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**THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The issue the instant matter raises before this Court is whether a party waives its right to appeal a Trial Court's pre-trial ruling excluding evidence when there was no proffer of the excluded evidence during trial. Below, the Sixth District Court of Appeals held that any error relating to the pre-trial exclusion of evidence was waived by the Appellant herein because he failed to proffer the subject evidence during trial.

The Trial Court record is clear that a proper proffer of the excluded evidence did not occur. Indeed, Appellant does not argue that the excluded evidence was properly proffered during trial pursuant to Evid.R. 103(A)(2). Instead, Appellant argues that the requirement to proffer the excluded evidence was somehow excused in this case. Appellant requests that this Court cannot ignore the mandates of Evid.R. 103(A)(2), which conclusively establishes that he is not entitled to any further relief by this Court.

The mere fact that a procedural rule resulted in a waiver of an appealable issue does not necessarily create to a case of public or great general interest or to a substantial constitutional question justifying the grant of jurisdiction. Procedural rules established by the Courts and Legislatures, provide for orderly and uniform progression of civil actions, criminal actions, appellate actions, as well as the presentation of evidence during trials. Indeed, procedural rules ensure that all parties are given equal treatment under the law and to prevent subjecting all parties to arbitrary and constantly changing rules. These are not intended to be traps for the unwary, but to promote efficient and truthful proceedings. When a procedural rule has been violated by one party, the violation cannot be ignored because the offending party feels the results are "unjust."

The Appellant has insisted that the instant action is one of public or great interest for two reasons: (1) the Ohio Rule of Evidence, which sets forth the requirements for an offer of proof when evidence is excluded during a trial, does not conserve judicial resources and encourages matters to be decided upon procedural grounds, rather than upon their merits; and (2) the Trial Court made a substantive “final” ruling under the Federal Employers’ Liability Act, 45 U.S.C. § 51 *et seq.* (Hereinafter “FELA”), which denied a substantial right granted to the Appellant-Plaintiff under federal law and was ignored by the Appellate Court.

Appellant has also claimed that this matter involves a substantial constitutional question relating to an alleged denial of procedural due process. Appellant contends that the Court of Appeals denied him procedural due process when it allowed Appellee for the first time at oral argument to raise the issue of Appellant’s waiver of any appealable issue. This action by the Court of Appeals allegedly deprived the Appellant of an opportunity to brief and argue the issue before the Court of Appeals. None of Appellant’s proffered arguments justify the granting of jurisdiction over this matter.

Appellant has argued at length that this Court must first, grant jurisdiction over this matter and second, effectuate a change in the procedural processes contained within the Ohio Rules of Evidence which would excuse his failure to proffer the subject evidence at trial. *Appellant’s Memorandum in Support of Jurisdiction* at 1. In fact, Appellant requests that this Court **retroactively** adopt and incorporate the current language of Federal Rule of Evidence 103(a) into Ohio Rule 103(A)(2). *Id.* at 3. The current version of Federal Rule of Evidence 103(a) contains an additional sentence that the Ohio rule does not. The additional language reads as follows:

\*\*\*Once the court makes a **definitive ruling** on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

Fed. R. Civ. P. 103(a) (2000 Advisory Committee Notes) (emphasis added). The Federal Rules were amended due to a split in the Circuit Courts regarding the need for a proffer of evidence during trial. *Id.* There is no such conflict in Ohio as this Court requires proffers of excluded evidence during trial to preserve the record for appeal. Evid.R. 103(A)(2); *State v. Grubb* (1986), 28 Ohio St.3d 199, 203.

Appellant has requested that this Court either retroactively append this language to the current version of Ohio Evid.R. 103(A)(2) or read this additional language into the current rule because as written, the rule favors decisions based upon form and not substance. *See Appellant's Memorandum in Support of Jurisdiction* at 1-4. There is no evidence in the record that the Trial Court made a **definitive ruling** regarding the exclusion of the subject evidence, as required by the additional language of the Federal Rule. Therefore, even if this Court were able to retroactively amend the Ohio Rules of Evidence directly from the bench, Appellant's arguments herein still fail.

Appellant contends that the Trial Court's interlocutory ruling in connection with a separate and distinct motion *in limine*, was revisited on the morning of trial, making the previous interlocutory ruling a final appealable order. *Id.* at 1, 2, 3, 4, 7-10. Despite Appellant "extensively [briefing] his position regarding his intention..." to ask questions of his first witness, Mr. Williams, about the previously excluded evidence, as well as his intent to obtain a "final" ruling on the previous interlocutory ruling, there is no evidence in the record that reflects these intents. Appellant contends that one question, which was asked of the Trial Court while it was making its ruling on the motion *in limine* then before it, somehow was a request for a "final"

or “definitive ruling” on the prior motion. *Id.* at 1. Appellant argues that his counsel readdressed the September 2, ruling through the following:

MR. THOMPSON: And then the question you’re not allowing me to show is that even beforehand there were the total closed clipped – closed handled clips to hold the EOT –

THE COURT: That’s correct.

MR. THOMPSON: - and I obviously take exception to that.

*Tr.* 3-4. However, there is nothing in the record that supports Appellant’s interpretation that this question was an express request for a “final” ruling on a prior motion *in limine*. Without such a request, Appellant’s arguments would fail even if the additional language of the Federal Rules of Evidence, were read into the Ohio Rules of Evidence.

In addition, even had the Appellant requested and had the Trial Court given a “final” ruling prior to the commencement of the trial, Appellant’s sole authority that such a “final” ruling excuses his failure to proffer the evidence during trial is nothing more than this Court’s footnoted dicta in *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 86 n 5. This Court has not cited this dictum as authority for any subsequent opinions. In fact, this Court’s often cited holding in *State v. Grubb*, requiring a proffer of excluded evidence at trial, was made subsequent to the *Huffman* case. Again, in *Huffman* there was an express request for a “final” ruling on the matter prior to trial, which is lacking herein.

In addition to his invitation to this Court to expand its dicta in a prior ruling, Appellant contends that the instant matter is of great public or general interest because the Appellate Court’s finding of waiver ignores a substantial right under federal law and greatly harms railroad workers who are protected by the FELA. *Appellant’s Memorandum in Support of Jurisdiction* at 4. In other words, the Appellant is requesting that plaintiffs who commence FELA actions in

state courts should not be bound by the procedural rules of his or her chosen forum. However, on the morning of trial, the Court did not make a “final” ruling upon an earlier motion *in limine*, nor did it rule as a matter of law that such evidence was inadmissible in all FELA cases. It was plaintiff’s own expert witness and not the Court’s ruling that limited what evidence was admitted by the Court.

Mr. Colleran, Appellant’s expert, testified upon deposition that the railroad should have used either the type of restraining device recommended by the manufacturer or use a close throated clip. The evidence showed that the manufacturer recommended an open throated “s” clip, which was substantially similar to the one that was allegedly in use on the subject EOT device. Appellee motioned the Trial Court to exclude the testimony of Mr. Colleran based upon this inconsistency, due to the great potential for confusion of the issues by the jury. The Trial Court exercised its broad discretion to limit the testimony of Mr. Colleran based upon the potential for such confusion, and nothing more.

Finally, Appellant contends that the instant matter raises a significant constitutional questioning the area of procedural due process, justifying jurisdiction by this Court. *Id.* Appellant has argued that because the Appellee only raised the issue of wavier at oral argument before the Appellate Court that the issue of waiver was somehow waived and any decision by the Appellate Court based upon same denies the Appellant of procedural due process. *Id.* at 4, 14. This contention is misplaced at best. In fact, this Court has long held that Appellate Courts may consider issues not addressed in the briefs before it. *Chemical Bank of New York v. Neman* (1990), 52 Ohio St.3d 204, 207. Furthermore, the Appellate Court has the broad discretionary power to *sua sponte* address issues that were not addressed by either party. *Id.*

Furthermore, the mere fact that a person is unsuccessful before a court in a matter involving life, liberty or property does not show that there has been a deprivation of procedural due process. *Sexton v. Barry* (6th Cir. 1956), 233 F.2d 220. Due process of law in Ohio has been interpreted to provide for and require that litigants shall each have their day in court. *Miami County v. City of Dayton* (1915), 92 Ohio St. 215. In order to have their day in court, a litigant must have notice and an opportunity to be heard. *State v. Edwards* (1952), 157 Ohio St. 175. In fact, such rights to notice and hearing can both be waived. *State ex rel. Allstate Ins. Co.* (1936), 130 Ohio St. 347.

Herein, Appellant contends that the hearing before the Court of Appeals was improper. *Appellant's Memorandum in Support of Jurisdiction* at 4, 13-14. However, what Appellant fails to point out is that he was given proper notice of the hearing and was given a fair opportunity to be heard at same and indeed argued in open court. *New York Cent. R.R. Co. v. Public Utilities Comm. of Ohio* (1952), 157 Ohio St. 257. Furthermore, one hearing can satisfy the constitutional hearing requirement. *Gallagher v. Harrison* (1st Dist. 1949), 86 Ohio App. 73. Moreover, the rules of Appellate Procedure in Ohio provide for an Application for Reconsideration, of which Appellant availed himself herein. Appellant was able to address this same issue, providing him even more of an opportunity to be heard on this matter, but the Appellate Court upheld its prior ruling. *See Judgment Entry* (Attached hereto in the Appendix).

Again, the matter before this Court is whether a party's failure to proffer evidence at trial, which was excluded prior to trial, may be excused. Appellant clearly failed to comply with the procedures set forth for proffering excluded evidence at trial and preserving any error relating same for appellate review. Procedural rules allow the Courts and all parties to follow an organized process relating to litigation and they cannot be ignored every time a judgment is not

entered in favor of one party or another. This case is not one public or great general interest, nor does it raise a substantial constitutional question that should compel this Court to exercise its discretionary power of jurisdiction.

**ARGUMENT IN OPPOSITION TO APPELLANT'S ARGUMENTS OF LAW**

**Proposition of Law No. 1: A final evidentiary ruling was not requested by Appellant prior to jury selection and a proper proffer of the excluded evidence was required to preserve the issue for appeal.**

Appellant contends that somehow by asking one question, which could not be placed into proper context by the Trial Court, the Court's prior ruling on a Motion *in Limine* was transformed into a final appealable order, excusing his failure to properly proffer the excluded evidence as required by Ohio Rule of Evidence 103(A) and related case law. *Appellant's Memorandum in Support of Jurisdiction* at 1, 2, 5-6, 7-10. However, Appellant's sole authority for his position is the twenty-one year old footnoted dicta of this Court. *Id.* at 2, 8-9 (citing *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d, 86 n 5.

In Ohio, trial courts have broad discretion in evidentiary matters. *Peters v. Ohio Lottery Comm.* (1992), 63 Ohio St.3d 296, 299; *Baycliffs Corp. v. Village of Marblehead* (6th Dist. 2000), 138 Ohio App.3d 719, 725; *Mason v. Swartz* (6th Dist. 1991), 76 Ohio App.3d 43, 55. A ruling on a Motion *in Limine* is within the trial court's broad evidentiary discretion to "prevent the interjection of prejudicial, irrelevant, inadmissible matters into trial." *Mason*, 76 Ohio App.3d at 55 (citing *State v. Grubb* (1986), 28 Ohio St.3d 199, 200-201). In fact, such a ruling is not a ruling on the evidence, but a preliminary interlocutory order. *Id.*; *Caserta v. Allstate* (1983), 14 Ohio App.3d 167, 170; *Riverside Methodist Hosp. Assn. v. Guthrie* (1982), 3 Ohio App.3d 308, 310.

In fact, the Trial Court recognized this in its September 2, 2005, written ruling which stated:

[a] motion in limine is '[a] pretrial request that certain inadmissible evidence not be referred to or offered at trial.' Black's Law Dictionary (7 Ed. 1999), 1033. 'The purpose of such a motion is to prevent potentially prejudicial matter that is neither relevant nor admissible from being interjected into trial.' *Rinehart v. Toledo Blade Co.* (1985), 21 Ohio App.3d 274, 278. 'Motion in limine is an interlocutory ruling, granting of which operates as a tentative order which can be later modified depending on the circumstances at trial.' *Gollihue v. Consolidated Rail Corp.*, (sic) (1997), 120 App.3d 378.

*Doc. 86* at 1. Therefore, due to the preliminary nature of such an order it does not preserve the exclusion of evidence as an issue for appeal and failure to raise the issue *at trial*, waives the right to raise the same issue on appeal. *Grubb*, 28 Ohio St.3d at 203 (emphasis added).

Appellant heavily and almost exclusively relies upon the this Court's opinion in *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, as his authority for his contention that the September 7, 2005, Trial Court ruling transformed the September 2, interlocutory ruling into a final order, thereby excusing his failure to proffer the excluded evidence at trial. *Appellant's Memorandum in Support of Jurisdiction* at 2, 8-9. The *Huffman* case involved the exclusion of the defendant's medical expert upon a motion *in limine*, who was identified and disclosed four days before trial and after the deadline for disclosure of expert witnesses established by the court. *Id.* at 83. The defendant did not proffer the excluded expert testimony during trial. *Id.* at 86 n 5. The Court of Appeals remanded the case for further proceedings indicating that the trial court abused its discretion by excluding defendant's expert. *Id.* at 84.

The plaintiff appealed to this Court requesting that it certify the record. *Id.* This Court only addressed the issue of waiver within a footnote to the opinion. *Id.* In fact, the Court began

the discussion with the descriptive phrase, “[w]e note in passing....” *Id.* Furthermore, this Court has not cited to this footnote with approval in any subsequent rulings.

What this Court did find in *Huffman* was that the plaintiff’s Motion *in Limine* **expressly requested** a final ruling on the issue of introduction of the proposed medical testimony and that under the circumstances of the case at bar, there was no waiver for failing to properly object or proffer the evidence at trial. *Huffman*, 19 Ohio St.3d at 86 n 5. Unlike *Huffman*, at no time did counsel for the Appellant specifically request that the Trial Court’s September 2, ruling be transformed into a final ruling on the issue of exclusion of the subject evidence. *Id.*

As outlined above, the Appellant relies upon one question asked of the Trial Court on September 7, while it was ruling on a separate motion *in limine*, as the basis for his assertion that the September 2, ruling was transformed into a final ruling. Moreover, due to the context of this exchange it was difficult or nearly impossible for the Trial Court to ascertain any intent by counsel to transform the prior ruling into a final order. In addition, the Trial Court’s ruling on the morning of trial, which Appellant contends was a final ruling, merely prohibits the introduction of evidence that the closed clips recommend by Mr. Colleran were used prior to this incident.

Therefore, based upon the fact that Appellant’s authority is nothing more than dicta, in a case which is distinguishable from the case at bar, and the fact that the Trial Court record demonstrates that Appellant did not request a final order in connection with the excluded evidence, Appellant’s failure to properly proffer the subject evidence at trial is not excused and must prevent Appellant from prevailing.

**Proposition of Law No. 2: The ruling made by the Trial Court prior to trial was nothing more than an interlocutory evidentiary ruling requiring a proper proffer of the excluded evidence.**

As previously outlined, a trial court has broad evidentiary discretion to “prevent the interjection of prejudicial, irrelevant, inadmissible matters into trial.” *Mason*, 76 Ohio App.3d at 55 (citing *State v. Grubb* (1986), 28 Ohio St.3d 199, 200-201); *See also Schwer v. New York, Chicago & St. Louis R.R. Co.* (1954), 161 Ohio St. 15, 25. That is exactly what the Appellee requested in this matter with respect to both the September 2, and the September 7, rulings. In fact, Appellee originally requested in its initial Motion *in Limine* that the Trial Court exclude “any evidence plaintiff may attempt to offer that there were safer methods available [because such evidence] is irrelevant [to defendant’s duty] and will only serve to confuse the jury....” *Doc. 55* at 2. Appellee in its Reply in Support of its Motion, again requested that the Trial Court to exclude the proposed evidence as irrelevant and/or highly prejudicial. *Doc. 68, 69, or 71* at 3.<sup>1</sup>

The Trial Court did not in any way rule as a matter of law under the FELA that such evidence was inadmissible as argued by Appellant. *Appellant’s Memorandum in Support of Jurisdiction* at 4, 10-11. In fact, the Court expressly stated that its ruling in September 2, was “interlocutory” in nature and not as a matter of law. *Doc. 86* at 1.

Appellant has alleged in connection with his argument that the subject rulings were rulings as a matter of law that state procedural rules cannot be used to deny an FELA plaintiff recovery. Unlike the cases to which Appellant cites, as well as this Court’s recent ruling in *Hess v. Norfolk Southern Ry. Co.* (2005), 106 Ohio St.3d 389, he was not precluded from proceeding to trial and the exclusion of the subject evidence did not itself deny Appellant recovery.

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<sup>1</sup> It should be noted that the description for all three of these documents is essentially the same in the official docket and Appellee cannot determine which of these documents is the true responsive pleading.

Therefore, the rulings of the Trial Court on September 2, and September 7, were nothing more than evidentiary rulings requiring a proffer of the excluded evidence at trial to properly preserve the issue for appeal. Due to the fact that the record is devoid of any such proffer by the Appellant, such errors relating to the excluded evidence have been waived as previously decided by the Court of Appeals, below.

**Proposition of Law No. 3: The evidentiary ruling made by the Trial Court did not constitute plain error excusing the Appellant's failure to properly proffer the excluded evidence.**

Appellant alternatively contends that the exclusion of the subject evidence was plain error affecting his substantial rights under the FELA. *Appellant's Memorandum in Support of Jurisdiction* at 11-13. This argument requires two items; the exclusion of the subject evidence was plain error; and that the exclusion affected the substantial rights of the Appellant. Appellant relies upon the authorities cited in his Appellate Merit Brief as support for his contention that the exclusion of the subject evidence was plain error, as well as a subsequent ruling by Judge Wittenberg in a separate and subsequent matter. *Id.*<sup>2</sup>

Appellee would point out here that other evidentiary rulings as well as the one by Judge Wittenberg in a separate action under different circumstances, should not be in any way persuasive to this Court. In fact, evidentiary rulings are to be reviewed on an abuse of discretion standard. *Peters v. Ohio Lottery Comm.* (1992), 63 Ohio St.3d 296, 299; *Baycliffs Corp. v. Village of Marblehead* (6th Dist. 2000), 138 Ohio App.3d 719, 725. An abuse of discretion is "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157); *See also Baycliffs*, 138 Ohio App.3d at 725.

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<sup>2</sup> Judge Charles Whittenberg is a Lucas County Court of Common Pleas Judge to which this matter was originally assigned. Judge Wittenberg ruled on the pre-trial motions. Judge James Barber of the Fulton County Court of Common Pleas, who was assisting Judge Wittenberg by assignment, oversaw the trial.

Appellant has failed to direct this Court to any evidence that the Trial Court did in fact abuse its discretion by excluding the subject evidence. In fact, the Trial Court record is devoid of any such evidence. Without such an abuse, no error has occurred entitling Appellant relief by this Court.

**Proposition of Law No. 4: The issue of waiver by the Appellant cannot be waived by the Appellee and does not rise to a deprivation of procedural due process when the Trial Court Record indicates a lack of a proper proffer of evidence.**

Finally, Appellant contends that Appellee waived any potential argument of waiver of an appealable issue by only raising the issue of waiver at oral argument before the Appellate Court. *Appellant's Memorandum in Support of Jurisdiction* at 4, 14. It is clear that Appellate Courts in Ohio have broad discretion to determine an appeal on upon the assignments of error contained within the briefs, the record on appeal, and oral argument. App. R. 12(A)(1)(b). The Ohio Supreme Court has interpreted this broad discretion to include raising the argument of Appellant waiver. *Chemical Bank of New York v. Neman* (1990), 52 Ohio St.3d 204.

In *Neman*, this Court was presented with an appeal of an appellate court ruling and denial of an application for reconsideration. *Id.* at 206. During trial the Appellant moved for directed verdict at the close of the plaintiff's case. *Id.* This motion was denied. *Id.* The Appellant did not renew the motion at the close of all evidence. *Id.* However, following the verdict, the Appellant moved for judgment notwithstanding the verdict and for a new trial. *Id.* This motion was denied as well. *Id.*

The *Newman* Appellate Court was confronted with three assignments of error in connection with the directed verdict motion, but none addressing the JNOV motion. *Id.* The Appellee's brief in opposition did not address the issue of waiver. *Id.* However, the Court denied the Appellant's first three assignments of error because they had been waived by his failure to

renew his motion for directed verdict at the close of all evidence. *Id.* Appellant argued that he should have been permitted an opportunity to argue the issue of waiver, as the Appellant does in the instant matter. *Id.* at 207. This Court held that pursuant to App. R. 12(A) an Appeals Court in its sound discretion may consider issues not argued in the briefs. *Id.* (citing *Toledo's Great Eastern Shoppers City, Inc. v. Abde's Black Angus Steak House No. III, Inc.* (1986), 24 Ohio St.3d 198, 202-03).

Based upon the Appellate Court's broad discretion pursuant to App. R. 12(A), it had the power to consider arguments not contained within the briefs of the parties, as was the case herein. *Id.* Furthermore, the Appellate Court had the power pursuant to App. R. 12(A) to *sua sponte* raise the issue of Appellant's waiver because the Trial Court record is completely devoid of any attempt to proffer the subject evidence regardless of the actions and arguments of the parties. *Id.*

Appellant contends that the procedure and decision below deprived him of procedural due process. *Appellant's Memorandum in Support of Jurisdiction* at 4, 14. However, Appellant has failed to present any evidence that the proceedings in any way interfered with his constitutional rights to notice and a hearing. *Miami County v. City of Dayton* (1915), 92 Ohio St. 215. In fact, the Appellant had a hearing and was given the opportunity to raise any irregularity in that hearing by way of an Application for Reconsideration. Furthermore, the appellant took advantage of this post-opinion procedure and the Court of Appeals below; denied Appellant's Application for Reconsideration and upheld its earlier decision. *See generally, Judgment Entry* (attached in the Appendix hereto).

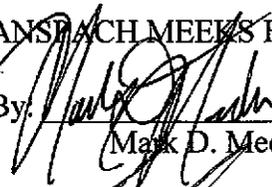
**CONCLUSION**

WHEREFORE, Defendant-Appellee, CSX Transportation, Inc. respectfully requests that this Court exercise its discretionary power to deny jurisdiction over the instant matter as it does not raise an issue of public or great interest because:

- (1) Appellant did not request, nor was he granted a “final” ruling on the morning of trial upon a previous interlocutory ruling;
- (2) The September 2, 2005, ruling on Appellee’s motion *in limine* was a interlocutory evidentiary ruling and not one as a matter of law;
- (3) The Trial Court’s September 2, 2005 ruling was not plain error and the proper standard of review for such a ruling is an abuse of discretion ; and
- (4) Courts of Appeals have broad discretion to rule upon matters whether raised by the parties or not, without depriving either party of procedural due process.

Respectfully Submitted,

ANSBACH MEEKS ELLENBERGER LLP

By: 

Mark D. Meeks (0040495)

By: 

Nathan R. Boyd (0077734)

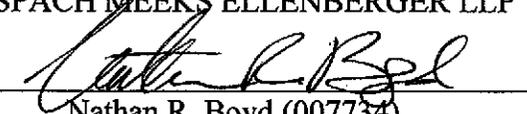
COUNSEL FOR APPELLEE,  
CSX TRANSPORTATION, INC.

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing **Appellee's Memorandum in Response to Appellant's Memorandum in Support of Jurisdiction** has been served by regular U.S. Mail, postage prepaid, upon: Robert B. Thompson, Esq., Vincent B. Browne, Esq., Harrington, Thompson, Acker & Harrington, Ltd., 180 North Wacker Drive, Third Floor, Chicago, IL 60606, attorneys for Appellant, on this 20<sup>th</sup> day of November, 2006.

ANSPACH MEEKS ELLENBERGER LLP

By: \_\_\_\_\_

  
Nathan R. Boyd (007734)

COUNSEL FOR APPELLEE,  
CSX TRANSPORTATION, INC.

FILED  
COURT OF APPEALS

2006 OCT 19 P 12:38

COMMON PLEAS COURT  
BERNIE QUILTER  
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

Dennis Staerker

Court of Appeals No. L-05-1416

Appellant

Trial Court No. CI 2003-4939

v.

CSX Transportation, Inc.

DECISION AND JUDGMENT ENTRY

Appellee

Decided:

OCT 19 2006

\*\*\*\*\*

This matter is before the court on the motion of appellant, Dennis A. Staerker, for reconsideration and a memorandum in opposition interposed by appellee, CSX Transportation, Inc.

On an application for reconsideration, "[t]he test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, 143.

JOURNALIZED

OCT 19 2006

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FAXED

This was an appeal from a defense jury verdict on a Federal Employer's Liability Act claim. Appellant injured his knee when struck by a hose from a piece of railroad equipment upon which he was working. At issue was the relative safety of an "S" clip used to hold the hose in place.

Prior to trial, the trial court granted appellee's motion in limine to exclude expert testimony concerning an alternative clip. In our principal decision, we found any error which may have been associated with this decision waived by appellee's failure to raise the issue again in the context of trial. *Staerker v. CSX Transportation, Inc.*, 6th Dist. No. L-05-1416, 2006-Ohio-4803, at ¶ 20.

In his motion to reconsider, citing *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 86, at fn. 4, appellant suggests that we committed obvious error in finding waiver. Alternatively, appellant suggests that the in limine ruling was not interlocutory, or constituted plain error, or the issue of waiver itself was waived by appellee's failure to raise it before oral argument.

*Huffman* represents a very narrow exception to the general rule that failure to raise during trial an evidentiary question that was the topic of an in limine ruling constitutes waiver. *Huffman* specifically dealt with the total exclusion of an expert witness as a sanction for late witness disclosure. The exception has never been extended beyond that narrow context. As appellee points out, this court has expressly rejected invitations to expand the exception. *Mason v. Swartz* (1991), 76 Ohio App.3d 43, 56. The remainder of appellant's assertions have already been considered and rejected by this court.

Accordingly, appellant has directed our attention to no obvious error or  
unconsidered issue. Upon consideration, appellant's motion for reconsideration is not  
well-taken and is, hereby, denied.

Peter M. Handwork, J.

Arlene Singer, P.J.

William J. Skow, J.  
CONCUR.

*Peter M. Handwork*

JUDGE

*Arlene Singer*

JUDGE

*William J. Skow*

JUDGE

**FAXED**