No. SC88597

IN THE SUPREME COURT OF MISSOURI

TIMOTHY SORRELL,

Plaintiff-Respondent,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant-Appellant.

On Appeal From The Circuit Court Of The Twenty-Second Judicial Circuit,

City Of St. Louis, Missouri

Hon. Joan M. Burger, Circuit Judge

APPELLANT'S SUBSTITUTE OPENING BRIEF

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JURISDICTIONAL STATEMENT

This is an action for damages for personal injury by Plaintiff Timothy Sorrell against Defendant Norfolk Southern Railway Company under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq*. The Circuit Court entered a judgment on a jury verdict of $1,500,000.

On appeal, the Missouri Court of Appeals, Eastern District, affirmed the judgment. The Court of Appeals and this Court denied Norfolk Southern's application for transfer. Norfolk Southern filed a petition for a writ of certiorari in the United States Supreme Court. The Supreme Court granted the writ, and after briefing and argument, vacated the judgment of the Court of Appeals. The United States Supreme Court held that the FELA requires jury instructions apply the same standard of causation for a defendant's negligence and for a plaintiff's negligence. *Norfolk Southern Ry. Co. v. Sorrell*, 127 S.Ct. 799, 808 (2007). The Supreme Court held that the trial court's use of both MAI 24.01 and MAI 32.07(B)[1996 Revision] was erroneous because they instructed the jury to use different causation standards for the defendant's negligence and the plaintiff's negligence, and then to use these different standards to try to compare one party's negligence against the other's.

The Supreme Court remanded the case to the Court of Appeals to determine whether the use of instructions with inconsistent standards of causation was harmless error. The Court of Appeals held that Norfolk Southern failed to prove prejudice, and affirmed the judgment again. This Court granted Norfolk Southern's application for transfer.

The Court has jurisdiction under art. V, § 10 of the Missouri Constitution, and Rules 83.04 and 83.09.

STATEMENT OF FACTS

A. *The November 1, 1999 Incident*

Plaintiff Timothy Sorrell was a trackman for the Norfolk Southern Railway Company. T.393. On November 1, 1999, he was assigned to drive a dump truck loaded with coal patch to track crews working near Kendallville, Indiana. T.409. Kendallville is in northeastern Indiana near Ft. Wayne (Sorrell's home). T.391. The coal patch was to be used to at several crossings in the area as a temporary fix that would allow residents to cross the tracks. T.409.

Sorrell was driving a 1986 Ford dump truck that at the time of the accident was carrying an estimated fifteen tons of coal patch. T.409, 415. Sorrell's truck was 95 inches wide, with mirrors that extended from each side another seven inches each. T.276.

David Fletcher, Sorrell's supervisor, gave the entire track gang involved in the work a safety briefing before they left for Kendallville. T.406-407. The briefing was, according to Sorrell, very general, consisting of reading a safety rule. T.406. Fletcher did not brief Sorrell or the other truck drivers on the nature of the roads they would be driving on (although Sorrell admitted that he was familiar with the area already). T.406-407, 455-456. Specifically, Fletcher did not tell the drivers about the width of, or what to do if they encountered each other on, County Road 24 — the road Sorrell and others would be using as access to the work site.

Sorrell performed a safety inspection on his truck, checking such things as the tires, fluids and so forth. T.408. He did not measure the width of his truck, nor had he ever seen a rule requiring him to do so. T.408.

At about 2:00 p.m. Sorrell delivered coal patch to a site just south of County Road 24. T.226, 411, Deft. Ex. N-2. In that area, County Road 24 runs east to west, and the railroad is south of the road. T.230. At the specific site where Sorrell made his delivery, the County Road 24 dips into a valley. T.233. The road is sixteen feet wide, with a narrow shoulder and a ditch about four feet deep on the south side. Beyond the ditch is a marshy area, with cattail reeds growing in it. T.233. It had been raining that morning, and the ground was still wet. T.226.

After making his delivery, Sorrell backed out onto County Road 24, and began to travel east. T.238, 411. As he started up, he saw another truck approaching him going west on County Road 24. T.411. Keith Woodin, another Norfolk Southern employee, was driving this truck. T.235. At this point, the testimony of Sorrell and Woodin diverge.

Woodin was driving a Chevrolet 7500 maintenance truck that carried equipment for the track crews. T.227. Woodin's truck was 71 inches wide, with mirrors that extended 22 inches on the driver's side and 20 inches on the passenger side. T.276.

Woodin said that he had turned off a blacktop road on to County Road 24 going west. T.235. He paused at the top of a hill to the east of Sorrell's location. T.236. Woodin saw Sorrell back out on to the road, and turn to come east. T.236. Woodin noticed that Sorrell began to veer to the south side of the road. T.236, 239-240. Woodin pulled up a little

further to see what Sorrell would do. T.239. When Woodin was still some 400-500 feet away, Woodin saw the right front wheel of Sorrell's truck drop off into the ditch. T.239-241.

Woodin drove forward at a speed of 10-15 miles per hour with the intention of going to help pull Sorrell's truck out of the ditch. T.241. Sorrell's truck was still in the ditch and more or less upright (although canted to one side) when Woodin passed it. T.242. At some point — Woodin didn't see it happen — Sorrell's truck "flipped over" on its right side. T.242.

Sorrell told a different story. Sorrell said that he paused in upshifting the gears in his truck to see what Woodin was going to do. T.412. Sorrell testified that Woodin approached him going up to 30 miles per hour. T.412. Sorrell pulled a little — "not much" — to the right to allow Woodin to pass. T.413. Sorrell "knew something was going to happen apparently. At the bottom of the hill, it just looked tight." T.413.

As Woodin got closer, Sorrell said, "I get over as much as I can. By this time I'm back down into granny gears. I'm rolling about five miles per hour. I was concerned about mirrors hitting because that causes a lot of damage." T.413. Sorrell didn't believe the vehicles could get by each other. He pulled to the right "absolutely as far as I could." T.414. Sorrell said that he came almost to a stop. T.458. As the cabs of the two trucks passed, he started up and tried to pull back to the left towards the center of the road. T.414, 617. Sorrell said that his right front tire was three inches from the side of the road when it "washed out." T.618. The shoulder of the road gave way, T.459, and the truck

dropped into the ditch. The back end of the truck went up, and the load shifted. T.415. The truck rolled onto its right side, with Sorrell hanging on to his seat belt. T.416.

Sorrell agreed that he could have backed up when he saw Woodin's truck coming towards him, although "with some difficulty." T.418. H said that Woodin could have turned off onto a driveway at the top of the hill, or onto another road east of the accident site that led to a railroad signal. T.418-419. Sorrell testified that he "could have stopped any time I wanted to." T.618. And Woodin could have stopped, too. T.618.

Sorrell called Fletcher after the accident. T.244. According to Woodin, when Fletcher showed up, he said: "I got a mess here and someone is going to pay." T.245. Woodin testified that Fletcher blamed Woodin for the accident. T.245-246. Woodin testified that "Sorrell told [Fletcher] I didn't run him off the road. [Fletcher] said he didn't care." T.246.

Fletcher wrote out a statement for Woodin to sign, which he did. T.246. Woodin's statement said that "Just before I got to him he pulled off the road." T.248. At trial Woodin agreed that the statement was accurate except for the quoted part because, according to Woodin, Sorrell pulled over to the side of the road while Woodin was still at the top of the hill. T.249.

Sorrell also gave a written statement after the accident. His statement says that when the two trucks approached each other, "both trucks had to get off the edge of the road in order to pass. That is when I felt the shoulder was soft and I eased back on the road but apparently it was too late. The front end washed out in a ditch and the truck followed,

landing on its side." Deft. Ex. N-2, T.464. Sorrell also said that his statement was inaccurate because, according to Sorrell, Woodin didn't "get off the edge of the road" at all and he did. T.464.

Plaintiff claimed injuries to his back and neck. T.429-437. He did not return to work after November 1, 1999.

B. *The Trial And Jury Instructions*

The court gave a verdict-directing instruction patterned on MAI 24.01, requiring the jury to find that either defendant's "employee failed to use ordinary care" or that defendant "failed to provide Plaintiff with reasonably safe methods for work." L.F.24. The jury was instructed that it should find for the plaintiff if the railroad was negligent under either theory, and "such negligence resulted in whole or in part in injury to plaintiff." L.F.24.

The court also gave MAI 32.07(B)[1996 Revision] on contributory negligence, over defendant's objection that it provided a different standard of causation from the instruction on defendant's negligence. T.575. The court instructed the jury that it could find plaintiff contributorily negligent if it believed that plaintiff either "failed to stop his truck, or failed to keep his truck on the roadway," that such conduct was negligent, and that such "negligence of the plaintiff directly contributed to cause his injury." L.F.25.

The court also gave MAI 8.02 and the corresponding verdict form in MAI 36.01 over Norfolk Southern's objections. T.576-577, L.F. 26, 33. Taken together, MAI 8.02 and the

verdict form do not require the jury to find plaintiff's total damages and the parties' respective percentages of fault as is the practice in ordinary negligence actions.

The jury returned a general verdict in favor of plaintiff for $1,500,000. L.F.33. In accordance with the instructions and verdict form, the jury verdict did not indicate whether the amount of the verdict reflected a reduction in damages for plaintiff's contributory negligence or the jury's finding of plaintiff's total compensatory damages. L.F.33.

C. *The Appeal And Subsequent Proceedings*

On appeal, the Missouri Court of Appeals, Eastern District, affirmed the judgment. Norfolk Southern sought transfer to this Court, but both the Eastern District and this Court denied the applications. Norfolk Southern successfully petitioned the United States Supreme Court to consider whether the standard of causation for a defendant's negligence and a plaintiff's contributory negligence should be the same.

The United States Supreme Court reversed the judgment. It held that "the same standard of causation applies to railroad negligence . . . as to plaintiff contributory negligence." *Norfolk Southern Ry. Co. v. Sorrell*, 127 S.Ct. 799, 808 (2007). Justices Souter, Scalia and Alito said in a concurring opinion that the traditional "proximate cause" or "legal cause" standard was correct, and thus Missouri's long-standing interpretation of *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957) — as embodied in MAI 24.01 — was wrong. *See id*. at 809-812. Justice Ginsburg disagreed. *See id*. at 812-814. Although Justice Ginsburg found the railroad's proposed instruction better than

MAI 32.07(B)[1996 Revision], even if imperfect, she also believed that the railroad was not prejudiced because the error was "almost certainly harmless." *Id*. at 815. None of the other eight Justices ventured an opinion on the harmlessness of the instructional error. The Court remanded the issue of harmless error to the Court of Appeals for its determination. *See id*. at 809.

On remand, the Court of Appeals held that the railroad had the burden of showing that the instruction "misdirected, misled, or confused the jury." Op. at 3. The Opinion noted that the verdict form (in accordance with MAI) made it impossible to determine whether the jury found Sorrell negligent at all — a difficulty encountered *only* in FELA cases — because (as noted above) an FELA jury does not find percentages of fault. *See* MAI 8.02 and Committee Comment (1996 Revision), MISSOURI APPROVED JURY INSTRUCTIONS (6th ed. 2002)("MAI 6th") at 109.[1] The panel concluded that the jury could have found Sorrell negligent only if his negligence "directly" contributed to his injury — as submitted in MAI 32.07(B)[1996 Revision]. In other words, the Opinion held that there was no way the jury could find that Sorrell's conduct was an "indirect or contributing causative factor" in the accident, but a factor that nevertheless failed to rise to the level of "proximate cause." Thus, the Court held that the error in using different standards of causation was harmless. Op. at 4-5.

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[1] Norfolk Southern objected to this aspect of the verdict form. On the first appeal, the Court of Appeals held that it was bound to follow MAI. The United States Supreme Court did not grant certiorari on the verdict form issue.

The Court granted Norfolk Southern's application for transfer on August 21, 2007.

POINT RELIED ON

The Trial Court Committed Prejudicial Error In Giving Instructions Nos. 12 And 13 Because The Instructions Misdirected, Misled And Confused The Jury In That The Jury Could Not Assess Comparative Fault Using Different Standards Of Causation And There Is A Substantial Likelihood That The Jury Could Have Found That Plaintiff's Negligence Was A "Slight" Cause Of The Accident, But The Jury Would Not Have Compared The Parties' Fault Due To The Requirement In Instruction No. 13 That It Find Plaintiff's Negligence Was A "Direct" Cause Of The Accident To Be Contributory Negligence

Norfolk Southern Ry. Co. v. Sorrell, 127 S.Ct. 799, 809 (2007).

Hiers v. Lemley, 834 S.W.2d 729 (Mo. banc 1992)

Carlson v. K-Mart Corp., 979 S.W.2d 145 (Mo. banc 1998)

Sheinbein v. First Boston Corp., 670 S.W.2d 872 (Mo. App., E.D. 1984)

ARGUMENT

The Trial Court Committed Prejudicial Error In Giving Instructions Nos. 12 And 13 Because The Instructions Misdirected, Misled And Confused The Jury In That The Jury Could Not Assess Comparative Fault Using Different Standards Of Causation And There Is A Substantial Likelihood That The Jury Could Have Found That Plaintiff's Negligence Was A "Slight" Cause Of The Accident, But The Jury Would Not Have Compared The Parties' Fault Due To The Requirement In Instruction No. 13 That It Find Plaintiff's Negligence Was A "Direct" Cause Of The Accident To Be Contributory Negligence

A. *Introduction*

The United States Supreme Court remanded this appeal for a determination of whether the use of jury instructions that misstate the law by requiring the jury to apply different standards of causation for the defendant's negligence and the plaintiff's negligence was harmless error. *See Norfolk Southern Ry. Co. v. Sorrell*, 127 S.Ct. 799, 809 (2007). The Missouri Court of Appeals, Eastern District, held that Norfolk Southern had the burden of showing that the jury instructions were not harmless error, and that it failed to meet that burden.

The court below, however, reversed the usual allocation of the burden of showing harmless error. The burden of showing harmless error is, and should be, on the party benefiting from the error — not the party challenging the instructions. That the challenged instructions here complied with the Missouri Approved Instructions 24.01 and 32.07(B)[1996 Revision] makes no difference. The party benefiting from the erroneous

submission here was the plaintiff, not the defendant. Such a rule follows from the general principles governing harmless error, as well as the Court's specific application of the doctrine to jury instructions.

It has long been the rule that an appellant is entitled to reversal if, and only if, it can show that an error was committed that was prejudicial. Stated another way, the appellant must show that the error "materially affect[ed] the merits of the action." Rule 84.13(b). Whether an error is so prejudicial that it becomes reversible error, or whether it "materially affects" the merits of the action is the ultimate legal conclusion an appellate court must reach in deciding to reverse or affirm a judgment.

The appellant's burden in showing the existence of prejudicial error is two-fold: The appellant must first show, of course, that the action of the trial court was error. The next step is for the appellant to show that the error affected a material issue in the case. Once the appellant has satisfied these requirements, it has made a *prima facie* showing of prejudice that would ordinarily lead to the reversal of the judgment. If the harmlessness of the error is raised, the burden shifts to the respondent to show that the error did not affect the ultimate outcome of the case — in other words, that it was harmless. *See, e.g.*, *Hamilton v. Petroleum Products, Inc.*, 438 S.W.2d 197, 201 (Mo. 1969).

The Court has directed that a similar process be followed in considering the prejudicial effect of erroneous jury instructions. To establish harmless error in the giving of erroneous instructions, the party benefiting from the instructions must show that it is

"perfectly clear" that the error did not prejudice the appellant. In other words, the respondent is required to show there is a high probability that the error was harmless.

Sorrell did not and cannot meet that burden. First, the United States Supreme Court held that the use of MAI 24.10 and MAI 32.07(B)[1996 Revision] was error because the same standard of causation governs both parties' negligence, and the instructions given misstate the law. Second, this Court and the courts of appeal have already held that submitting differing standards of causation is prejudicial error. Third, the jury cannot make a valid comparison of the fault of the parties where the instructions require the jury to apply different standards of causation. Fourth, a consideration of the evidence in this case shows many scenarios in which the jury's decision could have been affected by the incorrect instructions — where the jury could have found Sorrell's negligence to be a "slight" cause of the accident, but the jury would have failed to make the required comparison of fault because they were instructed to find Sorrell contributorily negligent only if his negligence was a "direct" cause.

The case should be remanded for a new trial.

B. *The Use Of Instructions No. 12 and 13, Based On MAI 24.01 and 32.07(B)[1996 Revision], Was Error*

The Circuit Court erred in giving both Instructions No. 12 and 13, based upon MAI 24.01 and 32.07(B)[1996 Revision], because the pair of instructions misstated the correct legal standard for causation under the FELA for comparative negligence. The Supreme Court held that under the FELA pure comparative fault system, the jury must apply the

same causation standard to the conduct of the Plaintiff and Defendant to compare the relative fault of the parties. Yet Instruction No. 13 (MAI 32.07(B)[1996 Revision]) instructed the jury that it could find that Plaintiff Sorrell was negligent and should reduce his damages only if it found that his negligence "*directly* contributed to cause" (emphasis added) his injuries. Conversely, the causation standard applied to Norfolk Southern in Instruction No. 12 and MAI 24.01 was whether the defendant's negligence "*resulted in whole or in part* in injury to plaintiff." L.F.24. (emphasis added).

MAI 32.07(B)[1996 Revision] was the approved instruction for submitting contributory negligence in an FELA case at the time of trial. Instruction No. 13 tracked MAI 32.07(B)[1996 Revision] word-for-word. It provided:

> You must find plaintiff contributorily negligent on his November 1, 1999 claim if you believe:
>
> First, plaintiff either:
>
> failed to stop his truck, or
>
> failed to keep his truck on the roadway, and
>
> Second, plaintiff, in any one or more of the respects submitted in Paragraph First, was thereby negligent, and
>
> Third, such negligence of plaintiff *directly contributed to cause his injury*.

L.F.25 (emphasis added).

By contrast, the third paragraph of Instruction No. 12, submitting the causation issue on Plaintiff's claims against Defendant (in compliance with MAI 24.01), instructed the

jury to find for the plaintiff if the defendant's negligence "resulted in whole or in part in injury to plaintiff." L.F.24. Norfolk Southern objected to Instruction No. 13 as contrary to the FELA. T.574-576. It proffered a proposed Instruction No. A with the following language: "Third, such negligence of the plaintiff contributed in whole or in part to cause his injury." L.F.162; App. 1; T.574. If Instruction No. A had been given, the jury would have applied the same standard of causation to the plaintiff's negligence that it was instructed to apply to the defendant's negligence.

The United States Supreme Court noted that the use of different causation standards for an FELA defendant's negligence and a plaintiff's contributory negligence was apparently unique to Missouri. *See Sorrell*, 127 S.Ct. at 806. It concluded that differing standards of causation were neither required by the statutory language of the FELA itself nor consistent with the common law rule. *See id*. at 807. The Court pointed out the difficulty of reducing damages in proportion to the employee's negligence if each party's negligence is measured by a different standard. The Court concluded that "Missouri's idiosyncratic approach of applying different standards of causation unduly muddies what may, to a jury, be already murky waters." *Id*. at 808. Accordingly, the Court held that "the same standard of causation applies to railroad negligence under Section 1 [45 U.S.C. § 51] as to plaintiff contributory negligence under Section 3 [45 U.S.C. § 53]." *Id*.

The United States Supreme Court judicially determined the combination of MAI instructions was erroneous under federal law. Therefore, the jury not only "may have" been misdirected or misled by the jury instructions, the Supreme Court found that they

were. The jury should have been given the *same* standard for the defendant's and the plaintiff's negligence so that it could have made the comparison of fault required by the FELA. Despite the undoubted error in misdirecting and misleading the jury, the Court of Appeals held that the error was harmless because — under the Court of Appeals' assessment of the evidence — Norfolk Southern failed to show that the jury was confused to the extent of affecting the merits of the case.

C. *The Standard Of Review — Harmless Error*

The principles under which the appellate courts consider errors in the giving of jury instructions have largely been settled since the adoption of MAI over forty years ago. When MAI has an instruction applicable to the facts in the case, that instruction "shall be given to the exclusion of any other instructions on the same subject." Rule 70.02(b). Accordingly, the giving of an instruction in violation of this rule is error, and presumed prejudicial. Rule 70.02(c); *Brown v. St. Louis Public Service Co.*, 421 S.W.2d 255, 259 (Mo. 1967); *Murphy v. Land*, 420 S.W.2d 505, 507 (Mo. 1967).[2]

[2] Until *Fowler v. Park*, 673 S.W.2d 749, 754-757 (Mo. banc 1984), and *Hudson v. Carr*, 668 S.W.2d 68, 71-72 (Mo. banc 1984), the presumption of prejudice for deviation from a required MAI instruction applied even if the party claiming error did not object at trial. *Fowler* and *Hudson* questioned whether such a deviation could be judicially determined to be prejudicial if the lawyers raised no objection at trial — even though so-called "sandbagging" was expressly permitted by rule. *But see Goff v. St. Luke's Hospital*, 753 S.W.2d 557, 564-565 (Mo. banc 1988). In 1993, the Court adopted changes to Rules

The presumptive prejudice rule was adopted in part to discourage any tinkering with the MAI-approved instructions. "If counsel are permitted to 'improve' the approved instructions, even within the confines of specific precedents, the value of these instructions will be lost. Each such 'improvement' by counsel will prompt an offsetting 'improvement' by his opponent and after a while the court will not be able to find the original with a divining rod." *Brown*, 421 S.W.2d at 258, *quoting Motsinger v. Queen City Casket Co.*, 408 S.W.2d 857, 860 (Mo. 1966).

Moreover, an erroneous jury instruction almost always involves a material issue in the case because the instructions are the method by which the court explains to the jury "how its determination of the facts affects the outcome." *See* "Why and How To Instruct a Jury," MAI 6th at LVI. The presumptive prejudice rule thus collapses the first two steps of showing error into one. Once a party shows a deviation from a required MAI instruction, it has shown both error and that the error materially affected the merits of the action.

As with the usual procedure governing appellate error, the burden then shifts to the party benefiting from the error to show that it is harmless. To avoid reversal for a deviation from a required MAI instruction, the proponent of the instruction must show

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70.02 and 70.03 that required objections to jury instructions be made at trial to preserve claims of error. Thus, the "presumptive prejudice" rule now applies only to preserved errors. Rule 70.02(c).

that it is "perfectly clear . . . that no prejudice could have resulted from the deviation." *Brown*, 421 S.W.2d at 259.

The rule is not inflexible. Even in the case of presumptive prejudice, the appellate court still must judicially determine the prejudicial effect of the error. Rule 70.02(c).

Trivial deviations from an MAI instruction will not mandate reversal — not because they are trivial, but because it is "perfectly clear" they could not have affected the result. For example, in *Gormly v. Johnson*, 451 S.W.2d 45 (Mo. 1970), the plaintiff was a woman and the defendant a man. The plaintiff's verdict referred to "his" claim for damages, instead of "her" claim. The Court noted that there were only two parties, and the plaintiff testified extensively to the damages she suffered. The jury could not have been misled by the use of the wrong gender in the instruction, which otherwise complied with MAI. *See id*. at 47.

Where the applicable MAI instruction must be modified to "fairly submit the issues," or where there is no MAI instruction that applies, Rule 70.02(b) requires the instruction to be "simple, brief, impartial, free from argument, and shall submit to the jury or require findings of detailed evidentiary facts." Although not expressly stated in the rule, another obvious requirement is that the instruction correctly submit the applicable law. *See, e.g.*, *Durley v. Board of Police Commissioners*, ___ S.W.3d ___, 2007 WL 2768222 (Mo. App. E.D., Sept. 25, 2007) at *1; "How To Use This Book," MISSOURI APPROVED INSTRUCTIONS (6th ed. 2002) at XLVIII-XLIX, LVIII.

An error in the giving of a not-in-MAI instruction is not presumed prejudicial because there is, by definition, no MAI mandate on how to instruct on the issue. *See Cornell v. Texaco, Inc.*, 712 S.W.2d 680, 682 (Mo. banc 1986). Therefore, the appellate courts follow the usual procedure for the determination of prejudicial error.

To show error in the not-in-MAI context, the party objecting to the instruction must demonstrate that it misdirected, misled, or confused the jury on a material issue. *See Cornell*, 712 S.W.2d at 682. Once a party satisfies this burden, it has made a *prima facie* showing of prejudice. The burden then shifts, as it does when prejudice is presumed, to the party benefiting from the erroneous instruction to show that it was harmless — that the instruction did not affect the ultimate outcome of the case. *See, e.g., Ploch v. Hamai*, 213 S.W.3d 135, 141-142 (Mo. App., E.D. 2006). The cases do not clearly state the degree of certainty that must be shown, but it is the same as when there is a deviation from MAI. In other words, the party claiming harmless error must "clearly" show that the error did not affect the result.

The third category of instructional error is that which occurs when the trial court *sua sponte* gives an erroneous instruction. The cases which have considered this situation after the adoption of MAI have held that an erroneous instruction drafted by the court that results in a verdict against the party objecting to the instruction is presumed prejudicial. *See Sheinbein v. First Boston Corp.*, 670 S.W.2d 872, 878 (Mo. App., E.D. 1984); *McLaughlin v. Hahn*, 199 S.W.3d 211, 217 (Mo. App., W.D. 2006).

Neither *Sheinbein* nor *McLaughlin* expressly explain why this type of error should be presumptively prejudicial. *Sheinbein* says that an erroneous court-given instruction that results in a verdict against the party objecting to the instruction "must be presumed prejudicial," citing a pre-MAI case. *See id*. at 878. *McLaughlin* cites *Sheinbein*. *See id*. at 217.

The rule is not illogical, however. Because the court — not the opposing party — drafted the erroneous instruction, the party benefiting from the error should bear the burden of showing that it was harmless. This procedure tracks the usual allocation of the burdens for establishing harmless error, and would be no more onerous than if the party benefiting from the erroneous instruction had drafted it in the first place. And, as with other errors, the opinions imply — even if they do not expressly hold — that the party benefiting from the instruction must clearly show that the error could not have affected the verdict.

The situation here is a variation of the third category. The trial court gave the approved MAI instruction over Norfolk Southern's objection. The MAI instructions, however, were judicially determined by the United States Supreme Court to be erroneous because, taken together, they improperly submit two different standards of causation. There was no deviation from MAI — although there should have been.

Missouri law recognizes that where an instruction incorrectly states the law, "and the error caused a *substantial potential* for prejudicial effect," reversal is required. *Van Vacter v. Hierholzer*, 865 S.W.2d 355, 358 (Mo. App., W.D. 1993)(emphasis added).

Because the erroneous instruction "*may have*" misled the jury, *Hiers v. Lemley*, 834 S.W.2d 729, 734 (Mo. banc 1992)(emphasis added), this case should be remanded for a new trial.

The party who received the benefit of the erroneous instruction was the plaintiff, not the defendant. The court gave MAI 32.07(B)[1996 Revision] over defendant's objection, and rejected defendant's own proffered instruction on contributory negligence.[3] This was no different from a court-drafted instruction favoring the plaintiff. Here, of course, the drafting was done by the MAI Committee. However, giving an instruction over defendant's objection that follows MAI, but which incorrectly states the law, has the same effect.

Thus, the giving of MAI 32.07(B)[1996 Revision] by the trial court over Norfolk Southern's objection should be treated the same as the trial court's giving of an instruction *sua sponte* — presumptively prejudicial. *McLaughlin v. Hahn,* 199 S.W.3d at 217; *Sheinbein v. First Boston Corp.*, 670 S.W.2d at 878. Therefore, it is incumbent on the plaintiff to show that there was no possibility of jury confusion, not on the defendant to show that there was in fact jury confusion.

[3] The Court approved a revised MAI 32.07(B)[2008 Revision] in the form proffered by Norfolk Southern at trial. The new contributory negligence instruction submits the same standard of causation for a plaintiff's contributory negligence as for a defendant's negligence. *See* MAI 6th, July 2007 Pocket Part at 72.

This procedure was followed by the Court of Appeals in *Dickerson v. St. Louis Southwestern Ry. Co.*, 697 S.W.2d 210 (Mo. App., E.D. 1985), in the most closely analogous situation. There, the United States Supreme Court held that the MAI damage instruction in an FELA case should have directed the jury to reduce future pecuniary losses to present value (*see* the current MAI 8.02). *Dickerson v. St. Louis Southwestern Ry. Co.*, 470 U.S. 409, 411 (1985). On remand, the court had to consider whether the failure to give the present value instruction was harmless. The verdict did not break down the damages into lost future wages (which should have been reduced to present value) and pain and suffering damages (not subject to reduction to present value). Thus, the court held that the record left "respondent [*i.e.*, plaintiff] unable to show that the error in denying the present value instruction was harmless." 697 S.W.2d at 212.

D. *The Use Of Different Standards Of Causation Was Not Harmless Error*

On remand, the Court of Appeals did not address the prejudice inherent in attempting to compare different degrees of causation — the very evil that using the same standard of causation is supposed to avoid. *See Norfolk Southern Ry. Co. v. Sorrell*, 127 S.Ct. at 807-808. How could the jury avoid confusion even if it found both parties negligent under the standards of MAI 24.01 and 32.07(B)[1996 Revision]? As the Supreme Court noted, "[C]omparative responsibility is difficult to administer when different rules govern different parts of the same lawsuit." *Id*. at 808, *quoting* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3, Reporter's Note, p. 37, Comment *a* (1999). The two

instructions' use of "different standards of causation unduly muddies what may, to a jury, be already murky waters." *Id.* at 808.

The purpose of a contributory negligence instruction is to give the jury a basis of comparison — the essence of the comparative fault system. But a jury cannot make a valid comparison unless the negligence being compared is governed by the same causation standard. This Court and the courts of appeal have uniformly held that the use of *different* causation standards in jury instructions where they should have been the *same* is prejudicial error, and therefore, by definition, not harmless.

In *Hiers v. Lemley*, 834 S.W.2d 729 (Mo. banc 1992), the plaintiffs sued for medical malpractice in a wrongful death case. The verdict director required the jury to find that the defendant's negligence "directly caused or directly contributed to cause" the injury to the decedent. *Id*. at 733. Defendant's converse, however, told the jury that it could not find in favor of the plaintiffs unless they believed that "as a direct result of [defendant's] negligence" the decedent sustained her injuries. *See id*.

The converse did not comply with the requirement that it track the language of the verdict director. As a result, "the jury may have perceived that this instruction required plaintiff to prove that [defendant] could not be liable if his negligence only contributed to plaintiff's damages." *Id*. at 734. Accordingly, the error was prejudicial.

In *Carlson v. K-Mart Corp.*, 979 S.W.2d 145 (Mo. banc 1998), the Court was confronted by a similar error. The plaintiff suffered a back injury. The primary dispute

was whether the injury was caused by degenerative disk disease, an incident at K-Mart where some merchandise fell on her head, or by an automobile accident. *See id.* at 146.

The verdict director required the jury to find that K-Mart's negligence "directly caused or directly contributed to cause" damage to the plaintiff. The damage instruction actually given, adapted from MAI 4.01, however, directed the jury to award such damages as it believed she "sustained and is reasonably likely to sustain in the future as a direct result of the K-Mart occurrence." *Id.* at 147. Plaintiff's requested instruction — refused by the trial court — would have required the jury to award her damages that were "directly caused or contributed to be caused by the incident at K-Mart." *Id*.

The Court held that it was error to use two different standards in the verdict director and damage instruction. The damage instruction was supposed to "identify which causes of injury the plaintiff was entitled to be compensated for." *Id*. The "phrase 'direct result' is sufficiently inconsistent with 'directly caused or contributed to cause' to produce inconsistent results where the phrases are used in different instructions." *Id.* at 148. As a result, the instructions, taken together, were confusing to the jury, and therefore, prejudicial. *Id*. at 148.

Thus, in both *Hiers* and *Carlson*, this Court found prejudicial error because in both cases, one of the two instructions omitted "contributed to cause" language – even though in both *Hiers* and *Carlson* both challenged instructions included the word "direct" or "directly." The difference in the causation language of the instructions in this case is far more stark than the differences in *Hiers* and *Carlson*.

The courts of appeals have reached similar results when considering the effect of conflicting instructions on causation. In *Snyder v. Chicago, Rock Island & Pacific R. Co.*, 521 S.W.2d 161 (Mo. App. 1975), the plaintiff submitted his FELA claim using MAI 24.01, which required the jury to find that the defendant's negligence "directly resulted in whole or in part in injury to plaintiff." *Id*. at 164. The defendant submitted a converse instruction which failed to track the verdict director in omitting the "in whole or in part" language. It told the jury that its verdict must be for defendant unless it found "that plaintiff sustained damage as a direct result of [defendant's negligence]." *Id*.

The court held the converse instruction misdirected and confused the jury because it "impose[d] upon the plaintiff a legal theory of causation different and more burdensome than the submission of that proposition in the verdict director. It allows the plaintiff recovery only if his damage was a direct result of rather than in whole or in part from negligence [,] and thus requires proof of common law proximate cause, the very standard FELA (and the verdict director) abrogates." *Id*. at 165.

Finally, *Leake v. Burlington Northern R. Co.*, 892 S.W.2d 359 (Mo. App., E.D. 1995), presented the identical issue as in *Snyder*. The verdict director, using MAI 24.01, required the jury to find that defendant's negligence "resulted in whole or in part" in injury to the plaintiff, while the converse required the jury to find for defendant unless the jury found plaintiff's injury was a "direct result" of defendant's negligence. *Id*. at 364. For the same reason as given in *Snyder*, the court held that the converse was confusing, and required a new trial.

Each of these four decisions stands for the proposition that the use of differing standards of causation where the substantive law requires only one standard is not only error, but prejudicial error requiring the grant of a new trial. The result below cannot be reconciled with these four appellate decisions.

E. *The Evidence Shows Several Ways That The Incorrect Instructions Could Have Affected The Outcome; Plaintiff Cannot Prove That It Is "Perfectly Clear" That The Instructions Did Not Prejudice Defendant*

The facts suggest a number of plausible circumstances in which the erroneous jury instructions could have affected the outcome. For instance, there were many ways the jury could have failed to compare the fault of the parties because it could have found that Sorrell's negligence played only a "slight" role in causing the accident.

But first, it is important to keep in mind the difference between the two standards. Under MAI 24.01 (Instruction 12), if the employer's negligence played *any part, even the slightest*, in producing the injury, the railroad is liable. That instruction covers conduct that, under the principles of negligence applied to non-FELA cases, would not be considered a "proximate cause" or "legal cause" of the injury because it would otherwise be too remote. *See* MAI 24.01 Committee Comments (1978 New), MAI 6th at 373.

On the other hand, MAI 32.07(B)[1996 Revision] (Instruction 13) expressly used a "proximate cause" or "legal cause" standard, which required the railroad to show that the plaintiff's conduct is not only negligent, but also "directly contributed to cause" his injury.

The difference in the two instructions was intentional. In the early editions of MAI, the verdict directors for both the negligence and contributory negligence claims used the word "directly." In both the first and second editions, MAI 24.01 used the phrase "directly resulted in whole or in part in injury to plaintiff." *See* MAI 24.01 (1st ed. 1964); MAI 24.01 (2d ed. 1969). Likewise, the third paragraph of the FELA contributory negligence instruction in the first two editions read: "such negligence of plaintiff directly contributed to cause his [injury][death]." *See* MAI 28.03 (1st ed. 1964), MAI 32.07 (2d ed. 1949).[4]

In 1978, the Committee revised MAI 24.01 to eliminate the word "directly" from the causation paragraph. *See* MAI 24.01 [1978 Revision], MAI (2d ed. 1980 Supplement). The Comments to MAI 24.01[1978 Revision] made clear that the revision was intended to reflect what the Committee regarded as the sharp distinction between the traditional notions of "proximate cause" that required a finding that the defendant's negligence "directly caused or contributed to cause" the plaintiff's injury and the supposedly more liberal causation standard of the FELA. *See* Committee Comment (1978 New) to MAI

[4] In the second edition of MAI, the FELA contributory negligence instruction was re-numbered from MAI 28.03 to MAI 32.07. There were no changes to the instruction itself or its Notes on Use.

24.01 [1978 Revision]. *See id.*[5] Indeed, all but the last paragraph of the Comments are devoted to explaining why the causation language is different in MAI 24.01 from the corresponding language in other MAI verdict-directing instructions in non-FELA negligence cases.

The 1978 Comments explain that in the "traditional negligence case, it is mandatory for the plaintiff to include the word 'direct' or 'directly' in his instruction because of the proximate (direct) cause requirements." In other words, the MAI states that the traditional proximate cause test — ordinarily submitted in MAI by language requiring the jury to find that "as a direct result" of the defendant's negligence the plaintiff sustained damage, *see e.g.*, MAI 17.01 — is not appropriate in an FELA case, *citing Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 507 (1957).[6]

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[5] The Committee Comments to MAI 24.01 remain unchanged from 1980 through the current (Sixth) edition of MAI.

[6] Although a majority of the Supreme Court declined to decide which standard of causation — proximate cause or the slightest cause — was correct, *Sorrell*, 127 S.Ct. at 805, three Justices believed (contrary to the MAI Committee Comments) that *Rogers* did not change the proximate cause standard historically applied in FELA cases. *See id*. at 809-812 (Souter, Scalia and Alito, J.J., concurring). One Justice disagreed. *See id*. at 812-814 (Ginsburg, J., concurring). The issue would have to be resolved by the trial court on remand.

Although the Committee changed 24.01 in 1978, it did not make a corresponding change to the FELA contributory negligence instruction. The Notes On Use for the 1978 Revision of MAI 32.07 (and MAI 32.07(B)[1996 Revision]) said nothing about the causation standard. MAI 32.07(B)[1996 Revision], was derived directly from MAI 32.07, originally adopted in 1978. *See* Committee Comments to MAI 32.07(B)[1996 Revision] in MAI 6th at 519.

Under the proximate cause standard of MAI 32.07(B)[1996 Revision], negligence that is a cause in fact of the plaintiff's injury would not be *contributory negligence* sufficient to reduce the plaintiff's damages unless the railroad also shows that plaintiff's conduct is not "too far removed from the ultimate injury or damage" to make it unreasonable to impose the consequences of the plaintiff's negligence on him. *See State ex rel. Missouri Hwy. and Transp. Comm'n v. Dierker*, 961 S.W.2d 58, 60 (Mo. banc 1998).

There are a number of scenarios where the different causation standards could have affected the jury's decision. The jury could have found both parties' negligence was a cause of the accident, but that Sorrell's negligence (while a "slight" cause) did not "directly contribute to cause" his injuries. Yet, in those situations, under the "apples to oranges" instructions as given, *Sorrell*, 127 S. Ct. at 807, the jury was required to find the railroad liable and to make no comparison of the parties' respective negligence.

The assumption underlying jury instructions is that the jurors actually read and follow the instructions. In addition, plaintiff submitted alternative theories of the

railroad's negligence — one based on Woodin's driving and a second based on the railroad's alleged failure to provide "reasonably safe methods" of work. Defendant submitted alternative theories of Plaintiff's fault, that he either failed to stop his truck or alternatively, failed to keep his truck on the roadway.

Here, the jury could have believed Sorrell, or believed Woodin, or believed neither, or believed some of the testimony of each. Under these instructions, these are just some of the permutations of how the jury could have assessed the evidence.

1. The jury could have found that Woodin (and therefore the railroad) was negligent when he continued to drive towards Sorrell's truck. The jury could have found that Sorrell was negligent by failing to stop or by stopping his truck so close to the edge of the ditch. Under MAI 24.01, the railroad would be negligent and liable, even if the jury considered that Woodin's conduct in driving forward played only a slight role in causing the injury. For example, just creating an incidental condition in which the railroad's negligence operated to injure Sorrell would not rise to the level of proximate cause, *Davis v. Wolfe*, 263 U.S. 239, 243 (1923), but it could play, under MAI 24.01, "any part, even the slightest," in causing the accident.

2. The jury might have decided that Plaintiff simply stopping with his front wheel close to the ditch was too remote as a causal factor to conclude that it "directly contributed" to his injury.

3. The jury could have found that Fletcher's safety briefing was inadequate because he did not specifically cover what the drivers should do if they encountered each other on

County Road 24. Indeed, this was a specific act of negligence plaintiff's counsel argued to the jury in closing argument. T.640-641. The jury could also have concluded that Sorrell was negligent either not stopping or in attempting to pass, but concluded such negligence was only a slight cause.

4. In arguing that Defendant failed to provide reasonably safe methods of work, Plaintiff contended that the road was too narrow at sixteen feet wide for the trucks to pass. The two trucks, which met driver's side to driver's side were a total of sixteen feet, three inches wide. But the jury could have concluded from the testimony and an examination of the photographic evidence that it was possible for the trucks to have passed. Sorrell could have been found negligent for pulling off the road a little, "not much," but too much, T.413. Sorrell's negligence would have been a slight cause — perhaps an inch or two less off the side of the road and the right wheel of his truck would not have fallen into the ditch.

5. The jury could have concluded that Sorrell's failure to stop as soon as he saw Woodin come down the hill was a "slight" cause of the accident, but not one that led directly to its occurrence because Woodin was coming too fast for the trucks to safely pass.

6. The jury could have concluded that both drivers should have stopped and were negligent in failing to do so, but the failure to do so was only a "slight" cause of the accident because the margin of safety was too narrow due to the width of the road and the width of the trucks.

7. The jury could have believed that Sorrell should have waited (with his right wheel just off the road) until Woodin passed before he attempted to get back to the center of the road. T.414. Or it could have concluded that Sorrell could have backed up — albeit with "some difficulty," T.418 — to a point where the trucks could have passed safely (for example, to the side road where Sorrell pulled out on to County Road 24).

If the jury considered the railroad's negligence to be only a "slight" cause of the accident in any of these scenarios, the instructions *required* them to award damages to Sorrell. But if the jury considered Sorrell's negligence to be only a "slight" cause, the jury was instructed *not* to reduce his damages in any amount because his negligence was too remote to be the proximate cause of the accident, and thus not "contributory negligence."

Given the uncertainties that arise from the nature of a general verdict, it simply cannot be "perfectly clear" that the erroneous submission of different standards of causation did not materially affect the merits of the action.

CONCLUSION

For the foregoing reasons, Appellant Norfolk Southern Railway Company requests that the Court reverse the judgment of the trial court, remand the case for a new trial, and grant such other and further relief as the Court deems proper in the circumstances.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information required by Rule 55.03, complies with the limitations in Rule 84.06(b), and it contains 8,040 words, excluding the parts of the brief exempted; has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 13 point Times New Roman font; and includes a virus free 3.5" floppy disk in Microsoft Word 2003 format.

_____

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of Appellant's Substitute Opening Brief and a virus-free diskette was mailed this ___ day of September, 2007, to Roger Denton, Schlichter, Bogard & Denton, 100 South Fourth, Suite 900, St. Louis, Missouri 63102.

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