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Railroad Law

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INTRODUCTION

There are relatively few Virginians who go through a day without seeing a train or crossing a railroad track, and yet many modern-day citizens know very little about the railroad and railroad law. Certainly the advent of interstate highways and air travel has lessened the importance of rail travel in the day-to-day lives of most citizens, but the economy of scale and environmental friendliness of modern-day railroads promises the launch of a railroad renaissance in the twenty-first century.[1]

The *Annual Survey of Virginia Law* has never featured an article that sought to survey the various areas of law affecting the railroads. As a result, this article discusses recent judicial decisions affecting the Federal Employers' Liability Act,[2] statutory and judicial decisions affecting railroad safety generally, and a discussion of the law surrounding railroad crossings in Virginia.[3]

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1. *See* Emily T. Simon, *Stilgoe Predicts the Return of Railroad*, HARV. U. GAZETTE ONLINE, Apr. 10, 2008, *available at* http://www.news.harvard.edu/gazette/2008/04.10/09-stilgoe.html.

2. 45 U.S.C. §§ 51-60 (2000).

3. The heavily unionized nature of the railroad gives rise to some fairly complex legislative enactments and frameworks regarding employment matters that would prove to make this article too lengthy. As a result, they will not be discussed here.

I. THE FEDERAL EMPLOYERS' LIABILITY ACT

A. *The Historical Origins of the Act*

It would be difficult, if not impossible, to understand the application of the Federal Employers' Liability Act ("FELA") without first understanding when and why the FELA was originally enacted. The FELA was enacted during a time of significant change in the United States, where industrialization and westward expansion were paving the way for the United States to become the world's economic power following World War I. The close of the nineteenth century, however, also brought a great deal of debate over the security and protection of the railroad workers that were vital to those efforts.[4] At the time, the notion of a workers' compensation scheme was unheard of, and common-law negligence suits still almost universally employed the doctrines of contributory negligence and assumption of risk.[5] The result was a situation—much like that of general common-law suits in Virginia—in which the slightest negligence of a worker would prevent him from having any means of financial recovery in a world that had no social protections in place to care for the underprivileged in society.[6]

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4. *See* Johnson v. S. Pac. Co., 196 U.S. 1, 19 (1904). The Supreme Court noted:

> President Harrison, in his annual messages of 1889, 1890, 1891 and 1892, earnestly urged upon Congress the necessity of legislation to obviate and reduce the loss of life and the injuries due to the prevailing method of coupling and braking. In his first message he said: "It is competent, I think, for Congress to require uniformity in the construction of cars used in interstate commerce, and the use of improved safety appliances upon such trains. Time will be necessary to make the needed changes, but an earnest and intelligent beginning should be made at once. It is a reproach to our civilization that any class of American workman should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war."

Id.

5. *See* S. REP. NO. 76-661, at 4 (1939) (noting that "such simple doctrines do not apply equitably under the infinite complexities of modern industrial practices").

6. *See* Andrew R. Klein, *Comparative Fault and Fraud*, 48 ARIZ. L. REV. 983, 986 & n.20 (2006) (quoting Christopher M. Brown & Kirk A. Morgan, Comment, *Consideration of Intentional Torts in Fault Allocation: Disarming the Duty to Protect Against Intentional Conduct*, 2 WYO. L. REV. 483, 510 (2002) ("Jurisdictions adopted comparative fault principles to alleviate the harshness of the contributory negligence doctrine. Courts and legislatures decided that the doctrine was unfair to the plaintiff because the plaintiff had to bear the burden of the entire loss if he was only slightly negligent.")).

In response, the United States Congress enacted the FELA,[7] which "abolishe[d] the defenses of contributory negligence and assumed risk and [was] interpreted to impose a liberal view of fault and causation that makes recovery relatively easy."[8] Of course, the abolition of contributory negligence and assumption of risk was a "liberal" or "progressive" ideal in the early twentieth century. Given that Virginia is only one of five remaining jurisdictions to recognize contributory negligence,[9] the FELA has lost much of its "liberalness and progressiveness" with the passage of time.

As political moods and movements changed in the United States and throughout the world in the beginning of the twentieth century, Congress slowly responded by enacting a framework of employer liability schemes around the FELA. In 1916, Congress enacted the Federal Employees' Compensation Act, which created a workers' compensation program for federal workers.[10] Four years later in 1920, the nation's maritime workers successfully lobbied Congress to enact the Jones Act, which made the provisions of the FELA applicable to seaman injured on vessels.[11] In 1927, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act, which was designed to provide workers' compensation protection to those workers who were not covered under state workers' compensation law, the FELA, or the Jones Act.[12] Over time, other state and federal laws have been enacted to fill the gaps in existing regulation, regulation that began in large part with the FELA.

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7. Actually, the initial FELA of 1906 was struck down as unconstitutional, but the current version was later enacted in 1908. *See* The Employers' Liability Cases, 207 U.S. 463, 504 (1908). Although the original FELA did not contain a prohibition on assumption of risk, it was specifically amended in 1939 to contain those prohibitions. *See* Act of Aug. 11, 1939, Pub. L. No. 76-382, 53 Stat. 1404 (1939) (codified as amended at 45 U.S.C. §§ 51-58 (2000)).

8. 1 DAN B. DOBBS, THE LAW OF TORTS § 133, at 312 (2001).

9. Christopher J. Robinette & Paul G. Sherland, *Contributory or Comparative: Which Is the Optimal Negligence Rule?*, 24 N. ILL. U. L. REV. 41, 45 n.27, 56 (2003).

10. *See* Federal Employees' Compensation Act, Pub. L. No. 64-267, 39 Stat. 742 (1916) (codified as amended at 5 U.S.C. § 8102 (2006)).

11. *See* Jones Act, Pub. L. No. 66-261, 41 Stat. 988, 1007 (1920) (codified as amended at 46 U.S.C. § 688 (2000)).

12. *See* Calbeck v. Travelers Ins. Co., 370 U.S. 114, 117–22 (1962).

B. *The FELA—Negligence Without Draconian Defenses*

Given that the FELA was enacted by Congress, the Act does not apply unless and until it is established that the employee is engaged in interstate commerce at the time of the accident[13]—a reduced threshold considering the more expansive view of interstate commerce taken by the United States Congress and the Supreme Court of the United States.[14] Specifically, the FELA states that railroad carriers shall be held liable for injury or death to railroad workers engaged in interstate commerce "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."[15]

Ironically, the FELA did little to create a *new* cause of action, rather, it simply codified a common-law cause of action as a means of recovery for railroad workers.[16] The innovation behind the FELA, however, was its declaration that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."[17] Further, Congress noted that even comparative negligence could not be used in those instances in which the railroad's violation of a safety statute enacted for the benefit of an employee proximately caused the employee's injury.[18] Later, in

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13. 45 U.S.C. § 51 (2000) (stating that the FELA covers an injury to "[a]ny employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act be considered as being employed by such carrier in such commerce").

14. Interestingly, however, this may be less true in light of the Supreme Court's recent decisions abrogating the scope and breadth of Congress's power under the Commerce Clause of the United States Constitution. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 602 (2000); United States v. Lopez, 514 U.S. 549, 551 (1995).

15. 45 U.S.C. § 51.

16. *See id.*

17. *See id.* § 53.

18. *See id.* The "safety statutes" envisioned by Congress include the Safety Appliance Act, 49 U.S.C. §§ 20301–06 (2000), and the Locomotive Inspection Act, 49 U.S.C. §§ 20701–03 (2000). Courts have clarified that state and local laws are not included within the meaning of "statute enacted for the safety of employees." *See* Seaboard Air Line Ry. v. Horton, 233 U.S. 492, 503 (1914) ("By the phrase 'any statute enacted for the safety of employees,' Congress evidently intended Federal statutes, such as the Safety Appliance Acts,

1939, Congress amended the FELA to proscribe the use of assumption of risk as an absolute bar to recovery in a negligence suit brought under the FELA.[19]

Courts interpreting the FELA shortly after its enactment appeared to recognize that the FELA merely removed the draconian defenses normally associated with common-law negligence suits of the time period, and otherwise codified railroad employees' rights to bring a *common-law* cause of action against their railroad employers.[20] Over time, however, the growing use and acceptance of workers' compensation schemes and similar statutory frameworks have caused confusion with the FELA and have given rise to efforts to "liberalize" the reach and scope of the FELA as something more akin to strict liability than negligence.

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and the Hours of Service Act.") (internal citations omitted). Courts have disagreed, however, as to whether the phrase includes regulations promulgated under statutes like the Occupational Safety and Health Act, 29 U.S.C. §§ 651–78 (2000). *Compare* Pratico v. Portland Terminal Co., 783 F.2d 255, 268 (1st Cir. 1985) ("We find § 653(b)(4) no obstacle to treating OSHA regulations as safety statutes under § 53 of FELA."), *with* Bertholf v. Burlington N. R.R., 402 F. Supp. 171, 173 (E.D. Wash. 1975) ("In any case, by the express terms of OSHA, violation of regulations under that act would not affect plaintiff's recovery under FELA."). The reasoning employed in *Bertholf* is the more persuasive of the two, given the express statutory language contained in OSHA:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish *or affect in any other manner* the common law or statutory rights, duties, or liabilities of employers and employees *under any law* with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. § 653(b)(4) (2000) (emphasis added).

19. *See* Act of Aug. 11, 1939, Pub. L. No. 76-382, 53 Stat. 1404, § 4 (codified as amended at 45 U.S.C. § 54 (2000) ("[S]uch employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.")).

20. *See Horton*, 233 U.S. at 501–02 ("The common law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employees is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen."); *see also* Missouri Pac. R.R. v. Aeby, 275 U.S. 426, 429–30 (1928) ("There is no liability in the absence of negligence on the part of the carrier. Its duty in respect of the platform did not make petitioner an insurer of respondent's safety; there was no guaranty that the place would be absolutely safe. The measure of duty in such cases is reasonable care having regard to the circumstances.") (citations omitted).

C. *Into the Divide—What Did Congress Mean by "Caused in Whole or in Part?"*

What appears at first glance to be a relatively unimpressive question is, in reality, the distinction between a FELA that is something very close to strict liability and a FELA that is more like the negligence statute intended by Congress. As a result, lawyers and courts throughout the United States have routinely struggled to identify the proper test for causation under the FELA.

In *Rogers v. Missouri Pacific Railroad Co.*, the Supreme Court stated that under the FELA an "employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played *any part, however small*, in the injury or death which is the subject of the suit."[21] Although the Court's language was merely dicta, lower appellate courts and trial courts across the country focused on the Court's language as illustrative of the proper standard for causation under the FELA.

For example, the United States Court of Appeals for the Seventh Circuit relied upon *Rogers* in *Holbrook v. Norfolk Southern Railway Co.*, and held that "a plaintiff's burden when suing under the FELA is significantly lighter than in an ordinary negligence case . . . . [because] a railroad will be held liable where 'employer negligence played any part, *even the slightest*, in producing the injury.'"[22] The Tenth Circuit in *Summers v. Missouri Pacific Railroad System* also held that the Supreme Court "definitively abandoned" the requirement of proximate causation in FELA suits.[23] The Ninth Circuit in *Funseth v. Great Northern Railway Co.* also found *Rogers* controlling on the issue of causation under the FELA, and ultimately upheld a jury instruction finding proximate causation "whenever it appears from a preponderance of the evidence in the case, that the act or omission played *any part, no matter how small*, in bringing about, or actually causing, the injury."[24]

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21. 352 U.S. 500, 507–08 (1957) (emphasis added).

22. 414 F.3d 739, 741–42 (7th Cir. 2005) (quoting *Rogers*, 342 U.S. at 506) (emphasis added).

23. 132 F.3d 599, 606 (10th Cir. 1997).

24. 399 F.2d 918, 920 (9th Cir. 1968) (emphasis added). The Ninth Circuit extended

Some courts, however, found that because the foundation of the FELA is negligence, any departure from a requirement of proximate causation was an improper perversion of the FELA into something it was not. For example, the Supreme Court of Montana in *Marazzato v. Burlington Northern Railroad Co.* concluded that under the FELA, "[t]he plaintiff has the burden of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's [death]."[25] Similarly, in *Gardner v. CSX Transportation, Inc.*, the Supreme Court of West Virginia held that in order "to prevail on a claim under [the FELA], a plaintiff employee must establish that the defendant employer acted negligently and that such negligence contributed proximately, in whole or in part, to plaintiff's injury."[26] The Supreme Court of Iowa in *Snipes v. Chicago, Central & Pacific Railroad Co.*, concluded that "[r]ecovery under the FELA requires an injured employee to prove that the defendant employer was negligent and that the negligence proximately caused, in whole or in part, the accident."[27] The Supreme Court of Nebraska followed suit in *Chapman v. Union Pacific Railroad*, concluding that "an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury" in order to recover under the FELA.[28]

Despite the difference of opinion as to whether the "in whole or in part" language contained in the FELA removes the proximate cause requirement traditionally found in common-law railroad actions, the Supreme Court of the United States has largely remained silent since 1957—at least until last year.

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this concept to cases under the Boiler Inspection Act in *Oglesby v. Southern Pacific Transportation Co.*, concluding that if a jury could find "'that any negligence of the defendant contributed in any way or manner, toward an injury or damage suffered by [a] plaintiff, [a jury] may find that such injury or damage was proximately caused by the defendant's act or omission.'" 6 F.3d 603, 608 n.1 (9th Cir. 1993) (quoting *Funseth*, 399 F.3d at 920).

25. 817 P.2d 672, 675 (Mont. 1991) (alteration in original) (citing Barilla v. Atchison, Topeka & Santa Fe Ry. Co., 635 F. Supp. 1057, 1059 (D. Ariz. 1986)).

26. 498 S.E.2d 473, 483 (W. Va. 1997).

27. 484 N.W.2d 162, 164 (Iowa 1992).

28. 467 N.W.2d 388, 395 (Neb. 1991).

D. *The Old D.C. Two-Step—Now You See It, Now You Don't*

1. All Negligence Under the FELA Employs the Same Standard of Causation

In *Norfolk Southern Railway Co. v. Sorrell*, the Supreme Court of the United States was presented with an opportunity to clarify, affirm, or change its dicta in *Rogers*, when the highest court in Missouri ruled that a different and more stringent standard of causation (i.e., historical proximate causation) applied for an employee's contributory negligence under the FELA.[29] Ultimately, however, the request of Norfolk Southern Railway Company ("NS") to have the Court define the standard of causation under the FELA was declined as not properly presented and briefed.[30]

Mr. Sorrell was employed by NS and was driving a dump truck when he was approached by another dump truck driven by an NS employee.[31] Although the versions of the story diverged at that point, "Sorrell's truck veered off the road and tipped on its side, injuring him."[32] The other employee claimed that Sorrell simply drove into a ditch, but Sorrell claimed that his truck was run off the road.[33] Sorrell filed suit against NS in Missouri under the FELA, alleging back and neck injuries.[34]

At trial, NS argued that Mr. Sorrell was contributorily negligent and his damages should be diminished in proportion to his own negligence pursuant to 45 U.S.C. § 53.[35] Interestingly, Missouri courts interpreted the FELA as applying "different standards of causation to railroad and employee contributory negligence."[36] Specifically, a railroad employee could only be found contributorily negligent "if the employee was negligent and his negligence '*directly contributed to cause*' the injury," whereas a railroad could be found negligent if "its negligence contributed 'in whole or in part' to the injury."[37] In applying the different stan-

29. 127 S. Ct. 799, 804–05 (2007).
30. *See id.* at 805.
31. *Id.* at 802.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 803 (quoting MO. APPROVED JURY INSTR., CIV., Nos. 24.01, 32.07(B) (6th ed.

dards, the jury returned a verdict in favor of Mr. Sorrell in the amount of $1.5 million.[38] NS appealed.

On appeal, NS argued that the differing standards were improper and also asked the Supreme Court of the United States to address definitively the appropriate standard for causation under the FELA.[39] The Court declined to define the standard of causation under the FELA, however, concluding that the issue was not raised on *certiorari* and thus was not properly before the Court.[40] In assessing whether the FELA mandated differing standards for causation under the FELA for primary and contributory negligence, the Court noted that "[a]bsent express language to the contrary, the elements of a FELA claim are determined by reference to the common law."[41] The Court noted that there was no dispute between the parties that at common law, "the causation standards for negligence and contributory negligence were the same."[42] The Court went on to note that "[a]s a practical matter, it is difficult to reduce damages 'in proportion' to the employee's negligence if the relevance of each party's negligence to the injury is measured by a different standard of causation."[43] Concluding that nothing within the FELA specifically abrogates the common-law approach of measuring primary and contributory negligence under the same standard, the Court held that the "the same standard of causation applies to railroad negligence under [45 U.S.C. § 51] as to plaintiff contributory negligence under [45 U.S.C. § 53]."[44]

2. So, What Is the Standard of Causation Employed Under the FELA?

Although the Supreme Court artfully avoided addressing the huge elephant in the courtroom, the Court's handling of the question does provide some insight into the viability of *Rogers* and existing precedent regarding causation under the FELA. Specifically, the court noted,

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2002)) (emphasis added).

38. *Id.* at 802.
39. *Id.* at 803–04.
40. *Id.* at 804–05.
41. *Id.* at 805 (citing Urie v. Thompson, 337 U.S. 163, 182 (1949)).
42. *Id.*
43. *Id.* at 807.
44. *Id.* at 808.

> Although [NS was] doubtless correct that we could consider the question of what standard applies as anterior to the question whether the standards may differ, the issue of the substantive content of the causation standard *is significant enough* that we prefer not to address it when it has not been fully presented.[45]

As an initial matter, if the Court felt the matter had been definitively addressed in *Rogers*, then the question would not need to be addressed, nor would it be significant. The Court also recited all of the ways in which Congress had departed from common-law negligence in enacting the FELA, and an alteration of the standard of causation was not enumerated by the Court.[46] Chief Justice Roberts even hinted at the possibility that the language in "whole or in part" may have been only a recognition of the fact that contributory negligence as *a complete bar* to recovery no longer existed under the FELA:

> Even if the language in [45 U.S.C. § 51] is understood to address the standard of causation, *and not simply to reflect the fact that contributory negligence is no longer a complete bar to recovery*, there is no reason to read the statute as a whole to encompass different causation standards. [45 U.S.C. § 53] simply does not address causation.[47]

Perhaps just as importantly, the Court noted that the remedial nature of the FELA does not dictate the interpretation that must be given to the FELA.[48]

Justices Souter, Scalia, and Alito joined the Court's opinion, but also authored a separate concurring opinion discussing the proper standard for causation under the FELA.[49] Specifically, Justice Souter wrote that "*Rogers* did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm; the case merely instructed courts how to proceed when there are multiple cognizable causes of an injury."[50] He went on to note that "[p]rior to FELA, it was clear common law that a plaintiff

45. *Id.* at 805 (emphasis added).

46. *See id.* at 807 (citing Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 542–43 (1994)) ("In *Gottshall* we 'cataloged' the ways in which FELA expressly departed from the common law: it abolished the fellow servant rule, rejected contributory negligence in favor of comparative negligence, prohibited employers from contracting around the Act, and abolished the assumption of risk defense.").

47. *Id.* at 808 (emphasis added).

48. *Id.*

49. *See id.* at 809–12 (Souter, J., concurring).

50. *Id.* at 809–10.

had to prove that a defendant's negligence caused his injury proximately, not indirectly or remotely."[51] Noting that *Rogers* relied upon FELA cases *applying the common-law standard of proximate causation*, Justice Souter concluded that *Rogers* did not change the law of causation in FELA cases.[52]

In a separate concurring opinion, however, Justice Ginsburg concluded that "[i]n [*Gottshall*] we acknowledged that 'a relaxed causation standard applies under FELA.'"[53] Justice Ginsburg noted that proximate causation has not been eliminated under the FELA, but rather that *Rogers* held that "[w]henever a railroad's negligence is the slightest cause of the plaintiff's injury, it is a legal cause, for which the railroad is properly held responsible."[54]

The result: *Sorrell* reveals four justices who appear to support the finding that the FELA does not alter the common-law standard for proximate causation, and one justice who definitely disagrees. Since Justice Thomas authored the *Gottshall* opinion, which acknowledged that "a relaxed standard of causation applies under FELA,"[55] it does not appear that he would join in an opinion concluding that the common-law standard applies. Because Justices Breyer, Kennedy, and Stevens joined the majority opinion, but not the concurrences, it is uncertain how they would decide the issue. Simply put, the question remains unresolved.

3. Logic Really Only Dictates One Result—Negligence Means Negligence, Not Strict Liability

As discussed previously, it is important to revisit the origins and roots of the FELA in order to properly evaluate whether a reduced standard of causation is contemplated by the Act. Congress did not create a new cause of action for railroad workers by enacting the FELA, but merely removed the draconian defenses that often prevented recovery at common law.[56] At the time, the shift

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51. *Id.* at 810.

52. *Id.*

53. *Id.* at 812 (Ginsburg, J., concurring) (quoting Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 543 (1994)).

54. *Id.* at 813.

55. *Gottshall*, 512 U.S. at 543.

56. 46 U.S.C. § 688(a) (2000) ("[I]n such action all statutes of the United States modifying or extending the *common-law* right or remedy in cases of personal injury to [and

from contributory negligence as a complete bar to recovery to contributory negligence as a reduction in total recovery was innovative and precedent-setting.[57] Clearly this must have been what Congress was describing when using the phrase "in whole or in part."[58] The fact that assumption of risk was not abolished for thirty-one years following the original enactment of the FELA lends further evidence that the "in whole or in part" language was meant to refer to the comparative negligence standard rather than the standard of causation under the FELA.[59]

To permit a plaintiff to recover for injuries based upon *any* negligence of a railroad, no matter how remote, essentially results in a workers' compensation scheme—something the Supreme Court of the United States has made clear the FELA is not.[60] Even a strict liability regime only "means liability without regard to

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death of] railway employees shall apply") (emphasis added); *see also* Rogers v. Consol. Rail Corp., 948 F.2d 858, 861 (2d Cir. 1991) ("FELA thus modified or eliminated the common-law defenses that had precluded railway employees from recovering from their employers for injuries sustained in the course of their employment.").

57. It should be remembered that comparative negligence, abolition of the fellow-servant rule, provision of a wrongful death suit, and the abolition of contracts limiting damages were all very progressive, and were serious departures from the common law in 1906 when the FELA was enacted, and again in 1908 when it was reenacted.

58. So long as the employee was not the sole cause of his injury, of course.

59. *See, e.g.*, Frese v. Chicago, Burlington & Quincy R.R. Co., 263 U.S. 1, 3 (1923) ("Whatever may have been the practice, he could not escape his duty, and it would be a perversion of the [FELA] to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more.") (citation omitted); Boghich v. Louisville & N. R. Co., 26 F.2d 361, 362 (5th Cir. 1928) ("It is not sufficient to merely show a violation of the Safety Appliance Acts to support a recovery. That violation must be the proximate cause of the injury; and the contributing negligence of the injured employee may be so great as to bar a recovery."); Kurn v. Reese, 133 P.2d 880, 882 (Okla. 1943) ("When an injury to one employee results from the combined fault of himself and a fellow-worker, the damages are divided; but an exception has grown up when the injured employee's fault is the violation of a rule or an express instruction.") (citation omitted); Hudson v. Norfolk & W. Ry. Co., 146 S.E. 525, 529 (W. Va. 1928) ("The federal decisions in cases of this character, where there is a positive duty imposed upon the engineman, hold that he cannot recover on the theory that other members of his crew were also bound to perform that duty and their negligence contributed in a proximate way to the injury by nonperformance."); *see also* McDonald v. Great N. Ry. Co., 207 N.W. 194, 198 (Minn. 1926) ("The fact that McCabe was also guilty of negligence in his silent permission in allowing the engineer, who was the primary wrongdoer, to violate the order, will not permit them to recover upon the theory that McCabe's negligence was a contributing cause. To so hold would permit the anomaly of an employee violating orders proximately resulting in his own injury to recover upon the theory that if some other employee had done his duty and prevented the violation the injury would not have occurred.").

60. *See* Norfolk S. Ry. Co. v. Sorrell, 127 S. Ct. 799, 805 (2007) ("Unlike a typical workers' compensation scheme, which provides relief without regard to fault, [45 U.S.C. § 51] provides a statutory cause of action sounding in negligence.").

fault; it does not normally mean liability for every consequence, however remote, of one's conduct."[61]

Sorrell illustrates how the FELA has grown well beyond its initial purpose to include injuries and risks that are not peculiar to the railroad industry—Mr. Sorrell was involved in an automobile accident, just like thousands of non-railroad workers every year.[62] Abrogating the common-law doctrine of proximate causation[63] without any express statement in the FELA would result in an even greater departure from the intent of the legislation. Nevertheless, the interpretation offered by Justice Ginsburg would require just that—liability for every consequence of a railroad's conduct, no matter how remote. Such an interpretation belies the foundation of the FELA as a negligence-based statute, and is likely to be revisited by the current Court.

II. THE FEDERAL RAILROAD SAFETY ACT

A. *The Origins of the Federal Railroad Safety Act*

In 1970, the United States Congress enacted the Federal Railroad Safety Act ("FRSA") "to promote safety in all areas of railroad operations and to reduce railroad-related accidents" and incidents.[64] Specifically, Congress provided the Secretary of Trans-

61. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 712 (1995) (O'Connor, J., concurring); *see generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 79 (5th ed. 1984) (describing "practical necessity for the restriction of liability within some reasonable bounds" in the strict liability context).

62. *See Sorrell*, 127 S. Ct. at 802; *see also id.* at 813 (Ginsburg, J., concurring) (pointing out that "'[c]ognizant of the physical dangers of railroading that resulted in the death or maiming of thousands of workers every year,' and dissatisfied with the tort remedies available under state common law, 'Congress crafted a federal remedy that shifted part of the human overhead of doing business from employees to their employers.'" (quoting Consol. Rail Corp. v. Gotshall, 512 U.S. 532, 542 (1994))).

63. At the time of the FELA's passage, the doctrine of proximate causation was widely recognized and accepted at common law. *See* Miller v. Baltimore & Ohio Sw. R.R., 85 N.E. 499, 504 (Ohio 1908) ("The rule is elementary that a defendant in an action for negligence can be held to respond in damages only for the immediate and proximate result of the negligent act complained of, and in determining what is direct or proximate cause the rule requires that the injury sustained shall be the natural and probable consequence of the negligence alleged; that is, such consequence as under the surrounding circumstances of the particular case might, and should have been foreseen or anticipated by the wrongdoer as likely to follow his negligent act.").

64. Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971 (codified as amended at 49 U.S.C. § 20101 (2000)). In order to avoid confusion by references to re-

portation with the authority to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970."[65] Subsequent to the enactment of the FRSA, the Secretary of Transportation delegated his rulemaking authority under the FRSA to the Administrator of the Federal Railroad Administration ("FRA").[66] Pursuant to that authority, FRA promulgated a multitude of regulations governing everything from equipment on locomotives to drug testing for railroad personnel.[67] Understanding that the Secretary of Transportation was entering a field traditionally regulated by state law, Congress specifically indicated its desire to establish uniform regulations: "Laws, regulations, and orders related to railroad safety *shall be nationally uniform to the extent practicable*."[68]

Courts asked to determine the preemptive effect of the FRSA over state law causes of action almost universally found in favor of preemption where specific regulations had been promulgated covering the subject matter at issue in a lawsuit.[69] For example, the Supreme Court of the United States was asked in *CSX Transportation, Inc. v. Easterwood* to assess whether a plaintiff could maintain an excessive speed claim where a train was operated within the maximum speed limits promulgated by the FRA.[70] The Court concluded that "under the FRSA, federal regulations adopted by the Secretary of Transportation pre-empt [Easterwood's] negligence action only insofar as it asserts that petitioner's train was traveling at an excessive speed."[71]

The section of track at issue in *Easterwood* involved a class four section for which the maximum speed was sixty miles per hour by federal regulation.[72] Even though the train was operating at a speed of less than sixty miles per hour, the plaintiff alleged that CSX "breached its common-law duty to operate its

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pealed portions of the United States Code, the author will refer to the recodified sections of the FRSA in Title 49.

65. 49 U.S.C. § 20103 (2000).
66. 49 C.F.R. § 1.49 (2007).
67. *See, e.g.*, 49 C.F.R. § 219 (2007).
68. 49 U.S.C. § 20106 (2000) (emphasis added).
69. *See, e.g.*, CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 673–74 (1993).
70. *Id.*
71. *Id.* at 676.
72. *See id.* at 673.

train at a moderate and safe rate of speed."[73] Acknowledging that the federal regulations only seemed to address the maximum speed at which trains can travel, the Supreme Court noted that "related safety regulations adopted by the Secretary reveal that the limits were adopted only after the hazards posed by track conditions were taken into account."[74] The Court "[u]nderstood [that] in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation of the sort that [Easterwood] seeks to impose on [CSX]."[75] The Court concluded that the federal regulations governing maximum train speed "should be understood *as covering the subject matter of train speed* with respect to track conditions, including the conditions posed by grade crossings."[76]

The Supreme Court's decision in *Easterwood* laid the groundwork for analyzing whether federal regulations effectively preempt common-law claims pursuant to 49 U.S.C. § 20106. The only remaining question in most cases was whether the federal regulations sufficiently illustrated a desire to occupy the field. Two questions, however, were not answered by the Court: One, do regulations promulgated pursuant to the FRSA *preclude* FELA actions as a result of that statute's basis in *common law*? Two, do federal regulations preempt a state law claim where the regulations occupy the field but the defendant railroad has failed to comply with the regulations?

B. *To Preclude or Not To Preclude, That Is the Question*

As discussed previously, the Supreme Court of the United States has made clear that the FELA provides litigants with a common-law negligence suit with modifications as specifically enumerated within the body of the Act itself.[77] As a result, courts across the country have been asked to determine whether the

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73. *Id.*

74. *Id.* at 674.

75. *Id.*

76. *Id.* at 675 (emphasis added).

77. *See* Norfolk S. Ry. Co. v. Sorrell, 127 S. Ct. 799, 807 (2007) ("In *Gottshall* we 'cataloged' the ways in which FELA expressly departed from the common law: it abolished the fellow servant rule, rejected contributory negligence in favor of comparative negligence, prohibited employers from contracting around the Act, and abolished the assumption of risk defense." (citing Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 542–43 (1994))).

FRSA's language regarding national uniformity and preemption operate to preclude certain actions under the FELA.

The majority of courts asked to address the issue have held that where federal regulations under the FRSA have substantially covered an area—like train speed, then the goal of uniformity expressly stated within the FRSA dictates that negligence claims under the FELA must similarly be precluded when the railroad has complied with the regulations.[78] For example, when the question was presented to the United States Court of Appeals for the Fifth Circuit in *Lane v. R.A. Sims, Jr., Inc.*, the court concluded that "uniformity can be achieved only if the regulations covering train speed are applied similarly to a FELA plaintiff's negligence claim and a non-railroad-employee plaintiff's state law negligence claim."[79]

The court reasoned that if the FRSA is not held to preclude suits under the FELA where the railroad has complied with federal regulations, then "a railroad employee could assert a FELA excessive-speed claim [based on common-law negligence], but a non-employee motorist [also asserting a claim based upon common-law negligence] involved in the same collision would be precluded from doing so."[80] In other words, the court concluded that if plaintiffs under the FELA could utilize an act which provides them with a tort-based common-law suit against the railroad where the railroad has not violated the terms of the FRSA, then "'[t]he railroad could at one time be in compliance with federal railroad safety standards with respect to certain classes of plaintiffs yet be found negligent under the FELA with respect to other classes of plaintiffs for the very same conduct.'"[81]

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78. *See, e.g.*, Lane v. R.A. Sims, Jr., Inc., 241 F.3d 439, 443 (5th Cir. 2001); Waymire v. Norfolk & W. Ry. Co., 218 F.3d 773, 776 (7th Cir. 2000) ("In *Easterwood*, the train was operating within the FRSA prescribed 60 miles per hour speed limit, as was N&W's train in this case. It would thus seem absurd to reach a contrary conclusion in this case when the operation of both trains was identical and when the Supreme Court has already found that the conduct is not culpable negligence."); Dickerson v. Staten Trucking, Inc., 428 F. Supp. 2d 909, 913 (E.D. Ark. 2006) ("Mindful of the FRSA's goal of national uniformity, courts have precluded FELA claims when the railroad's underlying conduct was in compliance with specific FRSA regulations."); Rice v. Cincinnati, New Orleans & Pac. Ry. Co., 955 F. Supp. 739, 740–41 (E.D. Ky. 1997); Thirkhill v. J.B. Hunt Transp., Inc., 950 F. Supp. 1105, 1107 (N.D. Ala. 1996).

79. *Lane*, 241 F.3d at 443.

80. *Id.*

81. *Id.* (quoting Waymire v. Norfolk & W. Ry. Co., 65 F. Supp. 2d 951, 955 (S.D. Ind. 1999), *aff'd*, 218 F.3d 773 (7th Cir. 2000)).

Once again, it is important to remember that the FELA did not establish a new cause of action, but only removed the draconian defenses from common-law negligence suits of the time. The FRSA has expressed its goal of uniformity in railroad regulation throughout the country. Surely jury verdicts under the FELA that can vary from jurisdiction to jurisdiction—or even from jury to jury within a jurisdiction—pose just as substantial a threat to uniformity as do common-law suits under state law. The Supreme Court of the United States found that state common-law suits cannot qualify for the local hazard exception to the FRSA's goal of national uniformity because

> [t]he state law on which [plaintiffs] rel[y] is concerned with local hazards only in the sense that its application turns on the facts of each case. The common law of negligence provides a general rule to address all hazards caused by lack of due care, not just those owing to unique local conditions.[82]

[T]he Supreme Court found "reliance on the common law 'incompatible with' [the] FRSA."[83] To conclude otherwise would leave the FRA powerless to enact meaningful regulation, as an FELA jury could effectively nullify a regulation of the FRA, or at the very least find railroads liable for compliance. That just cannot be the rule.

C. *Testing the Limits of Federal Preemption—Noncompliance with Federal Regulations*

In the early morning of January 18, 2002, a Canadian Pacific ("CP") train hauling containers of anhydrous ammonia derailed in Minot, North Dakota.[84] The derailment caused the release of approximately 220,000 gallons of anhydrous ammonia into the air, forcing residents to flee their homes.[85] A combination of bad luck and bad emergency planning resulted in one death, eleven serious injuries, and 322 major injuries.[86] The accident occurred as a result of a continuous welded rail (essentially one very long and continuous piece of metal) being replaced with a short "plug rail,"

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82. CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 675 (1993).

83. *Id.*

84. *See* Lundeen v. Canadian Pac. Ry. Co., 507 F. Supp. 2d 1006, 1008–09 (D. Minn. 2007).

85. *Id.* at 1009.

86. *Id.*

put in place to repair a damaged section of track.[87] The National Transportation Safety Board concluded that the joint bars holding the plug rail in place were cracked and not properly secured, and that their failure contributed to the derailment.[88]

Following the derailment, many of the residents and their families filed suit against CP alleging negligent track maintenance and other similar claims.[89] The suit was initially filed in state court, but CP removed the case to federal court, asserting that the plaintiffs had alleged violations of "United States law."[90] The trial court concluded that the reference to "United States law" created a federal question on the face of the complaint and denied the plaintiffs' motion for remand.[91] Subsequently, however, the plaintiffs sought and were granted leave to amend their complaints to remove the reference to "United States law," and they successfully renewed their motion to remand.[92]

CP appealed the trial court's remand order to the United States Court of Appeals for the Eighth Circuit, contending that the trial court should not have permitted the amendment and that the plaintiffs engaged in blatant forum shopping.[93] The Eighth Circuit rejected the forum shopping argument, but noted that the issue of subject matter jurisdiction could be taken up at any time *sua sponte*—including on appeal.[94] Specifically, the court concluded that the regulations promulgated by the FRA were sufficiently complete to preempt most, if not all, of the plaintiffs' claims, and that complete preemption created federal question jurisdiction with the district court.[95] Accordingly, the Eighth Circuit reversed the decision of the trial court and remanded the case for trial at the federal level.[96]

On remand, the trial court concluded that virtually all of the plaintiffs' claims were preempted and that it was irrelevant whether CP had complied with the regulations they argued

87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. Lundeen v. Canadian Pac. Ry. Co., 447 F.3d 606, 611 (8th Cir. 2006).
94. *Id.*
95. *Id.* at 613–15.
96. *Id.* at 615.

preempted the plaintiffs' claims.[97] Specifically, the trial court reasoned that "[n]either the United States Supreme Court nor the Eighth Circuit Court of Appeals requires a railroad to prove FRA compliance before allowing state law preemption. Both Courts deem coverage, rather than compliance, to be preemption's touchstone."[98]

Another court in the Eighth Circuit—the United States District Court for the District of North Dakota—was also asked to determine whether some of the Minot plaintiffs' claims were preempted under the FRSA in *Mehl v. Canadian Pacific Railway, Ltd.*[99] The court similarly concluded that the preemption analysis did not permit the court to assess or discuss compliance as a condition precedent to the application of the preemption doctrine; as such, the court concluded that virtually all of the plaintiffs' claims were preempted.[100] Apparently dismayed by his own ruling, the trial court judge went on to state that "[w]hile the [FRSA] does provide for civil penalties to be imposed on non-compliant railroads, the legislation fails to provide any method to make injured parties whole and, in fact, closes every available door and remedy for injured parties."[101] The court noted that the lack of any mechanism leaves "the judicial system . . . with a law that is inherently unfair to innocent bystanders and property owners who may be injured by the negligent actions of railroad companies."[102] Accordingly, the trial court asked for legislative action addressing the lack of available remedies.[103] Congress eventually responded.

D. *Congress's Clarification of FRSA Preemption*

On August 3, 2007, the President signed into law the Implementing Recommendations of the 9/11 Commission Act of 2007, containing provisions in section 1528 that amend the FRSA to "rectify the Federal court decisions related to the [January 18, 2002] Minot, North Dakota accident that are in conflict with

97. *Lundeen*, 507 F. Supp. 2d at 1012–13.
98. *Id.*
99. 417 F. Supp. 2d 1104, 1120 (D.N.D. 2006).
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 1020–21.

precedent."[104] Section 1528 is, by its own terms, a clarifying amendment that does not work any substantive change to the existing law.[105]

Through section 1528, Congress retained and reaffirmed the FRSA's preemption provision and goal of national uniformity in railroad regulation by republishing the existing statute under subpart (a).[106] As explained by the legislative history, section 20106(a) "contains the *exact text* of 49 U.S.C. § 20106 as it existed prior to enactment of [the 9/11 Act]. It is restructured for clarification purposes; however, *the restructuring is not intended to indicate any substantive change in the meaning of the provision.*"[107] Section 1528 then adds two new subsections, 49 U.S.C. § 20106(b) and (c), that "rectify" the Minot derailment cases.[108]

In other words, the FRSA amendment serves to clarify circumstances in which the FRSA's preemption clause does not bar a state law cause of action—namely, in those circumstances where the railroad has failed to comply with the federal regulation through which preemption is sought. First, the amendment clarifies that state lawsuits based upon a railroad's failure to comply with a federal standard of care established in a regulation that covers the subject matter of the state requirement are not preempted.[109] Second, the amendment clarifies that the FRSA allows state actions based upon a railroad's failure to comply with its own internal rules that are created pursuant to federal regulation.[110] Finally, completing the universe, subsection (b)(1)(C) captures all remaining state claims that are not preempted by ("not incompatible with") the operative language of subsection (a).[111]

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104. H.R. REP. NO. 110-259, at 351 (2007) (Conf. Rep.), *reprinted in* 2007 U.S.C.C.A.N. 119, 183; *see also Mehl*, 417 F. Supp. 2d at 1115 (preemption applies even if railroad failed to comply with applicable federal regulation); Lundeen v. Canadian Pac. Ry. Co., 507 F. Supp. 2d 1006, 1012–13 (D. Minn. 2007) (preemption applies even if railroad failed to comply with regulations requiring it to create internal plan).

105. H.R. REP. NO. 110-259, at 351.

106. *Id.*

107. *Id.* (emphasis added).

108. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1528, 121 Stat. 266, 453 (to be codified at 49 U.S.C. § 20106).

109. *See* § 1528(b)(1)(A), 121 Stat. at 453; *Mehl*, 417 F. Supp. 2d at 1115 (claim barred even if railroad failed to comply with federal regulation).

110. *See* § 1528(b)(1)(B), 121 Stat. at 453; *cf.* Lundeen v. Canadian Pac. Ry. Co., 507 F. Supp. 2d 1006, 1012–13 (D. Minn. 2007) (claim barred even if railroad failed to comply with federal regulation requiring the creation of an internal plan).

111. § 1528(b)(1)(C), 1121 Stat. at 453.

Courts assessing the impact of the clarification amendment to the FRSA have generally concluded that preemption remains alive and well under the FRSA except in those certain enumerated instances where Congress has specifically stated that it does not—i.e., where a railroad has failed to comply with a federal regulation through which preemption is sought.[112] Just as importantly, the FRA has expressly rejected any contention that the clarification amendment made any substantive change to the FRSA's preemptive effect.[113] Congress's amendment also makes clear that FRSA preemption cannot be used to confer federal question jurisdiction over a case by federal courts.[114] A fair reading of the clarification language reveals only one interpretation—FRSA preemption over common-law-based claims continues to exist as a means of ensuring uniformity in railroad regulation in those cases in which the railroad has complied with the regulation.[115]

III. RAILROAD CROSSING LAW

The most frequent contact Virginians have with railroad companies is the traversing of railroad crossings during travels on Virginia's road system. To the uninformed observer, railroad crossings seem technically unimpressive. The truth is, the FRA, the Virginia Department of Transportation, and each of the state's railroads put a great deal of thought and resources into ensuring the public's safety when crossing railroads in Virginia.

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112. *See, e.g.*, Murrell v. Union Pac. R.R. Co., No. 06-97-AA, 2008 U.S. Dist. LEXIS 28886, at *20 (D. Or. Apr. 4, 2008) ("[T]he amendment to *section 20106* did not change the findings that common law negligence claims would be preempted by federal law as long as such state law claims are covered by federal regulations pursuant to *section 20106*. Therefore, the Court's decision in *Shanklin* which held that common law negligence claims are preempted continues to stand today as long as the defendant complies with the requirements listed in *section 20106(b)(1)*") (emphasis added); Crabbe v. Consol. Rail Corp., 2007 U.S. Dist. LEXIS 80895, at *17 (E.D. Mich. Nov. 1, 2007); Mastrocola v. Se. Pa. Transp. Auth., 941 A.2d 81, 93 (Pa. Commw. Ct. 2008).

113. *See* Railroad Operating Rules, 73 Fed. Reg. 8442, 8456 (Feb. 13, 2008) (to be codified at 49 C.F.R. pt. 217).

114. Hunter v. Canadian Pac. Ry. Ltd., No. 07-3314, 2007 U.S. Dist. LEXIS 85110, at *15–16 (D. Minn. Nov. 16, 2007) ("Thus, Congress has clearly answered the jurisdictional question of complete preemption—it does not apply here. However, the railroad can still raise the affirmative defense of preemption to the trial court that has jurisdiction over the case.").

115. *See* 49 U.S.C. § 20106 (2000).

Railroad crossings can be divided into two distinct groups—public crossings and private crossings. Public crossings are those crossings where a public road and a railroad track intersect. Private crossings are where a private road or driveway and a railroad track intersect. Public crossings are generally regulated by federal and state statutory law, whereas private crossings have historically only been dealt with by the common law.

A. *Public Railroad Crossings*

Just as there are two separate types of railroad crossings, public railroad crossings can be further broken down into two distinct categories—those with automated warning devices and those with passive warning devices. As discussed previously, both the FRA and the Commonwealth of Virginia regulate public crossings in Virginia.[116] Because a thorough review of all laws and regulations related to crossing safety exceeds the scope of a multi-topic law review article, this article will focus on the Commonwealth of Virginia's regulation of public crossings.

1. Crossing Elimination Program—Virginia Code Section 56-366.1

Virginia Code section 56-366.1 pertains to the process and means by which railroads coordinate with the Secretary of Transportation to eliminate "grade crossings by grade separation or to widen, strengthen, remodel, relocate or replace existing crossing structures on *public highways*."[117] Specifically, section 56-366.1 regulates the plans, specifications, costs, and division of labor between the Commonwealth of Virginia and various railroad providers when a new crossing is expected to be built or an old crossing is expected to be replaced or updated.[118] The statute is inapplicable unless the road on which the crossing is maintained is part of the state highway system or is otherwise a public highway maintained by a locality.[119]

116. *See, e.g.*, 49 C.F.R. §§ 234.1–234.275 (2007); VA. CODE ANN. §§ 56-355.1 to -369, 56-405 to -412.2 (Repl. Vol. 2007).

117. VA. CODE ANN. § 56-366.1 (Repl. Vol. 2007) (emphasis added).

118. *See id.*

119. *Id.*

In 1996, the General Assembly defined "highway" as "any public highway, road, or street maintained by the Virginia Department of Transportation or for which maintenance payments are made pursuant to §§ 33.1-23.5:1 and 33.1-41.1."[120] Prior to 1996, courts in Virginia had determined that public highways were generally defined as those owned by the state,[121] but that there were "a narrowly defined class of cases, [in which] a technically private crossing [took] on the attributes of a public crossing for purposes of the statute."[122] It is unclear whether the General Assembly's decision to define public highway will alter the Supreme Court of Virginia's analysis of what crossings are "public" crossings in Virginia, but the supreme court has historically held that the General Assembly's defining of a term following the court's defining of a term renders the court's definition without legal effect.[123] The General Assembly's decision to adopt a more stringent definition of public highway in 1996 may very well operate to eliminate the need to discuss the character or use of a crossing as a means for determining whether the crossing is public or private in nature. The resulting test would obviously be whether the road is "maintained by the Virginia Department of Transportation or for which maintenance payments are made pursuant to §§ 33.1-23.5:1 and 33.1-41.1."[124]

120. *See* Act of Mar. 6, 1996, ch. 114, 1996 Va. Acts 205 (codified at VA. CODE ANN. § 56-355.2 (Repl. Vol. 2007)). For informational purposes, section 33.1-23.5:1 pertains to counties who have elected to withdraw from the secondary system of state highway, and section 33.1-41.1 pertains to hard-surface road maintenance by cities or towns. *See* VA. CODE ANN. § 33.1-23.5:1, -41.1 (Repl. Vol. 2005 & Cum. Supp. 2008).

121. *See* Weaver v. Nat'l R.R. Passenger Corp., 863 F. Supp. 291, 294 (W.D. Va. 1994) (citing Virginian Ry. Co. v. Rodgers, 170 Va. 581, 584, 197 S.E. 476, 477 (1938)).

122. *Id.* (citing Chesapeake & Ohio Ry. Co. v. Pulliam, 185 Va. 908, 912–13, 41 S.E.2d 54, 56 (1947)); *see also* Southern Ry. Co. v. Abee's Adm'r., 124 Va. 379, 382–83, 98 S.E. 31, 32 (1919) (finding a crossing owned by a private furniture company within the scope of a Virginia statute regulating public crossings).

123. *See, e.g.*, Williams v. Fairfax County Redev. & Hous. Auth., 227 Va. 309, 314, 315 S.E.2d 202, 204–05 (1984) (stating that the General Assembly is "presumed to use the language as judicially defined" when it does not change the judicial definition in a subsequent statutory revision).

124. *See* Act of Mar. 6, 1996, ch. 114, 1996 Va. Acts 205 (codified at VA. CODE ANN. § 56-355.2 (Repl. Vol. 2007)).

2. Maintenance of Crossings in Good Repair—Virginia Code Sections 56-405 and 405.02

Virginia Code section 56-405 provides that "[a]t every crossing . . . of a public road by a railroad or of a railroad by a public highway at grade, it shall be the duty of the railroad company to keep such crossing in good repair to the full width of the public highway" and to otherwise maintain the crossing in good repair.[125] Similarly, Virginia Code section 56-405.02 provides:

> When adjustments are made to railway trackage grade which crosses public rights-of-way in use as public highway or street in any locality, the railway company making such adjustments to their trackage shall also . . . maintain a safe vertical relationship between trackage and street surfaces and to insure positive storm drainage.[126]

In essence, each of these statutory sections merely provides that railroads should keep the crossing in good repair where it crosses a public highway.

3. Use of Crossbucks—Virginia Code Section 56-405.2

Virginia Code section 56-405.2 requires that railroad crossing signs—more commonly known as crossbucks—be installed at every public railroad crossing in the Commonwealth of Virginia.[127] Specifically, section 56-405.2 provides:

> Every railroad company shall cause signal boards, hereinafter referred to as crossbucks, well supported by posts or otherwise and approved by the Department of Transportation at such heights as to be easily seen by travelers from both directions of the public highway, and not obstructing travel, containing in capital letters, at least five inches high, the inscription "railroad crossing," to be placed, and constantly maintained, at each public highway at or near, and on both sides of, each place where it is crossed by the railroad at the same level.[128]

The signs described within section 56-405.2 are the "X" shaped signs that contain the words "Railroad Crossing." Other signs that warn of upcoming railroad crossings are more commonly re-

125. VA. CODE ANN. § 56-405 (Repl. Vol. 2007).
126. VA. CODE ANN. § 56-405.02 (Repl. Vol. 2007).
127. VA. CODE ANN. § 56-405.2 (Repl. Vol. 2007).
128. *Id.*

ferred to as "advance warning signs" and are generally yellow in color.

The federal government has historically provided federal funds to encourage states to upgrade the warning devices present at public crossings around the country.[129] Where federal funds are used to upgrade a crossing warning device to an automatic warning device or even a reflectorized crossbuck, claims regarding the inadequacy of those warnings for motorists are preempted by federal law.[130] Because use of federal funds by the Commonwealth of Virginia to upgrade crossing warning devices is subject to approval by the FRA, successful and complete upgrades are given the blessing of the FRA and thus cannot be attacked as inadequate.[131]

In an effort to maximize the diligence of drivers at railroad crossings, Virginia outlaws erecting, moving, or placing a crossbuck anywhere other than around a public crossing.[132] Virginia Code section 56-408 provides that "[n]o device or sign which is in the form of a railroad crossing signboard shall be erected or permitted to remain on or near any of the public roads of this Commonwealth."[133]

4. Installation of Automated Warning Devices—Virginia Code Sections 56-406.1 to 406.2

Virginia Code section 56-406.1 governs the installation of automated warning devices at public crossings within the Commonwealth of Virginia. Section 56-406.1 provides:

> A railroad shall not unilaterally select or determine the type of grade *crossing warning* system to be installed at any *crossing* of a public highway and railroad at grade. The railroad shall only install or up-

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129. *See* Norfolk S. Ry. v. Shanklin, 529 U.S. 344, 350 (2000) (discussing the use of federal funds by the Tennessee Department of Transportation to install warning signs at railroad crossings).

130. *Id.* at 358 ("[23 C.F.R. s]ections 646.214(b)(3) and (4) 'cover the subject matter' of the adequacy of warning devices installed with the participation of federal funds. As a result, the FRSA pre-empts respondent's state tort claim that the advance warning signs and reflectorized crossbucks installed at the Oakwood Church Road crossing were inadequate.").

131. *See id.* at 359 ("Once the FHWA approved the project and the signs were installed using federal funds, the federal standard for adequacy displaced Tennessee statutory and common law addressing the same subject, thereby pre-empting respondent's claim.").

132. VA. CODE ANN. § 56-408 (Repl. Vol. 2007).

133. *Id.*

> grade a grade crossing warning system at any crossing of a public highway and railroad at grade pursuant to an agreement with the Virginia Department of Transportation or representative of the appropriate public road authority authorized to enter into such agreements.[134]

The language makes fairly clear that railroads in Virginia are without the legal authority to specify or install unilaterally any type of automatic warning device, thereby displacing any common-law duty to do so.

In *Chandler v. National Railroad Passenger Corp.*, the United States District Court for the Eastern District of Virginia was asked to interpret whether a previous version of Virginia Code section 56-406.1 displaced a railroad's common-law duty to erect additional warnings at "hazardous" public crossings.[135] The court noted that "[i]n Virginia, the common law remains in force except where it is changed by statutory or constitutional law."[136] The court also observed that "[t]he common law places upon railroads the responsibility for making railroad crossings safe . . . include-[ing] the obligation to discover crossings that are especially, extraordinarily, or extra-hazardous and to make them reasonably safe by erecting lights or other protective devices there."[137] In order for a statute to change the common law, the court reasoned, the "legislative intent to change the common law must be 'clear,' or 'plainly manifested.'"[138]

The court, claiming that the statute did not manifest an express intent to change the common law, held that "the language does not eradicate the long-standing, independent, common-law duty imposed on railroads."[139] Rather, it reasoned, the statute's focus was "on granting to certain governmental bodies authority to initiate a procedure for making railroad crossings safer in the

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134. VA. CODE ANN. § 56-406.1 (Repl. Vol. 2007) (emphasis added).

135. 882 F. Supp. 533, 534 (E.D. Va. 1995). There is nothing about the crossing at issue in this case that is hazardous, and it has not been deemed hazardous by the Commonwealth of Virginia.

136. *Id.*

137. *Id.* (citing Bangley v. Virginian Ry. Co., 195 Va. 340, 346, 78 S.E.2d 696, 700 (1953); John F. Ivory Storage Co. v. Atl. Coast Line R.R. Co., 187 Va. 857, 868–69, 48 S.E.2d 242, 248–49 (1948); Atl. Coast Line R.R. Co. v. Clements, 184 Va. 656, 667–68, 36 S.E.2d 553, 558 (1946)).

138. *Id.* (citing Hill v. Nicodemus, 979 F.2d 987, 990 (4th Cir. 1992); Griffith v. Raven Red Ash Coal Co., 179 Va. 790, 797, 20 S.E.2d 530, 533 (1942)).

139. *Id.* at 535.

'public interest' and for allocating costs between the railroad and government when the changes are required by the government."[140]

The following year, the General Assembly amended Virginia Code section 56-406.1 as follows:

> Section 56-406.1. Proceedings for installation and maintenance of automatically operated gates, signals and other automatic crossing warning devices.
>
> Railroads shall cooperate with the Virginia Department of Transportation and the Department of Rail and Public Transportation in furnishing information and technical assistance *to enable the Commonwealth to develop plans and project priorities for the elimination of hazardous conditions at any crossing of a public highway which crosses at grade* including, but not limited to grade crossing elimination, reconstruction of existing grade crossings, and grade crossing improvements. The Commonwealth shall provide each locality a listing of their grade crossing safety needs for its consideration. Information collected and analyses undertaken by the designated state agencies are subject to 23 U.S.C. § 409. *A railroad shall not unilaterally select or determine the type of grade crossing warning system to be installed at any crossing of a public highway and railroad at grade. The railroad shall only install or upgrade a grade crossing warning system at any crossing of a public highway and railroad at grade pursuant to an agreement with the Virginia Department of Transportation or representative of the appropriate public road authority authorized to enter into such agreements.* A railroad is not required but is permitted to upgrade, at its own expense, components of any public highway at grade warning system when such upgrade is incidental to a railroad improvement project relating to track, structures or train control systems.
>
> *When required by the Commonwealth Transportation Commissioner or representative of the appropriate public road authority*, every railroad company shall cause a grade crossing warning device including flashing lights approved by the Department of Transportation at such heights as to be easily seen by travelers, and not obstructing travel, to be placed, and maintained at each public highway at or near each place where it is crossed by the railroad at the same level. Such warning device shall be automatically activated by the approaching train so as to be clearly discernible to travelers approaching the railroad crossing from each direction at a distance of two hundred feet. Such warning devices shall be erected at the initiative of the appropriate public road authority *only when required by or-*

140. *Id.*

> *dinance or resolution adopted by the Commissioner or the appropriate public road authority thereof* stating that such political subdivision will pay the full initial installation cost of such warning devices and that maintenance costs will be fixed as provided in § 56-406.2. A certified copy of such ordinance or resolution shall be delivered to such railroad company, and such railroad company shall forthwith install such warning devices at the full initial cost of such public road authority. The cost of such installation and maintenance of such warning devices may be shared by agreement between such railroad company and the Commonwealth Transportation Commissioner or the appropriate public road authority, when initiating such installation. The railroad shall be responsible for the continuing maintenance of the warning devices.[141]

There can be little doubt that the General Assembly's amendment to the statute was specifically designed to address the lack of "clarity" in displacing the common law that was outlined by the court in *Chandler*. The new legislation specifically withdrew the permissive language of the statute and prohibited railroads from installing additional warning devices without first obtaining permission from the Commissioner of the Department of Transportation, thereby placing the determination and issue of additional warnings squarely within the discretion of the Commonwealth of Virginia. [142]

Even under the court's opinion in *Chandler*, the revised language proscribes claims of inadequate warnings at "hazardous" crossings in Virginia.[143] Specifically, the court noted that such claims would likely be precluded if the statute was worded as follows:

> With due regard for safety and for the integrity of operations by highway and railroad users, the highway agency and the railroad company are entitled to jointly occupy the right-of-way in the conduct of their assigned duties. This requires joint responsibility in the traffic control function between the public agency and the railroad. The determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority. Subject to such determination and selection, the design, installation and operation shall be in accordance with the national standards contained [in the Manual on Uniform Traffic Control Devices].[144]

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141. Act of Mar. 6, 1996, ch. 114, 1996 Va. Acts 205 (codified as amended at VA. CODE ANN. § 56-406.1 (Repl. Vol. 2007)) (emphasis added).

142. *Id.* at 213.

143. *See Chandler*, 882 F. Supp. at 536.

144. *Id.* (quoting MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES § 8A-1 (1988)).

The Supreme Court of Virginia has made clear that the General Assembly is presumed to know of judicial decisions affecting the law when revisions are made.[145] Because the language of Virginia Code section 56-406.1 is even more restrictive than the language cited by the Court as preclusive, it would appear that common-law claims of inadequate warnings at public crossings are precluded.[146]

5. Maintenance of Railroad Rights-of-Way—Virginia Code Section 56-411

Virginia Code section 56-411 provides that "[e]very railway company . . . shall be required to clear from its right-of-way trees and brush for 100 [feet] on each side of public road crossings at grade when such trees or brush would otherwise obstruct the view of approaching trains."[147] Not every piece of brush or vegetation is required to be cut back pursuant to this statute, only those that obstruct a motorist's view of approaching trains.[148] Where brush is not cut back, however, a motorist's duty under Virginia law actually *increases*, and a failure to exercise due care could result in any claim for injury being barred under Virginia's contributory negligence doctrine.[149]

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145. *See* Philip Morris USA, Inc. v. Chesapeake Bay Found., Inc., 273 Va. 564, 576, 643 S.E.2d 219, 225 (2007) ("In interpreting a statute, we presume that the General Assembly acted with full knowledge of the law in the area in which it dealt." (citing United Masonry, Inc. v. Riggs Nat'l Bank, 233 Va. 476, 480, 357 S.E.2d 509, 512 (1987); Powers v. County Sch. Bd. of Dickenson County, 148 Va. 661, 668, 139 S.E. 262, 264 (1927))).

146. *See* Oraee v. Breeding, 270 Va. 488, 503, 621 S.E.2d 48, 55–56 (2005). ("[The Court] presume[s] that the legislature chose, with care, the words it used when it enacted the statute. Courts cannot add language to the statute the General Assembly has not seen fit to include. Nor are they permitted to accomplish the same result by judicial interpretation. Where the General Assembly has expressed its intent in clear and unequivocal terms, it is not the province of the judiciary to add words to the statute or alter its plain meaning." (quoting Jackson v. Fid. & Deposit Co., 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005))).

147. VA. CODE ANN. § 56-411 (Repl. Vol. 2007).

148. *Id.*

149. *See* Wright v. Norfolk & W. Ry. Co., 245 Va. 160, 171, 427 S.E.2d 724, 730 (1993) ("[A] railroad track is a *proclamation of danger* and the operator of a vehicle approaching a grade crossing *'is required to look and listen at a time and place when both looking and listening will be effective,'* intelligently using both eyes and ears." (quoting Norfolk & W. Ry. Co. v. Epling, 189 Va. 551, 557, 53 S.E.2d 817, 820 (1949)) (emphasis added)).

6. Obstruction of Railroad Crossings—Virginia Code Section 56-412.1

Virginia Code section 56-412.1 provides that "[i]t shall be unlawful for any railroad company . . . to obstruct for a longer period than five minutes the free passage on any street or road by standing cars or trains across the same."[150] The Supreme Court of Virginia has made clear that Virginia Code section 56-412.1 must only be read to apply to trains that are standing still rather than moving, because any application of the statute to moving trains would run afoul of the Commerce Clause of the United States Constitution.[151]

More recently, courts in other jurisdictions have concluded that statutes like Virginia Code section 56-412.1 are preempted by the FRSA.[152] In *Village of Mundelein v. Wisconsin Central Railroad*, the Supreme Court of Illinois was asked to determine whether the FRSA preempted Mundelein's statute prohibiting the blocking of railroad crossings.[153] The court noted that "[t]he plain language of the [Village] ordinance applies exclusively to railroad operations, requiring rail carriers to prevent obstructions of highway grade crossings except in certain specified circumstances."[154] The court noted that the FRSA's "regulations on train speed, air-brake testing, and grade crossing safety work together to regulate and control the movement of trains at grade crossings

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150. VA. CODE ANN. § 56-412.1 (Repl. Vol. 2007). Sometimes local police officers will cite train operators or crewmembers for violating this section, but such citations are improper under the statute because only *railroad companies* may be fined under its terms. *See id.* The lack of any statutory language corresponding to that for overweight citations making service upon the driver service upon the company, such citation of crewmembers is improper and should be dismissed. *Compare id. with* VA. CODE ANN. § 46.2-1132 (Repl. Vol. 2005) ("Any person, whether resident or nonresident, who permits the operation of a motor vehicle in the Commonwealth by his agent or *employee shall be deemed to have appointed the operator of such motor vehicle his statutory agent for the purpose of service of process* in any proceeding against such person agrowing out of any weight violation involving such motor vehicle.") (emphasis added).

151. *See* Ocean View Improvement Corp. v. Norfolk & W. Ry. Co., 205 Va. 949, 954, 140 S.E.2d 700, 703 (1965) (concluding that if blocked crossing statutes "were construed to apply to moving trains, the ordinance[s], in effect, would or could limit the length of a train and thereby unreasonably hinder the free flow of commerce between the states in contravention of the commerce clause of the Federal Constitution").

152. *See, e.g.*, Vill. of Mundelein v. Wis. Cent. R.R., 882 N.E.2d 544, 553–54 (Ill. 2008) (listing state and federal decisions considering whether blocked crossing laws are preempted by the FRSA).

153. *Id.* at 546.

154. *Id.* at 550.

. . . [and] control whether a train may be moved and the speed of a moving train."[155] As a result, "the overall structure of these regulations substantially subsumes the subject matter of the movement of trains at grade crossings . . . [and] manifest[s] a clear intent to preempt the Village's ordinance on that subject matter."[156] Other courts around the country have reached similar conclusions, all concerning statutes virtually identical to Virginia Code section 56-412.1.[157]

7. The Sounding of Warnings at Public Crossings—Virginia Code Sections 56-414 and 56-416

There is no mistaking the sound of a locomotive horn (historically referred to as a whistle, dating to when engines were operated by steam). Virginia Code section 56-414 regulates the sounding of locomotive horns at public crossings, and provides:

> Every railroad company shall provide each locomotive passing upon its road with a bell of ordinary size and steam whistle or horn, and such whistle or horn shall be sharply sounded *outside cities and towns* at least twice at a distance of not less than 300 yards nor more than 600 yards from the place where the railroad crosses upon the same level any public highway or crossing, and such bell shall be rung or whistle or horn sounded continuously or alternately until the locomotive has reached such highway crossing, *and shall give such signals in cities and towns as their local governing bodies may require.*[158]

The specific language of the statute makes clear that its provisions do not apply to the sounding of bells and whistles within the jurisdictional limits of cities or towns, and practitioners must look to the city's or town's ordinances to determine whether such warnings are required.[159] Virginia Code section 56-416 provides

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155. *Id.* at 553.

156. *Id.*

157. *See, e.g.*, CSX Transp., Inc. v. City of Plymouth, 92 F. Supp. 2d 643, 653 (E.D. Mich. 2000), *aff'd*, 283 F.3d 812, 814 (6th Cir. 2002); Krentz v. Consol. Rail Corp., 910 A.2d 20, 35 (Pa. 2006).

158. VA. CODE ANN. § 56-414 (Repl. Vol. 2007) (emphasis added).

159. *See id.*; Norfolk & W. Ry. Co. v. Gilliam, 211 Va. 542, 545–46, 178 S.E.2d 499, 502 (1971) ("The warnings required by Code § 56-414 are *not applicable to public grade crossings within the corporate limits of cities and towns.*") (emphasis added); *see also* Norfolk & W. Ry. Co. v. Wright, 217 Va. 515, 519, 229 S.E.2d 890, 893 (1976); Norfolk S. Ry. Co. v. Lassiter, 193 Va. 360, 363, 68 S.E.2d 641, 643 (1952); Atl. Coast Line R.R. Co. v. Clements, 184 Va. 656, 665, 36 S.E.2d 553, 557 (1946); S. Ry. Co. v. Davis., 152 Va. 548, 551, 147 S.E. 228, 228 (1929); Norfolk & W. Ry. Co. v. Wilkes, 137 Va. 302, 306, 119 S.E. 122, 124

that where the signals required by Virginia Code section 56-414 have not been given, then Virginia's contributory negligence doctrine may not be used as a bar to recovery.[160] Rather, a motorist's or a pedestrian's negligence may only be used in mitigation of damages—i.e., comparative negligence applies.[161]

Recently, however, the FRA promulgated new regulations governing the sounding of warning signals by locomotives at public crossings in the United States.[162] The express purpose of the new regulations is "to provide for safety at public highway-rail grade crossings by requiring locomotive horn use at public highway-rail grade crossings except in quiet zones established and maintained in accordance with this part."[163] Further, the FRA made clear that the new provisions are applicable to the "sounding [of] locomotive horns when locomotives approach and pass through public highway-rail grade crossings."[164] Most importantly, the FRA's regulations specify that "issuance of this part preempts any State law, rule, regulation, or order governing the sounding of the locomotive horn at public highway-rail grade crossings, in accordance with 49 U.S.C. [§] 20106."[165] As discussed previously, the FRA has clearly manifested its intent to cover completely the subject of sounding warning devices at public railroad crossings.[166] Given the clear regulatory mandate, it appears that Virginia Code sections 56-414 and 56-416 have been preempted by federal regulation.

8. The Standing Train Doctrine—Virginia Has Remained Silent

There are enough cases involving motorists running into the side of a stopped train that courts across the country have crafted a legal doctrine to deal specifically with those cases—the "standing train" doctrine.[167] Essentially, the standing train doctrine provides that "in the absence of statute, or special conditions of hazard to motorists, there is no duty on the railway company to

(1923).

160. VA. CODE ANN. § 56-416 (Repl. Vol. 2007).

161. *Id.*; *see also Gilliam*, 211 Va. at 546, 178 S.E.2d at 503.

162. 49 C.F.R. §§ 222.1–222.59 (2007).

163. *Id.* § 222.1.

164. *Id.* § 222.3.

165. *Id.* § 222.7.

166. *See* Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344, 358–59 (2000).

167. *See* 65 AM. JUR. 2D *Railroads* § 367, at 445 (2001).

provide special warning or safeguards to motorists . . . to prevent collisions with cars standing on or moving across a public grade crossing."[168] Courts have reasoned that "'[u]nder ordinary conditions the presence of a railroad train or car upon a crossing is adequate notice to a traveler approaching the crossing and so the railroad employees need not give additional notice or warning of the'" train in the crossing.[169] In fact, an increasing number of courts throughout the country have begun to follow the standing train doctrine.[170]

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168. Wojciechowski v. Louisville & Nashville R.R. Co., 173 So. 2d 72, 77 (Ala. 1965).

169. Union Pac. R.R. Co. v. Cogburn, 315 P.2d 209, 212–13 (Colo. 1957) (quoting Annotation, *Liability of Railroad for Injury Due to Road Vehicle Running into Train or Car Standing on Highway Crossing*, 161 A.L.R. 111, 127–28 (1946)).

170. *See, e.g.*, Davis v. Burlington N., Inc., 663 F.2d 1028, 1030 (10th Cir. 1981) (applying Oklahoma law) ("Ordinarily, the presence of a train or railway cars on a crossing, whether moving or stationary, is sufficient notice to a driver of a vehicle on the highway of such obstruction and, in the absence of unusual circumstances, the operating railway company is not under any duty to provide any other notice or warning." (quoting Kan., Okla. & Gulf Ry. Co. v. Painter, 333 P.2d 547, 548 (Okla. 1953))); Atl. Coast Line R.R. Co. v. Kammerer, 205 F.2d 525, 526 (5th Cir. 1953) (applying Georgia law) ("[T]he trial court erred in refusing to charge . . . that when a train is standing on a crossing, it is of itself ordinarily sufficient notice of the danger, and it is unnecessary to use gates or flagmen . . . to call attention to that which every prudent person should see."); Sisson v. S. Ry. Co., 68 F.2d 403, 406 (D.C. Cir. 1933) (observing that the failure of a railroad to maintain a light at a crossing occupied by a standing train is not actionable negligence); Dunn v. Baltimore & Ohio R.R. Co., 537 N.E.2d 738, 741 (Ill. 1989) ("[A] train stopped at a crossing is generally held to be adequate notice and warning of its presence . . . and the railroad is under no duty to give additional signs, signals, or warnings."); Jones v. Atchison, Topeka & Santa Fe Ry. Co., 282 P. 593, 594 (Kan. 1963) ("There is no statute which requires a railway company to warn travelers there is a freight train across the highway when those conditions exist, and a railway company rests under no common-law duty to take such precautions for the benefit of drivers of auto vehicles."); Ill. Cent. R.R. Co. v. Maxwell, 167 S.W.2d 841, 842 (Ky. Ct. App. 1943) ("The railroad company is justified in assuming that motorists will have lights and will drive so as to be able to see the train and bring the automobiles to a stop."); Chesapeake & Ohio Ry. Co. v. Switzer, 122 S.W.2d 967, 969 (Ky. Ct. App. 1938) ("Ordinarily, the presence of a train on a grade crossing is a sufficient warning of danger to a traveler on the highway."); Allen v. Grand Trunk W. R.R. Co., 53 N.W.2d 607, 608 (Mich. 1952) ("[T]he presence of a railroad train on a crossing is notice and warning to those using the highway, and . . . railroads will only be chargeable with negligence if there are unusual conditions which require additional warnings."); Clark v. Columbus & Greenville Ry. Co., 473 So.2d 947, 950 (Miss. 1985) ("We have too many cases recognizing that ordinarily a train legitimately stopped or standing over a public crossing because of its tremendous size is all the warning the traveling public is entitled to."); Los Angeles & Salt Lake R.R. Co. v. Lytle, 47 P.2d 934, 937 (Nev. 1935) ("It may be stated as a general principle of law that a railroad company, in the absence of a statute requiring lights or other precautions, may not be chargeable with actionable negligence merely because its train is at rest on a crossing . . . and is run into by an auto traveling on the highway."); Killen v. N.Y. Cent. R.R. Co., 232 N.Y.S. 76, 79 (N.Y. Sup. Ct. 1928) ("Here there is nothing to indicate that the condition created at the crossing by the standing train was especially hazardous, and defendant was not bound to anticipate so uncommon an accident."); Young v. Baltimore & Ohio R.R. Co., 146 S.E.2d 441, 444 (N.C. 1966) (applying Ohio law)

No case has been presented to a court of record in Virginia that would provide any guidance as to what the rule would be in cases involving a standing train on a crossing. The Supreme Court of Virginia has clearly stated that even where automatic warning signals are not working properly, a driver "must still exercise care to use his senses and give heed to other existing warnings sufficient of themselves to tell him the train *is coming*."[171] Specifically, where a driver fails to utilize some other means of ascertaining safety at a crossing—even where the automatic devices are not functioning—reasonable minds may find that the driver caused the accident.[172] The court has reasoned that "[n]either gongs nor gates relieve a traveler from the exercise of ordinary care and caution."[173] Indeed, the court has even precluded recovery in those cases in which a driver was directed to cross by a flagman, but failed to look for the presence of a train himself.[174]

Given the court's firm stance on requiring motorists to remain diligent at all railroad crossings for the *approach* of trains—even those with automated warning devices—it would appear that the failure to detect the presence of a train in the crossing would be negligence on the part of the driver as a matter of law. Given that all drivers in Virginia are obligated to look and listen at all railroad crossings when looking or listening would be effective,[175] Virginia law and precedent appear consistent with the application of the standing train doctrine.

("A passenger in a motor vehicle which is driven into the side of a train standing . . . over a grade crossing cannot in the absence of special circumstances rendering the crossing peculiarly hazardous recover from the railroad for injuries received.") (internal quotation marks omitted); Fort Worth & Denver Ry. Co. v. Williams, 375 S.W.2d 279, 283 (Tex. 1964) ("[T]he presence of a train on a crossing blocking a public highway does not in itself constitute an extra hazardous crossing."); Hendrickson v. Union Pac. R.R. Co., 136 P.2d 438, 441 (Wash. 1943) ("The railroad company . . . has the right to stop its train across the highway and permit a car to remain thereon for a reasonable length of time, and, if there are no unusual circumstances, it is not chargeable with negligence if guards are not stationed, or lights or other signals are not placed, so as to warn travelers on the highway of the presence of the train or car thereon.").

171. S. Ry. Co. v. Thompson, 186 Va. 106, 113, 41 S.E.2d 456, 459 (1947) (emphasis added).

172. *See id.*

173. Norfolk & W. Ry. Co. v. Wellons, 155 Va. 218, 222, 154 S.E. 575, 577 (1930).

174. Norfolk & W. Ry. Co. v. Benton, 160 Va. 633, 642–43, 169 S.E. 560, 563–64 (1933).

175. *See* Wright v. Norfolk & W. Ry. Co., 245 Va. 160, 171, 427 S.E.2d 724, 730 (1993) ("[A] railroad track is [itself] a *proclamation of danger* and the operator of a vehicle approaching a grade crossing 'is required to look and listen at a time and place when both looking and listening will be effective,' intelligently using both eyes and ears." (quoting Norfolk & W. Ry. Co. v. Epling, 189 Va. 551, 557, 53 S.E.2d 817, 820 (1949)) (emphasis added)).

9. The Duty of Passengers in Cars Driven over Public Crossings

The Supreme Court of Virginia does not relieve passengers of the duty to exercise reasonable care for their own safety at railroad crossings.[176] The duty of a passenger in a car that is about to be driven over a railroad crossing is clearly defined in a number of cases,[177] and basically requires a passenger to look and listen for approaching trains and warn the driver of the near approach or presence of a train.[178]

In *Norfolk & Western Railway Co. v. Gilliam*, two passengers in a vehicle were killed when the vehicle in which they were riding was struck by a freight train at a railroad crossing owned and operated by the defendant.[179] One of the passengers was seated next to the right front door, while the other was seated next to the right rear door.[180] The driver testified that she stopped the vehicle close to the defendant's track, "looked and listened, and then proceeded slowly onto the track," where she was struck by the defendant's train.[181] There was conflicting evidence at trial regarding whether the horn of the train was blown and whether the bell was rung.[182] The jury entered judgment in favor of the passengers' estates.[183] On appeal, the Supreme Court of Virginia reversed the decision.[184]

The court found that "[a]ssuming, but not deciding, that defendant failed to meet its common law dut[ies] . . . and that such a failure was a proximate cause of the collision . . . the decedent[s] . . . were both contributorily negligent as a matter of law and . . . their negligence bars a recovery."[185] The court stated that both passengers "were in a better position to see defendant's train

176. *See* Butler v. Darden, 189 Va. 459, 465–66, 53 S.E.2d 146, 149 (1949).

177. *See, e.g.*, Norfolk & W. Ry. Co. v. Gilliam, 211 Va. 542, 546–47, 178 S.E.2d 499, 503 (1971); Mann v. Norfolk & W. Ry. Co., 199 Va. 604, 611, 101 S.E.2d 535, 540 (1958), *Butler*, 189 Va. at 465, 53 S.E.2d at 149; Hancock v. Norfolk & W. Ry. Co., 149 Va. 829, 835, 141 S.E. 849, 850 (1928).

178. *See Gilliam*, 211 Va. at 547, 178 S.E.2d at 503.

179. *Id.* at 543, 178 S.E.2d at 500–01.

180. *Id.* at 544, 178 S.E.2d at 501.

181. *Id.*

182. *See id.*, 178 S.E.2d at 501–02.

183. *Id.* at 543, 178 S.E.2d at 501.

184. *Id.* at 546–47, 178 S.E.2d at 503.

185. *Id.*

than was the driver with whom they were riding."[186] The court also stated that both passengers "were awake and in possession of their faculties."[187] Thus, according to the court, "there was nothing for them to do but to look and listen."[188] The court concluded that in such circumstances, passengers are "charged with the duty of exercising reasonable care for their own safety . . . [which] entails looking and listening when it will be effective so that the driver can be warned."[189] What is of particular interest in this case is the court's treatment of front and rear passengers similarly, and the imposition of the same duty on both.[190]

In *Mann v. Norfolk & Western Railway Co.*, the plaintiff's decedent was a passenger in a truck whose right side was struck by the protruding part of a railroad's train.[191] At the time of the collision, the truck was three to four feet from the track.[192] The driver of the truck and the passenger were both familiar with the crossing and the train schedule.[193] At trial, there was evidence that the approaching train could have been seen from eighteen feet back from the track, "which would have given a careful driver ample time to stop in safety."[194] The trial court struck the plaintiff's evidence and entered judgment for the railroad.[195] The plaintiff subsequently appealed.[196]

On appeal, the Supreme Court of Virginia found that "[p]laintiff's decedent was in a better position to see the train than [the driver] was for he was seated on the right side of the cab, from which direction the train was approaching."[197] The court also found that the plaintiff's decedent "was wide awake and in possession of all his faculties."[198] Thus, according to the court, "[t]here was nothing for him to do but look and listen."[199]

186. *Id.* at 547, 178 S.E.2d at 503.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 546–47, 178 S.E.2d at 503.
191. 199 Va. 604, 606–07, 101 S.E.2d 535, 537 (1958).
192. *Id.* at 607, 101 S.E.2d at 537.
193. *Id.* at 606, 101 S.E.2d at 536–37.
194. *Id.* at 611, 101 S.E.2d at 540.
195. *Id.* at 605, 101 S.E.2d at 536.
196. *See id.*
197. *Id.* at 611, 101 S.E.2d at 540.
198. *Id.*
199. *Id.*

The court stated that the plaintiff's decedent "was charged with the duty of exercising reasonable care for his own safety," and if the plaintiff's decedent, who was wide awake, had looked and listened, he would have seen the approaching train.[200] The court concluded, therefore, that "the evidence clearly shows plaintiff's decedent was guilty of contributory negligence as a matter of law which bars a recovery."[201]

In *Butler v. Darden*, the plaintiff's decedent "was killed when the front end of the automobile in which he was riding as a guest" was hit by a train at a railroad crossing.[202] The plaintiff brought suit against both the driver of the vehicle and the railroad.[203] To sustain recovery against the driver, the plaintiff was required to prove that the driver was guilty of gross negligence because the decedent was a guest passenger in the car.[204] The jury rendered a verdict in favor of the plaintiff, which was subsequently set aside by the trial court.[205] The plaintiff appealed the court's decision.[206]

The Supreme Court of Virginia affirmed the judgment of the trial court.[207] The court concluded that, although there was evidence the jury could have used to find gross negligence on the part of the driver, the decedent was guilty of contributory negligence because he failed to look and listen and warn the driver of the approaching train.[208] The court found that both the driver and the decedent were familiar with the crossing.[209] Although neither the driver nor the decedent saw the train until their automobile was on the track, the court found that the decedent had at least forty-five feet to ascertain such information.[210] In addition, the court found the decedent was in the same or better position than the driver to observe the danger from the train.[211] Having failed to take any precautions for his own safety, the court

200. *Id.*
201. *Id.*
202. 189 Va. 459, 461, 53 S.E.2d 146, 147 (1949).
203. *Id.* at 462, 53 S.E.2d at 147.
204. *Id.* at 464, 53 S.E.2d at 148.
205. *Id.* at 462, 53 S.E.2d at 147.
206. *Id.*
207. *Id.* at 471, 53 S.E.2d at 152.
208. *Id.* at 465–66, 53 S.E.2d at 148–49.
209. *Id.* at 465, 53 S.E.2d at 148–49.
210. *Id.*, 53 S.E.2d at 149.
211. *Id.*

held that the plaintiff's decedent was guilty of contributory negligence.[212]

In *Hancock v. Norfolk & Western Railway Co.*, the plaintiff was injured at a railroad crossing when the vehicle in which she was riding as a passenger collided with a passenger train of the railroad.[213] At the time of the accident, the plaintiff was sitting on the lap of another passenger in the front seat on the vehicle.[214] The plaintiff contended that the railroad "was negligent in approaching the crossing without giving timely warnings to travelers on the highway and particularly at this place which was permitted to be and remain[ed] in a dangerous condition as a direct result of which she was injured."[215] At trial, the railroad demurred to the evidence, which was sustained by the court.[216] The plaintiff subsequently appealed.[217]

On appeal, the Supreme Court of Virginia determined that the plaintiff's "right of recovery must turn upon the question of the plaintiff's contributory negligence, which . . . pre-supposes the primary negligence of the [railroad], and is quite independent of the negligence of the driver of the car which could not under the facts of the case be imputed to the plaintiff."[218] The court noted that because a railroad track is a signal of danger, a person's "failure to exercise reasonable precaution for his own protection is contributory negligence, and bars a recovery."[219] The court found that "had the plaintiff looked for the on-coming train, as was her duty to do, it could have been seen in ample time for her to have cautioned the driver of the impending peril."[220] The court held that the plaintiff was "clearly guilty of concurring negligence,

212. *See id.* at 467, 53 S.E.2d at 150.

213. 149 Va. 829, 831–32, 141 S.E. 849, 849 (1928).

214. *Id.* at 832, 141 S.E. at 849.

215. *Id.*

216. *Id.* at 831, 141 S.E. at 849.

217. *Id.*

218. *Id.* at 834, 141 S.E. at 850.

219. *Id.* at 835, 141 S.E. at 850.

220. *Id.* at 837, 141 S.E. at 851. The court found that the plaintiff was riding on the lap of another passenger, which put her farther to the front of the car than any other passenger, and that the accident occurred during the day. *Id.* at 838, 141 S.E. at 851. According to the court, had the plaintiff looked she could have seen the train further up the track than the driver of the vehicle, and sitting across the lap of another passenger provided no excuse for disregarding this duty. *Id.*

without which in all probability she would not have sustained the injuries complained of."[221]

Once again, this line of cases reiterates the Supreme Court of Virginia's long history of requiring significant diligence on the part of drivers *and* passengers at railroad crossings. Although cases may be factually different from one another, the court has historically refused to accept many excuses for a vehicle occupant's failure to detect a train at a crossing.

B. *Private Railroad Crossings*

Unlike public railroad crossings, which are heavily regulated by both the state and federal governments, private railroad crossings are typically governed primarily by private contract and common law. Private crossings can be anything from an entrance into a facility to an individual person's driveway. Though there is currently no federal or state regulation of private crossings, the FRA has issued a notice of the Agency's intent to begin regulating private crossings.[222]

The Supreme Court of Virginia has made clear that

> '[only] constant or frequent use by the public of a private crossing, with the knowledge and acquiescence of the railway company, *may give* to such a passageway the attributes of a public crossing and cast upon the railway company *the duty of exercising ordinary care for the safety of such users.*'[223]

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221. *Id.* at 844, 141 S.E. at 853.

222. *See* Safety of Private Highway-Rail Grade Crossings; Notice of Safety Inquiry, 72 Fed. Reg. 18,730, 18,730 (Apr. 13, 2007). The FRA has issued the following notice:

> FRA intends to solicit oral statements from private crossing owners, railroads, and other interested parties on issues related to the safety of private highway-rail grade crossings, which will include, but not be limited to, current practices concerning the responsibility for safety at private grade crossings, the adequacy of warning devices at private crossings, and the relative merits of a more uniform approach to improving safety at private crossings. FRA has also opened a public docket on these issues so that interested parties may submit written comments for public review and consideration.

Id. Obviously federal control over private railroad crossings would come under the FRSA and would trigger the same preemptive effect of other regulations promulgated thereunder. This is something for practitioners to consider in the near future as federal regulations of private railroad crossings will impact real estate law, commercial law, and obviously railroad law.

223. Norfolk & W. Ry. Co. v. Fletcher, 198 Va. 397, 401, 94 S.E.2d 251, 254 (1956) (quoting Chesapeake & Ohio Ry. Co. v. Faison, 189 Va. 341, 345, 52 S.E.2d 865, 867

Thus, where the crossing is private in nature and the injured party is "not within the category of those persons for whose use the crossing was installed, he [is] at best a bare licensee on the property of the Railway Company and [takes] the crossing as he found it."[224] The court's language is particularly telling regarding the duty at a private crossing—constant use by the public may "cast upon the railway company the duty to exercising ordinary care for the safety of such users."[225] In other words, where a crossing is not public in nature, there is no duty on the part of the railroad company to exercise ordinary care for the safety of others.[226]

This is consistent with precedent from the Supreme Court of Virginia concerning private crossings. In *Chesapeake & Ohio Railway Co. v. Faison*, for example, the court concluded that the defendant "owed [the plaintiff] no duty to keep the crossing in a reasonably safe condition, free of obstruction, or to give him warning of the presence of the gate."[227] The railroad is "only liable to a licensee for willful and wanton injury which may be inflicted by the gross negligence of its agents and employees."[228] Where a party has entered onto the track or onto a private crossing, the court has ruled,

> It is not the duty of a railroad company to have a lookout on its front car . . . . A railroad company does not owe to a licensee the duty of running its train in a particular manner, or at a particular rate of speed, and is under no obligation to keep a lookout on its car, or *ring its bell, or to blow its whistle*, and the mere failure to do any or all of these things does not give him a right of action.[229]

(1949)) (emphasis added).

224. *Faison*, 189 Va. at 347, 52 S.E.2d at 868.

225. *Fletcher*, 198 Va. at 401, 94 S.E.2d at 254 (citation omitted).

226. *See id.*

227. 189 Va. at 347, 52 S.E.2d at 868.

228. Ingle v. Clinchfield R.R. Co., 169 Va. 131, 137, 192 S.E.782, 784 (1937); *see also* Chesapeake & Ohio Ry. Co. v. Bullington, 135 Va. 307, 318, 116 S.E. 237, 240 (1923); Chesapeake & Ohio Ry. Co. v. Saunders, 116 Va. 826, 833, 83 S.E. 374, 376 (1914); Harlow v. Chesapeake & Ohio Ry. Co., 108 Va. 691, 692, 62 S.E. 941, 942 (1908); Norfolk & W. Ry. Co. v. Stegall, 105 Va. 538, 542, 54 S.E. 19, 20–21 (1906); Hortenstein v. Virginia-Carolina Ry. Co., 102 Va. 914, 921, 47 S.E. 996, 998 (1904); Norfolk & W. Ry. Co. v. Wood, 99 Va. 156, 159, 37 S.E. 846, 847–48 (1901); Nichols v. Wash., Ohio & W. R.R. Co., 83 Va. 99, 102, 5 S.E. 171, 172–73 (1887).

229. *Ingle*, 169 Va. at 138, 192 S.E. at 785 (emphasis added); *see also Faison*, 189 Va. at 347, 52 S.E.2d at 868 (concluding that the driver's usage of the private crossing rendered him a bare licensee and the railroad owed no duty to him other than not to engage in willful misconduct).

Although the precedent discussed above generally explains the obligations of the parties at a private railroad crossing, these obligations can be altered or changed by contract. In the absence of such contract, however, users of private railroad crossings are tasked with exercising diligence—perhaps even more than at public crossings—because their status as bare licensees entitles them to nothing more than protection from intentional harm on the part of the railroad.[230]

CONCLUSION

This article explored railroad law in Virginia over more than just the preceding year. Due to the length of time since a piece has been written on the topic, this article not only discussed recent changes but also the progression and development of railroad law in Virginia in recent years. The unique interplay of state and federal law in this area of the law can be a daunting task for practitioners who do not specialize in this area but find themselves with a case involving Virginia's railroads. This area of the law is constantly changing, and thus it is important to reassess the status of the law any time a case is presented involving railroad matters.

230. *See Faison*, 189 Va. at 347, 52 S.E.2d at 868.

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