industrial hygienist, testified as an expert for Mrs. Sanders (C. 6856-57). CSX does not challenge the admission of his testimony on appeal.

Dr. Perez described Mr. Sanders' job for CSX and the data and reports he reviewed (C. 6859-65). He said it was clear there was friable asbestos in the Barr Yard while Mr. Sanders worked there that was not being managed, and which had been inspected and found as early as 1991 (C. 6865-69, 6890-95). Some of the asbestos was in pipe insulation, including in the attic and basement of Building 42/43 even as late as 2021-2022, where Mr. Horne said he and Mr. Sanders had worked (C. 6905, 6911, 6914-15). It also was in the engine house in 2001 and 2011, while employees were working there (C. 6883-86).

Dr. Perez testified OSHA said that if plumbers were going into a facility to perform maintenance, or to repair or respond to incidents, they had to be told where the asbestos was and how to deal with it (C. 6912-13). CSX did not do that (C. 6913-14).

Dr. Perez said studies found elemental carbon from diesel exhaust in engine houses from the 20-microgram level, which is the industry limit, to the 70-microgram level (C. 6916). He said, "20 micrograms per cubic meter, that's the level that they utilize in the same way an OSHA-permissible exposure limit is used" (C. 6916). When a locomotive is run indoors, exhaust does not dissipate, but instead goes up in the air and fills the space (C. 6917). So, if Mr. Sanders was exposed to elemental carbon in the engine house of 60-70 micrograms per cubic meter, that would mean CSX was violating their own industry standard with regard to diesel exhaust (C. 6918).

Dr. Perez said that for asbestos, OSHA only allows a worker to be exposed for eight hours to .1 fibers per cubic centimeter, and one whole fiber for no more than 30 minutes (C. 6918). Therefore, if the dust Mr. Horne described from the pipe insulation was asbestos, that would be a huge fiber release (C. 6920). With no respiratory protection, this meant "essentially a worst case-type scenario from the perspective of managing asbestos in a building," which would be over the OSHA short-term exposure limit (C. 6920-21). The effect of being over an OSHA limit is "a failure to find a reasonably safe place to work from an industrial hygiene standpoint," because "the fact that that's a possibility describes an unreasonable -- a situation that's not reasonably safe," and OSHA gives all employers a duty "to provide their employees with a safe and healthful working environment" (C. 6922).

Dr. Perez concluded CSX violated OSHA's general duty and did not provide Mr. Sanders with a reasonably safe place to work with regard to exposure to asbestos and diesel exhaust, in part because of the OSHA short-term exposure limit violation (C. 6924-26). He said CSX did not characterize its facility correctly, did not train Mr. Sanders on asbestos in pipe insulation, and did not provide him a respirator (C. 6926).

d. Steven Newman's testimony

Steven Newman, M.D., a physician board-certified in pulmonary and internal medicine, testified as Mrs. Sanders' medical causation expert (C. 7078, 7081). He also had a special qualification from OSHA,

NIOSH, and the Centers for Disease Control "in the evaluation of dust-exposed individuals, … coworkers pneumoconiosis" and extending to silica and asbestosis (C. 7081-82). CSX does not challenge the admission of Dr. Newman's testimony on appeal. (Erik Swenson, M.D., Mr. Sanders' treating physician (C. 7213), also testified at trial via video deposition (C. 7193). Only a notation of this appears in the transcript, and CSX omits his actual testimony from the record.)

Dr. Newman testified that to a reasonable degree of medical certainty, exposure to asbestos, diesel exhaust, and tobacco all cause colon cancer (C. 7086, 7089, 7123), which was the cancer that killed Mr. Sanders (C. 7097-98). He said studies from the International Agency for Research on Cancer found this and the studies accounted for all forms of asbestos (C. 7091-92, 7096-98, 7100).

Dr. Newman then applied Bradford-Hill criteria and a differential diagnosis to determine that, to a reasonable degree of medical certainty, Mr. Sanders' exposure to asbestos and diesel engine exhaust during his railroad work that Mr. Horne and Dr. Perez had described were causes of Mr. Sanders' cancer and therefore his death (C. 7101-27). He said three factors caused Mr. Sanders' cancer: smoking, asbestos, and diesel, though in no particular order and cannot be quantified – they were a "witch's brew" a "perfect storm that killed Mr. Sanders" (C. 7126-27).

Dr. Newman said Mr. Sanders worked on pipes containing asbestos over a twelve-year period, which was sufficient exposure for

him to develop colon cancer (C. 7188). Likewise, Mr. Sanders also worked inside an engine shop repairing pipes with diesel locomotives running, which was sufficient exposure to be a cause of his colon cancer (C. 7188). The cancer, in turn, was the cause of his death (C. 7189).

CSX then had its own medical expert, Douglas Weed, M.D., testify, who disputed Dr. Newman's conclusions (C. 7300).

e. Annette Sanders' testimony

Mrs. Sanders also testified (C. 7205). She described her marriage to Mr. Sanders, their family, and their life together (C. 7205-09, 7212, 7216-21). She described his work for CSX, including that he always came home with his clothes smelling of diesel, to the point that she made him change in their garage before coming inside the home (C. 7209-11). Finally, she described his cancer diagnosis and his illness, surgeries, chemotherapy, pain, metastasizing, and death (C. 7212-16, 7221-29)

f. Closing argument

During Mr. Sanders' counsel's closing argument, as he had in his opening statement, he discussed how the evidence fit her theory that by exposing Mr. Sanders to above-limit levels of asbestos and diesel exhaust, it had violated its duty to provide him a safe workplace, which was negligence:

> This is what's important. Okay? The concept is that the railroad failed to provide Joseph Sanders with a reasonably safe place to work. That makes them negligent. Okay?

When you violate an OSHA PEL, that's negligence. Okay? This is what's important. The FELA concept is that the railroad failed to provide Joseph Sanders with a reasonably safe place to work. That makes them negligent.

When you violate an OSHA PEL, that's negligence. So what Dr. Perez focused on is not the 8-hour time weighted average over his whole career, because we can't meet that burden. We can't put Joe around asbestos.

But what he can say is there was a clear violation of the OSHA exposure limit for short-term exposures, remember the STEL limit.

(C. 7603). CSX did not object (C. 7603).

Mrs. Sanders' counsel then continued:

And what he said was that if Mr. Sanders and Mr. Horne did what they described, which is worked on pipe to replace both pipes, what they did is they would go in there, they would have to cut off the old insulation, they would have to replace the pipe itself. When they're done, they've got to sweep it up and get it out of here. If that took 30 minutes or more, Dr. Perez said that's an OSHA STEL violation. An OSHA STEL violation is negligence.

(C. 7603-04). CSX's counsel then stated, "Objection, misstates the law"

(C. 7604). The court overruled the objection (C. 7604).

Mrs. Sanders' counsel then continued:

It's negligence under the FELA.

And if you go to that next one at the bottom there, what is described in terms of how do you know if it's above one fiber per CC. This is Dr. Perez: "If you can see it and it looks like it's a cloud, we're talking tens of fibers per CC, not one fiber per CC." So if it's actually visible, you can see that, that's well above the STEL limit.

(C. 7604). Later, Mrs. Sanders' counsel also stated that "if Mr. Sanders was being exposed to elemental carbon or diesel exhaust above 20 micrograms per cubic meter, the railroad violated their own industry standards. When you violate the industry standards, that's negligence under the FELA" (C. 7609). CSX did not object.

In its own closing argument, CSX's counsel conceded the permissible exposure limits and argued "OSHA had to be followed, and they followed it" (C. 7636). He argued Mr. Sanders' exposures were within limit or unsupported by the credible evidence, and the real cause of his cancer was his smoking (C. 7637-49). Therefore, he argued CSX provided Mr. Sanders a reasonably safe place to work (C. 7652).

g. Jury instructions and verdict

The court then issued jury instructions (C. 5052, 7673), none of which CSX challenges on appeal.

The court told the jury that

> An opening statement is what an attorney expects the evidence will be. A closing argument is given at the conclusion of the case and is a summary of what an attorney contends the evidence has shown. If any statement or argument of an attorney is not supported by the law or the evidence, you should disregard that statement or argument.

(C. 5052, 7673).

The court defined "negligence" as:

> the failure to do something which a reasonably careful person or entity would do, or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence. The

> law does not say how a reasonably careful person or entity would act under those circumstances. That is for you to decide.

(C. 5057, 7675).

The court defined "ordinary care" as "the care a reasonably careful person or entity would use under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person or entity would act under those circumstances. That is for you to decide" (C. 5058, 7675).

The court stated the FELA standard of causation:

> Defendant "caused or contributed to cause" plaintiff's injury and death if Defendant's negligence played a part – no matter how small – in bringing about the injury and death. There can be more than one cause contributing to an injury and death. The mere fact that an injury occurred does not necessarily mean that the injury and death was caused by negligence.

(C. 5060, 7676).

The court summarized Mrs. Sanders' case in part as:

> The plaintiff further claims that CSX TRANSPORTATION COMPANY was negligent in one of more of the following ways;
>
> 1. Failed to properly maintain the work area for Joseph Sanders so as not to expose him to harmful levels of diesel exhaust and asbestos;
>
> 2. Failed to warn Joseph Sanders of potential exposure to harmful levels of diesel exhaust and asbestos.

(C. 5065, 7678). It summarized CSX's position in part as:

> CSX TRANSPORTATION COMPANY denies that it was negligent as claimed by the plaintiff,

> CSX TRANSPORTATION COMPANY further denies that Joseph Sanders was exposed to harmful levels of diesel exhaust and/or asbestos at work.
>
> CSX TRANSPORTATION COMPANY further denies that Joseph Sanders's colon cancer was caused by exposure to harmful levels of diesel exhaust and/or asbestos at work.

(C. 5065, 7679).

The court then instructed the jury that Mrs. Sanders had the burden to prove in part:

> First, that Joseph Sanders became ill with colon cancer and died as a result of exposure to harmful levels of asbestos and/or diesel exhaust while he was engaged in the course of his employment by CSX TRANSPORTATION COMPANY
>
> Second, that CSX TRANSPORTATION COMPANY was negligent in one of the ways claimed by the plaintiff as stated to you in these instructions.

(C. 5066, 7680).

The court also instructed the jury that "[i]t was the duty of the railroad to use ordinary care to provide Joseph Sanders with a reasonably safe place in which to do his work" (C. 5069, 7682).

After deliberations, the jury entered a verdict for Mrs. Sanders and against CSX finding $2.2 million in damages but finding Mr. Sanders 65% at fault, resulting in a total award to Mrs. Sanders of $770,000 (C. 5016, C. 7731-32)

h. Post-trial proceedings

Part of CSX's request for a new trial also argued Mrs. Sanders' counsel had misstated the law in closing argument when he said, "An OSHA STEL violation is negligence," because this was really arguing

for negligence *per se* that the law does not support, and which the court adopted by overruling the defense's objection, prejudicing CSX, and requiring a new trial (C. 7782-89). In response, Mrs. Sanders did not take a position on whether the statement in closing argument was proper, but instead argued that regardless, it could not have substantially prejudiced CSX (C. 7919-23).

The court denied CSX's motion for a new trial (C. 8005). Addressing this issue, it held, "Did this statement given the totality of the circumstances deprive CSX of a fair trial? In this Court's opinion it did not" (C. 7997). It disagreed "that the Court's overruling of the objection somehow bolstered the statement. Arguments by all sides must be viewed in their entirety" (C. 7997). It held, "a new trial is not warranted based on improper closing arguments unless when a trial is viewed in its entirety the argument resulted in substantial prejudice to the losing party or arose to the level that it prevents a fair trial" (C. 7997). It also held, "Additionally, and very shortly thereafter during the trial, the Court instructed the jury as to the law on the issue of negligence, most specifically that the jury should disregard any statements or arguments made by attorneys that were not supported by the law and the evidence" (C. 7997).

CSX then timely appealed to this Court (C. 8015).

Argument

I. Standard of appellate review: abuse of discretion, viewing the evidence in the light most favorable to Mrs. Sanders.

Both of CSX's issues on appeal argue the trial court erred in denying it a new trial.

In reviewing a trial court's decision to deny a new trial, "it is important to keep in mind that '[t]he presiding judge in passing upon the motion for new trial has the benefit of [her] previous observation of the appearance of the witnesses, their manner in testifying, and of the circumstances aiding in the determination of credibility.'" *Maple v. Gustafson*, 151 Ill. 2d 445, 456 (1992) (citation omitted).

Therefore, this Court "will only reverse the trial court's denial of a motion for a new trial where [it] find[s] an abuse of discretion." *Vanderhoof v. Berk*, 2015 IL App (1st) 132927, ¶ 79 (citing *Maple*, 151 Ill. 2d at 455). This includes the trial court's decision on "questions as to the prejudicial effect of remarks made during opening statement[s] and closing argument," which "are within the discretion of the trial court, and determinations as to such questions will not be overturned absent a clear abuse of discretion." *Simmons v. Garces,* 198 Ill.2d 541, 568 (2002). It also includes the trial court's decision whether a witness should have been excluded from the courtroom under Ill. Evid. R. 615, which "is a matter within the sound judicial discretion of the trial court." *People v. Chatman*, 2022 IL App (4th) 210716, ¶¶ 67-68 (citing *People v. Mack*, 25 Ill. 2d 416, 422 (1962)).

"'Abuse of discretion' is the most deferential standard of review – next to no review at all …." *In re D.T.*, 212 Ill. 2d 347, 356 (2004). "A court abuses its discretion only where its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would adopt the court's view." *Davis v. City of Chicago*, 2014 IL App (1st) 122427, ¶ 72 (citation omitted).

As well, "on review of the trial court's decision to deny a new trial," this Court "must, like the trial court, view all of the evidence in the light most favorable to the opponent of the" motion for a new trial. *Tierney v. Cmty. Mem'l Gen. Hosp.*, 268 Ill. App. 3d 1050, 1054-55 (1st Dist. 1994). "This means that, instead of deciding for ourselves how credible a witness is and instead of deciding for ourselves which evidence to believe or disbelieve, [this Court] construe[s] the evidence in a way that supports the nonmovant's case, and [it] draw[s] inferences in the nonmovant's favor insomuch as it would be reasonably defensible to do so." *People v. Hancock*, 2014 IL App (4th) 131069, ¶ 136 (internal citation omitted) (citing *Maple*, 151 Ill.2d at 452 (1992)).

II. The trial court properly overruled CSX's objection to a comment by Mrs. Sander's counsel in closing argument and properly denied CSX's motion for a new trial: Mrs. Sanders' counsel did not misstate the law during closing argument, but instead made a proper comment on the evidence, and in any case this isolated comment could not have substantially prejudiced CSX.

In its first issue on appeal, CSX argues the trial court erred in overruling its objection to Mrs. Sanders' counsel's statement in the middle of closing argument that "[a]n OSHA STEL violation is negligence," because it argues this was a misstatement of the law improperly attempting to inject a negligence *per se* theory, and this error requires a new trial (Brief of the Appellant ["Aplt.Br."] 10-21).

CSX's argument is in error. First, counsel's statement was not a misstatement of law. Rather, it was a reasonable comment applying the facts of this case to the law, which was well within the leeway of closing argument. The issue in this case, as Mrs. Sanders pleaded it in her complaint, as the parties argued to the jury, and on which the jury was instructed, was whether CSX was negligent by breaching its duty to provide Mr. Sanders a safe workplace that would not expose him to harmful levels of asbestos and diesel exhaust. Mrs. Sanders presented evidence – which CSX does not challenge – that CSX breached this duty by exposing him to levels of asbestos and diesel exhaust that exceeded OSHA's and other industry limits, which caused his cancer and then his death.

The trial court was well within its discretion to determine that counsel's comment clearly was that *in the context of this case*, the

OSHA limit violation was negligence, and he was well within the bounds of proper argument to say so. It was well within its discretion to overrule CSX's objection.

Second, even if the comment was somehow improper, given the context, the instructions to the jury, and the evidence, the law of Illinois is that viewing the trial in its entirety it could not have prejudiced CSX. CSX did not contest to the jury that exposing Mr. Sanders to above-limit levels of asbestos or diesel exhaust would be negligence. Instead, it contested as a factual matter that Mr. Sanders was exposed to those levels at all, and instead argued his smoking was the cause of his cancer.

Moreover, the single comment to which CSX objected occurred briefly during lengthy closing arguments by both parties after a six-day trial. And the jury instructions, which CSX does not challenge, correctly instructed the jury on the law of negligence and Mrs. Sanders' burden. The instructions also told the jury that any statement or argument by counsel not supported by the evidence should be disregarded.

Under these circumstances, the trial court properly exercised its discretion in holding that CSX was not prejudiced by this comment. The Court should affirm the trial court's judgment.

A. The trial court did not abuse its discretion in overruling CSX's objection to counsel's comment that in this case, CSX's violation of the OSHA exposure limits was negligence, as this was not a misstatement of law but a reasonable comment on the evidence.

CSX premises its argument on the notion that Mrs. Sanders' counsel "misstated the standard for liability under FELA [*sic*] during closing argument" when he stated "[a]n OSHA STEL violation is negligence" (Aplt.Br. 11-12) (quoting C. 7603-04). It interprets this as arguing for a negligence *per se* legal standard, and cites authorities from throughout the country holding that violation of OSHA regulations in an FELA case is not negligence *per se* (Aplt.Br. 13-15).

CSX's premise is in error. Viewing the evidence most favorably to Mrs. Sanders, this was a reasonable comment on the evidence, not an argument for a different legal standard.[1] Mrs. Sanders' main theory of this case from its outset was that CSX was negligent by breaching its duty to provide Mr. Sanders a reasonably safe workplace that would not expose him to harmful levels of asbestos and diesel exhaust. The jury was instructed that CSX had this duty, it was Mrs. Sanders' burden to prove it was negligent by breaching this duty in this way,

---

[1] CSX suggests Mrs. Sanders did not deny below that this was a misstatement of law (Aplt.Br. 13). In fact, Mrs. Sanders took no position on that, but instead argued that even if CSX was right, it was not prejudiced by this comment (C. 7919-23). Regardless, "An appellee may defend a judgment by any argument and upon any basis appearing in the record, whether or not it was advanced at trial, and a reviewing court may affirm a correct decision for any reason appearing in the record, regardless of the basis relied upon by the trial court." *Peters & Fulk Realtors, Inc. v. Shah*, 140 Ill. App. 3d 301, 307-08 (1st Dist. 1986).

and to determine whether she had met that burden. Mrs. Sanders then presented evidence, which this Court must take as true, that CSX breached this duty by foreseeably exposing him to levels of asbestos and diesel exhaust that the railroad industry knew, including through OSHA limits, to be dangerous.

Therefore, in the context of this case, and as a matter of fact, not law, a reasonable juror could find that CSX violating an OSHA asbestos exposure limit was negligence.

As a general matter, counsel is afforded wide latitude in closing argument. *Wilson v. Humana Hosp.*, 399 Ill. App. 3d 751, 760 (1st Dist. 2010). The scope of closing argument is within the trial judge's sound discretion. *Velarde v. Ill. Cent. R.R. Co.*, 354 Ill. App. 3d 523, 524 (1st Dist. 2004).

Counsel may draw reasonable inferences and conclusions from the evidence. *Parsons v. Norfolk S. Ry. Co.*, 2017 IL App (1st) 161384, ¶ 57. Counsel also may make arguments applying the facts to the instructions the court will give. *Stennis v. Rekkas*, 233 Ill. App. 3d 813, 829 (1st Dist. 1992). Indeed, "[a]ttorneys can, and necessarily must, state what they believe the law to be and base their arguments as to the facts on this interpretation." *People v. Glasco*, 256 Ill. App. 3d 714, 718 (1st Dist. 1993). "Counsel may properly state what they believe the law to be and may explain to the jury what each side believes the evidence proves." *In re Salmonella Litig.*, 198 Ill. App. 3d 809, 819-20 (1st Dist. 1990) (internal citation omitted).

In *Stennis*, for instance, this Court held an argument paraphrasing the burden of proof in a civil case as a "balancing scale," while not a mirror of the instructions or a complete statement of the law, was not improper. 233 Ill. App. at 829-30. In *Glasco*, the Court ordered a new trial when criminal defense counsel was prevented from commenting on an application of the facts to the law of accomplice liability. 256 Ill. App. 3d at 719. And in *Salmonella*, the Court held it was not a misstatement of law for defense counsel to use an analogy that only something rising to the level of a motorist driving 75 miles per hour down a busy downtown street could be willful and wanton conduct. 198 Ill. App. 3d at 820-21.

As in all these cases, Mrs. Sanders' counsel's remark during closing argument to which CSX objected and now argues requires a new trial was a fair comment on the evidence given the law as instructed to the jury. Mrs. Sanders' claim against CSX was that it was negligent in breaching its duty to provide Mr. Sanders a reasonably safe place to work when he foreseeably was exposed to levels of asbestos and diesel exhaust that caused him to develop cancer, which in turn caused his death (C. 237-46). "The existence of a duty is a question of law for the court to decide; however, the issues of breach and proximate cause are factual matters for a jury to decide …." *Adams v. N. Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004).

Therefore, throughout the six-day trial, the parties argued and drew out evidence about what constituted safe and harmful levels of

exposure to asbestos and diesel exhaust. In his opening statement, Mrs. Sanders' counsel forecasted this without objection, saying, "What we're saying is Joe's exposure was above background, well above background, at times above permissible exposure limits. When it is above permissible exposure limits, that's negligence. When you violate an OSHA PEL, that's negligence" (C. 6343).

Both CSX's expert Dr. Bullock and Mrs. Sanders' expert Dr. Perez testified about the known dangers of asbestos and diesel exhaust exposure, permissible exposure levels, and the foreseeability of harm.

Dr. Bullock admitted CSX knew asbestos exposure caused colon cancer, it was a foreseeable hazard to its plumbers, and OSHA had set permissible exposure limits for asbestos that he detailed (C. 6744, 6833-34, 6850-52). He similarly admitted diesel exhaust was a known carcinogen, and the railroads adopted a permissible exposure limit for it, too – and knew that exposure to a running locomotive inside an engine house would be up to quadruple that limit (C. 6701-02, 6756-65).

Dr. Perez echoed these statements and further discussed the OSHA permissible exposure limit for asbestos and the railroad industry's permissible exposure limit for diesel exhaust (C. 6916-21). He testified Mr. Sanders was exposed to both in much greater amounts than the permissible exposure limits (C. 6918-21). More than that, though, Dr. Perez testified this meant CSX unreasonably violated its duty to provide Mr. Sanders a reasonably safe workplace (C. 6924-26), stating the effect of being over an OSHA limit is "a failure to find a

reasonably safe place to work from an industrial hygiene standpoint," because "the fact that that's a possibility describes an unreasonable -- a situation that's not reasonably safe," and OSHA gives all employers a duty "to provide their employees with a safe and healthful working environment" (C. 6922).

The jury then was instructed that CSX had the duty "to use ordinary care to provide Joseph Sanders with a reasonably safe place in which to do his work" (C. 5069, 7682). It was instructed that Mrs. Sanders claimed CSX was negligent when it "[f]ailed to properly maintain the work area for Joseph Sanders so as not to expose him to harmful levels of diesel exhaust and asbestos," and CSX denied this (C. 5065, 7678). It was instructed that Mrs. Sanders had the burden to prove Mr. Sanders "became ill with colon cancer and died as a result of exposure to harmful levels of asbestos and/or diesel exhaust" and CSX "was negligent in one of the ways claimed by the plaintiff as stated to you in these instructions" (C. 5066, 7680).

To determine this, the jury was instructed that "negligence" is "the failure to do something which a reasonably careful person or entity would do, or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence" (C. 5057, 7675). It was instructed that "ordinary care" is "the care a reasonably careful person or entity would use under circumstances similar to those shown by the evidence" (C. 5058, 7675).

Under these circumstances, given Mrs. Sanders' specific claims, the evidence of the permissive exposure levels, their meaning, and the effect of CSX's violation of them, and the instructions to the jury that her counsel anticipated, counsel's comment about the effect of CSX violating OSHA permissive exposure levels being negligence was a fair comment on the evidence. The evidence was that a reasonably careful railroad employer with a duty to provide its employees a safe workplace would not expose its plumber employees to the foreseeable danger of exposure to known dangerous levels of asbestos and diesel exhaust. By exposing Mr. Sanders to those levels in excess of what CSX knew to be dangerous and carcinogenic, CSX failed to properly maintain his work area, violated its duty, and failed to use the care a reasonably careful person or entity would use.

That clearly was all Mrs. Sanders' counsel meant in his comment to the jury. As he said, "[t]he concept is that the railroad failed to provide Joseph Sanders with a reasonably safe place to work. That makes them negligent" (C. 7603). How did CSX do that here? By foreseeably exposing him to levels of asbestos in excess of levels known to be dangerous and cause colon cancer. As counsel said, "So what Dr. Perez focused on is not the 8-hour time weighted average over his whole career, because we can't meet that burden. We can't put Joe around asbestos. But what he can say is there was a clear violation of the OSHA exposure limit for short-term exposures, remember the STEL limit" (C. 7603). Notably, CSX did not object to any of this. (CSX

claims counsel made a misstatement of law "four times" in his closing argument (Aplt.Br. 13 n.2), but it only objected once.) Counsel then connected this specifically to the evidence:

> And what he said was that if Mr. Sanders and Mr. Horne did what they described, which is worked on pipe to replace both pipes, what they did is they would go in there, they would have to cut off the old insulation, they would have to replace the pipe itself. When they're done, they've got to sweep it up and get it out of here. If that took 30 minutes or more, Dr. Perez said that's an OSHA STEL violation. An OSHA STEL violation is negligence.

(C. 7603-04). Only then, to that very last sentence, did CSX object (C. 7604).

Counsel plainly was arguing not that *any* OSHA STEL violation was negligence *per se* as a matter of law – notably not using the term "negligence *per se*" – but that in the context of this case, where Mrs. Sanders' FELA claim was that CSX negligently failed to provide her late husband a safe workplace by foreseeably exposing him to known cancer-causing levels of asbestos (known through the OSHA limits) and diesel exhaust (known through the industry standard), and the evidence was that CSX had done just that, *that* was negligence under the FELA. Indeed, when Mrs. Sanders' counsel made the same argument for diesel exhaust, that "if Mr. Sanders was being exposed to elemental carbon or diesel exhaust above 20 micrograms per cubic meter, the railroad violated their own industry standards. When you violate the industry standards, that's negligence under the FELA" (C. 7609), CSX did not object.

CSX argues Mrs. Sanders' counsel's statement to which it objected was a "knowing and deliberate" misstatement of the law because during the instructions conference, he had briefly argued for an instruction on negligence *per se* (Aplt.Br. 13 n. 2) (citing C. 7531, 7533). The trial court was entitled to view it otherwise. The court only instructed the jury properly, as CSX tacitly concedes by not challenging any jury instructions on appeal. Counsel was therefore well within his rights to argue the facts showing that regardless, in the context of this case, CSX's violation of OSHA's permissible exposure limit for asbestos, which the evidence established, was negligence because it failed its duty to provide Mr. Sanders a reasonably safe workplace, and so the trial court properly overruled CSX's objection. Its doing so was not "arbitrary, fanciful, or unreasonable, or where no reasonable person would adopt the court's view." *Davis*, 2014 IL App (1st) 122427, ¶ 72.

There was nothing improper about the statement in Mrs. Sanders' attorney's closing argument of which CSX complains. The trial court properly acted within its discretion in overruling CSX's objection to the statement and denying its motion for a new trial. This Court should affirm the trial court's judgment.

B. Even if counsel's statement was improper, the trial court's decision that it could not have substantially prejudiced CSX was not arbitrary, fanciful, or unreasonable: this was a single statement in a six-day trial, it did not impact CSX's defense, the jury was properly instructed on what constitutes negligence and to disregard any statement of law by counsel not supported by the instructions, and CSX does not rebut the presumption that the jury followed the instructions.

If the Court were to agree with CSX that Mrs. Sanders' counsel's statement was improper, the trial court still reasonably decided it was not so substantially prejudicial as to require a new trial. The trial court held "given the totality of the circumstances," the statement did not "deprive CSX of a fair trial," and noted that "very shortly thereafter during the trial, the Court instructed the jury as to the law on the issue of negligence," including "most specifically that the jury should disregard any statements or arguments made by attorneys that were not supported by the law and the evidence" (C. 7997).

This was not arbitrary, fanciful, or unreasonable. Instead, it was well supported by the record and the law. The trial court did not abuse its discretion in determining the statement did not prejudice CSX, and this Court should affirm its decision.

While improper closing argument can provide a basis for a new trial, the determination of whether comments of counsel have deprived a party of a fair trial is a matter resting in the first instance in the discretion of the trial court. *Lagoni v. Holiday Inn Midway*, 262 Ill. App. 3d 1020, 1034 (1st Dist. 1994). This is especially so when the objectionable comment "was brought to the trial court's attention in"

the appellant's "post-trial motion," because "this [C]ourt will defer to the decision of the trial court, which heard the argument and observed any effect it had upon the jury, as to whether the argument was so prejudicial as to warrant a new trial." *Stennis*, 233 Ill. App. 3d at 831 (citation omitted) (affirming denial of motion for new trial based on alleged misstatement of law in closing argument).

A closing argument must be clearly improper and prejudicial to warrant reversal of a judgment. *Lagoni*, 262 Ill. App. 2d at 1034. This means "[a] new trial is not warranted based on an improper … closing argument unless, *when the trial is viewed in its entirety*, the argument resulted in substantial prejudice to the losing party or rose to the level of preventing a fair trial." *Davis*, 2014 IL App (1st) 122427, ¶ 84 (emphasis added). "'[E]rrors in … closing argument must result in *substantial* prejudice *such that the result would have been different absent the complained-of remark* before reversal is required.'" *Id.* (quoting *People v. Williams*, 192 Ill. 2d 548, 573 (2000)).

This means the arguments of both parties must be reviewed in their entirety, with the challenged portion placed in its proper context. *People v. Cisewski*, 118 Ill. 2d 163, 175-76 (1987). A significant factor in determining the impact of an improper comment on a jury verdict is whether "the comments were brief and isolated in the context of lengthy closing arguments." *People v. Runge*, 234 Ill. 2d 68, 142 (2009).

Here, the comment to which CSX made its one objection was brief and isolated in the context of this case and occurred during lengthy

closing arguments by both parties at the end of a six-day trial. Notably, CSX does not challenge the sufficiency of the evidence to support the jury's verdict, the weight of the evidence, the admission of any evidence (including Mrs. Sanders' expert testimony), or the propriety of any jury instructions. And viewed most favorably to Mrs. Sanders, the evidence was more than sufficient for the jury to find CSX negligently failed to provide her late husband a reasonably safe workplace by unreasonably exposing him to levels of asbestos and diesel exhaust that it knew to cause colon cancer. Moreover, CSX did not object to similar comments in opening statements about the effect of its violation of the OSHA exposure level (C. 6343) or in closing argument about the effect of its violation of industry standards exposure limits for diesel exhaust (C. 7609).

At the outset, given CSX's defense, the statement that its violation of the OSHA exposure limit for asbestos was negligence under the FELA could not have substantially prejudiced it. CSX's defense was not that it *did violate* OSHA's exposure limit, but this nonetheless was *not* negligence. Instead, it argued it *did not* violate that limit at all and Mr. Sanders' exposure to asbestos, if any, was within safe levels.

Indeed, counsel for CSX *conceded* the OSHA exposure limits (as, indeed, its expert, Dr. Bullock, had (C. 6687-88)) and argued "OSHA had to be followed, and they followed it" (C. 7636). Instead, he argued Mr. Sanders' exposures were within limits or unsupported by the credible evidence, and the real cause of his cancer was his smoking (C.

7637-49). He argued Mr. Horne was not credible and the jury should not believe the exposures to which Mrs. Sanders' witnesses testified, but instead should believe its witnesses (C. 7637-49). Therefore, *for this reason*, he argued CSX provided Mr. Sanders a reasonably safe place to work (C. 7652). Given this, the trial court reasonably could conclude that Mrs. Sanders' counsel arguing CSX *did* violate the exposure limits and this *was* negligence did not prejudice CSX's defense.

Additionally, this Court must presume, absent a showing to the contrary, that the jury followed the trial court's instructions in reaching a verdict. *People v. Simms*, 192 Ill. 2d 348, 373 (2000). So, where the trial court instructs the jury that opening and closing arguments are not evidence or law and it should disregard any statement or argument by an attorney that is not supported by the law or the evidence, and then correctly instructs the jury on the law, this cures any isolated improper argument. This is because:

> [I]mproper arguments can be corrected by proper jury instructions, which carry more weight than the arguments of counsel. Moreover, any possible prejudicial impact is greatly diminished by the court's instructions that closing arguments are not evidence. A trial court's instructions that closing arguments are not evidence protect [the parties] against any prejudice caused by improper comments made during closing arguments. It is presumed that jurors follow the instructions provided by the trial court.

People v. Green, 2017 IL App (1st) 152513, ¶ 98 (internal citations and quotation marks omitted).

In *Green*, the Court held that isolated improper comments by a prosecutor during closing argument, even if error, were cured by the jury instructing the jury that closing arguments are not evidence, and then correctly instructing the jury on the law. *Id.* at ¶ 99. This is true with improper legal comments, too. *See, e.g.*, *Simms*, 192 Ill. 2d at 373-74 (improper closing argument as to scope of jury's duty cured where court correctly instructed jury on duty); *People v. Jefferson*, 2022 IL App (1st) 172484-U, ¶ 95 (improper remarks in closing argument by prosecutor not substantially prejudicial where court instructed jury that any statement not supported by evidence should be disregarded, as "the instructions to the jury, together with the limited nature of the two improper comments, precluded substantial prejudice"); *People v. Sims*, 2019 IL App (3d) 170417, ¶¶ 49, 52 (same; "Any possible prejudice caused by improper closing remarks is greatly diminished when the trial court instructs the jury that closing arguments are not evidence").

Here, CSX does challenge any of the trial court's instructions to the jury. The jury plainly was correctly instructed at length on CSX's duty to provide a safe workplace, on what constitutes negligence and ordinary care, on the FELA standard of causation, on the parties' claims and defenses, and on Mrs. Sanders' burden of proof (C. 5057-58, 5060, 5065-66, 5069, 7675-76, 7678-80, 7682). But most importantly, it was instructed on the functions of opening statements and closing arguments, and that "If any statement or argument of an attorney is

not supported by the law or the evidence, then you should disregard that statement or evidence" (C. 5052, 7673).

The law of Illinois presumes the jury followed these instructions, and CSX fails in any way to rebut that presumption. The jury was instructed to disregard any statement of counsel not supported by the law. The instructions to it on the law then did not state to the jury that violation of an OSHA exposure limit is negligence *per se* under the FELA, but instead correctly instructed the jury on what negligence, ordinary care, CSX's duty, and the standard of causation were under the FELA, as well as what the specific claims of negligence and burdens it was weighing were. As the trial court plainly stated it saw (C. 7997), the jury followed the instructions and the remark by Mrs. Sanders' counsel did not have a substantial prejudicial effect on it.

In arguing otherwise, CSX points to three decisions it argues required new trials in similar situations: *Chakos v. Ill. State Toll Highway Auth.*, 169 Ill. App. 3d 1018 (1st Dist. 1988); *Spurgeon v. Alton Mem'l Hosp.*, 285 Ill. App. 3d 703 (5th Dist. 1996); and *People v. Carbajal*, 2013 IL App (2d) 111018 (Aplt.Br. 19-21). All three decisions are inapposite.

Chakos did not involve a misstatement of law by trial counsel in closing argument at all.[2] Instead, the misstatement of law was in an

[2] A separate issue was raised in *Chakos* about improper comments on the evidence in closing argument. 169 Ill. App. 3d at 1029. The Court did not hold the remarks separately required a new trial, but merely directed that they were improper and "should not be repeated on retrial

improper non-IPI instruction that *the trial court* gave the jury, which this Court found conflicted with *other* instructions the trial court gave the jury. 169 Ill. App. 3d at 1027-28. The problem was "it cannot be determined which instruction was actually followed by the jury." *Id.* at 1028. *That* required a new trial. *Id.* Here, the jury is presumed to have followed the written instructions, none of which CSX challenges.

In *Spurgeon*, as CSX mentions in its brief (Aplt.Br. 20), the *trial court* granted a new trial, and the Fifth District *affirmed that* decision. 285 Ill. App. 3d at 709. But the proper exercise of discretion one way in one case does not mean that the converse is an abuse of discretion in another case. The fact "that a [trial] court [in one case] did not abuse its discretion by" taking an action "does not lend measurable support to the contrary position that the [trial] court in this case abused its discretion by refusing to" take that action. *N. Am. Specialty Ins. Co. v. Britt Paul Ins. Agency, Inc.*, 579 F.3d 1106, 1112 (10th Cir. 2009) (joined by Gorsuch, J.). This is "the nature of judicial discretion," which "precludes rigid standards for its exercise." *Gordon v. United States*, 383 F.2d 936, 941 (D.C. Cir. 1967) (Burger, J.). Indeed, this is especially true when reviewing the trial court's *grant* of a new trial as in *Spurgeon*, as opposed to the *denial* of one here: "the decision to grant a new trial should be accorded more deference than the decision to deny one." *Davis*, 2014 IL App (1st) 122427, ¶ 70.

…." *Id.* at 1030. But the law to which CSX points in its brief concerned the improper *trial court* instruction.

In any case, *Spurgeon* illustrates why the comment at issue here was not prejudicial. There, in a slip-and-fall case, the defense "freely admitted that they removed snow and ice from the parking lot in issue" and so "had a duty to correctly remove the snow." 285 Ill. App. 3d at 709. But defense counsel then stated, "if in making their efforts to clear off snow they left some snow behind and she fell on that, there's no liability to the hospital." *Id.* This prejudiced the plaintiff, because the issue in the case was "whether the snow was improperly removed, causing the formation of ice on which plaintiff fell." *Id.* Additionally, there was no discussion of the court's instructions to the jury and whether they cured this issue. *Id.*

Conversely, here, CSX *did not* admit it had violated the OSHA exposure limits, but instead conceded they *did* have to obey those limits and argued they had done so. Unlike in *Spurgeon*, where the trial court was entitled to find the comment at issue prejudicial, in this context the trial court reasonably found the comment was not prejudicial. And the trial court found that especially given the written instructions, the jury was not prejudiced.

Finally, in *Carbajal*, a criminal case, a new trial was ordered under plain error review because the prosecutor violated the defendant's right to due process by telling the jury twice that the defendant failed to prove his innocence. 2013 IL App (2d) 111018, ¶¶ 33-36. Mrs. Sanders agrees that in that egregious, unconstitutional circumstance, when a criminal defendant's liberty is at stake, and a

prosecutor confuses the jury as to the burden of proof, per well-established law a new trial would be required. *Id.* (citing *People v. Phillips*, 127 Ill. 2d 499, 527 (1989)).

This case is nothing like *Carbajal*. Here, in this civil case, with the FELA's relaxed standard of causation, CSX does not dispute that the jury was correctly instructed on the burden of proof or any of the other law and makes no argument that Mrs. Sanders' counsel shifted the burden. Instead, despite Mrs. Sanders' counsel's isolated statement in closing argument that violation of an OSHA exposure limit is negligence, the jury followed the instructions, disregarded that statement, and applied the actual law applicable to this situation as given to it in the Court's instructions.

Viewing this trial in its entirety, including the length of trial, the evidence, and the arguments and the instructions to the jury, the trial court's determination that CSX was not substantially prejudiced by Mrs. Sanders' counsel's isolated statement in closing argument was a proper exercise of its discretion. This Court should affirm its decision.

III. Under the circumstances before it, the trial court appropriately determined within its discretion that CSX's use of Jason Pritchard as a Rule 615 corporate representative was an attempt to circumvent its ruling excluding fact witnesses from the courtroom, and appropriately instructed the jury that it could take that into account in weighing his credibility.

In its second issue on appeal, CSX argues the trial court erred in instructing the jury that in weighing the credibility of its witness, Jason Pritchard, it could consider that he had been present through the prior testimony and would have been excluded from the courtroom during the prior testimony of Dominick Horne but for the fact that it was kept from Mrs. Sanders' counsel and the court that he was no longer a CSX employee (Aplt.Br. 21-41).

CSX's argument is in error. It fails to view the evidence most favorably to Mrs. Sanders. It fails to take into account – or even mention – its own related failure to timely disclose 11,000 pages in discovery for which the trial court sanctioned it. And it relies on authorities *affirming* trial courts *allowing* Rule 615 representatives who were former employees under different circumstances, rather than any *reversing* the *refusal* of this, as the trial court did here.

The trial court properly exercised its discretion in determining CSX's use of Jason Pritchard as a Rule 615 corporate representative without disclosing that, contrary to his deposition testimony, he was no longer a CSX employee, was an attempt to circumvent its ruling excluding fact witnesses from the courtroom, so that he could hear Mr. Horne's testimony and then respond directly to it. It properly

determined that had it or Mrs. Sanders' counsel known he was no longer a CSX employee, contrary to his express statement otherwise in his deposition that was never updated, he would have been excluded from the courtroom, which it had discretion to do, given that he was a Rule 213(f)(1) lay fact witness, and would not have heard Mr. Horne's testimony.

This is especially true given the other, similar shenanigans the court already had observed CSX try to pull. It already knew CSX had unreasonably failed to produce thousands of pages of documents in discovery, for which the court sanctioned CSX (of which CSX omits any mention in its brief). And it also knew CSX then tried to cover that by baselessly accusing Mrs. Sanders' counsel of "witness tampering," which the trial court saw through and denied (which CSX also does not mention in its brief).

The law of Illinois is and must be that in this circumstance, the trial court could find Mr. Pritchard should have been excluded from the courtroom under the parties' agreed motion *in limine* excluding witnesses from the courtroom. It then equally properly exercised its discretion in deciding the remedy for this was to inform the jury that he would have been excluded if the Court had known this. The trial court has wide latitude in fashioning a remedy for violation of the witness sequestration rule and would have been well within its discretion to strike Mr. Pritchard's testimony entirely.

This Court should affirm the trial court's judgment.

A. The trial court was well within its discretion to determine that Mr. Pritchard should have been excluded during Mr. Horne's testimony, and that CSX having him there as its Rule 615 representative was an attempt to circumvent the trial court's ruling excluding fact witnesses from the courtroom.

At the outset, CSX's suggestion that the trial court's decision turns on whether, generally, a former employee can or cannot be a Rule 615 representative (Aplt.Br. 25) is a red herring. While it may be so that a former employee *can* serve as a Rule 615 representative in some cases, this still remains a matter within the trial court's discretion. As with all discretionary decisions, the question is whether *under the circumstances here*, the trial court's decision was arbitrary, fanciful, or unreasonable. It plainly was not.

CSX correctly notes that Ill. Evid. R. 615, which provides, "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion," but this "does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney," is based on Fed. R. Evid. 615 (Aplt.Br. 26).

CSX then cites (1) commentary that the Rule 615 representative can be a former employee, (2) two trial-level cases from Pennsylvania in which it argues one of Mrs. Sanders' counsel was involved in which it says this happened,[3] (3) a few other trial-level cases involving railroads

[3] CSX omits that Mrs. Sanders' counsel said he was only involved in one of those cases, not both (C. 6653-54).

from other states in which it says this happened, and (4) three federal decisions *affirming* a trial court's decision to allow a former employee to be a Rule 615 representative (Aplt.Br. 27, 29-33). It uses this to suggest that a former employee *always must be* allowed to be a Rule 615 representative (Aplt.Br. 31, 34).

Like CSX's use of decisions *affirming* a trial court's exercise of its discretion to grant a new trial due to improper argument in its first issue (*see* above at p. 46), its use of federal decisions affirming allowing a former employee to serve as a Rule 615 representative equally misses the mark and ignores the nature of judicial discretion. "The enforcement of a rule to exclude witnesses, made at the outset of a trial, is within the trial court's discretion." *Friedman v. Park Dist. of Highland Park*, 151 Ill. App. 3d 374, 390 (2d Dist. 1986). The fact "that a [trial] court [in one case] did not abuse its discretion by" taking an action "does not lend measurable support to the contrary position that the [trial] court in this case abused its discretion by refusing to" take that action. *N. Am. Specialty Ins. Co.*, 579 F.3d 1106 at 1112 (joined by Gorsuch, J.). This is "the nature of judicial discretion," which "precludes rigid standards for its exercise." *Gordon*, 383 F.2d at 941 (Burger, J.).

Other federal decisions equally have affirmed a trial court holding a former employee should not serve as a Rule 615 representative and excluding him from the courtroom. *See, e.g.*, *Bass v. Hardee's Food Sys., Inc.*, 229 F.3d 1141, 2000 WL 1124515 at *2 (4th

Cir. 2000) (affirming excluding plaintiff employee's former manager who no longer worked for defendant company and was defendant's fact witness from courtroom, holding trial court could determine he was not proper Rule 615 representative); *cf. Marathon Pipe Line Co. v. Drilling Rig Rowan/Odessa*, 699 F.2d 240 (5th Cir. 1983) (affirming excluding as Rule 615 representative person who defendant claimed was its employee but the record did not show was actually its employee).

Indeed, other decisions have reversed allowing a former employee (or even a current employee) to remain in the courtroom under Rule 615 when the trial court determines the witness's doing so would impair the truth-seeking function of trial. *See, e.g.*, *Kozlowski v. Hampton Sch. Bd.*, 77 F. App'x 133, 151-54 (4th Cir. 2003) (former employee); *United States v. Farnham*, 791 F.2d 331, 335 (4th Cir. 1986) (current employee).

This is because "Rule 615 does not bar the Court from excluding [a party noted in the rule] from the courtroom; it 'merely withholds authorization for the[ir] exclusion.'" *United States ex rel. El-Amin v. George Wash. Univ.*, 533 F. Supp. 2d 12, 48 (D.D.C. 2008) (excluding actual party from courtroom until other testimony complete) (quoting WRIGHT & GOLD, FEDERAL PRAC. & PROC.: EVID. § 6245 (collecting cases including *United States v. Mosky*, No. 89 CR 669, 1990 WL 70819 (N.D. Ill. 1990) ("court 'exercise[d] its discretion' to exclude the government's case agent from the courtroom until he had testified")).

In *Kozlowski*, for example, the Fourth Circuit reversed allowing the plaintiff former high school coach's former principal, who no longer worked for the defendant, to remain in court during other witnesses' testimony as the defendant's Rule 615 representative. *Id.* The Court observed, "just as a natural person may not designate her most important witness as her representative at trial, a corporate defendant cannot designate its most important witness simply because he is a former officer or employee." *Id.* at 152. "When the individual in question is a key fact witness, adherence to the sequestration rule is most important." *Id.* (quotation marks and citation omitted). This is because "[w]hen a witness is properly sequestered, that witness loses his ability to re-characterize his testimony in light of damaging contradictory testimony by other witnesses or to explain away inconsistencies." *Id.* at 153.

At trial, the former principal was asked on the stand "to respond directly to much of the contradictory testimony that he had observed." *Id.* at 152. The Fourth Circuit noted, "This is precisely the situation that Rule 615 was designed to prevent. When a witness is properly sequestered, that witness loses his ability to re-characterize his testimony in light of damaging contradictory testimony by other witnesses or to explain away inconsistencies." *Id.* at 153. It held that in the context of that case, allowing this "substantially prejudiced [the plaintiff]'s case." *Id.* at 154; *see also Bradshaw v. Purdue*, 319 F. Supp. 3d 286, 289-90 (D.D.C. 2018) (excluding defendant government agency's

employee who was also its fact witness as Rule 615 representative during plaintiff's testimony where to do otherwise "would risk jeopardizing the truth-seeking function of the proceeding by providing the opportunity for defendant's critical fact witness to – consciously or subconsciously – shape his testimony to counter what he has heard from plaintiff's critical fact witness in court rather than simply recount events from fifteen years ago as he remembers them;" collecting cases).

The trial court had the same concern here about Mr. Pritchard as these other courts that resulted in the exclusions of former employees or current employees who were also fact witnesses.

The issue was not just that Mr. Pritchard was a former employee and not a current employee. Rather, as the trial court put it in denying CSX's motion for a new trial, the issue was that "the use of Mr. Pritchard as a railroad corporate representative given the facts and under these circumstances was an attempt by the Defendant to circumvent this Court's rulings on excluding witnesses from the courtroom" (C. 7997). In ruling on the issue, it noted, "During that testimony Mr. Pritchard was in the courtroom and had the benefit of hearing all of Mr. Horne's testimony. Thereafter, Mr. Pritchard took the stand, and for the first time, it was discovered through his testimony that he hadn't worked for CSX for two years," and the court was "concerned over having one witness over another gaining an unfair advantage by hearing the testimony of another witness" (C. 7405-06).

These were reasonable determinations from the context. First, and of which CSX omits any mention from its brief, the trial court was already well aware that CSX had unreasonably withheld 11,000 pages of asbestos-related material from discovery, for which the court sanctioned CSX (C. 7764-65). Second, and of which CSX also omits any mention, the trial court was aware that CSX had attempted to cover for this by baselessly accusing Mrs. Sanders' counsel of witness tampering, which the court firmly denied, too (C. 7747-48). Finally, despite revealing for the first time at trial that he had not worked for CSX since 2020 (C. 6492-93), Mr. Pritchard had testified differently in his deposition in March 2021, *after* he said he had stopped working for CSX (C. 2880). The trial court remarked on this in its ruling as "conflicting evidence that was presented in this regard" (C. 7406). And if that answer thereafter changed, CSX had not updated it after the deposition – which was similar to their failure to produce required discovery, for which they were sanctioned.

In the midst of all of this, knowing that Mr. Pritchard would be called after Mr. Horne, and knowing that Mrs. Sanders' Rule 615 motion had been granted (C. 1769, 5914), CSX sat silent with Mr. Prichard in the courtroom as its Rule 615 representative from jury selection onward (C. 6083, 6198, 6203). As the trial court remarked, this allowed him to hear Mr. Horne's testimony and then specifically respond to and refute particular factual statements on which Mrs.

Sanders was relying, which he otherwise would not have heard (C. 6526-58).

As the Fourth Circuit observed in *Kozlowski*, "[t]his is precisely the situation that Rule 615 was designed to prevent," as were he sequestered, Mr. Pritchard would have "los[t] his ability to re-characterize his testimony in light of damaging contradictory testimony by other witnesses or to explain away inconsistencies." 77 F. App'x at 153. Just as there, the trial court here properly determined this "substantially prejudiced [the plaintiff]'s case." *Id.* at 154.

As CSX conceded, Mr. Pritchard was a Rule 213(f)(1) lay fact witness (C. 6646). He was crucial to countering Mr. Horne, who was Mrs. Sanders' main Rule 213(f)(1) lay fact witness – and the only witness who ever worked directly with Mr. Sanders and personally could attest to his asbestos and diesel exhaust exposures. Had the plaintiff or the court been apprised that he was a former employee of CSX, rather than a current employee, a fact which the trial court reasonably could conclude from the surrounding circumstances that CSX unreasonably failed to divulge, than as in these other decisions the trial court would have sequestered him, too.

Regardless whether a former employee *generally* can be a Rule 615 representative and avoid sequestration, under these circumstances, the trial court reasonably concluded CSX had continued its shenanigans by failing failed to disclose that Mr. Pritchard was no longer its employee to circumvent the sequestration ruling.

B. The trial court's admonition to the jury was proper relief for CSX's conduct well within its discretion.

As CSX quotes (Aplt.Br. 39), "[t]he purpose of the sequestration rule is to prevent the shaping of testimony by one witness to match that of another and discourage fabrication." *Friedman*, 151 Ill. App. 3d at 390. But determining a remedy for violating it is a decision "committed to the sound discretion of the court." *Smith v. City of Chicago*, 299 Ill. App. 3d 1048, 1055 (1st Dist. 1998) (citing *People v. Nelson*, 33 Ill .2d 48, 53 (1965)). And that discretion is broad. *Id.* Illinois courts have upheld the outright exclusion of such a witness, *see, e.g.*, *Gatto v. Curtis*, 6 Ill. App. 3d 714, 736 (1st Dist. 1972), or the declaration of a mistrial, *see, e.g.*, *People v. Redd*, 135 Ill. 2d 252, 323 (1990).

But while Illinois courts have not yet explored whether another possibility remedy is a curative instruction informing the jury of the issue and allowing it to take that into account in weighing the witness's credibility, decisions nationwide uniformly hold that is entirely proper. *See, e.g.*:

- *Hill v. Porter Mem'l Hosp.*, 90 F.3d 220, 223-24 (7th Cir. 1996) (affirming permitting witness who had violated exclusionary order under Fed. R. Evid. 615 to testify but instructing jury it could consider this in evaluating witness's credibility);
- *United States v. Payan*, 992 F.2d 1387, 1393-94 (5th Cir. 1993) (affirming permitting witnesses who had been present in

courtroom to testify but instructing jury it could consider this in evaluating their credibility);

- *United States v. Jimenez*, 780 F.2d 975, 981 (5th Cir. 1986) (affirming permitting witness who had violated exclusionary order under Fed. R. Evid. 615 to testify but instructing the jury it could consider this in evaluating witness's credibility);
- *Hawes v. Chua*, 769 A.2d 797, 809-10 (D.C. App. 2001) (affirming permitting witness who violated rule barring speaking with other witnesses to testify but instructing jury it could consider witness's violation of rule in considering their testimony);
- *Spring v. Bradford*, 403 P.3d 579, 585-86 (Ariz. 2017) (affirming permitting witnesses who had been given trial testimony in violation of exclusion rule to testify but instructing jury it could consider this in considering their testimony);
- *Romo v. Keplinger*, 978 P.2d 964, 966 (Nev. 1999) (holding giving curative instruction is proper remedy for witness's violation of exclusion order);
- *Bean v. Landers*, 450 S.E.2d 699, 702 (Ga. App. 1994) (affirming permitting witness who had violated exclusion order to testify but issuing "curative instructions … advising that the violation could be considered by the jury in assessing the witness' credibility").

The trial court's admonition to the jury was substantially similar to those in all these cases (C. 7410).

Undersigned counsel is unable to find any decision from anywhere in America holding this practice is improper. None of the decisions CSX cites about the remedy involves this situation at all (Aplt.Br. 35-38). And given that Illinois courts routinely follow the interpretation of Fed. R. Evid. 615 in applying the sequestration standards of Ill. Evid. R. 615, *see, e.g.*, *Chatman*, 2022 IL App (4th) 210716, ¶ 70, and *Friedman*, 151 Ill. App. 3d at 390, there is no reason that this practice of which the Seventh Circuit has approved, *see Hill*, 90 F.3d at 223-24, should not also apply in Illinois.

As in all the decisions cited above, the trial court properly exercised its discretion in allowing Mr. Pritchard to testify but giving the jury a curative instruction that it could consider his presence during Mr. Horne's testimony in evaluating his credibility. This Court should affirm the trial court's judgment.

Conclusion

The Court should affirm the trial court's judgment.

Respectfully submitted,

Jonathan Sternberg, Attorney, P. C.

by /s/Jonathan Sternberg
Jonathan Sternberg, IL#6331607
2323 Grand Boulevard #1100
Kansas City, Missouri 64108
(816) 292-7020
jonathan@sternberg-law.com

/s/Stephen F. Monroe
Stephen F. Monroe, IL#6305823
Marc J. Bern & Partners, LLP
Cook Co. Firm No. 61789
200 W. Monroe St., Ste. 2250
Chicago, IL 60606
Phone: (312) 894-7941
Email: smonroe@bernllp.com

Counsel for Plaintiff-Appellee Annette Sanders

Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 14,989 words.

/s/Jonathan Sternberg
Jonathan Sternberg
Attorney for Plaintiff-Appellee

Certificate of Filing and Proof of Service

I certify that on October 6, 2023, I electronically filed the foregoing brief with the Clerk of the Appellate Court of Illinois, First District, by using the Odyssey E-Filing System. Under Local Rule 22(e) and within five days of the acceptance of the electronically filed brief, I will cause five copies of the file-stamped brief to be delivered to the Clerk of the Appellate Court of Illinois, First District, via FedEx express delivery.

I further certify that on October 6, 2023, I served the foregoing brief and appendix on each of the appellant's counsel named below by e-mail:

Mr. Michael A. Scodro
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 701-8886
mscodro@mayerbrown.com

Mr. Evan M. Tager
Mr. Carl J. Summers
Mayer Brown LLP
1999 K Street, NW
Washington, D.C. 20006
(202) 263-3247
etager@mayerbrown.com
csummers@mayerbrown.com

I certify that everything in this Certificate of Filing and Proof of Service is true and correct. I understand that a false statement on this form is perjury and has penalties provided by law under 735 ILCS 5/1-109.

/s/Jonathan Sternberg
Jonathan Sternberg
Attorney for Plaintiff-Appellee