IN THE SUPREME COURT OF MISSOURI

No. SC 91617

EDDIE CLUCK,

Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

SUBSTITUTE REPLY BRIEF OF APPELLANT

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Reply to UP's Statement of Facts

Appellant Eddie Cluck ("Cluck") did not drop Clark's bag. *See* Tr. 448.

Clark placed the gun in his bag a week or two before the incident, and went on multiple trips for the railroad with the gun. Legal File 737-38 (vol. V), Resp't App. 12-13.

Respondent Union Pacific ("UP") does not support its accusation that Cluck's attorneys facilitated his loan. In the page UP cites, its counsel merely notes the loan was from an Illinois company. Tr. 853.

Cluck denied UP's suggestions that he would not take a job paying less than $2,350 per month. Tr. 603-05.

Instructions

UP claims it never argued the only proper instruction would be MAI 24.01(A). However, UP argued "If they were seeking to hold Union Pacific liable for Mr. Clark's negligent act or omission, the proper instruction should have been 24.01(A) as modified by Note 3." Tr. 823. UP argued the trial court's 24.01(B) instruction was "the wrong instruction to submit the negligence of a fellow employee." *Id.*

Cluck's statement that the 24.01(B) instruction was proper in form did not mean he agreed to its submission. *See* Tr. 831 ("the instruction the Court presents does direct verdict against Cluck on the theory of imputed liability, and, of course, Cluck objects to that.").

Cluck noted the real reason the trial court rejected the 24.01(A) instructions was not their form, but the trial court's belief that Clark's negligence could never be imputed to UP. Tr. 830-31.

Contrary to UP's suggestion, Judge Mesle did not articulate any clear rationale for rejecting the 24.01(A) instructions other than her belief Clark's conduct could not be imputed to UP. *See* Tr. 774-816; Tr. 778:11-13; Tr. 781:15-782:18. UP correctly notes Judge Mesle held multiple conferences during which she rejected Cluck's attempts to draft a MAI 24.01(A) instruction she would submit. However, it does not explain how Cluck could have overcome an implicit directed verdict. Judge Mesle stated, "I do not believe that Mr. Clark's act in not telling [anyone about the gun in his bag] is negligence attributable to the company," and further opined that the only viable theory for Cluck was for direct negligence, indicating she would not give ***any*** MAI 24.01(A) instruction. Tr. 701-02.

Proceedings before the Court of Appeals

Cluck's Point Relied On in the appellate court, as in this Court, stated the trial court erred in "refusing to submit a verdict-directing instruction based on Missouri Approved Instruction (MAI) 24.01(A)." Aplt. Br. at 8, 10. The Point Relied On further noted, "Plaintiff requested and submitted such an instruction." *Id.* Cluck set forth in full the five instructions he proffered, *see* Aplt. Br. at 5-6, and also included them in his appendix. *See* Aplt. App. at 18-28. UP addressed these instructions. *See* Appellee's Br. at 8.

Cluck argued each of these instructions were correct based on the facts and law in his Point Relied On and Argument. Aplt. Br. at 8, 10, 13-35.

UP's claim that Cluck's Point I violated Rule 84.04(d)(1) was fully addressed by Cluck below and was properly ignored by the Court of Appeals. *See* Reply Br. at 2-5.

UP's claim that Cluck has not challenged the verdict in favor of UP on the direct negligence theory is clearly incorrect, as shown by his points III and IV and argument below, maintained here, regarding instructional and evidentiary errors that prejudiced him on that theory.

Argument

I. The trial court committed prejudicial error in denying Cluck's motion for a partial directed verdict as to liability

A. A directed verdict was proper because UP's counsel and its witnesses admitted the truth of the basic facts upon which the claim of Cluck rested

Brandt v. Pelican, M.D., 856 S.W.2d 658, 664 (Mo. banc 1993) states directed verdicts may be granted where the defendant admits "the truth of the basic facts upon which the claim of the proponent rests."

UP's counsel admitted that Clark broke railroad rules and the law by bringing a gun to work, having the gun at work for one to two weeks, and not warning Cluck or anyone else about the gun. Tr. 190:19-192:19. UP's counsel noted that railroad employees pack their grips so they can do their work. Tr.

191:14-25. UP's counsel noted the accident occurred while Cluck and Clark were unloading the van at the hotel as part of their job duties. Tr. 190:9-18, 192:1-25. While UP's counsel did not admit the legal conclusions of negligence or *respondeat superior*, he admitted "the truth of the basic facts upon which the claim of the proponent rests." As such, a directed verdict was warranted.

Brandt recognized that in FELA cases, a directed verdict may also be granted "based upon the testimony of the defendant's employees." *Id.* at 665, citing *Rogers v. Thompson*, 265 S.W.2d 282 (Mo. banc 1954). The rule against directing verdicts for plaintiffs does not apply "where defendant in his pleadings or by his counsel in open court admits plaintiff's claim, or by his evidence also establishes plaintiff's claim, or where there is no real dispute of the basic facts …". *Id.* at 287 (citations omitted). *Rogers* affirmed the directed verdict because the railroad's witnesses and its counsel admitted the railroad's employee's negligence caused the collision that injured the plaintiff. *Id.*

Clark and UP's other employees admitted Clark's conduct, both packing the gun and failing to warn about an unsafe condition, violated railroad rules. Every witness with knowledge acknowledged Cluck was shot by the gun while Clark and Cluck were unloading the van. The only contested issue was the legal significance of these facts. Accordingly, Cluck was entitled to a directed verdict.

UP does not explain how any reasonable person would view a person's forgetting they had broken the law and their employer's rules by packing a loaded gun into their bag, and thus failing to mention that to someone else who is

handling that bag, would be anything other than negligent. UP's argument also contradicts its argument on the *respondeat superior* issue, in which it argues that Clark's conduct was so outrageous that it could not be considered within the scope of his employment.

UP cites *Drury v. Missouri Pacific R. Co.*, 905 S.W.2d 138, 145 (Mo.App. E.D. 1995). However, in *Drury*, the plaintiff sought a directed verdict based on his testimony, rather than the testimony of the railroad's supervisory employees or the admissions of its counsel. *Id.* Here, UP's witnesses and its counsel admitted the basic facts upon which liability rests. UP's corporate representative admitted the injury happened because Clark was "careless." Tr. 743. UP's rules establish the injury was foreseeable. *See* Op. at 9-10. Because these basic facts were admitted by UP, a directed verdict was required.

B. Cluck and Clark were within the course and scope of employment as a matter of law

1. *Respondeat superior* requires the general activity, not the specific negligent act, to further the interests of the employer; UP's position that the particular negligent act must further the interests of the employer would revive the fellow servant defense and eliminate *respondeat superior* liability, because negligence never furthers the interests of an employer

UP asks for a radical narrowing of traditional agency principles to require

that the negligent act furthers the master's business. If that test were the law, no employer could ever be held liable under *respondeat superior*. The common law rule was exactly the opposite, holding that "mere disobedience on the servant's part while doing his master's work would not excuse the master." Smith, *Frolic and Detour, 2*4 Colum.L.Rev. 444 (1923), citing *Joel v. Morison,* 6 C.&P. 501, 503 (1834); *cited with approval in Zueck v. Oppenheimer Gateway Properties, Inc*. 809 S.W.2d 384, 389 (Mo.1991).

The FELA imposes liability on railroads for the negligence of their "officers, agents and fellow employees" and has expressly abrogated the fellow servant defense. 45 U.S.C. § 51. Cluck is not arguing that *respondeat superior* is inconsistent with the abolition of the fellow servant rule. However, UP's position that *respondeat superior* requires a finding that the negligent act was done to benefit the railroad would revive the fellow servant defense. Negligent acts are never done to benefit the railroad. Thus, while the FELA would hold employers liable for the negligence of employees, the UP test would allow employers to escape liability by showing the negligence was not done for the purpose of serving the railroad. The effect is the same as having a fellow servant rule – railroads would escape liability for injuries caused by the negligence of their employees.

If UP's test were the law, no employer could ever be held liable under *respondeat superior*. The delivery driver's act of texting his girlfriend while driving does not further the master's business. The engineer's act of falling asleep does not further the master's business. The failure of an engineer to heed the

message of the train dispatcher does not further the master's business. Quite simply, a railroad could argue in every case that an employee who violates one of its rules is not furthering its business and thus liability cannot be imputed to it. As the United States Supreme Court noted ***in 1916***, "[t]he unsoundness of the contention is so apparent that further discussion is unnecessary." *Spokane & Inland Empire R.R. Co. v. Campbell*, 241 U.S. 497, 509 (1916).

UP's test is not the proper standard for the FELA or the common law. *See, e.g,* Aplt. Substitute Br. at 25-39. UP ignores ample Missouri authority indicating its approach to *respondeat superior* is incorrect. *See, e.g., id.* at 31 (noting MAI agency instructions 13.03, 13.04, 13.05, 13.06, 18.01, and 37.05(1) all allow reference to general activities such as "operation of a motor vehicle" rather than specific acts of negligence such as "violating a traffic signal").

Courts have consistently recognized that requiring the employer to authorize the particular negligent act, or permitting the employer to escape liability by adopting rules prohibiting employee negligence, would eviscerate the principle of *respondeat superior*. *Id.* Instead, the test is whether the negligent employee is engaged at the time of the injury in a general activity "that is fairly and naturally incident to the employer's business," even if that general activity "is mistakenly or ill-advisedly done." *Southers v. City of Farmington*, 263 S.W.3d 603, 619 n.22 (Mo. banc 2008). Clark was part of a work crew preparing to enter a hotel and unloading luggage when he forgot to warn Cluck about the pistol in his luggage.

He was therefore engaged in a general activity that was "fairly and naturally incident" to UP's business.

UP argues it is not enough that Clark's negligence occurred during working hours. However, Cluck's argument is not merely that Clark was "on the clock," but that his general activity was furthering the railroad's business at the time Cluck was injured. UP's revisionist argument that the negligent act must always have been done in furtherance of the master's business does not explain how an employee's negligent act ever furthers the railroad's business. As such, UP's test would eliminate vicarious liability in cases such as *Burrus v. Norfolk and W. Ry. Co.*, 977 S.W.2d 39 (Mo. App. 1998), because falling asleep while operating a train surely does not further the railroad's interests.

Furthermore, UP's test begs the question of which acts can be imputed to the railroad – Clark's negligent packing of his luggage, or Clark's failure to warn Cluck about the gun while they were unloading luggage at the hotel. Both activities furthered the railroad's interests. UP's counsel noted railroad employees pack their bag so they can do their work, as "[t]hey put their rule books in there, sometimes their lanterns, their gloves, their vests, their ear protection, their eye protection. They put whatever in they're going to eat, their lunch, their dinner, whatever." Tr. 191:14-25.

The proper test for *respondeat superior* is whether at the time of injury the employee was negligently performing a task in furtherance of the railroad's business, and that negligent performance of that task caused the plaintiff's injury,

in whole or in part. This test explains the result in all of the cases cited by Cluck and UP. This test also compels a finding as a matter of law that Clark's conduct can be imputed to the railroad. It was undisputed that at the time Cluck was injured, Clark was negligently performing a task in furtherance of the railroad's business (assisting with the unloading of the van but failing to warn Cluck of the presence of the gun), and that his negligent failure to warn caused Cluck to handle Clark's luggage and get shot in the knee.

UP cites *Arnold v. Wigdor Furniture Co.*, 281 S.W.2d 789 (Mo. 1955) but that case does not "deal with situations involving the principle of respondeat superior" and thus is "not in point." *Leverton v. Hartstein*, 365 S.W.2d 60 (Mo. App. 1963). UP cites *Leverton*, but in that case the drive-in employees were not engaged in any general activity that would benefit their employer, but were instead shooting a total of 30 rounds at paper cups and other targets. *Id.* at 61-62. The court distinguished other cases where "at the very time of the injurious occurrence, the employee was performing or attempting to perform some act in the furtherance of his master's business and the act complained of was performed in and intended to accomplish or promote to some appreciable extent the particular business of the master intrusted to the servant." *Id.* at 63. *Leverton* shows that where the employee is attempting to perform "some act" "at the very time of the injurious occurrence" that is "intended to accomplish or promote to some appreciable extent the particular business of the master," the master can be held liable for injuries if the employee is negligent in some way during the performance of that act. By

contrast, where the employee is not engaged in any such general activity at the time of injury, there will not be a finding of imputed liability.

2. UP's cases involving horseplay with loaded pistols, pranks and the cracking of necks are easily distinguished

None of the employees in UP's cases were doing anything productive for their employer when their negligence injured the plaintiff. *See Lavender v. Illinois Cent. R. Co.*, 219 S.W.2d 353, 357 (Mo. 1949) (employees were engaged in "horseplay with loaded pistols" when the decedent was killed); *Sobieski v. Ispat Island, Inc.*, 413 F.3d 628 (7th Cir. 2005) (employee cracked or popped the plaintiff's neck); *Copeland v. St. Louis-San Franciso Ry. Co.*, 291 F.2d 119, 120 (10th Cir. 1961) (employee "as a practical joke, and as a prank, pushed upward on the back end of the tie" plaintiff was carrying, causing the plaintiff's injury). In this case, Clark was not playing with his loaded pistol, pretending to be a chiropractor, or pulling a prank when Cluck was injured. Instead, Clark was assisting with the unloading of luggage, and all witnesses agreed he was on duty and furthering the railroad's business at the time Cluck was injured.

In other cases UP cites, the courts held the issue of whether the employee was acting within the scope of employment was for the jury to decide because it was unclear the employees' general activities furthered the railroad's interests in any way. *See Gallose v. Long Island R. Co.*, 878 F.2d 80, 83 (2d Cir. 1989); *Schipper v. BNSF Ry. Co.*, 2008 WL 2783160, *6 (D.Kan. 2008). In *Schipper*, the court noted, "a plaintiff must prove that the employees involved were acting

within the scope of their employment at the time of the injury." *Id.* at *4. Here, there was no dispute that at the time of the injury, Clark was acting within the scope of his employment by helping to unload a van and preparing to enter the hotel.

3 While Cluck was seeking liability under a failure to warn theory, packing luggage for use during business travel is also incidental to employment

UP argues that Clark's bringing of a gun to work was not within the course and scope of his employment. Notably, that is wholly irrelevant as Cluck was seeking to impose liability on Clark for failing to warn him of the gun's presence. Furthermore, UP's counsel stated that the general activity, Clark's packing of his luggage for the purposes of travel on UP business, was "fairly and naturally incident to the employer's business." Tr. 191:14-25. The fact that he violated UP rules by packing certain items shows that he did so negligently, but it does not take him out of the course and scope of employment.

4. Cluck's cases correctly apply *respondeat superior*

UP suggests *Baker v. Baltimore & Ohio R.R. Co.*, 502 F.2d 638 (6th Cir. 1974) declined to apply a course and scope of employment test. However, while the court suggested the *respondeat superior* test may not apply in FELA actions, it noted, "That question, however, is not before us, as Appellee did not object to the 'course and scope of employment' test." *Id.* at 643, n.3. It proceeded to define the course and scope of employment based on case law dating back to 1917 (*id.* at

642), and held a railroad could be liable under that test for an employee's negligence in forgetting he had brought a loaded pistol to work. *Id.* at 641-43. *Baker* specifically held that for purposes of *respondeat superior* analysis, the critical act was not bringing the gun to work in the first place, but forgetting about it immediately prior to its discharge. *Id.* at 643.

Significantly, UP does not ask this Court to overrule *Burrus,* but instead admits that *Burrus* applied the proper rule. UP argues that "a railroad is liable for an employee who negligently performs tasks within the course and scope of his employment." Resp't Substitute Br. at 26. However, it is undisputed in this case that when Cluck was shot, Clark was unpacking luggage in support of railroad operations. Just as in *Burrus,* the employee was performing a task in service to the railroad, and did something negligent in the course of performing that task. Using UP's analysis, UP should be liable for Clark's negligence.

Defendant argues *Russell v. U.S.*, 465 F.2d 1261 (6th Cir. 1972) is inapposite because it was based on Kentucky substantive law. However, the court in *Russell* looked to the Second Restatement of Agency and Prosser on Torts. *Id.* at 1263. The Sixth Circuit, based on the liberalization of the common law in general (and not just in Kentucky), reversed summary judgment. *Id.*

5. Whether Clark's conduct violated a UP rule is irrelevant for purposes of *respondeat superior*; furthermore, UP's analysis proves imputing liability is appropriate

Even as it claims it has never argued that Clark's violation of its rules took him out of the course and scope of employment, UP nevertheless maintains its rules "place[] a clear limit on the scope of the employees' duties." UP's position is clearly incorrect – whether or not the employer forbade the act is irrelevant for purposes of *respondeat superior*. *See* Aplt. Substitute Br. at at 31-32, citing *Garretzen v. Buenckel*, 50 Mo. 104, 112, 1872 WL 7886 (Mo. 1872) (affirming exclusion of evidence that employer had forbidden the negligent act); *id.* at 32, citing Restatement (Second) of Agency § 230 ("An act, although forbidden or done in a forbidden manner, may be within the scope of employment"); *id.*, citing Restatement (Second) of Agency § 231 ("An act may be within the scope of employment although consciously criminal or tortious.").

The reason the employer's rules are irrelevant is clear – otherwise, the employer could always create and cite rules in an effort to avoid liability. *Spokane*, 241 U.S. at 509.

UP states, "A locomotive engineer may negligently perform his duties by operating an engine too fast, failing to sound the horn, reading a book instead of watching the tracks, or sending text messages, because operating a locomotive is the very thing that an engineer is hired to do." Resp't Substitute Br. at 29. In the next breath, it states, "Packing a loaded weapon that he intends to sell to a friend is

not." *Id.* However, UP's test is completely arbitrary. An engineer was not hired to operate the engine "too fast." The engineer was not hired to "read a book." The engineer was not hire to "send text messages." The engineer was not hired to "fall asleep." Nevertheless, UP is fine with imputing liability in those situations because the engineer would still be performing a general activity for the railroad's benefit (operating a locomotive) even while engaged in those particular acts of negligence. In this case, Clark was also performing a general activity for the railroad's benefit (unloading luggage and entering a hotel) even while engaged in a particular act of negligence. One to two weeks before the injury, he was performing another general activity for the railroad's benefit (packing his luggage) even while engaged in a particular act of negligence. UP offers no distinction between its hypothetical negligent engineer and Clark. In fact, both employees' acts of negligence should be imputed to the railroad.

6. Cluck's failure to warn theory is entirely legitimate

UP argues that allowing Cluck to proceed on a failure to warn theory would lead to absurd results. As an initial matter, a failure to warn is a specific act of negligence under the Federal Employers' Liability Act (FELA). *See, e.g., Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 369 (Ky. 2010) ("As required for a successful claim under FELA, Coomer alleged that his injuries were the result of CSX's negligence, including … failure to warn of the risks posed by job duties …"). Courts have long recognized claims for negligence based on a failure to warn. *See, e.g., Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748,

784 (Mo.App. 2008); *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 383 (Mo. banc 1986); *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 158-59 (Mo. 2000); *Gregorc v. Londoff Cocktail Lounge, Inc.*, 314 S.W.2d 704, 707 (Mo. 1958).

As such, a holding that Cluck cannot impute liability to UP arising from Clark's failure to warn would deprive Cluck of a theory of negligence long allowed under the FELA and the common law.

Furthermore, none of UP's "absurd results" would occur if the Court properly applies *respondeat superior*. UP's examples of assembling a pipe bomb, infecting a trainman with hepatitis by giving a tattoo with a dirty needle, and manufacturing methamphetamine do not involve any general activity that would benefit a railroad in any way. Furthermore, they do not involve any "negligent" acts that could be performed within the confines of such a general activity. Finally, they do not appear to involve situations where the injured employee would be performing a task for the railroad and where the failure to warn, not the underlying activity, was the cause of the injury. By contrast, Clark had a gun in his grip for one to two weeks without incident. The injury occurred when he failed to warn Cluck of its presence.

To the extent there may need to be an "outrageous" exception to ordinary principles of *respondeat superior*, this is not such a case. To the contrary, UP claims in its brief that Clark may not even have been negligent. If that is the case, UP can hardly claim his conduct was "outrageous."

UP argues on page 31 that the bringing of the firearm was without any intent to benefit the railroad. However, the same could be said for any negligent act (texting, speeding, sleeping, etc.). UP's test would allow it to escape imputed liability in nearly every situation. The issue is not whether someone intended their negligence to benefit the railroad, it is whether they were otherwise performing a general activity on behalf of the railroad at the time of their negligence.

7. Clark and Cluck were engaged in a general activity to benefit the railroad at the time of Cluck's injury

While UP argues this point is inapposite, it is clear that riding in the van, unloading the luggage and preparing to enter the hotel were all general activities Clark and Cluck performed for the benefit of the railroad. Aplt. Substitute Br. at 26-30. The undisputed evidence is that both Clark and Cluck were engaged in one or more of these tasks at all times relevant. As such, they were clearly acting within the course and scope of their employment at the time Cluck was injured.

C. Clark Was Negligent as a Matter of Law

The uncontroverted evidence was that Clark had a loaded gun with the safety set to off in his luggage and forgot to tell Cluck of that fact, causing Cluck to sustain a gunshot wound, with both acts (bringing the gun and failing to warn of it) in violation of UP rules. UP's corporate representative characterized Clark's conduct as "careless." Tr. 743. While UP may be correct that not every violation of a railroad's rules constitutes negligence, these violations clearly do. UP cites to no special circumstances suggesting that failing to warn a coworker that you have

brought a loaded gun with the safety set to off is anything other than negligence. UP's corporate representative admitted that Clark violated UP's rules by failing to warn a co-worker of a dangerous condition. *See* Tr. at 744-45, 752. The basic facts regarding Clark's conduct were admitted, such that this case did not require evaluations of the credibility of the witnesses.

The Court of Appeals noted, "The evidence also established that Union Pacific has a Code of Operating Rules that prohibits employees from bringing guns to work and requires them to maintain safe conditions and warn co-workers of any dangers. **These facts were uncontroverted**." Op. at 9 (emphasis added). Furthermore, it noted that Clark's violations of Union Pacific's rules constituted negligence from which injury was foreseeable. Op. at 9-10.

II. The trial court committed prejudicial error in refusing to submit a verdict-directing instruction based on MAI 24.01(A)

UP's claim that Cluck's substitute brief violates Missouri Supreme Court Rule 83.08 is meritless. The Point Relied On and the arguments in support in the substitute brief do not alter or enlarge the claims raised in the Court of Appeals. As the Court of Appeals noted, the submission of MAI 24.01(A) was required because there was evidence that Clark was engaged in a general activity that benefitted UP at the time Cluck was injured. A modification of MAI 24.01(A) to incorporate *respondeat superior* was unnecessary because the evidence was uncontroverted. Moreover, even if modification were required, Cluck submitted modifications that were consistent with FELA and the MAI.

A. Cluck's Point II complies with Rule 83.08; UP does not identify any argument raised therein that was not raised below

Rule 83.08 forbids litigants from raising claims of error that were not raised before the Court of Appeals. But Cluck argued in the Court of Appeals that the trial court erred in refusing to submit an instruction based on MAI 24.01(A) because Cluck requested and submitted such an instruction and the evidence supported the instruction. Aplt. Br. at 11. This identical argument is made in his point relied on in the substitute brief. Aplt. Substitute Br. at 43.

UP's claim that Cluck abandoned his argument that the trial court had a non-delegable duty to submit a MAI 24.01(A) instruction is puzzling. The Point Relied On states the refusal to submit a MAI 24.01(A) instruction was error because "Plaintiff had a right to have the jury instructed on any theory supported by the evidence." Aplt. Substitute Br. at 43. The argument supports this position and the Court of Appeals' holding that the trial court erred in failing to instruct the jury on Cluck's theory of imputed liability. *Id.* at 44-47.

UP's claim that Cluck did not argue in the Court of Appeals that his instructions were correct based on the law and facts, or that Judge Mesle erred in refusing all of them, is also incorrect. Cluck stated the law required the use of MAI 24.01(A), that the facts supported the instruction, and that he had submitted such an instruction. Aplt. Br. at 8, 10. Cluck set forth in full the five instructions he ultimately proffered. *See id.* at 5-6. UP addressed these instructions. See

Appellee's Br. at 8. The requested instructions were also included in the appendix. *See* Appellant App. at 18-28. In the argument, Cluck argued the trial court erred because his instructions were required by the MAI and were supported by the law and the evidence. *See, e.g.*, Aplt. Br. at 13-21.

Contrary to UP's contention, Cluck's position in the Court of Appeals, as it is here, was that (1) a MAI 24.01(A) instruction should have been submitted, and he tendered several that were proper in form and substance; (2) modification of MAI 24.01(A) was not required in light of the substantive law and the evidence in this case, but (3) submission of a modified MAI 24.01(A) consistent with the instructions he drafted at the trial court's request was preferable compared to not submitting his theory of the case. As noted *supra*, the Court of Appeals properly ignored UP's suggestion that Cluck's brief violated Rule 84.04(d)(1).

Notably, all of UP's arguments against Cluck's instructions are being made for the very first time in this Court – they were not even raised in the trial court. As such, they should all be stricken pursuant to Rule 83.08.

B. MAI 24.01(A) was required because there was competent evidence that Clark was acting within the course and scope of his employment at the time Cluck was injured

The trial court twice refused to direct a verdict against Cluck on the issue of imputed liability. Tr. 701-02, 773-74. By denying the directed verdict, the trial court indicated Cluck had "substantial evidence" in support of this theory. *Stanley*

v. JerDen Foods, Inc., 263 S.W.3d 800, 802-03 (Mo.App. 2008). *See also* Point I., *supra*.

C. The Court of Appeals did not create any new duties for trial courts

The Court of Appeals' holding did not create any new affirmative duty for trial courts. Missouri Supreme Court Rule 70.02 and the Missouri courts have long held that a trial court commits error if it submits an incorrect instruction to the jury. The statement that MAI 24.01(A) was required does not impose a duty to draft the instruction, but does show why it was error for the trial court to submit a MAI 24.01(B) instruction in its place.

The trial court's non-delegable duty to give a complete and correct charge to the jury has been recognized by the Missouri Supreme Court Committee on Civil Jury Instructions since at least 1969. *See* MAI 6th ed. (2002) at pp. L1-L3; MAI (3d Ed.1981) at p. XCVII; MAI (2d Ed.1969) at p. LIII. "Although not bound to follow MAI committee comments, this Court carefully considers them. *See Peak v. W.T. Grant Co.*, 409 S.W.2d 58, 60 (Mo. banc 1966)." *Kauzlarich v. Atchison, Topeka, and Santa Fe Ry. Co.*, 910 S.W.2d 254 (Mo. banc 1995).

While lawyers may request instructions, the trial judge instructs the jury. This is why it is error *by the trial court* when it fails to instruct a jury properly, and the error, if prejudicial, requires reversal. *See, e.g., Harvey v. Washington*, 95 S.W.3d 93, 97 (Mo. banc 2003); *Closson v. Midwest Division IRHC, LLC*, 257 S.W.3d 619, 625 (Mo.App. 2008); *Marion v. Marcus*, 199 S.W.3d 887, 892-894

(Mo.App. 2006); *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 120 (Mo.App. 2006); *see also Thurman v. St. Andrews Management Services, Inc.*, 268 S.W.3d 434 (Mo. App., 2008) (reversing where trial court submitted non-apportionment instructions where both parties agreed apportionment instruction was required, even though trial court had rejected multiple attempts by plaintiff to draft an apportionment instruction).

None of UP's cases state it is proper for a trial court to submit an instruction over the objection of both parties that it is not applicable to the plaintiff's theory of the case. In fact, two of UP's cases reversed trial courts for submitting improper instructions, stating "when the trial court on its own drafts an instruction, 'it is required to give the correct one'." *McLaughlin v. Hahn*, 199 S.W.3d 211, 217 (Mo. App. 2006), quoting *Sheinbein v. First Boston Corp.*, 670 S.W.2d 872, 878 (Mo. App. 1984). Furthermore, in UP's cases, the flaws with the drafted instructions were identified. In this case, the trial court's sole rationale appears to be a decision to direct a verdict without formally doing so. None of UP's cases involve requiring modification of a MAI verdict director in the absence of precedent requiring the modification.

Cluck complied with Rule 70.02 and drafted multiple instructions. Rule 70.02 states, "The giving of an instruction in violation of the provisions of this Rule 70.02 shall constitute error." Because only a trial court can give an instruction, Rule 70.02 squarely supports the Court of Appeals' holding that the trial court erred in giving the wrong verdict director.

D. Cluck's verdict directors were in proper form

1. Instructions 7D and 7J were proper

While UP argues that agency was "at issue," the uncontroverted evidence was that at the time of Cluck's injury, Clark was engaged in general activities (unloading luggage, preparing to enter the hotel) that were intended to further the interests of the railroad. *See* Point I., *supra*. Thus, even assuming MAI 24.01(A) may need to be modified in some unknown circumstance to incorporate an agency element, this case did not create that necessity. Accordingly, either instruction 7D or instruction 7J should have been submitted. *See Elliott v. St. Louis Southwestern Ry. Co.*, 487 S.W.2d 7 (where as a matter of law evidence showed employee was acting within the scope of his employment, it was unnecessary to hypothesize that element in his verdict director).

UP argues 7J was inappropriate because it advanced a failure to warn theory. As noted *supra*, a failure to warn is clearly a viable theory of negligence. Clark's packing of the gun one to two weeks before Cluck was injured did not cause Cluck's injury. UP surely is not suggesting Clark was never acting within the course or scope of his employment for the one to two weeks he had a gun in his bag. The act causing injury was Clark's failure to warn Cluck of the gun when Cluck was unloading the grip. Furthermore, even if both acts caused the injury, it was enough for Cluck to show that the failure to warn was a cause, "in part" of the injury. 45 U.S.C. § 51**.** Contrary to UP's suggestion, both 7D and 7J identified the negligent act or omission.

UP also complains that 7J used the phrase "unsafe condition." However, the similar phrase "reasonably safe conditions for work" in MAI 24.01 has been consistently upheld against claims it creates a roving commission. *See, e.g., Ball v. Burlington Northern R. Co.*, 672 S.W.2d 358 (Mo. App. 1984).

2. Instruction 7E was proper

UP cites no authority for its claim that Cluck was required to hypothesize the particular act that was done within the course and scope of Clark's employment in the instruction. This Court has made clear that the pertinent inquiry is the employee's general activity **at the time of injury**. *See Elliott*, 487 S.W.2d at 13:

> **From all of which, one question remains--was plaintiff's activity at the time of injury for a private purpose? We do not believe that it was. …** We are convinced that **at the time of injury** plaintiff was making such necessary and contemplated preparations for work that he had the legal status of an employee engaged in interstate commerce and was thus covered by the act.

Id. (emphasis added).

7E required the jury to determine if Clark was acting on behalf of UP at the time of the gunshot incident, consistent with *Elliott*. Notably, the Court of Appeals agreed this was the pertinent test. *See* Op. at 16 ("However, to prevail on his FELA claim, Cluck was also required to prove that Clark was acting within the scope and course of his employment at the time the handgun discharged and caused injury.").

UP claims MAI 18.01 requires the jury to determine whether the particular act causing injury was within the course and scope of employment. In fact, that is not the case. The "First" paragraph in MAI 18.01 refers to a general activity ("operating the defendant's motor vehicle") that must be within the scope and course of employment. The "Second" paragraph refers to the particular negligent act ("violated the traffic signal"). MAI 18.01 supports Cluck's point that it is only the general activity that must be within the scope and course of employment, and not the specific negligent activity causing injury. UP's criticism of MAI 18.01, in essence, is that it does not comport with UP's view of *respondeat superior*. However, MAI 18.01 is consistent with Missouri case law on the subject. *See* Point I., *supra*.

3. Instruction 7H was proper

UP's suggestion that Clark was not "preparing to enter a hotel" is contradicted by the record. *See* Resp't App. at 7 (van had just arrived at the hotel); Tr. 448-49 (same, Cluck was unloading Clark's luggage when incident occurred).

UP's other criticism of 7H is that it does not require the jury to find that the act causing injury furthered the railroad's interest. However, as stated in Point I., *supra*, that is not the law. MAI 18.01, consistent with Missouri case law, only requires a finding that the general activity was done to serve the master's interest. Cluck's instruction conformed to the form prescribed by MAI 18.01.

4. Instructions 7F and 7I were proper

UP's claim that MAI 13.02 is the only proper MAI to define agency in this

matter strains credulity. MAI 13.02 is titled "Agency – Battery Committed by Servant." The only cases cited by UP in which MAI 13.02 was extended to other torts involved intentional torts, specifically fraud. *Tietjens v. Gen. Motors Corp.*, 418 S.W.2d 75, 88 (Mo. banc 1967), *Jefferson County Bank & Trust Co. v. Dennis*, 523 S.W.2d 165, 169 (Mo. App. 1975). There is no authority cited by UP suggesting that MAI 13.02 is the only appropriate agency instruction in a negligence case. It would be puzzling for MAI 13.02 to be the only appropriate agency instruction inasmuch as MAI 13.03 and 13.05 exist.

UP suggests MAI 13.03 is inappropriate but that is the only MAI that applies the dual purpose doctrine. The evidence indicated Clark packed his luggage in part to serve UP (by packing materials allowed by UP when employees go on trips on its behalf) and in part for his own interests. While the doctrine may arise most frequently in workers' compensation cases, the Notes on Use do not restrict it to those situations.

UP's criticism of 7I is based on its familiar claim that a plaintiff must prove the employee's negligence served the master. MAI 13.05, like MAI 13.03 and MAI 13.04, show UP's statement of the law is inaccurate. MAI 13.05 and its Notes on Use, like 13.03 and 13.04, allow the use of "[a] phrase describing the general conduct which is the subject of the alleged employment or agency, such as 'operation of the motor vehicle" as a substitute for the word 'acts." Combined with MAI 18.01, the MAIs pertaining to agency all show it is only the general activity that must be within the course and scope of employment, and not the

particular negligent act.

III. The trial court erred in refusing Cluck's request to submit MAI 34.05

Cluck requested that the jury be instructed, pursuant to MAI 34.05, "in determining the total amount of claimant's damages, you are not to consider any evidence of prior payments to or on behalf of Cluck. The judge will consider any such payment and make any adjustments required by law." Tr. 907, *cited in* Aplt. Substitute Br. at 7. Because the content of the requested instruction was clear, there is no reason to alter the standard of review.

UP argues Rule 70.02 does not permit instructions in response to jury inquiries. However, Rule 70.02(a) states, "Requests shall be submitted prior to an instruction conference **or at such time as the court directs**." *Id*. (emphasis added). The trial court directed the parties to make their requests regarding how to respond to the jury's interrogatory. Accordingly, Cluck's request was timely. Rule 70.03, which states all such objections must be made before the jury retires, is in conflict with Rule 70.02(a). The purpose of Rule 70.03 is to ensure that parties make their objections known before the court submits the instructions which, in this instance, occurred both before and during deliberations. Cluck made his objections to the trial court's action known at the time the trial court directed. Accordingly, he preserved the error. If UP's approach were the law, no party could ever assign as error the failure to provide an instruction whose necessity only became apparent by a note the jury submitted during deliberations.

UP's arguments regarding the timing of Cluck's request fail to recognize that it was not until the jury asked if Cluck was receiving disability that the parties and the trial court realized the jury was engaging in collateral source supposition.

UP's cases state subsequent modification of the jury instructions should not occur if no question arises as to the adequacy or clarity of the instructions. In this case, questions did arise. The jury's question showed the instructions previously submitted were not adequate. As such, MAI 34.05 was required.

UP's suggestion that the jury did not realize Cluck was receiving collateral source income explains why Cluck did not initially request MAI 34.05. Once the jury asked the question, an answer was required. Defendant cites *Beste v. Tadlock*, 565 S.W.2d 789 (Mo. App. 1978). However, *Beste* affirmed a decision not to order a mistrial, and did not involve a MAI 34.05 request. *Id.* at 791-92.

UP claims the error was not prejudicial in light of the liability finding. However, it is clear as a matter of substantive law under the FELA that any error in allowing the jury to consider collateral source payments requires a new trial, even if the jury finds for defendant on liability. *See Green v. Denver & Rio Grande W. R.R. Co.*, 59 F.3d 1029, 1033 (10th Cir. 1995). While *Green* did not involve a withdrawal instruction, its rationale applies – if a jury becomes aware that a plaintiff is receiving collateral source payments, it is far less likely to render ***any*** verdict for that plaintiff.

IV. The trial court erred in excluding Cole's deposition testimony

A. UP's arguments as to why this evidence was inadmissible are

objections that could have been cured during Cole's deposition

Evidence that UP's managers had read multiple reports in which employees had been disciplined for bringing guns to work was obviously relevant in refuting UP's claim that it was unaware of its employees bringing guns to work. UP's arguments about similarity, inability to discern when Cole saw the reports, and other lack of detail all reflect objections that could have been cured during the deposition. UP argues that objections to competency, relevancy or materiality are not waived by failure to object at the depositions, but the remainder of the rule clarifies that "errors of any kind that might be cured if promptly presented are waived unless seasonable objection thereto is made during the deposition." Mo. S. Ct. R. 57.07(b)(4). UP's argument that courts can exclude such testimony on their own several years after the deposition, even after a defendant has waived the objection, would eviscerate 57.07(b)(4) with a wink and a nod. UP cites *Hackman v. Kindrick*, 882 S.W.2d 157, 159 (Mo. App. E.D. 1994), but that court held "This defect in the testimony could not be cured at the deposition by prompt presentation." In this case, the alleged defects could have been cured if UP had made objections during the deposition. UP's arguments that Cluck did not ask enough follow-up questions during the deposition shows errors that might have been cured if objections had been made.

B. The doctrine of curative admissibility clearly applied

The doctrine of curative admissibility required Cluck ***not*** to raise an objection to Eardensohn's testimony. *See Brown v. Poetz*, 201 S.W.3d 76, 81

(Mo. App. E.D. 2006). It is irrelevant whether Eardensohn's testimony regarding UP's lack of notice at any time would have withstood an objection. *See id.*

The doctrine merely requires that the evidence pertain to the same subject, and does not require that it directly rebut the opposing evidence. Because Cole's excluded testimony pertained to the same subject as Eardensohn's testimony, it should have been admitted.

C. The exclusion of this evidence was prejudicial

Because the trial court submitted MAI 24.01(B), the exclusion of this evidence was clearly prejudicial.

CONCLUSION

WHEREFORE, Cluck urges this Court reverse the judgment of the trial court and remand with instructions for a new trial in which UP's liability has been established as a matter of law, with the new trial limited to Cluck's damages. In the alternative, Cluck requests this Court reverse the judgment of the trial court and remand with instructions for a new trial on all issues.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

I hereby certify that Appellant's Substitute Reply Brief complies with the limitations contained in Rule 84.06(b), and that Appellant's Substitute Reply Brief contains 7,524 words according to the Microsoft Word for Windows software used to prepare the brief, not including those contained in the table of contents, table of authorities or appendix.

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CERTIFICATION THAT CD-ROM IS VIRUS-FREE

I hereby certify that the CD-ROM containing a full and complete copy of Appellant's Brief in Microsoft Word for Windows format has been scanned for viruses and that it is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant's Substitute Reply Brief, as well as a CD-ROM containing the same in Microsoft Word format and otherwise in compliance with Rule 84.06(g), was forwarded via U.S. Mail, proper postage prepaid, on the 29th day of July, 2011 to:

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