IN THE MISSOURI SUPREME COURT

No. SC91617

EDDIE CLUCK, APPELLANT

vs

UNION PACIFIC RAILROAD COMPANY, RESPONDENT

SUBSTITUTE BRIEF OF RESPONDENT

UNION PACIFIC RAILROAD COMPANY

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STATEMENT OF FACTS

This action under the Federal Employers Liability Act ("FELA") 45 U.S.C. § 51 *et seq.* arises from a peculiar gunshot incident that occurred on January 13, 2004, as plaintiff/appellant Eddie Cluck ("Cluck") was unloading luggage from the back of a van that had just transported him and three other trainmen from Van Buren, Arkansas, to a hotel in Coffeyville, Kansas. Resp. App. 7[1]. After arriving at the hotel, Cluck got out of the van and went to unload the bags. He opened up the van's back doors, and fellow employee Larry Clark's bag was sitting on top of his. Cluck picked up Clark's bag, dropped it to the ground, and a gun inside the bag discharged. Tr. 448. When the gun discharged, Clark was standing outside the van. Resp. App. 8. Mr. Clark testified that he was standing next to the bench by the door to the hotel when he heard the gun discharge. *Id*. Cluck, however, claims that Clark was standing beside him as Cluck unloaded the bags from the back of the van. Tr. 448.

The gun that shot Cluck was a 9 mm Derringer that Clark had only owned for a few months. Resp. App. 10. Clark testified that he had the Derringer with him on the trip because he was trying to sell it to a friend. Resp. App. 11. It was in his bag because he and his friend "didn't hook up." It had initially been in Clark's truck, but Clark said he put the gun in his grip because he did not want it sitting out in plain sight on his

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[1] Mr. Clark's testimony at trial was presented by deposition and is not contained within the trial transcript. The deposition transcript presented at trial is therefore set forth in UP's Appendix beginning at Resp. App. 1.

truck's seat. Resp. App. 11-12. Clark testified that he only had the Derringer loaded because his friend would want to make sure that it would shoot before he would buy it. Resp. App. 14. Clark testified that he wanted to sell the gun because "I bought it really cheap and I [wanted] to make a little bit of money off it." Resp. App. 15. Clark stated that he simply forgot that the Derringer was in his grip. Resp. App. 27. Clark testified that the first time he remembered that he had placed his Derringer in his grip was the day of the accident, January 13, 2004. Resp. App. 28.

Clark has been with the Union Pacific since 1981. Resp. App. 5. Since 1995 Clark has worked for Union Pacific as a locomotive engineer. His pre-shooting disciplinary record was nearly spotless—his only infraction was for a derailment. Resp. App. 4-5.

Clark noted that he never felt like he was in danger, and never felt like he needed the Derringer for protection. Resp. App. 29. UP's General Code of Operating Rules ("GCOR") Rule 1.12 provides in pertinent part "[w]hile on duty or on railroad property, employees must not [possess] firearms or other deadly weapons." Tr. 498; Ex. 100. Clark had been aware of this rule since the time he first started working for UP in 1981. Resp. App. 26-27. Clark said that no manager or other employee of UP ever told him that it was permissible to carry a gun in his grip. Resp. App. 27. Neither had anyone ever suggested to Clark that any part of his railroad duties would necessitate carrying a firearm. Resp. App. 29.

Facts Concerning Cluck's Receipt of Collateral Source Benefits

Cluck claimed that the accident left him with a knee injury, depression, and post-traumatic stress disorder that rendered him totally and permanently disabled and "unemployable." Tr. 182-187; 867-871. UP sought to admit evidence that the real reason Cluck had not returned to work was because he had no economic incentive to do so. UP contended Cluck had not worked since the gunshot incident and had made only limited efforts to find substitute employment. UP further pointed out that Cluck was receiving, after taxes, approximately $2,350 per month in the form of a Railroad Retirement Board ("RRB") disability annuity. Tr. 853. These payments would cease, however, in any month in which Cluck earned more than $400. *Id*. Cluck supplemented his RRB disability annuity with monthly payments of $1,500 from a loan facilitated by his attorneys and secured by any proceeds from his lawsuit against the railroad. *Id*. Cluck admitted that he had no motivation to obtain a job that paid him less than the $2,350 per month he was receiving in RRB payments. Tr. 603-605.

Cluck's retained psychiatric expert, Dr. Paul Packman, testified that Cluck's inability to find a job contributed to his depression, anxiety, and worries about the future. Tr. 225-226. Based on this testimony, UP took the position that Cluck had opened the door to the admission of Cluck's receipt of collateral source benefits. Tr. 271-72. UP argued that Dr. Packman had created the misleading impression that Cluck's depression was caused by his inability to find work and his anxiety about the future, when in reality Cluck had no legitimate interest in the jobs for which he had applied and likely would

have rejected them even if he had received a job offer because they did not pay him more than he received monthly from the RRB. Tr. 271, 640.

UP requested the opportunity to present evidence of Cluck's RRB payments, but the Court consistently sustained Cluck's objections to this evidence, finding that although the door may have been "cracked," it had not been opened wide enough to admit evidence of collateral source payments. Tr. 640. The Court did, however, permit UP's counsel to question Cluck about his reluctance to accept a job paying him less than the amount he was receiving monthly in RRB benefits, though the jury was not told that that figure represented the net amount of Cluck's disability annuity. Tr. 600-01. Nor did the jury hear any testimony or receive any evidence of Cluck's receipt of collateral source benefits.

Instructions Conference

At the instruction conference, UP's counsel did not agree that that the only proper instruction in the case would be a "MAI 24.01(A)" instruction, as Cluck suggests at p. 7 of his Brief. UP's primary position was that no verdict director was appropriate because Cluck had failed to make a submissible case against UP under any cognizable theory. UP also took the position that there was no basis for a verdict director based on Clark's negligence because the undisputed evidence established that Clark's carrying the loaded gun in his grip was not imputable to UP under a *respondeat superior* theory. Tr. 823-826. As for the form of the instruction, UP did agree that the MAI 24.01(A) was in theory the proper MAI to submit the issue of a fellow employee's negligence, but only if appropriate modifications were made to submit the issue of agency to the jury consistent

with the doctrine of *respondeat superior* incorporated into the FELA. Tr. 823-29. Cluck's counsel confirmed that he had not submitted a modified MAI verdict director that addressed UP's objections. Tr. 830.

At the instruction conference, Cluck raised no objection to the form of Instruction No. 7, the verdict director actually given, which was based on MAI 24.01(B). Cluck's counsel conceded that there were two potential theories for holding UP liable for Cluck's injury: a "direct negligence" theory and an "imputed liability" theory. With regard to the direct liability theory, Cluck's counsel stated, "We believe MAI 24.01(B), the instruction that the Court intends to submit, correctly submits the issue of the railroad's direct negligence for what occurred." Tr. 830. Cluck's counsel further agreed that Instruction No. 7 was "in proper procedural form for the direct negligence theory." Tr. 831.

THE PROCEEDINGS BEFORE THE TRIAL COURT

In the case below, Cluck maintained that *respondeat superior* did not apply in FELA cases, and the verdict directors he proffered would have allowed the jury to hold UP liable for Clark's negligence without any finding that Clark's negligent act was committed within the course and scope of his employment. UP maintained, and Judge Mesle agreed, that the FELA did incorporate principles of *respondeat superior* and thus rejected Cluck's proffered instructions that did not submit the issue of agency. At Judge Mesle's direction, and under protest, Cluck prepared and tendered instructions that attempted to submit the question of Clark's agency. Judge Mesle refused these instructions as well, agreeing with UP's position that Cluck's proposed instructions did

not submit the issue of agency in a manner consistent with the substantive law of the FELA and MAI's instructional scheme or were otherwise defective.

After Cluck repeatedly proved either unable or unwilling to prepare an appropriate verdict director on his imputed liability theory, Judge Mesle gave an instruction based on MAI 24.01(B), which submitted Cluck's alternative "direct negligence" theory. Although Cluck claimed that Judge Mesle's instruction based on his direct negligence theory amounted to a directed verdict on his imputed liability theory, Cluck conceded that the instruction given by the trial court properly submitted his alternative "direct negligence" theory and made no objection to its form or content. Tr. 830.

Judge Mesle devoted a generous amount of time to addressing the instructional issues, giving Cluck every opportunity to submit an appropriate verdict director on his imputed liability theory. During the multiple discussions with counsel—some on the record, some off—Judge Mesle not only permitted Cluck to submit as many proposed instructions as he wanted, but further explained why she was rejecting the instructions he had proffered.

Judge Mesle first spent an extended period discussing instructions after the close of evidence on Friday, November 7, 2008. Tr. 774-816. During these exchanges, which preceded the actual instruction conference, Judge Mesle considered a number of Cluck's proposed instructions on his imputed liability theory but made clear that, consistent with the law, any instruction based on MAI 24.01(A) had to submit the question of Mr. Clark's agency. Tr. 781:15-782:18; Tr. 778:11-13. She also agreed with UP's position that the instructions that Cluck prepared, which attempted to submit the issue of agency,

were inconsistent with the law and MAI. *See* Tr. 781:15-782:18; Tr. 778:11-13. Cluck's counsel acknowledged these concerns and expressed a clear understanding of Judge Mesle's rationale for refusing his instructions. The record from November 7, 2008 reflects lengthy exchanges in which Judge Mesle and Cluck's counsel discussed the content of Cluck's proffered instructions. Tr. 787:16-794:6.

After the extended discussions on November 7, 2008, Judge Mesle then had the parties' counsel meet with her on Sunday, November 9, 2008, for the purposes of discussing instructions further. *See* Tr. 814:10; 933:3; 944:18. These discussions were off the record. Finally, Judge Mesle held a formal, on-the-record instruction conference on November 10, 2008, immediately before closing arguments. Tr. 819. At this conference, Cluck's counsel was afforded the opportunity to tender multiple proposed verdict directors and make whatever record he desired.

PROCEEDINGS BEFORE THE COURT OF APPEALS

After the jury returned a verdict in favor of UP, Cluck appealed, asserting four points of error. In his Point I,[2] he asserted that the trial court "committed prejudicial error in refusing to submit a verdict-directing instruction based on Missouri Approved Instruction (MAI) 24.01(A)."[3] Neither Cluck's Point Relied On nor his argument asserted that any of the specific instructions he actually requested was correct based on the law and the facts. Nor did Cluck assert that Judge Mesle erred in refusing any of the

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[2] Point I of Cluck's original brief now appears as Point II of his substitute brief.

[3] See Appt.'s Brief, Pt. I at p. 10.

instructions he had proffered. In fact, Cluck's argument under Point I did not address by number—or discuss the substance of—any of the multiple verdict directors he submitted.

Cluck also did not contend in Point I that the trial court erred in failing to modify MAI 24.01(A) to submit the issue of *respondeat superior*. Indeed, Cluck's Point I argued that 24.01(A) had to be given without modification because *respondeat superior* was inapplicable in FELA actions, because the trial court was prohibited from modifying an MAI that was applicable, and because the undisputed evidence demonstrated that Clark was acting within the course and scope of his employment at the time of the incident.

Cluck did assert, however, that because the trial court had a "non-delegable duty" to instruct the jury on a theory of liability supported by the evidence, "the trial court was obligated to tender an appropriate MAI 24.01(A) instruction, even if it did not approve of any of Plaintiff's attempts to tender an instruction based on MAI 24.01(A)."[4]

Point II of Cluck's original Brief asserted that the trial court erred in denying his motion for a directed verdict on the issue of UP's liability. Count III challenged the trial court's failure to give a withdrawal instruction in response to a question by the jury during its deliberations, while Point IV asserted that Judge Mesle erred in excluding a portion of the deposition of Lee Cole.

In response to Cluck's Point I, UP argued, among other things, that Cluck's Point Relied On violated Rule 84.04(d)(1) in that Cluck had not identified any specific ruling by the trial court that constituted error. UP argued that Cluck had not assigned error to

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[4] Appellant's Original Brief at 12.

the trial court's refusal of any one of the multiple alternative instructions he tendered, nor did he discuss the substance of any one of the instructions or explain why any was correct under the law or the facts. UP therefore urged the Court to reject Cluck's Point I purely on procedural grounds.

THE COURT OF APPEALS' OPINION

The Court of Appeals' Opinion actually agreed with Union Pacific on most of the issues raised in Point I. It held that the FELA does incorporate elements of *respondeat superior*. Op. at 7.[5] The Court also found that because Clark's agency was a disputed issue of fact for the jury, MAI 24.01(A) had to be modified to submit this question to the jury. Op. at 12-13. The Court of Appeals acknowledged that Judge Mesle rejected Cluck's proffered jury instructions because they did not properly reflect the governing law; and the Court of Appeals' Opinion did not claim that Judge Mesle erred in refusing any of the proffered instructions. Op. at 14.

Despite finding no error in her refusal of Cluck's tendered instructions, the Court of Appeals nevertheless held that Judge Mesle committed reversible instructional error by failing to instruct the jury on Cluck's theory of imputed liability based on Clark's negligence. It accepted Cluck's argument that a trial court has a "non-delegable duty to instruct the jury according to the law and evidence in the case" and that Judge Mesle violated this duty by failing to submit an instruction on Cluck's chosen *respondeat*

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[5] Unless otherwise indicated, all references to the Court of Appeals' Opinion are to the Modified Opinion issued March 1, 2011.

superior theory. Op. at 14. The Court of Appeals held that Cluck "made reasonable efforts to proffer instructions to satisfy the concerns of the court and Union Pacific that MAI 24.01(A) should be modified to address the unique facts of this case." Op. at 14. And although recognizing that Cluck's eight alternative verdict directors "were not models of clarity," the Court held that the variations of Cluck's proposed instructions "included all of the necessary legal elements and facts to submit his theory of imputed liability." Op. at 14-15. The Court of Appeals then held that because Cluck was entitled to an instruction on his selected theory of recovery, the trial court erred in failing to submit one and that the error was prejudicial. *Id*. at 15.

With regard to Cluck's original Point II, asserting that the trial court erred in denying his motion for a directed verdict, the Court of Appeals held that issues of fact regarding Clark's negligence and agency precluded a directed verdict on liability in favor of Cluck. Op. at 17.

Because the Court reversed for a new trial based on instructional error, it declined to discuss the merits of Point III, challenging the trial court's refusal to give a withdrawal instruction, and Point IV, challenging the court's exclusion of testimony from witness Lee Cole.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION FOR DIRECTED VERDICT ON THE ISSUE OF LIABILITY BECAUSE THE UNDISPUTED EVIDENCE DEMONSTRATED CONCLUSIVELY THAT UNION PACIFIC WAS NOT LIABLE FOR CLARK'S ALLEGED NEGLIGENCE, OR ALTERNATIVELY, BECAUSE THE ISSUE OF CLARK'S NEGLIGENCE AND AGENCY WERE ISSUES OF FACT TO BE DETERMINED BY THE JURY.

The trial court correctly denied Cluck's Motion for Directed Verdict. Plaintiff has not demonstrated that UP admitted[6] in its case facts that demonstrated UP's liability for Cluck's injury as a matter of law. Courts generally recognize two independent theories of liability a plaintiff may use to hold a railroad liable for a tort committed by its employees—"*respondeat superior*" or "direct liability." *See generally Sobieski v. Ispat Island, Inc.*, 413 F.3d 628, 635 (7th Cir. 2005). Under *respondeat superior*, a railroad is liable for injuries caused by its employee's acts or omissions committed within the course and scope of and in furtherance of the railroad's business. *Id.*; *see also Lavender v. Illinois Cent. R. Co.*, 219 S.W.2d 353, 357 (Mo. 1949). Under the direct negligence

[6] Contrary to Cluck's representation, UP's counsel did not admit during opening statements that Clark was "negligent." Cluck has not pointed to any portion of the record where UP admitted that Clark was negligent or that he was acting within the course and scope of his employment and in furtherance of the railroad's business.

theory, a railroad may be liable for its employee's acts or omission that were beyond the course and scope of the employer's business if the railroad knew or should have known of the employee's propensity for certain conduct but failed to take appropriate steps to prevent it. 413 F.3d 628, 635.

Cluck's Point Relied On concerns only the former *respondeat superior* theory; he has not claimed that the railroad was liable for Clark's conduct under a direct liability theory.[7] Cluck argues that the trial court should have directed a verdict in his favor on the issue of UP's liability under his *respondeat superior* theory because UP admitted all of the facts essential to establish negligence as a matter of law. As described below, Cluck's argument is contrary to the law and unsupported by the record.

In order to establish UP's liability for Clark's actions, Cluck had to establish that Clark was negligent, that UP was liable for Clark's actions, and that Clark's alleged negligence caused Cluck's injuries. UP did not admit these facts. On the contrary, UP strongly contested liability, and if anything, the evidence presented by UP, as well as that

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[7] As the Court of Appeals correctly noted, although Cluck's Petition alleged both *respondeat superior* and direct negligence theories, at trial Cluck requested an instruction only on his *respondeat superior* theory. And as the Court of Appeals also correctly noted, Cluck did object to the Court's decision to instruct on the direct negligence theory, but he has not argued on appeal that the trial court erred in giving the instruction based on his alternative direct negligence theory or challenged the verdict in favor of UP on that theory.

provided by Cluck, required judgment as a matter of law in favor of UP. Alternatively, at a bare minimum, whether Clark was negligent and whether the conduct causing injury was within the course and scope of his employment and furthered the railroad's business were factual issues that the jury, not the trial court, was to resolve.

A. Standard of Review

As a general rule, verdicts may not be directed in favor of the party having the burden of proof. *Inauen Packaging Equipment Corp. v. Integrated Indus. Services, Inc.*, 970 S.W.2d 360, 365 (Mo. App. 1998)(citing *Coleman v. Jackson County*, 160 S.W.2d 691, 693 (1942)). The only exception to this rule arises where the party not having the burden of proof—in this case, Union Pacific—admits the truth of the basic facts upon which the claim of the proponent rests. *Id.* A directed verdict in favor of the party having the burden of proof is never based upon the plaintiff's evidence. *Id.* (citing *Brandt v. Pelican*, 856 S.W.2d 658, 664 (Mo. banc 1993)). Rather, a directed verdict for plaintiff depends not on what the plaintiff offers into evidence but upon what the defendant admits is true. The Missouri Supreme Court has expressed the rule as follows:

> [Absent a case of] undisputed documentary proof, a directed verdict is not given in favor of the party having the burden of proof ***no matter how overwhelming that party's evidence may be or how minuscule the other party's evidence may be***; a directed verdict in favor of the party having the burden of proof (usually the plaintiff) is never based upon the plaintiff's evidence. This is in recognition of the fact that the defendant, who has the benefit of the burden of proof, is entitled to try the case with no evidence at

all and to rely solely upon the jury disbelieving the plaintiff's evidence. This strategy may result in a loss for the defendant, but it will not be on a directed verdict; the defendant is entitled to have the case go to the jury.

Brandt, 856 S.W.2d at 664-65 (emphasis added).

B. UP was not liable for Clark's conduct as a matter of law, or alternatively, the issue of Clark's agency was a disputed question of fact to be resolved by the jury.

If anything, the trial court's error was in denying UP's own Motion for Directed Verdict, in that there was no evidence from which a jury could have concluded that Clark's bringing a loaded gun to work in his luggage was done within the course and scope of his job as a locomotive engineer or in furtherance of the railroad's business. Cluck's argument to the contrary is based on a misinterpretation of the governing law of the FELA and a selective and inaccurate recitation of the facts.

1. Basis for liability under the FELA.

The FELA is not a workers' compensation statute and does not make the employer the insurer of the safety of his employees while they are on duty. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994). The basis of a railroad's liability is negligence, not the fact that injuries occur. *Id.* Absent express language to the contrary, the elements of an FELA claim are determined by reference to the common law. *Norfolk Southern Ry. Co. v. Sorrell*, 549 U.S. 158, 166 (2007)(citing *Urie v. Thompson,* 337 U.S. 163, 182 (1949)). Unless common law negligence principles are expressly rejected in

the text of the statute, they are entitled to great weight in a court's analysis. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994).

The FELA does not represent a wholesale repudiation of the common law, but instead a limited revision of it. As the Supreme Court has noted, "[W]hen Congress abrogated common law rules in FELA, it did so expressly." *Norfolk Southern Ry. Co. v. Sorrell*, 549 U.S. 158, 174 (2007)(citing *Norfolk & Western R. Co. v. Ayers*, 538 U.S. 135, 145 (2003) and *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532 (1994)). Hence, the statute abolished the fellow servant rule (45 U.S.C. § 51); rejected the doctrine of contributory negligence in favor of that of comparative negligence (45 U.S.C. § 53); prohibited employers from exempting themselves from FELA through contract (45 U.S.C. § 55); and abolished the assumption of risk defense (45 U.S.C. § 54). *Gottshall*, 512 U.S. at 542-543.

2. *Respondeat superior* remains an integral part of the FELA.

Respondeat superior was not among the common law doctrines that Congress eliminated when it enacted the FELA. On the contrary, as the Supreme Court said, FELA "applies the principle of respondeat superior." *Jamison v. Encarnacion*, 281 U.S. 635, 639 (1930)(citing 45 U.S.C. § 51). The overwhelming majority of cases since *Jamison*, including one from this Court, have recognized that *respondeat superior* remains an integral part of the FELA and an important limitation on the railroad's liability for injuries owing to an employee's negligence. *Lavender v. Illinois Cent. R. Co.*, 219 S.W.2d 353, 357 (Mo. 1949).

Lavender was a wrongful death case under the FELA arising from the death of a railroad employee, Hunter, who had been shot by a gun that a fellow employee, McCampbell, had brought to work in his handbag. *Id*. at 355. McCampbell pulled the gun out, and as he went to replace it in his bag, another employee who was engaged in what was described as "horseplay" jostled McCampbell and caused the gun to discharge. *Id*. McCampbell's job did not require him to carry a pistol, and he stated that he was carrying it for protection from another employee who had previously threatened him. *Id*.

The Court held that the railroad was not vicariously liable for the death because the shooting did not occur within the course and scope of the employees' employment with the railroad and in no way furthered the railroad's business. The Court explained, "Even under the Federal Employers' Liability Act a carrier is not liable for every act of an employee causing injury to another employee." *Id*. at 357. Rather, "to hold the master liable the act must always have been done in furtherance of the master's business." *Id*. The Court concluded that "the instrumentality was owned by McCampbell and the act was that of a former servant who had stepped out of the scope of his employment without notice to or knowledge of the master." *Id*. at 357-58.

The *Lavender* Court's adherence to traditional *respondeat superior* principles in FELA cases, as well as its refusal to adopt a diluted standard of vicarious liability, has been followed by the clear majority of federal appellate courts to have considered the issue. For example, in *Sobieski,* , the Seventh Circuit held that the "course of

employment" test for FELA[8] cases requires a plaintiff to show "that the employee's tort was committed in furtherance of the employer's business." 413 F.3d at 632 (7th Cir. 2005) (citing *Lancaster v. Norfolk and Western Ry. Co.*, 773 F.2d 807, 817 (7th Cir. 1985)(holding that *respondeat superior* applied in FELA action)). The Tenth, Second, and Fourth Circuits have similarly applied *respondeat superior* principles in FELA or Jones Act cases and rejected attempts by plaintiffs to subject defendants to a broader standard of vicarious liability. *See Copeland v. St. Louis-San Francisco Railway Co.*, 291 F.2d 119, 120 (10th Cir. 1961)(affirming district court's application of *respondeat superior*); *Gallose v. Long Island R. Co.*, 878 F.2d 80, 83 (2nd Cir. 1989)(same); *Trost v. American Hawaiian S. S. Co.*, 324 F.2d 225, 227 (2nd Cir. 1963), *cert. denied*, 376 U.S. 963 (1964); *McClure v. U.S. Lines Co.*, 368 F.2d 197, 199 (4th Cir. 1966)(recognizing applicability of *respondeat superior* principles in Jones Act cases); *see also Schipper v. BNSF Ry. Co.*, 2008 WL 2783160, *6 (D. Kan. 2008)(holding that *respondeat superior* principles would apply in determining railroad's liability for motor vehicle accident that occurred in parking lot of hotel provided by railroad for its employees).

[8] *Sobieski* was actually a case under the Jones Act, which by its terms extends the protections of the FELA to seamen; thus FELA caselaw is broadly applicable in the Jones Act context. 413 F.3d at 631.

3. Under the FELA, *respondeat superior* does not focus merely on the time and location of the alleged negligent conduct, but requires that the conduct itself fall within the course and scope of employment and further the railroad's business.

Respondeat superior requires more than simply showing that an accident occurred during working hours. Cluck's suggestion that the shooting occurred within the course and scope of Clark's employment—because both Clark and Cluck were being transported by van in connection with their work for the railroad—is based on an expansive interpretation of *respondeat superior* that is inconsistent with the governing law and has been firmly rejected by multiple courts, including this one.

Under controlling authority, the relevant question is not simply whether the alleged tortfeasor was on duty, but whether the act causing injury was within the course and scope of his employment and had the tendency to further the railroad's business. As this Court held in *Lavender*, it was "not enough that the shooting complained of occurred during the hours these employees were on their regular dining car under the orders of defendant to be there." *Lavender*, S.W.2d at 357. Instead, the Court held, the focus must be on the relationship between the injury causing conduct and the nature of the employment, explaining, "[T]o hold the master liable ***the act must always have been done in furtherance of the master's business***." *Id*. at 357 (emphasis added).

Other courts have similarly required evidence that the act causing injury fell within the course and scope of employment and furthered the defendant's business. In *Sobieski*, the plaintiff alleged neck injuries caused by another employee who performed

an amateur chiropractic adjustment while the two were on duty on a ship. Because seaman aboard a vessel were on duty "24/7," the plaintiff asked the court to adopt a modified version of *respondeat superior* that would extend liability for all negligent acts by employees that occurred on the vessel, thus dispensing with the need to show that the tortfeasor's acts were in furtherance of the ship's business. The Seventh Circuit rejected this request for a "broad theory of vicarious liability" under which all acts committed by seamen aboard a vessel would be deemed to be within the course and scope of their employment. The court held that it could "not ignore common law principles of negligence unless Congress expressly indicates otherwise." *Sobieski*, 413 F.3d at 632 (citing *Gottshall,* 512 U.S. at 543-44). And while acknowledging that the FELA did dispense with certain common law defenses, the court held that nothing in the FELA's express terms indicated Congressional intent to set aside common law principles of *respondeat superior*, noting that "most courts have continued to apply traditional rules of respondeat superior for both negligence and intentional tort cases." *Id*. at 633 (citing *Lancaster*, 773 F.2d at 817-18). The *Sobieski* court further noted that the proposed rule would effectively make employers the insurers of their employees' safety, in violation of the FELA. *Id*. at 632 (citing *Gottshall,* 512 U.S. at 543 ("FELA does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.")).

The Second Circuit followed the same reasoning in *Gallose*, where a plaintiff sued for bite injuries inflicted by a large German shepherd mix that a fellow employee had brought to work with her. The employee who brought the dog was concerned about drug

use and crime near her workplace and kept the dog locked in a nearby bathroom to alert her of possible intruders. At some point, the dog escaped from the bathroom and bit a railroad police officer who was patrolling the area. The plaintiff alleged that the employee was negligent in bringing the dog to work with her, in keeping the animal confined in a bathroom, and in allowing it to escape and attack him. *Id*. at 82. The plaintiff requested an instruction that would have held the railroad liable for the employee's negligence without regard to agency. The trial court rejected this instruction, holding that in order for the railroad to be liable under the FELA for the employee's negligence, her negligent conduct must have occurred within the scope of her employment. The trial court then found as a matter of law that the employee's conduct was not within the course and scope of her employment.

The Second Circuit affirmed the trial court's application of *respondeat superior*, explaining:

> Under the FELA, not only must *the injured employee* be acting within the scope of employment at the time of injury, but *the employee whose conduct causes the injury* must also be acting within the scope of his employment. Thus, under the FELA employers are liable for the negligence of their employees only if it occurs within the scope of employment, and no liability attaches when an employee acts "entirely upon his own impulse, for his own amusement, and for no purpose of or benefit to the defendant employer."

Gallose, 878 F.2d at 83 (quoting *Copeland*, 291 F.2d at 120)(emphasis in original)(citations omitted).

The court found, however, that the trial court erred in removing the agency issue from the jury. The court held that the salient question was whether, by bringing the dog to work with her, the employee was "acting within the scope of her employment-that is, was she, within the limits of her employment duties, attempting to further her employer's interests." *Id*. at 84. Because there was some evidence that the employee had brought the dog to work for some legitimate employment purpose—namely to protect her from a workplace hazard and allow her to better focus her attention on her work—the court held that the agency issue was for the jury. *Id*. at 84. The Court noted, however, that the trial court's conclusion that the employee was acting outside the scope of her employment might have been warranted if the only evidence showed that the employee brought the dog to work "because she had nowhere else to leave it, or that she had brought the dog to play a practical joke on a friend, or that she did it for some other purely personal reason. . . ." *Id*.; *see also Trost*, 324 F.2d at 227 ("fact that the captain and the purser were 'in the course of their employment' in terms of time and place, is not sufficient; a shipowner may not be held liable unless the particular act performed negligently was also in the scope of employment of the negligent employee."); *McClure*, 368 F.2d at 199 (holding it was not within the scope of his employment for a seaman to aid an intoxicated member of the same crew in returning to their ship); *Copeland,* 291 F.2d at 122 (holding that railroad was not liable for the "prankish" act of a fellow employee that was "wholly outside the scope of his employment, intended only to further his own interests, and not those of his employer, and were not chargeable to his employer.").

This Court has refused to find that injuries associated with the accidental discharge of a gun during working hours necessarily arise during the course and scope of employment. *Arnold v. Wigdor Furniture Co.*, 281 S.W.2d 789 (Mo. 1955). In *Arnold*, a claimant sought workers compensation benefits for the death of a delivery van driver who died when a shotgun he was carrying discharged accidentally while he was making a delivery. The Court held that whether the injuries were compensable depended on a showing that the employee was carrying the gun for purposes related to his work. The Court explained:

> [A]s we analyze the case, we think it must be apparent that if the shotgun was carried in the truck solely for deceased employee's own purposes, unrelated to his employment or the duties thereof, claimant may not recover. This because, under such circumstances, the accident did not arise 'out of the employment' in that the causal origin of the injury was unconnected with deceased's employment.

Id. at 792. Thus, even in the context of workers compensation, which does not require a showing a negligence, this Court has required proof that the injury was caused by conduct logically connected to the employee's employment.

Similarly, in *Leverton v. Hartstein*, 365 S.W.2d 60, 61 (Mo. App. 1963), the court refused to hold a drive-in theater owner liable to a third party who suffered a gunshot wound caused by two theater employees who were using a gun for target practice while on duty. The court found, as a matter of law, that the employer was not liable for his employees' negligence. Although it was undisputed that the employees were working for their employer at the time of the shooting, the court held that their using a gun for target

practice was unrelated to the scope of their employment and "show[ed] a departure from the master's business for the sole purpose of the employees' own pursuits." *Id*. at 63.

4. The undisputed evidence established that Clark's bringing a loaded gun to work in his luggage was beyond the course and scope of his employment and for the sole purpose of furthering his own interests; alternatively, the question of Clark's agency was an issue of fact for the jury.

Additionally, directing a verdict on liability in favor of Cluck required some factual basis for imputing Clark's alleged negligence to the railroad. As explained above, UP was not liable for Clark's conduct under the FELA unless the negligent act causing injury was committed by Clark within the course and scope of his employment and in furtherance of the railroad's business. *Lavender,* 219 S.W.2d at 357 (Mo. 1949); *Sobieski,* 413 F.3d at 631-32; *Copeland,* 291 F.2d at 122; *Gallose,* 878 F.2d at 83. UP maintains that this issue of agency could and should have been resolved in its favor, because there was no evidence that Clark's carrying a loaded gun in his grip was within the course and scope of his employment as a locomotive engineer and furthered the railroad's business. In fact, not even Cluck can credibly argue that Clark's bringing a gun to work was part of his job or furthered the railroad's business. UP did not admit that Clark's acts or omissions that caused Cluck's injury were done within the course and scope of his employment or in furtherance of the railroad's business.

The undisputed evidence in this case, even when viewed in the light most favorable to Cluck, provided no rational basis for the jury to conclude that Clark's

bringing a gun to work was within the scope of his employment or furthered the railroad's business. Carrying a loaded gun was not related to Clark's job as a locomotive engineer, and the railroad operating rules that governed his employment expressly forbade employees from carrying weapons while at work. There was no testimony that carrying a weapon was part of an engineer's job or in any way furthered it. Clark's motive for placing the loaded gun in his grip was purely personal. He intended to show the gun to a friend who had expressed interest in buying it, and Clark's hope was to "make a little bit of money off it" because he had "bought it really cheap." Resp. App. 15. Rather than leaving the gun in plain sight on the seat of his personal truck, he stashed the gun in his grip, then brought the grip to work forgetting the gun was inside. It was not until the gun discharged accidentally that Clark remembered that the gun was in his luggage. Unlike the employee in *Gallose* who brought her dog to work for protection, Clark admitted that he had not brought the gun to work for any purpose arguably relating to his job, such as protection or self defense.

Under these undisputed facts, there was no factual basis for concluding that Clark's bringing a concealed, loaded weapon to work with him was within the course and scope of his employment and furthered the railroad's business. Rather, Clark's carrying the loaded gun furthered only his personal interests—namely his goal of selling the gun at a profit and his desire not to leave a weapon in plain sight in the cab of his pickup truck.

If, however, there were any factual issues regarding Clark's agency, it was up to the jury to resolve them. *See Gallose*, 878 F.2d at 84 (holding whether employee's bringing a dog to work with her was done in furtherance of the railroad's business

presented a question for the jury); *accord Schipper*, 2008 WL 2783160 at *6 (holding whether employee who struck plaintiff with car in hotel parking lot was acting within the course and scope of his employment was issue for the jury). This is especially true in this action under the FELA, where the role of the jury is significantly greater than in common law negligence actions, and where the jury's right to pass upon the question of the employer's liability "must be most liberally viewed." *Id*. For this reason, "the scope of employment issue may be taken from the jury only when it is clear that 'reasonable men could not reach differing conclusions.'" *Id*. (quoting *Baker v. Texas & Pacific Railway Co.*, 359 U.S. 227, 228 (1959)). The trial court therefore did not err in denying plaintiff's motion for a directed verdict.

5. The cases cited by Cluck do not warrant the Court's disregard for *respondeat superior* principles in an FELA case.

The cases Cluck cites in an effort to expunge *respondeat superior* from the FELA lexicon are unpersuasive. The only case that even remotely supports Cluck's argument is *Baker v. Baltimore & Ohio Railroad. Co.*, 502 F.2d 638 (6th Cir. 1974). *Baker*, however, is not binding on this Court, nor is it persuasive, because it conflicts with the interpretation of the FELA adopted by the United States Supreme Court, this Court, and the clear majority of federal appellate courts that have reaffirmed the applicability of *respondeat superior* in FELA cases. As the Seventh Circuit observed in *Sobieski*, the *Baker* court declined to apply a course and scope of employment test at all and essentially repudiated the doctrine of *respondeat superior*, ruling that railroads were liable for all torts committed by a servant while at work. *Sobieski*, 413 F.2d at 633 (citing *Baker*, 502

F.2d at 641). Refusing to follow *Baker*, the Seventh Circuit reasoned that even if FELA is to be given a "liberal" reading, courts "are not to ignore the statutes' clear terms or common law principles in the absence of statutory language indicating otherwise." 413 F.2d at 633. The court found no authority for abandoning the doctrine of *respondeat superior*. *Id*. citing *Lancaster*, 773 F.2d at 817-818 (rejecting *Baker* and finding that purpose of FELA was not to broaden doctrine of *respondeat superior*).

Also distinguishable is *Burrus v. Norfolk and W. Ry. Co.*, 977 S.W.2d 39 (Mo. App. 1998). In *Burrus*, a conductor was injured when his engineer fell asleep while in the course of operating a locomotive—precisely the task his job required him to perform. *Respondeat superior* liability was not at issue, nor was it discussed. *Burrus* stands only for the proposition that a railroad is liable for an employee who negligently performs tasks within the course and scope of his employment without regard to notice by his employer of the negligence. *Burrus* does not hold that a railroad is liable for all negligent acts of an employee that occur on railroad property. The distinction between *Burrus* and this case is obvious: operating a locomotive, albeit negligently, is within the course and scope of a locomotive engineer's job; packing a concealed handgun that one hopes to sell at a profit is not.

Cluck's reliance on *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891 (11th Cir. 2004) is completely misplaced, and his characterization of that case is misleading. In *Doe*, the plaintiff alleged she was raped by a cruise line's employee while the two were ashore. The court's analysis focused on the unique and special relationship between a common carrier and its passengers, which obligated the former to protect the latter. The court

applied principles of federal admiralty law and Florida state law, both of which rendered a common carrier strictly liable to passengers for assaults committed by the carrier's employees. Although the rape was committed by the employee while he was formally off duty, it occurred as the employee was escorting a passenger at a port of call destination, which was among the duties the employee was expected to perform and for which he received gratuities. *Doe* has no applicability to this case, and it provides no authority for relaxing ordinary *respondeat superior* principles in FELA cases.

Sweet v. Roy, 801 A.2d 694, 705 (2002) is likewise inapposite. *Sweet* involved allegations that agents of a mobile home park used improper means to evict a resident. Although the means the employees used were improper, they were part of the work that directly benefited their master. The court found that although the specific means employed by the agents may not have been expressly authorized, the means were used to accomplish an act that directly benefitted the mobile home park and were not unforeseeable.

Cent. of Ga. R. Co. v. Rush, 239 So. 2d 763 (Ala. 1970) involved a plaintiff who shot himself accidentally while at work. The plaintiff alleged that his employer was negligent in requiring him to work in conditions that encouraged him to carry a firearm for his own protection. The central issue was whether the plaintiff was himself working for his employer when he shot himself. It did not involve *respondeat superior* issues.

Russell v. United States, 465 F.2d 1261 (6th Cir. 1972) is likewise not persuasive. That case arose under the Federal Tort Claims Act, which incorporated the law of the state where the tort occurred, in that case, Kentucky. The court's holding was based on

acknowledgement that Kentucky had adopted a "considerably broader interpretation of the doctrine of respondeat superior" than at the common law. *Id*. at 1262 Because the court's decision was based on a unique aspect of Kentucky law that adopted a view of *respondeat superior* broader than that applied in FELA cases, Russell is neither controlling nor persuasive.

6. UP has not argued that an employee's violation of a railroad safety rule insulates the railroad from liability for Clark's conduct.

Cluck devotes significant space to rebutting an argument that UP has not made. UP has never contended that it can avoid liability under the FELA simply by passing rules prohibiting negligent conduct, and then claiming that negligence is beyond the course and scope of employment. Rather, UP's argument is that its safety rules help to define conduct that is specifically unauthorized and to corroborate a position that Cluck does not dispute, namely that Clark's carrying a loaded weapon in his grip was wholly unrelated to his job as a locomotive engineer and in no way furthered the railroad's interests.

UP's argument is consistent with section 230 of the Restatement (Second) of Agency, entitled "Forbidden Acts." Comment c to section 230 incorporates the general rule that "Conduct is not within the scope of employment if it has no connection with the act which the employee is required to perform." Rest. 2d Agency § 230 comment c. Further, the employer's prohibition on certain acts may be a factor in determining "whether or not, in an otherwise doubtful case, the act of the employee is incidental to the employment" because " it accentuates the limits of the servant's permissible action and

hence makes it more easy to find that the prohibited act is entirely beyond the scope of employment." Restatement (Second) of Agency § 230 comment c (1958). Applied to this case, it means that UP's express prohibition on the possession of firearms by employees places a clear limit on the scope of the employees' duties and reinforces the conclusion that an employee bringing a gun to work has exceeded the scope of his authority.

It is one thing to perform negligently an essential function of the job and quite another to act negligently in matters unrelated to one's job. 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. Packing a loaded weapon that he intends to sell to a friend is not.

7. Cluck cannot evade *respondeat superior* by recharacterizing Clark's conduct as a "failure to warn."

Under Cluck's view of the law, an employer could be held liable for any act of an employee—no matter how outrageous or unconnected to work—so long as the plaintiff asserted that the employee failed to warn his fellow employees of the impending danger. If Cluck's theory were accepted, the doctrine of *respondeat superior* would disappear, and a railroad would become the insurers of their workers' safety—a result that is contrary to law. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994)(the FELA is not a workers' compensation statute and does not make the employer the insurer of the safety of his employees while they are on duty).

Cluck's argument appears to be that because the railroad's rules require employees to warn of dangerous workplace conditions, UP is liable for Clark's own failure to warn of dangers that Clark created through conduct wholly unrelated to his job as a locomotive engineer. And according to Cluck, as long as Clark's "failure to warn" occurred while he was on duty, the railroad is automatically liable for any resulting harm, no matter how outrageous the underlying conduct.

Cluck's theory, if followed to its logical conclusion, would yield absurd results. Through a semantic sleight of hand, a railroad would become liable for:

- an engineer who accidentally blew up a railroad van while assembling a pipe bomb he intended to use to kill rodents on his farm, under the theory that the employee "failed to warn" the van's other occupants of the dangers of an explosion;
- an engineer who infected a fellow trainman with hepatitis by giving a tattoo with a dirty needle, on grounds that he "failed to warn of a dangerous condition;"
- a fire started by an engineer who was using his hotel room to manufacture methamphetamine, under the theory that the employee failed to warn those sleeping in adjoining rooms of a "dangerous condition."

Although the variations on this theme are potentially endless, the message is simple: a plaintiff cannot sanitize unauthorized or outrageous behavior by reclassifying it as a "failure to warn" without effectively obliterating core concepts of *respondeat superior*.

Cluck's "failure to warn" theory is yet another example of Cluck's effort to impose a "time and place" test for *respondeat superior*. Cluck has not cited any railroad rule that expressly obligated employees to warn other of workplace conditions. Rather, Cluck's "failure to warn" theory is an outgrowth of a railroad rule that advises employees to "take precaution to prevent injury to themselves, other employees, and the public," Tr. 744. Stated differently, this rule tells employees not to be negligent.

Cluck argues that a railroad cannot insulate itself from liability by prohibiting negligent conduct by employees and then, when such negligence occurs, claim that the negligence is beyond the course and scope of employment. Yet Cluck advocates essentially the same rule, only in reverse: Cluck contends that because a railroad rule imposes a duty not to negligently harm others, any conduct by an employee that harms another *ipso facto* violates the railroad rules and thus necessarily falls within the course and scope of employment. Just as a railroad cannot avoid negligence under the FELA by passing a rule barring negligent conduct, neither can a plaintiff circumvent *respondeat superior* by benignly characterizing specific unauthorized conduct a an employee's breach of a rule not to harm others, then claim that it automatically arises within the course and scope of employment. Cluck's proffered theory would effectively make railroads the insurers of their employees' safety.

The simple fact is that Cluck's injury was caused by the accidental discharge of a firearm that a fellow employee brought to work without authorization and without any intent (misguided or otherwise) to benefit the railroad.

8. Cluck's "transportation and lodging" cases miss the point.

Cluck's cases[9] involving injuries sustained by employees during their transport and lodging are inapposite. Those cases generally involve question of either (1) whether an injured employee is acting within the course and scope of his employment at the time of his injury or (2) whether the railroad is liable for the negligence of third-party contractors who are performing operational activities of the railroad. Cluck's argument based upon this line of cases is simply a variation on his broader effort to impose a relaxed standard of *respondeat superior* that looks only at whether the alleged tortfeasor's conduct occurred during business hours rather than on whether the conduct related to his employment or furthered the railroad's interest. The cited cases do not support this contention.

In fact, in *Schipper, supra,* the court held that cases involving injuries occurring at third-party lodging facilities had no application in a case premised on one employee's negligent conduct that injured another. 2008 WL 2783160 at *6. In that case, although one employee was alleged to have injured another in a hotel parking lot, the court held that the proper test for determining the railroad's liability was "whether the acts engaged in by the railroad's employees that caused the injury were within the scope of employment." *Id*. (citing *Copeland*, 291 F.2d at 120).

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[9] Appellant's Substitute Brief at 26-30.

9. Cluck's fellow servant rule argument misunderstands the distinction between *respondeat superior* and the fellow servant doctrine.

FELA's abolition of the fellow servant rule is immaterial to the issues of the case. At common law, the fellow servant doctrine barred an action against an employer by an employee who was injured because of a fellow employee's negligence. While FELA abolished the fellow servant doctrine, Congress did not similarly abolish the doctrine of *respondeat superior*. On the contrary, as the *Jamison* Court observed, the FELA "abrogates the common-law rule that makes every employee bear the risk of injury or death through the fault or negligence of fellow servants, ***and applies the principle of respondeat superior***." *Jamison*, 281 U.S. at 639 (emphasis added). Thus, the operative question remains whether the employee's conduct causing injury was within the course and scope of his employment and in furtherance of the railroad's business.

C. UP did not concede Clark's negligence.

Whether Clark was negligent and whether Clark's negligence caused plaintiff's injuries were, at best, questions of fact to be decided by the jury. UP's rules did, in fact, prohibit the possession of firearms while on duty, but Clark's violation of this rule was, at most, evidence of negligence—not unassailable proof of liability. The jury was not obligated to find Clark negligent simply because Clark violated UP's rule banning the possession of weapons on the job. This is especially true considering that Clark testified that he did not intend to bring the gun to work with him and, in fact, that he had forgotten the gun was in his bag until it discharged accidentally after Cluck dropped Clark's grip

on the ground. And because Clark had forgotten the gun was in his bag, he had no reason to warn Cluck or the others of the gun's presence.

Cluck's claim that UP admitted Clark's negligence is based largely on his contention that UP admitted that Clark violated UP's own internal rules. This argument, in turn, depends on a selective and inaccurate portrayal of testimony elicited from UP employee Eardensohn on cross-examination. Cluck has taken certain statements by Eardensohn from their original context in an effort to cobble together a narrative that varies significantly from Eardensohn's actual testimony.

First, Eardensohn did not testify that Clark violated the railroad's rules by failing to warn Cluck that he had brought a gun in his bag. Cluck's counsel asked the question, "[W]hen Larry Clark brought a gun to work and kept it in his grip, he should have warned Eddie Cluck that there was a gun in his grip, right?" but Eardensohn never answered it because UP's counsel objected. Tr. 745. After a lengthy exchange at the bench, Cluck's counsel asked Eardensohn, "[T]o your knowledge, are there any exceptions to the railroad's rule requiring one employee to warn another employee about a dangerous condition?" to which Eardensohn stated, "Not to my knowledge." Tr. 752. Although Eardensohn did admit that Clark violated the railroad's own rules by bringing a loaded weapon in his grip (Tr. 739), he also made clear that UP prohibited locomotive engineers from possessing weapons while at work without exception. Tr. 722.

Second, plaintiff's suggestion that Eardensohn admitted that Cluck's injury happened because Clark was "careless" is also based on a selective and out-of-context quotation of Eardensohn's testimony. Eardensohn testified that both Clark and fellow

employee Danny Thomas, after being terminated for violating the railroad's rule prohibiting guns at work, had been brought back to work on a leniency basis, largely because the railroad has concluded that neither employee's violation of the rules had been intentional. The following exchange took place in discussing UP's decision to return Clark and Thomas to work:

> Q. So the two men who violated the railroad's rules were given leniency?
>
> A. That's my understanding, yes.
>
> ***
>
> Q. (By Mr. Armbruster) You testified that Union Pacific has never relaxed the gun rule. Did I get that right?
>
> A. Yes.
>
> Q. What do you call letting two men come back to work within five months of a shooting?
>
> A. What do I call that?
>
> Q. Yes.
>
> A. Bringing them back on a leniency basis based on their remorsefulness and their -- the lack of it being an aggressive action. It was an accident. And I think that's kind of how it was seen by everybody.
>
> Q. They were careless?
>
> A. Yes.

Tr. 743.

In any event, Cluck's heavy reliance on Clark's alleged rules violations erroneously assumes the proof of a rules violation requires a finding of negligence as a matter law. In reality, a railroad employee's violation of a company rule is, at most, evidence that the jury may consider in determining whether the employee violated the applicable standard of care. But as this Court and several others have held, an employee's violation of a railroad rule is not itself proof of negligence. *See Wehrli v. Wabash R. Co.*, 315 S.W.2d 765, 775 (Mo. 1958)(holding, "Generally, the violation of a company rule does not constitute negligence or contributory negligence as a matter of law."); *accord First Nat. Bank of Fort Smith v. Kansas City S. Ry. Co.*, 865 S.W.2d 719, 729 (Mo. App. 1993)(holding that employee's violation of railroad's operating rule did not equate to a violation of a legal standard of care); *Magelky v. BNSF Ry. Co.*, 1:06-CV-025, 2008 WL 281778 (D. N.D. Jan. 29, 2008)(holding that railroad's General Code of Operating Rules did not constitute a legal standard of care).

This is because the duty of care under the FELA is an objective standard determined by what an ordinary careful and prudent person would have done under the same or similar circumstances. 865 S.W.2d at 729 (quoting *Pierce v. Platte–Clay Electric Cooperative, Inc.*, 769 S.W.2d 769, 772 (Mo. banc 1989)); *accord Gagnier v. Bendixen*, 439 F.2d 57, 62 (8th Cir. 1971)(holding that negligence is measured by the legal obligation to use due care under the circumstances and not by the railroad's internal rules). Thus, a railroad employee's violation of railroad rules—even if done knowingly—does not establish negligence as a matter of law. *First Nat. Bank of Fort Smith*, 865 S.W.2d at 729. Cluck's argument that evidence of Clark's rule violations

amounted to negligence as a matter of law is simply wrong. Whether Clark's conduct constituted negligence under the circumstances was a question of fact for the jury, and the trial court therefore did not err in denying Cluck's Motion for Directed Verdict or Motion JNOV.

It was the jury's duty to judge the credibility of witnesses and to weigh and value the witnesses' testimony. *Ryburn v. General Heating & Cooling, Co.,* 887 S.W.2d 604, 606 (Mo. App. 1994). The jury was entitled to believe all, part or none of any witness's testimony. *Id*. Under the circumstances, the jury could reasonably have concluded that Clark's actions or inactions did not constitute negligence but instead amounted to an innocent mistake. *See generally Drury v. Missouri Pacific R. Co.*, 905 S.W.2d 138, 145 (Mo. App. 1995)(affirming trial court's denial of directed verdict for plaintiff in FELA action, finding no exception to general rule against directing a verdict in favor of party bearing burden of proof); *see also Zagarri v. Nichols*, 429 S.W.2d 758, 760 (Mo. 1968)("Rarely does a negligence case depending upon oral testimony present itself wherein the court is justified in directing a verdict in favor of the party having the burden of proof.").

II. THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE AN INSTRUCTION "BASED ON" M.A.I. 24.01(A) BECAUSE THE UNDISPUTED EVIDENCE ESTABLISHED THAT CLARK'S ACT OF BRINGING A LOADED GUN TO WORK IN HIS LUGGAGE WAS NOT DONE WITHIN THE COURSE AND SCOPE OF HIS EMPLOYMENT, AND, ALTERNATIVELY, BECAUSE NONE OF CLUCK'S PROFFERED INSTRUCTIONS WAS CORRECT BASED ON THE LAW AND THE FACTS.

Point II of Cluck's Brief should be denied for reasons both procedural and substantive. Procedurally, Cluck's point relied on violates the specific mandates of Missouri Supreme Court Rule 83.06, which prohibits an appellant from using a substitute brief to alter or enlarge the claims for which review is sought. Point II raises arguments before this Court that Cluck failed to include in the Brief he filed with the Court of Appeals and amounts to a wholesale substantive revision of the specific point he did make. The rules prohibit him from using a substitute brief to smuggle in new arguments, and this Court may therefore summarily reject Point II.

Cluck's point is also substantively deficient because it ignores the governing law of the FELA, which informs the process by which juries are instructed under MAI. Cluck asks this Court to ignore principles of *respondeat superior* that have been an integral part of the FELA since its inception. The Missouri Supreme Court, as well as multiple federal appellate courts, have held that a railroad cannot be held liable for acts of an employee that are not within the course and scope of his employment or in furtherance

of the railroad's business. The trial court did not err in refusing Cluck's instructions "based on" MAI 24.01(A) because the undisputed evidence demonstrated that Clark brought a gun in his luggage for purposes wholly unrelated to—and, in fact, contrary to—his job as a locomotive engineer. Alternatively, the trial court correctly refused Cluck's proffered instructions because none was in proper form and properly submitted the issue of agency to the jury for its determination, as required by the FELA and MAI.

A. Standard of Review.

The Court evaluates the propriety of jury instructions under a *de novo* standard of review. *Bach v. Winfield-Foley Fire Protection Dist.*, 257 S.W.3d 605, 608 (Mo. banc 2008). Instructions "shall be given or refused by the court according to the law and the evidence in the case." Mo. S. Ct. R. 70.02; *Eckerd v. Country Mut. Ins. Co.*, 289 S.W.3d 738, 746 (Mo. App. 2009). Instructions must also be in proper form. *Marion v. Marcus*, 199 S.W.3d 887, 892-894 (Mo. App. 2006).

The content of jury instructions in an FELA case is a matter of federal substantive law. *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985); *Kauzlarich v. Atchison, Topeka, and Santa Fe Ry. Co.*, 910 S.W.2d 254, 257 (Mo. banc 1995)(when adjudicating FELA cases, a state court is bound by federal substantive law). Thus, a party is entitled to an instruction only if it comports with the substantive federal law of the FELA. *Id.*

B. Point II of Cluck's Brief before this Court violates Rule 83.08 because Cluck has included arguments that were not included in this Point Relied on in the Brief submitted to the Court of Appeals.

Cluck is attempting to use the substitute brief authorized by Rule 83.06 to introduce new arguments he never made in the brief he submitted before the Court of Appeals. The Court's own rules expressly prohibit this practice. Although Rule 83.06 allows an appellant to file a substitute brief with this Court, such brief "shall not alter the basis of any claim that was raised in the court of appeals brief. . . ." Mo. Sup. Ct. R. 83.08. This Court has consistently enforced this admonition and has refused to consider arguments that were not made before the Court of Appeals. *Blackstock v. Kohn*, 994 S.W.2d 947 (Mo. 1999)(refusing to consider argument not made before the Court of Appeals); *Linzenni v. Hoffman*, 937 S.W.2d 723, 727 (Mo. 1997)(same); *Essex Contracting, Inc. v. Jefferson County*, 277 S.W.3d 647, 656 (Mo. banc 2009)(refusing to consider argument in substitute brief that "appeared nowhere in the brief to the court of appeals").

Here, Cluck asks the Court to review new issues that not only were absent from his Brief before the Court of Appeals, but actually conflict with those he did raise. And he has abandoned the only argument that the Court of Appeals actually accepted—that the trial court's non-delegable duty to instruct the jury includes an affirmative obligation either to prepare or correct a verdict director for the party bearing the burden of proof. Cluck's Point II is therefore both a wholesale revision to and a repudiation of the Point Relied On he submitted to the Court of Appeals.

In his Point I[10] before the Court of Appeals, Cluck argued that trial court "committed prejudicial error in refusing to submit a verdict-directing instruction based on Missouri Approved Instruction (MAI) 24.01(A)."[11] Neither Cluck's Point Relied On nor his argument asserted that any of the specific instructions he actually requested was correct based on the law and the facts. Nor did Cluck assert that Judge Mesle erred in refusing any of the instructions he had proffered. In fact, Cluck's argument under Point I did not address by number—or discuss the substance of—any of the multiple verdict directors he submitted and the trial court rejected.

Cluck also did not contend in his original Point I that the trial court erred in failing to modify MAI 24.01(A) to submit the issue of *respondeat superior*. Indeed, Cluck's Point I argued that 24.01(A) had to be given without modification because *respondeat superior* was inapplicable in FELA actions, because the trial court was prohibited from modifying an MAI that was applicable, and because the undisputed evidence demonstrated that Clark was acting within the course and scope of his employment at the time of the incident. Instead, his principle arguments in Point I were (1) because the trial court had a "non-delegable duty" to instruct the jury on a theory of liability supported by the evidence, the trial court "was obligated to tender an appropriate MAI 24.01(A) instruction, even if it did not approve of any of Plaintiff's attempts to tender an

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[10] Point I of Cluck's original brief now appears as Point II of his substitute brief.

[11] See Appt.'s Brief, Pt. I at p. 10.

instruction based on MAI 24.01(A);"[12] (2) the Court was required to give an instruction "based on" MAI 24.01 and was prohibited by MAI from altering the instructions to include the element of *respondeat superior*;[13] and (3) there was no dispute that Clark was acting within the course and scope of his employment, and thus modifications to MAI 24.01(A) were not required.

In response to Cluck's Point I, UP argued, among other things, that Cluck's Point Relied On violated Rule 84.04(d)(1) in that Cluck had not identified any specific ruling by the trial court that constituted error. UP posited that Cluck had not challenged the trial court's refusal of any of the multiple alternative instructions he tendered, had not discussed the substance of any one of the instructions, and had not explained why any of these instructions was correct under the law or the facts. UP therefore urged the Court to reject Cluck's Point I purely on procedural grounds.

The Court of Appeals' Opinion rejected all of Cluck's argument except one: it held that although it was Cluck's duty to request an instruction, the trial court's "non-delegable duty" to instruct the jury included an "obligation to submit a verdict director predicated on the theory of imputed liability under FELA." Modified Opinion at 15. In other words, the Court held, it was incumbent upon the trial court either to prepare Cluck's verdict director for him or remedy the errors in the ones he had submitted. And

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[12] Appellant's Original Brief at 12.

[13] *Id*. at 14.

it was on this basis—and this basis alone—that the Court of Appeals reversed and remanded for a new trial.

Cluck has now substantially altered his assignments of error. He has abandoned his claim that the trial court had a non-delegable duty to instruct the jury on his chosen theory of recovery. In its place, he raises an entirely new argument, accusing the trial court of error in refusing certain of the specific instructions that he tendered. In fact, whereas his initial Brief's argument made no reference to any of his proposed instructions by number or accused the trial court of error in refusing them, Cluck's Point II now references no fewer than five of his instructions and now claims, for the first time, that they should have been given. Then, in the body of his argument, Cluck argues why each proffered instruction was proper and should have been given. Because these issues were not raised in the brief before the Court of Appeals, they are waived. *Linzenni*, 937 S.W.2d at 727. The Court may therefore deny Cluck's Point II without reaching the merits of his arguments.

C. The trial court did not err in refusing an instruction "based on" M.A.I. 24.01(A) because the undisputed evidence established that Clark's bringing a loaded gun to work in his luggage was beyond the course and scope of his employment, and thus not an act for which the railroad was liable under the Federal Employers' Liability Act.

Even if the Court is inclined to consider Cluck's new arguments on their merits, it may nevertheless reject them on substantive grounds.

1. Respective roles of trial court and counsel.

The Court of Appeals erroneously concluded that the trial court's duty to instruct the jury carries with it the responsibility for preparing a party's instructions or correcting errors in the ones submitted by his counsel. Although Cluck's Brief does not expressly address this point or defend the Court of Appeals' unprecedented holding, UP will nevertheless address it here in the event this Court is inclined to address it *sua sponte.*

The trial court's duty is to give or refuse instructions based on the governing law and the evidence of the case. Mo. S. Ct. R. 70.02. The trial court does not, however, have a duty to draft a party's instructions. *McLaughlin v. Hahn*, 199 S.W.3d 211, 217 (Mo. App. 2006)(citing *Parker v. Wallace*, 431 S.W.2d 136, 139 (Mo. 1968)). In civil cases, the court is not required to instruct upon any proposition of law arising in a case unless requested, and a party may not complain of error in the failure of the court to give an instruction not requested. *Miller v. Gillespie*, 853 S.W.2d 342, 345 (Mo. App. 1993). It is a party's counsel's own duty to prepare the instructions, and a party's entitlement to submit on his chosen theory of the case carries with it the duty to tender instructions that are "correct in both form and substance." *Wright v. Barr*, 62 S.W.3d 509, 530 (Mo. App. 2001)(citing *Orloff v. Fondaw*, 315 S.W.2d 430, 433 (Mo. App. 1958); *accord Mitchell v. Evans*, 284 S.W.3d 591, 596 (Mo. App. 2008)(holding that party's right to choose its own submissions of liability and defense assumes an instruction that is in proper form). The necessary corollary of this rule is that a trial court does not err in refusing instructions that are not in proper form. *Pennington*, 309 S.W.2d at 601; *accord Helming v. Adams*, 509 S.W.2d 159, 167 (Mo. App. 1974)(holding that it

is not error for a trial court to refuse to give a requested instruction that is incorrect); *accord Wors v. Glasgow Vill. Supermarket, Inc.*, 460 S.W.2d 583, 589 (Mo. 1970) (same).

Although a party has the right to submit its chosen theory of the case, "the duty rests upon their counsel, not upon the court, to formulate an instruction, substantially correct in form and in substance, on that theory." *Anderson v. Welty*, 334 S.W.2d 132, 140 (Mo. App. 1960). And where, as in this case, a party's counsel submits an erroneous instruction, the trial court does not commit error in refusing it, and "the court is under no *duty* to correct or modify an offered instruction." *Id*. (emphasis in original).

This express limit on the trial court's duty regarding jury instructions is well defined and firmly settled. In *Wors*,, this Court held that the trial court that has correctly rejected an improper instruction proffered by a party is "under no duty either to modify the tendered instruction or to give a correct one of its own motion." 460 S.W.2d at 589. The *Wors* Court's refusal to burden the trial court with the duty to prepare or correct a litigant's jury instructions represents more than one hundred years of settled precedent. *See McLaughlin v. Hahn*, 199 S.W.3d 211, 217 (Mo. App. 2006)(holding "A trial court does not have a duty to draft a party's instructions."); *Henderson v. Terminal R.R. Ass'n of St. Louis*, 736 S.W.2d 594, 599 (Mo. App. 1987)(holding that "it is the duty of the attorney to prepare and submit instructions and request that they be given. There is no duty on the part of the trial court to prepare instructions or to offer to correct an instruction offered by a party."); *Sheinbein v. First Boston Corp.*, 670 S.W.2d 872, 878 (Mo. App. 1984)(citing *Wors* for the proposition that "[t]here also is generally no duty on

a trial court to offer to correct an instruction offered by a party"); *McDowell v. Schuette*, 610 S.W.2d 29, 36 (Mo. App. 1980)(citing *Wors*, 460 S.W.2d at 589, and holding, "The trial court did not err in refusing an improper instruction and it was under no obligation to modify the tendered instruction or to give a correct instruction on its own motion."); *Cohn v. Missouri Terminal Oil Co.*, 590 S.W.2d 381, 383 (Mo. App. 1979)(citing *Wors* and holding that the trial court, after properly refusing a tendered instruction, was under no obligation to give an instruction of its own); *Parker*, 431 S.W.2d at 139 (it was not incumbent upon the trial court to prepare instructions for plaintiff in civil case); *Hertz v. McDowell*, 214 S.W.2d 546, 550 (Mo. banc 1948)(holding, "A requested instruction must be correct or the court may refuse it without committing reversible error; and when erroneous instructions are requested the trial court is under no duty to correct or modify them in any way."); *Schipper v. Brashear Truck Co.*, 132 S.W.2d 993, 996 (Mo. 1939)(holding, "When erroneous instructions are presented the trial court is under no duty to correct them or modify them in any way."); *State, to Use of Little v. Donnelly*, 9 Mo. App. 519, 530-31 (Mo. App. 1881)(stating, "Whilst the court might have modified this instruction so as to make it conform to the law, and then given it as modified . . ., yet it was under no obligation to do so, the rule being that if a request for an instruction is erroneous in any particular, the court is at liberty to refuse it entirely.").

The Court of Appeals' opinion found the trial court guilty of reversible instructional error without finding that any of the proffered instructions was proper and should have been given, and without finding that she erred in refusing the instructions

that Cluck tendered. The trial court's duty to instruct the jury does not include the duty to prepare a party's instructions, and the Court of Appeals erred in holding otherwise.

2. The trial court did not err in refusing Cluck's proffered instructions because there was no evidence from which a jury would reasonably have concluded that Clark's negligence occurred within the course and scope of his employment.

The trial court did not err in refusing to give an instruction "based on" MAI 24.01(A) because the undisputed evidence established that the act causing injury—Clark's bringing a loaded gun to work in his luggage—was beyond the course and scope of Clark's employment and in no way furthered the railroad's business. Accordingly, UP was not legally responsible for Clark's act under the doctrine of *respondeat superior*, and there was therefore no legal basis for submitting an instruction based on MAI 24.01(A), which instruction presupposes the railroad's legal responsibility for its employee's negligence.

3. Cluck's proffered verdict directors were erroneous and therefore properly refused.

The trial court did not err in refusing Cluck's proffered instructions because they were not consistent with the law and the facts of the case. A trial court is obliged to give only instructions that are "correct in both form and substance." *Wright v. Barr*, 62 S.W.3d 509, 530 (Mo. App. 2001)(citing *Orloff v. Fondaw*, 315 S.W.2d 430, 433 (Mo. App. 1958); *accord Mitchell v. Evans*, 284 S.W.3d 591, 596 (Mo. App. 2008)(holding

that party's right to choose its own submissions of liability and defense assumes an instruction that is in proper form). As described below, Cluck's instructions were not proper in both form and substance.

a. Instructions 7D and 7J were properly refused.

Instructions 7D and 7J were properly refused because they did not contain the element of agency. The content of jury instructions in an FELA case is a matter of federal substantive law. *Dickerson*, 470 U.S. at 411; *Kauzlarich*, 910 S.W.2d at 257 (when adjudicating FELA cases, a state court is bound by federal substantive law). Thus, a party is entitled to an instruction only if it comports with the substantive federal law. *Id*. An MAI instruction may not be given when it conflicts with the substantive law, nor can a party's contention that a different or modified instruction is warranted be dismissed on the ground that such an instruction is not to be found in MAI, because the content of instructions in an FELA case is a matter of federal law. *See Dickerson*, 470 U.S. at 411; *accord Kauzlarich*, 910 S.W.2d at 257. "The Missouri Supreme Court has held that MAI and its Notes on Use are not binding to the extent they conflict with the substantive law. If an instruction following MAI conflicts with the substantive law, any court should decline to follow MAI." *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 167 (Mo. App. 1997) (quoting *State v. Carson*, 941 S.W.2d 518, 520 (Mo. banc 1997)).

Because Clark's agency was at issue, MAI 24.01(A) had to be modified to allow the jury to consider that issue. The Missouri Supreme Court Rules concede that standard MAI instructions may not be appropriate in all cases and mandate that an instruction be

modified to fairly submit the substantive issues in the case. Rule 70.02 recognizes situations "[w]here an MAI must be modified to fairly submit the issues in a particular case. . . ." Mo. S. Ct. R. 70.02(b). Indeed, MAI itself acknowledges that "it may be necessary to modify an instruction to submit an issue which is in dispute in your case but which is usually not disputed and thus is not submitted by the approved MAI." MAI 6th Ed. (2002), "How to Use this Book" at XLIX. In such a case, MAI provides, "A modification which is necessary to make a provided MAI fit the facts of your case . . . is not only permissible ***but is required***." *Id*. (emphasis added); *accord Shutt v. Chris Kaye Plastics Corp.*, 962 S.W.2d 887, 890 (Mo. 1998)(holding that when an approved instruction does not fit the case precisely, modifications must be made, citing *MAI 5th, Committee Comment); Pierce v. Platte-Clay Elec. Co-op., Inc.*, 769 S.W.2d 769, 777 (Mo. banc 1989)(citing *MAI 3rd* "How to Use this Book" for proposition that modification of MAI is mandatory where MAI does not precisely fit the case). An instruction that ignores an issue of fact vital to the conclusion it invites is fatally defective. *Dickey v. Nations*, 479 S.W.2d 208, 211 (Mo. App. 1972); *accord MAI 6th* "How to Use this Book" at XLVIII ("It is still error to assume a disputed fact").

Recognizing agency is sometimes a disputed factual issue, MAI states that standard verdict directors may need to be modified in order to fairly submit the question of agency. *See, e.g.* MAI 6th Ed. 18.01 and 13.01. These instructions, however, are not set in stone, as MAI recognizes the impossibility of preparing a "universally applicable definition of scope of agency" and instructs that MAI's agency instructions should be

treated as a guide, with the ultimate goal being "to call to the jury's attention the fact issues which determine liability in a particular case." MAI 6th Ed. 13.01 (1996 Rev.).

Neither 7D nor 7J included the necessary language. On the contrary, they would have allowed the jury to find the railroad automatically liable for Clark's acts or omissions without any finding of agency. Although UP maintains that there was no evidence that Clark's act could be imputed to the railroad under the doctrine of *respondeat superior*, if there was a factual issue as to agency, it was mandatory that the instruction be modified to fairly submit that issue to the jury. *See Dickey*, 479 S.W.2d at 211 (instruction was fatally defective where it assumed an agency relationship that was disputed); *Galemore Motor Co., Inc. v. State Farm Mut. Auto. Ins. Co.*, 513 S.W.2d 161, 168 (Mo. App. 1974)(holding that trial court committed reversible error in failing to modify verdict director to reflect disputed issue of agency, as mandated by MAI 18.01 and 13.01); *Ratterree v. General Motors Corp.*, 460 S.W.2d 309, 313 (Mo. App. 1970)(holding that disputed issue of agency should have been submitted using MAI 18.01 and an appropriate definition of agency). For these reasons, both instructions 7D and 7J were defective.

Instruction 7J suffered additional problems. It posited the theory that sought to improperly recharacterize Clark's negligence as a "failure to warn." As stated above in Section ___, the act causing injury was Clark's bringing a loaded weapon to work. And because MAI 24.01(A) must identify the negligent act or omission, Cluck's instructions were invalid.

7J suffers another problem, namely that the term "dangerous condition" is vague and ambiguous and fails to hypothesize what the condition is. The language of an instruction should be so plain that no doubt can arise as to its meaning. *Braun v. Lorenz*, 585 S.W.2d 102, 109 (Mo. App. 1979). The purpose of this rule is to require the use of simple, direct, concise and unambiguous words and phrases that do not require further definition where that is possible. *Black v. Kansas City S. Ry. Co.*, 436 S.W.2d 19, 27 (Mo. banc 1968). The term "dangerous condition" was not defined or limited, and, as contrasted with instruction 7D, was vague and ambiguous.

b. Instruction 7E was properly refused.

7E is defective because it simply asks whether Clark was "acting within the course and scope of his employment" without any reference to the particular act causing injury. In order to fairly submit the question of agency, it was necessary for Cluck to hypothesize the particular act that was done within the course and scope of his employment. Cluck's instruction, however, dissociates the act from the employment and reflects Cluck's erroneous "time and place" view of *respondeat superior*. As discussed above, to impute Clark's negligence to the railroad, it was necessary to demonstrate that the act causing injury occurred within the course and scope of Clark's employment—not merely that Clark was generally on duty where his work required him to be. 7E did not adequately focus the jury's inquiry on the negligent act or omission causing injury and therefore conflicted with the governing law.

Although MAI 18.01 is not suited to this particular case without substantial modifications, that pattern instruction demonstrates that there must be some way for the jury to determine whether the particular act causing injury was within the course and scope of employment.[14]

c. Instruction 7H was erroneous and properly refused.

Instruction 7H was erroneous for multiple reasons. First, the instruction improperly characterized Clark's alleged conduct as "preparing to enter a hotel" and then asked whether that act was within the course and scope of his employment. At the time of the shooting, Clark was not "preparing to enter a hotel," but was instead either standing outside the van (per Clark) or standing next of Cluck as Cluck was unloading the parties' luggage. Thus, the proposed instructions were not consistent with the facts and could be rejected for this ground alone.

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[14] MAI 18.01 appears best suited to instances where the question is whether the negligent employee was performing the subject task at the time of the accident, or whether he was performing the task for his own purposes, such as where a delivery van driver allegedly on a frolic, detour, or route deviation runs a red light and causes a collision. In such a case, the agency issue rightly focuses not on the particular act of negligence—running a red light—but on whether at the time the employee was doing work for the employer. MAI 18.01, as patterned, makes perfect sense in such a scenario, but it is of little use in a case where the particular act is itself alleged to have been outside the course and scope of the employee's job.

More important, however, is 7H's failure to properly submit an instruction that focuses on the act causing injury. Cluck's instructions once again focus erroneously on Clark's physical location when the gun discharged instead of on the nature of the negligence act causing injury. This instruction perpetuates Cluck's erroneous "time and place" view of *respondeat superior*. Under Cluck's instruction, the jury would be permitted to resolve the agency issue merely by finding that Clark, at the time of the gun's discharge, was preparing to enter a hotel, without regard to whether the act causing injury in any manner furthered the railroad's interest. To paraphrase *Lavender*, it was not enough that the shooting complained of occurred during the hours Cluck and Clark were at a hotel under the orders of defendant to be there. *Lavender*, S.W.2d at 357. Rather, to hold UP liable "the act must always have been done in furtherance of the master's business." *Id*. at 357.

d. Plaintiff's agency instructions, 7F and 7I, were erroneous and properly refused.

Neither 7F nor 7I was correct under the law and the facts of the case. The appropriate definition of agency applicable to this case is set forth in MAI 13.02. Although MAI 13.02 is designed specifically for an assault carried out by an employee, Missouri courts have also sanctioned its use in other scenarios in which the focus of the jury's agency analysis is on the nature of the act to be attributed to the employer. *Tietjens v. Gen. Motors Corp.*, 418 S.W.2d 75, 88 (Mo. banc 1967)(stating, "Although designed for use in a case of battery by an agent, it is equally the proper instruction for use in a

case involving other wrongful or tortious conduct of an agent"); *accord Jefferson County Bank & Trust Co. v. Dennis*, 523 S.W.2d 165, 169 (Mo. App. 1975)(finding MAI 13.02 was the correct instruction on agency where issue was whether tortious conduct, fraudulent misrepresentation, was within the course and scope of employment). MAI 13.02, and not 13.03 or 13.01, was the proper MAI to use to define course and scope of employment under the facts of this case. Because this instruction is the applicable one, it had to be given to the exclusion of all others. The trial court therefore did not err in refusing plaintiff's instructions, which were based on MAI 13.03 and 13.05.

7F was wrong because it was based on MAI 13.03, which instructs on the dual purpose doctrine. This doctrine has no applicability to the present case. As the committee Comments to MAI 13.03 indicate, the dual purpose doctrine arises most frequently in workers compensation cases and typically involves motor vehicle accidents. The dual purpose doctrine is viewed as an exception to the coming and going rule, under which an employer is ordinarily not liable for the negligent operation of a vehicle by an employee who is driving to or from work or otherwise driving for purely personal reasons. *See generally Delozier v. Munlake Const. Co.*, 657 S.W.2d 53, 56 (Mo. App. 1983)(and cases cited therein). Under the dual purpose doctrine, if the employee while coming or going to work is also performing a task for his employer, he is deemed to be acting within the course and scope of his employment. MAI 13.03 has no applicability to this case, where the question of agency is not concerned with whether Clark was generally performing work for his employer, but rather whether the negligent act or

omission itself may be deemed within the course and scope of employment and in furtherance of the master's business.

7I was likewise erroneous because it did not properly characterize the act causing injury and instead focused the jury's inquiry on whether or not Clark's "preparing to enter a hotel" was within the course and scope of his employment. It is yet another example of Cluck's erroneous assumption that a *respondeat superior* analysis focuses simply on the time and location of the employee's conduct instead of the nature of the conduct causing injury.

III. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN REFUSING TO GIVE CLUCK'S PROFFERED WITHDRAWAL INSTRUCTION BASED ON M.A.I. 34.05 BECAUSE CLUCK DID NOT PROFFER THE INSTRUCTION AT OR BEFORE THE JURY INSTRUCTION CONFERENCE, BECAUSE THE LAW DOES NOT PERMIT THE COURT TO GIVE A WITHDRAWAL INSTRUCTION IN RESPONSE TO A QUESTION POSED BY THE JURY DURING ITS DELIBERATIONS, BECAUSE THE WITHDRAWAL INSTRUCTION WAS NOT WARRANTED BY THE EVIDENCE, AND BECAUSE CLUCK WAS NOT PREJUDICED BY THE REFUSAL TO INSTRUCT.

A. Standard of Review.

Ordinarily, a trial court's refusal to give a withdrawal instruction is reviewed under an abuse of discretion standard. *First Nat. Bank of Fort Smith*, 865 S.W.2d at 740.

But because Cluck has violated Supreme Court Rule 84.04(e) by failing to set forth the instruction in the argument portion of the Brief or in his Appendix, Cluck has failed to preserve the alleged error for review. *Total Economic Athletic Management of America, Inc. v. Pickens*, 898 S.W.2d 98, 103 (Mo. App. 1995). This Court reviews Cluck's Point III, if at all, only for "plain error" under Missouri Supreme Court Rule 84.13(c). Under the "plain error" standard of review, a court may consider an issue only when the Court finds "that manifest injustice or miscarriage of justice has resulted therefrom." Mo. S. Ct. R. 84.13(c); *see also Coats v. Hickman*, 11 S.W.3d 798, 805 (Mo. App. 1999)(citing *Coleman v. Gilyard*, 969 S.W.2d 271, 274 (Mo. App.1998)).

B. Cluck failed to preserve error by failing to request a withdrawal instruction at the instruction conference and before the jury retired, and by failing to object to the damage instruction given by the Court.

Cluck has waived any point relating to the Court's failure to give a damage instruction based on MAI 34.05 for two related reasons. First, Cluck never requested such an instruction before the jury retired. On the contrary, Cluck first requested the instruction after the jury, which had already begun its deliberations, asked the trial court, "Can we know if E.C. has received disability pay while off work?" Tr. at 905. In response to this question, Cluck's attorneys asked that the jury be read MAI 34.05. Tr. at 907-909. Cluck did not proffer a formal instruction, but merely asked that the jury be given the substance of the instruction in a responsive note from the trial court.

Cluck's request was untimely and procedurally improper. If Cluck believed that an instruction based on MAI 34.05 was warranted by the evidence, he had the obligation

to request the instruction before—not after—the jury retired. Missouri Supreme Court Rule 70.02 provides, in pertinent part:

> Requests for Instructions. Any party may, and a party with the burden of proof on an issue shall, submit written requests for instructions on the law applicable to the issues. Requests shall be submitted prior to an instruction conference or at such time as the court directs.

Mo. S. Ct. R. 70.02(a). Rule 70.03 reinforces this timing requirement, stating, "No party may assign as error the giving or failure to give instructions unless that party objects thereto ***before the jury retires to consider its verdict***, stating distinctly the matter objected to and the grounds of the objection." Mo. S. Ct. R. 70.03 (emphasis added). Cluck's failure to request an instruction including language from MAI 34.05 at the instruction conference and before the jury retired to deliberate is deemed a waiver of the point on appeal. A party may not complain of the court's failure to give an instruction not properly requested. *Howard Const. Co. v. Teddy Woods Const. Co.*, 817 S.W.2d 556, 562 (Mo. App. 1991)(citing *Sullivan v. KSD/KSD-TV*, 661 S.W.2d 49, 51 (Mo. App. 1983)).

Cluck simply cannot justify his belated request for a withdrawal instruction. Cluck objected to UP's counsel's questioning Cluck about his unwillingness to accept a job paying him less than $2,350 per month and argued that such questioning raised the specter of collateral source benefits. Tr. 600-01. The trial court did not permit evidence that Cluck was receiving collateral source benefits, but the court did allow defense counsel to question Cluck about the minimum compensation threshold that Cluck

admitted he would use in evaluating potential job offers.[15] *Id*. Cluck was certainly aware of the trial court's ruling long before the instruction conference occurred and thus had ample opportunity to request a withdrawal instruction before the jury retired.

Cluck's point grows weaker still considering that he did not object to the damages instruction given by trial court—hardly surprising since the instruction was the one based on MAI and tendered by Cluck himself. If Cluck believed that evidence of collateral source benefits had been improperly injected into the case, it was his duty to request that the standard FELA damage instruction be modified to include language authorized by MAI 34.05, which provides:

> If the jury has knowledge, from the evidence or a trial incident, of an advance payment, a partial settlement, or a collateral source payment, then upon the request of any party ***the following addendum must be added to the appropriate damage instruction***.

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[15] The trial court's ruling in this regard was consistent with the Eighth Circuit's opinion in *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188, 200 (8th Cir. 1981). In that case, the Eighth Circuit affirmed the trial court's exclusion of evidence of collateral source benefits while recognizing that the defendants "brought out repeatedly and forcefully that [plaintiff] had not applied for jobs and would not consider a job which paid less than $15,000 per year, which evidence "went to the heart of the malingering issue." *Id*.

MAI 34.01 (emphasis added). Thus, it was Cluck's obligation to request that the trial court modify the FELA damage instruction found in MAI 8.02 with appropriate language from MAI 34.05.

Cluck not only failed to timely request such a modified instruction, but more importantly, he submitted an unmodified instruction based on MAI 8.02 and raised no objection to this instruction during the instruction conference. Tr. 775, 819-820. A party may not complain of error in an instruction that it requested. *Stevenson v. First Nat. Bank of Callaway County*, 604 S.W.2d 791, 795 (Mo. App. 1980)(citing *State ex rel. State Highway Comm'n. v. Nickerson and Nickerson, Inc.*, 494 S.W.2d 344, 349 (Mo. 1973)). Cluck cannot now claim error in the content of the damage instruction that he requested and that the trial court gave without objection.

C. The Rules do not authorize a trial court to give a withdrawal instruction after the jury retires and in response to a question from the jury.

The trial court would have committed reversible error had it granted Cluck's request for a new jury instruction in response to jury's request about whether Cluck was receiving disability payments. In *Houston v. Northup*, 460 S.W.2d 572, 575 -576 (Mo. banc 1970), the Court held that the trial court committed reversible error in providing the jury with additional instructions in response to a jury question. The Court explained that implicit in the MAI scheme is "the central idea that such instructions do not require further clarification or amplification." *Id*. Thus, if no question arises as to the correctness, adequacy, or clarity of the Missouri Approved Instructions utilized to submit a case to the jury, subsequent modification or explanation of the jury instructions in

response to a jury question constitutes error. *Id*.; *accord Hoover v. Gray*, 616 S.W.2d 867, 869 (Mo. App. 1981).

D. A withdrawal instruction was not warranted because no evidence of collateral source payments had been submitted to the jury.

The Court did not err in refusing to give MAI 34.05 because there was no evidence regarding any receipt of collateral source benefits by Cluck. On the contrary, the Court consistently sustained Cluck's objections and refused the railroad's multiple requests to admit evidence that Cluck was receiving monthly RRB disability payments. Thus, not only was there no basis to give MAI 34.05, but doing so would have been improper because it would have instructed the jury to disregard evidence that it never heard, leading to unnecessary confusion.

The jury's mere question during deliberations about whether Cluck had received collateral source benefits did not warrant giving MAI 34.05. In fact, the jury's question indicates that the jury was unaware of any collateral source payments Cluck had received and was requesting to know whether he was, in fact, receiving such payments. *See Beste v. Tadlock*, 565 S.W.2d 789, 792 (Mo. App. 1978)(phrasing of question regarding insurance indicated the jury did not assume the existence of insurance).

E. Cluck cannot argue that the trial court's refusal to give MAI 34.05 was prejudicial error because the jury found in favor of Union Pacific on the issue of liability and, thus, never reached the question of damages.

Cluck has not demonstrated any prejudice resulting from the Court's refusal to give MAI 34.05. Evidence of Cluck's receipt of collateral source benefits was relevant

only to the issue of damages. The jury did not reach the question of damages because it found in UP's favor on the question of liability. The court in *Toppins v. Miller*, 891 S.W.2d 473 (Mo. App. 1994) addressed the prejudicial effect of the trial court's refusal of a damage instruction that contained a modification authorized by MAI 34.05. The court found that it was unnecessary to determine whether the trial court's refusal of the instruction was erroneous because the jury found in favor of the defendant and thus was never required to reach the instruction on damages. *Id*. at 475. MAI 34.05, the court explained, "instructs the jury that it may not consider certain evidence in determining the *amount* of damages." *Id*. (emphasis in original). Because the jury resolved the liability question in the defendant's favor, the jury had no need to assess damages, and thus the trial court's refusal to give the instruction could not have affected the plaintiff's rights. *Id*.; *see also Elmahdi v. Ethridge*, 987 S.W.2d 366, 369 -370 (Mo. App. 1999)(erroneous admission of evidence relating to damages could not have been prejudicial where the jury found for the defendant on liability and thus never reached the issue of damages); *Mead v. Grass*, 461 S.W.2d 708, 710 (Mo. 1971)(same).

Cluck's claim of prejudice relies on a rhetorical bait and switch that ignores the actual error challenged in Cluck's Point III. Point III does not assert that the trial court erred in permitting defendant to question Cluck regarding his unwillingness to take a job that paid less than $2,350 per month. Instead, Point III challenges only the trial court's refusal to respond to the jury's question by reading MAI 34.05. The cases Cluck relies on, however, involved circumstances where the plaintiffs asserted that the trial court committed prejudicial error in admitting evidence of collateral source benefits. None of

these cases involved the refusal of a withdrawal instruction. Cluck cites no authority that would allow this Court to judge the prejudicial effect of the denial of a withdrawal instruction by evaluating the prejudicial effect of evidence whose admission has not been challenged.

F. Cluck has waived his challenge to the trial court's admission of Cluck's testimony by failing to include it in his Point Relied On, and in failing to raise the issue in his Brief before the Court of Appeals.

Cluck has waived any challenge to the trial court's admission of testimony from Cluck that he would not consider a job that paid him less than $2,350 per month. This point appears nowhere in his Point Relied On. Rule 84.04(d), which governs points relied on, required Cluck to "(A) ***identify the trial court ruling or action that the appellant challenges***; (B) state concisely the legal reasons for the appellant's claim of reversible error; and (C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error." Mo. S. Ct. R. 84.04(d)(1)(emphasis added); *Ward v. United Eng'g Co.*, 249 S.W.3d 285, 287 (Mo. App. 2008). This requirement "is not simply a judicial word game or a matter of hypertechnicality on the part of appellate courts." *Kieffer v. Gianino*, 301 S.W.3d 119, 120 -121 (Mo. App. 2010)(quoting *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. App. 1978)). Rather, this rule ensures that the opposing party is given notice "as to the precise matters that must be contended with and to inform the court of the issues presented for review." *Washington v. Blackburn*, 286 S.W.3d 818, 821 (Mo. App. 2009)(*quoting Eddington v. Cova*, 118 S.W.3d 678, 681 (Mo. App. 2003)).

The failure to comply with Rule 84.04(d) preserves nothing for appeal. *Washington,* 286 S.W.3d at 821; *see also D.L.C. v. Walsh*, 908 S.W.2d 791, 800 (Mo. App. 1995)(holding that any matter not raised in a "point relied on" is considered abandoned and is no longer an issue on appeal); *Schmidt v. Warner,* 955 S.W.2d 577, 584 (Mo. App. 1997)(issues to which an appellant alludes only in the argument portion of his brief are not presented for review.)

Additionally, Cluck is prohibited from including in his substitute brief matters not originally presented in his brief before the Court of Appeals. Rule 83.08 expressly prohibits Cluck from altering the basis of any claim raised in his Court of Appeals brief. Here, Cluck's brief to the Court of Appeals did not argue that the trial court erred in admitting Cluck's testimony that he would not consider a job paying less than $2,350 per month. Accordingly, Cluck is prohibited from raising this argument for the first time in his substitute brief before this Court.

Even if the Court were to find that Cluck has properly raised the issue concerning the admissibility of his testimony, the Court should decline to consider it on ripeness grounds. Cluck is not urging reversal based on the admission of his testimony. Rather, he is asking the Court to rule that the evidence would be admissible upon a retrial of the case. The admissibility of evidence that a plaintiff is receiving collateral source payments cannot be judged in a vacuum. The rule announced in *Eichel v. New York Central R. Co.*, 375 U.S. 253 (1963) is not absolute. This Court in *Moore v. Missouri Pac. R.R. Co.,* 825 S.W.2d 839, 842 (Mo. banc 1992) specifically rejected a rigid adherence to the general rule expressed in *Eichel*, recognizing exceptions to *Eichel* where a plaintiff

voluntarily injects the issue into the case. *Id*. at 842; *accord Leake v. Burlington Northern R. Co.*, 892 S.W.2d 359, 363 (Mo. App. 1995) (holding that if plaintiff injects his financial condition into the proceedings and implies financial distress, defendant may rebut this by showing plaintiff had other financial assistance available). Because the admissibility of collateral source evidence depends on Mr. Cluck's own trial testimony, the Court cannot determine the issue in advance.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING PORTIONS OF THE DEPOSITION TESTIMONY OF LEE COLE BECAUSE IT CONSTITUTED INADMISSIBLE HEARSAY, WAS IRRELEVANT, WAS NOT PROBATIVE OF ANY FACT, WAS MORE PREJUDICIAL THAN PROBATIVE, AND CONSTITUTED EVIDENCE OF OTHER INCIDENTS FOR WHICH THERE WAS NO SHOWING OF SUBSTANTIAL SIMILARITY, AND THE RULE OF CURATIVE ADMISSIBILITY DID NOT APPLY.

The Court acted well within its discretion when it sustained UP's objections to a portion of the testimony of Lee Cole to the effect that he had seen Public Law Board[16] awards addressing issues of employees bringing weapons to work. UP objected to this testimony on grounds that Cole lacked first-hand knowledge, that his testimony was hearsay and that there was no factual foundation to find an exception to the hearsay rule,

[16] A Public Law Board is an adjudicative body that resolves disputes arising under the Railway Labor Act.

and that the testimony was irrelevant. Tr. 427-432. The challenged testimony consisted of a single question and answer, which read as follows:

> Q: Other than Clark and Mr. Thomas, in your career with the railroad, have you ever heard of any other railroad employee carrying a firearm while at work?
>
> A: Yes, sir. I've read of them in board awards and so forth.

L.F. 139. The trial court's decision to exclude this limited portion of Mr. Cole's testimony was consistent with the law, and Cluck has not demonstrated that the exclusion of this excerpt constituted prejudicial error.

A. Standard of Review.

Appellate review of error alleged in the exclusion of evidence is limited to an abuse of discretion standard. *Aliff v. Cody*, 26 S.W.3d 309, 314 (Mo. App. 2000). The focus is not on whether the evidence was admissible but on whether the trial court abused its discretion in excluding the evidence. *Id*. A trial court possesses great discretion in its determination of whether evidence should be excluded, and an appellate court will give substantial deference to the trial court's decision to admit or exclude evidence. *Aliff v. Cody*, 26 S.W.3d 309, 314 (Mo. App. W.D. 2000). This Court has characterized its abuse of discretion review standard as "quite severe," explaining:

> Judicial discretion is abused when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if

reasonable men can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Id. (quoting *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 73 (Mo. banc 1999)).

In reviewing the correctness of the trial court's decision, this Court is not limited to the rationale for the objection made or the reasons expressed by the trial court for excluding the evidence. Rather, the trial court's ruling will be upheld when there is "any recognizable ground on which the trial judge ***could have*** rejected the evidence." *Aliff*, 26 S.W.3d at 315 (quoting *State ex rel. Missouri Highway and Transp. Comm'n v. Buys*, 909 S.W.2d 735, 738 (Mo. App. 1995)(emphasis added)). "Once the appellate court has found that the trial court had alternative choices that would not yield a result contrary to the law, however, the review ends, and the appellate court will affirm any of those choices." *Id*. (quoting *Waters v. Barbe*, 812 S.W.2d 753, 757 (Mo. App. 1991)).

A failure to admit evidence does not require reversal unless the appellant demonstrates that the error "materially affected the merits of the action." *Aliff*, 26 S.W.3d at 315 (quoting *Environmental Waste Management, Inc. v. Industrial Excavating & Equipment, Inc.*, 981 S.W.2d 607, 613 (Mo. App. 1998)). This Court will not reverse "unless there is a substantial or glaring injustice." *Id*. (quoting *State ex rel. Missouri Highway and Transp. Comm'n v. Pracht*, 801 S.W.2d 90, 93 (Mo. App. 1990)).

Cluck urges a more liberal standard of review that is at odds with the governing law and the issues raised in this appeal. Citing *Eckelkamp v. Burlington N. Santa Fe Ry. Co.*, 298 S.W.3d 546, 550 (Mo. App. 2009), reh'g denied (Dec. 7, 2009), Cluck contends that "an evidentiary ruling that ignores case law and Missouri Supreme Court rules

compels reversal." Brief at p. 63. *Eckelkamp* made no such broad pronouncement. *Eckelkamp* held only that it is improper to read a statute to the jury, and that if, in doing so, counsel misstates the law or misleads the jury, it constitutes reversible error. *Id*. at 550. *Eckelkamp* dealt only with the improper admission of a specific type of evidence that misled the jury about the controlling law. *Eckelkamp* in no way dealt with or modified the highly deferential standard of review that this Court applies in evaluation a trial court's *exclusion* of testimony.

B. The challenged evidence was inadmissible for multiple reasons that support the trial court's decision to exclude it.

Multiple alternative reasons supported the trial court's decision to exclude the proffered portions of Cole's testimony, any one of which is sufficient to affirm the court's decision. Among other things, it was irrelevant, its limited probative value was far outweighed by the danger of confusion and unfair prejudice, and it was hearsay not subject to any exception.

4. The evidence was irrelevant, and any probative value was substantially outweighed by the danger of unfair prejudice

Cole's vague reference to unidentified Public Law Board awards was irrelevant and inadmissible. For evidence to be considered legally relevant, its prejudicial effect must be outweighed by its probative value. *State v. Hayes*, 15 S.W.3d 779, 785 (Mo. App. 2000). Trial courts are given wide discretion on admission of evidence of similar occurrences. *Alcorn v. Union Pacific R.R. Co.*, 50 S.W.3d 226, 244 (Mo. banc 2001). Before admitting evidence of similar incidents, the trial court must satisfy itself that the

evidence is relevant and that the evidence of such occurrences sufficiently resembles the injury-causing incident. *Id*. The trial court must also weigh the possibility of undue prejudice or confusion of issues. *Id.*

In this case, however, there was absolutely no factual basis that would have allowed the trial court to judge the similarity of the circumstances between Cluck's incident and those at issue in the unidentified Public Law Board awards referenced by Cole. Cluck's attorneys, who elicited this testimony, asked Cole no follow-up questions about the details of these incidents, such as when the incidents occurred, when Cole learned of these awards, the factual circumstances at issue, where the incidents occurred, whom they involved, the sort of weapon involved, or any connection between those incidents and Cluck's own injury. Because Cole had been employed by the railroad for more than 25 years, the incidents he referenced could well have occurred decades before Cluck's injury, or even after it. And the incidents could have occurred in remote locations on the railroad wholly unrelated to the place and circumstances of Cluck's injury. Given the absence of evidence establishing substantial similarity, the trial court properly exercised her discretion in excluding the portions of Cole's testimony.

Any minimal probative value the evidence had was far outweighed by its potential prejudicial effect. Not surprisingly, Cluck has focused virtually no attention on the substance of the extraordinarily limited testimony that the trial court excluded. The trial court excluded only a single question and answer from Cole's testimony. And because Cole's testimony was presented by deposition, there was no possibility of follow-up questioning that could have elevated Cole's vague references to reports of other incidents

into evidence that was probative of any fact at issue in the case. The trial court correctly concluded that the evidence was inadmissible, and Cluck has not demonstrated how excluding the evidence "materially affected the merits of the action" or amounted to a "glaring injustice." *See Aliff*, 26 S.W.3d at 315.

Cluck's reliance on *Mid-Am. Lines, Inc. v. Littrell*, 653 S.W.2d 391, 392-93 (Mo. App. 1983) is misplaced. That case does not stand for the illogical proposition that evidence of events occurring after a plaintiff's incident are admissible to prove notice. *Littrell* involved an action for damages caused when a car struck a horse that had escaped from an enclosure, allegedly because of a faulty gate and latch. The Court held that photographs of the gate taken several months after the incident were admissible because there was no evidence that the condition of the gate and latch had changed between the date of the incident and the date the photograph was taken. Accordingly, the Court held, the photograph was probative of the gate's condition on the date of the incident, and defendant's objection as to remoteness went to the weight, not admissibility, of the evidence. *Id*. at 393. This case, of course, does not involve a condition of land, but rather acts or omissions of UP's employees. The *Littrell* Court's opinion is therefore inapposite.

5. The evidence was inadmissible hearsay.

Cole's testimony about facts contained on unidentified Public Law Board Awards was hearsay. When a witness offers the out-of-court statements of another to prove the truth of the matter asserted in the statement, the testimony is hearsay. *Bynote v. National Super Markets, Inc.*, 891 S.W.2d 117, 120 (Mo. banc 1995). Generally, courts exclude

hearsay because the out-of-court statement is not subject to cross-examination, is not offered under oath, and is not subject to the fact finder's ability to judge demeanor at the time the statement is made. Once counsel objects on the basis of hearsay, the proponent has the burden to demonstrate that the statement fits into a recognized exception to the hearsay rule. *State v. Reed*, 282 S.W.3d 835, 837 (Mo. 2009). Here, Cole's testimony was hearsay not subject to any exception, and the trial court properly excluded it.

Cluck's suggestion that the testimony was offered not for the truth of the matter asserted but to establish notice ignores the substance of the testimony. Notice implies that the events related by Cole occurred before Cluck's injury and thus provided UP with knowledge of a problem and an opportunity to rectify it. Cole's testimony, however, allows no such inference. Cole was not asked to provide even the most basic of details regarding the awards he referenced, and there was no evidence that the awards predated Cluck's injury. The trial court therefore correctly concluded that Cluck had not shown that the testimony was admissible on the issue of notice.

C. The Missouri Supreme Court Rules dictating the procedure for the taking of depositions are not rules of evidence that obligated the trial court to admit testimony that it determined was otherwise inadmissible.

Cluck relies heavily and without justification on Missouri Supreme Court Rule 57.07, claiming that UP's failure to raise certain objections at Cole's deposition precluded UP from raising these objections later, and more importantly, affirmatively obligated the trial court to admit testimony that it found inadmissible. This argument ignores the substance of Rule 57.07, under which, "An objection to the competency,

relevancy, or materiality of testimony is not waived by failure to object before or during the deposition." Mo. S. Ct. R. 57.07. UP's objections based on hearsay, lack of first-hand knowledge, and relevance were therefore preserved, and UP's objections at trial on these grounds were timely. *Hackman v. Kindrick*, 882 S.W.2d 157, 159 (Mo. App. 1994)(hearsay objection not raised at time of deposition was not waived).

UP was not obligated to anticipate all the potential uses of Cole's testimony or to develop on cross-examination a sufficient record to admit Cole's testimony. As the party taking the deposition, it was incumbent on Cluck to ask Cole appropriate follow-up questions to elicit the details of the other incidents needed to render the testimony admissible. Cluck's counsel had both the motive and opportunity to question Cole at length about each incident he saw referenced in board awards, including when the incidents occurred and when Cole learned of them. Remarkably, not a single follow-up question was asked. To suggest that UP's counsel should have foreseen all possible uses of Cole's testimony at trial, and then prompted Cluck's attorneys to develop a sufficient factual record to admit Cole's testimony, is patently ridiculous.

Additionally, Rule 57.07 is a procedural rule governing the deposition process, not a rule of evidence concerning the admissibility of testimony at trial. Rule 57.07 does not override the trial court's discretion to admit or exclude evidence, nor does it alter the standard of review that this Court applies in evaluating the trial court's exclusion of evidence. The trial court has the authority to exclude evidence *sua sponte* and is not necessarily limited to objections raised by a party. *Missouri Bd. of Nursing Home Adm'rs v. Stephens*, 106 S.W.3d 524, 529 (Mo. App. 2003)(citing *State v. Dixon*, 70 S.W.3d 540,

548-49 (Mo. App. 2002) (presupposing that trial court has the power to exclude testimony on its own motion)). Similarly, this Court is "not confined to the objections made" and may affirm the trial court's evidentiary ruling "if there is any recognized ground on which the trial judge *could have* rejected the evidence." *Missouri Farmers Ass'n v. Kempker*, 726 S.W.2d 723, 726 (Mo. banc 1987)(emphasis added). Thus, Cluck's argument that Rule 57.07 required the trial court to admit deposition testimony simply because there was no contemporaneous objection is plainly wrong.

The cases[17] Cluck cites all involved appellants' challenges to the trial court's admission of deposition testimony and the issue of whether the defendant waived certain objections by not raising them at the deposition. None of these cases addressed the trial court's exclusion of deposition testimony, and none held that a defendant's waiver of certain objections affected the trial court's prerogative to exclude evidence or an appellate court's deferential standard of review in gauging the exclusion of evidence.

D. The doctrine of curative admissibility is inapplicable.

The doctrine of curative admissibility did not require the admission of Cole's testimony. Cluck contends that Cole's testimony about his own knowledge of Public Law Board awards was necessary to contradict the testimony of Randy Eardensohn, a UP

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[17] *Brooks v. SSM Health Care*, 73 S.W.3d 686 (Mo. App. 2002), *Turnbo by Capra v. City of St. Charles*, 932 S.W.2d 851, 856 (Mo. App. 1996), and *Seabaugh v. Milde Farms, Inc.*, 816 S.W.2d 202 (Mo. 1991).

employee who testified that he had not personally received notice of employees carrying weapons at any time during his 25-year railroad career.

Mr. Eardensohn testified as follows:

Q. With respect to your 25 years, are you familiar with any individual that you know of that has ever, in violation of Rule 1.12, brought a firearm onto the Union Pacific property?

A. No.

Tr. at 720. Eardensohn also testified, during cross examination by plaintiff's counsel, that he had personally never seen a law Public Law Board award involving employees who brought guns to work and said that if there had been published decisions by a Public Law Board during his career involving employees who brought guns to work, he did not know about them. Tr. at 730. So Cluck had ample opportunity to examine Mr. Eardensohn about his own awareness of Public Law Board awards.

Cluck's argument confuses curative admissibility with ordinary rebuttal. The doctrine of curative admissibility lies only to combat an opponent's introduction of *inadmissible* evidence. *State v. Hill*, 250 S.W.3d 855, 858 (Mo. App. 2008). Cluck has not alleged that Eardensohn's testimony was inadmissible and therefore cannot establish the predicate for curative admissibility. Cluck did not object to Eardensohn's testimony, and he cannot seriously contend that Eardensohn's testimony was irrelevant.

Cluck's suggestion that Eardensohn's testimony was that of UP's "corporate representative" is likewise misplaced. Although Eardensohn did sit at counsel table with UP's counsel during the trial, the only testimony he offered was that of an individual

witness based on his personal knowledge. Mr. Eardensohn did not say that during his 25 years there had been no other incident in which an employee brought a firearm to work with him in violation of UP's rules. Nor did Mr. Eardensohn purport to offer testimony based on facts known by UP at large or by any of its other employees, as might be done by a witness responding to a notice of deposition pursuant to Missouri Supreme Court Rule 57.03(b)(4). Rather, Eardensohn simply testified about his own personal experiences during his career at the railroad. Thus, Cluck's argument that Cole's testimony about what Cole personally knew was admissible to rebut Eardensohn's testimony about his own personal experiences is illogical. Evidence of what Cole heard would not have rebutted Eardensohn's testimony, because each witness's testimony was necessarily confined to his respective personal experience.

CONCLUSION

For the foregoing reasons, Defendant-Respondent Union Pacific Railroad Company respectfully requests that the Court affirm the judgment of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

I certify that Respondent's Brief complies with the limitations contained in Rule 84.06(b), in that Respondent's Initial Brief contains 22,556 words according to the Microsoft Word for Windows software used to prepare the brief, excepting the cover, certificate of service, certificate required by Rule 84.06(c), signature block, and appendix.

_____
Craig M. Leff

CERTIFICATION THAT CD-ROM IS VIRUS FREE

I certify that the CD-ROM containing an electronic copy of Respondent's Brief has been scanned for viruses and is virus free.

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Craig M. Leff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was forwarded via U.S. Mail, proper postage prepaid, on the 19th day of July, 2011 to:

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