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 REPLY BRIEF

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A. *Introduction*

Respondent Timothy Sorrell takes Norfolk Southern to task for having successfully obtained an opinion from the United States Supreme Court vacating the first decision of the Court of Appeals, and for successfully obtaining an order from this Court transferring the appeal to consider three issues of general interest and importance, resulting in the vacation of the second decision of the Court of Appeals. The appeal has been prolonged because the trial court gave an erroneous instruction, and MAI 32.07(B)[1996 Revision] incorrectly submitted a different standard of causation from the verdict director.

Most of Sorrell's Brief — indeed, all of Point II — is a screed that relies on pejoratives rather than analysis to argue that the trial court did not err in giving Instruction No. 12, based on MAI 24.01, submitting defendant's negligence. The United States Supreme Court declined to decide whether the appropriate standard of causation in

an FELA case was the slightest cause "in part" standard of MAI 24.01 or the proximate cause "direct" standard of MAI 32.07(B)[1996 Revision]. *See Norfolk Southern Ry. Co. v. Sorrell*, 549 U.S. ___, 127 S.Ct. 799, 805 (2007). The question of the proper standard of causation is not before the Court at this time. Given the apparent disagreement even among the Justices of the U.S. Supreme Court, that federal question is an important and ultimately still an open one. It *may* be presented to this Court in this case — after a new trial to which MAI 24.01 and MAI 32.07(B)[2008 Revision] would apply — or it may come up in another FELA case in Missouri or even in the United States Supreme Court.

The United States Supreme Court *did* decide that the standard of causation must be the same for a defendant's negligence and a plaintiff's contributory negligence. *See id.*, 127 S.Ct. at 808. The issue in this case is whether, the court having instructed the jury under MAI 24.01 that the railroad is liable if its negligence caused the plaintiff injury "in whole or in part," it is harmless for the court to instruct the jury that a different and higher "direct" causation standard applies to the plaintiff's contributory negligence.

That is the question that the United States Supreme Court remanded for a decision. To that question Sorrell provides little analysis or assistance to the Court.

His principal claim is that his negligence could not have been "indirect" because he had his "hands on the wheel" of his truck. But the instruction that Norfolk Southern submitted — and the one the Court now endorses — does not speak of "indirect" negligence (whatever that means). Rather, the question is whether Sorrell's injury "resulted . . . *in part*" from his negligence. In other words, could the jury have reached a

different result if it used the same standard of causation for contributory negligence as it did for the defendant's negligence? The answer is yes. There was substantial evidence from which the jury could have concluded that Sorrell's negligence played a role "in part" in causing his injuries, even though his negligence would not have been found to been a direct or proximate cause of them. *See* Appellant's Substitute Opening Brief at 33-36.

The party who argues that an error of any type is harmless error, whether an instructional error or not, bears the burden of showing that the error is harmless. Sorrell has not shown harmless error — indeed, he scarcely even makes an effort to do so. The judgment should be reversed and the case remanded for a new trial.

B. *The United States Supreme Court Held That The Giving Of Jury Instructions That Submitted Different Standards Of Causation For The Defendant's Negligence And The Plaintiff's Contributory Negligence Was Error And A Misdirection Of The Jury*

Sorrell says that the United States Supreme Court did not find that the jury was misdirected, Resp. Br. at 15-16, and chides Norfolk Southern for failing to provide a citation to such a finding. This argument is puzzling because the one thing the Supreme Court did find was that standards of causation must be the same — as Norfolk Southern pointed out in its Substitute Opening Brief at 12, 19. The Supreme Court held that "Missouri's idiosyncratic approach of applying different standards of causation unduly muddies what may, to a jury, be already murky waters." *Id*., 127 S.Ct. 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*.

No court remands for a determination of harmless error unless it has determined that there has been error. That seems obvious. If the Supreme Court had not determined that the submission of different standards of causation was error, then it would have affirmed instead of vacating the judgment.

C. *The Giving Of An Erroneous MAI-Approved Instruction Over Norfolk Southern's Objection Was Presumptively Prejudicial*

Sorrell claims that Norfolk Southern is trying to "change the standard of review" in cases where instructional error is alleged. This is pure hyperbole.

To support his position Sorrell draws a distinction between an error affecting a "material issue" and one affecting the "outcome of the case." Resp. Br. at 16-17. There is no such distinction. A material issue is one that affects the outcome of the case. Otherwise, it isn't material.

Damages are almost always material, and certainly they were material here. Under the FELA, the defendant is entitled to have the plaintiff's damages reduced "in proportion to the amount of negligence attributable to [the] employee." 45 U.S.C. § 53. No one has disputed that Norfolk Southern made a submissible case that Sorrell was negligent. Therefore, whether the jury was properly instructed as to his contributory negligence is material to the outcome of the case — in particular, the assessment of damages. The

United States Supreme Court held that the contributory negligence instruction and the plaintiff's verdict director should have, but did not, used the same standard of causation. That was error. And it was error affecting a material issue in the case — damages.

Harmless error only comes into play once the parties reach the stage we have reached here: there is an error affecting a material issue that *prima facie* would change the outcome of the case *unless* the error was harmless.

Sorrell's contention that a party who has shown the existence of error affecting a material issue also has the burden of showing that the error is not harmless makes no sense. Had this been an instruction that the plaintiff had submitted, there would be no doubt that the proponent of the instruction (in that hypothetical, the plaintiff) would bear the burden of showing the error was harmless.

The unusual twist in this case is that Norfolk Southern submitted a correct instruction that was refused. It was forced to submit an incorrect instruction only because MAI required it, not because it was proper. Plaintiff obviously was not going to submit a contributory negligence instruction. Thus, the only comparable situation is where the trial court drafts and submits an improper jury instruction over defendant's objection. That is in essence what happened here. In those circumstances, 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).

Sorrell says this analogy is "outrageous," Resp. Br. at 19, but doesn't explain why. Mere name calling isn't analysis. He offers no explanation why this situation should be

considered comparable to, for example, a situation where the defendant actually wanted the erroneous instruction given.

Sorrell suggests that presumptions of prejudice under MAI no longer are applicable, *citing Hudson v. Carr*, 668 S.W.2d 68 (Mo. banc 1984) and *Goff v. St. Luke's Hospital*, 753 S.W.2d 557 (Mo. banc 1988). Both *Hudson* and *Goff* were primarily concerned with the practice of "sandbagging," where counsel made no objection at trial, and later argued on appeal that an instruction that deviated from MAI was prejudicial error. Neither opinion did away with the principle that deviation from a mandatory MAI instruction was presumed error. They merely held that the presumption could be overcome. *See Hudson v. Carr*, 668 S.W.2d at 71-72 and *Goff v. St. Luke's Hospital*, 753 S.W.2d at 564-565. As Norfolk Southern pointed out in its Substitute Opening Brief, that issue was settled by an amendment to Rule 70.02(c), which applies the presumptive error doctrine to deviations from a required MAI instruction only where an objection was timely made pursuant to Rule 70.03.

The other cases Sorrell cites do not change the analysis. Neither *Jone v. Coleman Corp.*, 183 S.W.3d 600 (Mo. App., E.D. 2006), *Twin Chimneys Homeowners Association v. J.E. Jones Construction Co.*, 168 S.W.3d 488 (Mo. App., E.D. 2005), nor *Kopp v. Home Furnishing Center*, 210 S.W.3d 319 (Mo. App., W.D. 2006), reached any question of harmless error in the giving of a jury instruction because each of those cases — in contrast to this one — there was no error. *Syn, Inc. v. Beebe*, 200 S.W.3d 122 (Mo. App., W.D. 2006) notes that "the proponent of the instruction bears the burden of showing

nonprejudice." *Id*. at 129. Norfolk Southern was certainly not the proponent of Instruction No. 13.

Where the trial court has given an MAI-approved contributory negligence instruction over defendant's objection that proves erroneous, the Court should presume prejudice. Thus, as it is with any other claim of harmless error in civil or criminal cases, the party benefiting from the error should have the burden of showing that it is harmless.

D. *The Failure To Instruct The Jury That It Should Find Plaintiff Contributorily Negligent If His Injury Resulted "In Part" From His Own Negligence Was Prejudicial And Not Harmless Error*

The verdict-directing instruction, based on MAI 24.01, and the contributory negligence instruction, based on MAI 32.07(B)[1996 Revision], submitted different standards of causation. Sorrell has previously admitted that, even if he scarcely acknowledges it now. *See Norfolk Southern Ry. Co. v. Sorrell*, 127 S.Ct. at 803 ("Sorrell did not dispute that Missouri courts apply 'different causation standards . . . to plaintiff's and defendant's negligence in FELA actions' ").

Sorrell says that the error in using different standards of causation is harmless because the only way the jury could have found against Sorrell was to decide that his negligence directly caused his injury. And, according to Sorrell, there was no evidence from which the jury could find that Sorrell "indirectly" caused his injury because his "hands were on the wheel." Resp. Br. at 21.

This is a false dichotomy. The instruction that Norfolk Southern proffered (and the one the Court now says should be given, MAI 32.07(B)[2008 Revision]) would have required the jury to find that Sorrell's negligence contributed "in whole or in part to cause his injury."[1] It would not have required the jury to find that Sorrell's negligence "indirectly" contributed to cause his injury.

As Norfolk Southern has discussed in some detail in its Opening Brief, there are a number of scenarios where the jury could have, based on the evidence at trial, found that Sorrell's negligence caused the accident "in part," even though his negligence would not have qualified as a direct or "proximate cause" of it. It was the inclusion of the word "directly" and the omission of the "in part" language in the contributory negligence instruction as given that deprived Norfolk Southern of the opportunity to show that Sorrell's negligence played at least a slight role in causing the accident, and thus the jury should compare the two parties' negligence to decide what proportion was attributable to each.

[1] MAI 32.07(B)[2008 Revision] is somewhat different, but the meaning is the same. The new instruction requires the jury to find that the "negligence of the plaintiff resulted in whole or in part in injury to the plaintiff."

Sorrell says that the jury was never told that the railroad's negligence could be a "slight" cause and Sorrell's negligence had to be more than "slight."[2] Resp. Br. at 22. That assumes that the jury failed to interpret the instructions correctly. The MAI Committee Comment (1978 New) to MAI 24.01 points out that the language "in whole or in part" was used to submit a different standard of causation from the traditional "proximate cause" standard. *See* MISSOURI APPROVED JURY INSTRUCTIONS (6th ed. 2002) at 373. As the Comment says, the standard used in MAI 24.01 tells the jury to hold the railroad liable if its negligence was the slightest cause of the plaintiff's injury. *See id*.

Sorrell says that the jury had "no hint" that it was using two different causation standards, Resp. Br. at 24. That is not what Sorrell told the United States Supreme Court, as noted above. Sorrell offers no reason to think that the jury did anything other than follow MAI 24.01 and MAI 32.07(8)[1996 Revision] as given. The jury judged the railroad's negligence by whether it played any role in causing the accident, even if plaintiff's injury resulted only "in part" from the railroad's conduct. It decided whether to reduce Sorrell's damages by whether his conduct "directly" caused his injury.

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[2] Sorrell says "Woodin's negligence" in his Brief. Resp. Br. at 22. It is clear that the railroad's negligence, as submitted and argued by the plaintiff, was not limited to Woodin's conduct. As noted in Norfolk Southern's Opening Brief, Sorrell argued that the supervisor was negligent in giving an inadequate safety briefing. App. Opening Br. at 35; T. 640-641.

Sorrell points out that Norfolk Southern's attorney did not use the word "slight" in his closing argument. And why would he? The instruction given regarding contributory negligence would not have authorized it. Indeed, it would have been subject to an objection that such an argument was a misstatement of the law had he made it. Further, Defendant's counsel would have no incentive to emphasize that the instructions required it to judge Defendant's fault by a lesser standard than Plaintiff's fault.

Sorrell's notion that compliance with the FELA requirement that the jury must apply the same standard of causation to both parties is excused simply because these were just a couple of truck drivers who got in an accident is contrary to the United States Supreme Court's holding. The individuals involved were railroad employees. It doesn't matter if they were driving trucks or driving trains — they are covered by the FELA and are bound by the law applicable to that statute.

Sorrell says that cases that have found prejudice because the jury was given two different standards of causation don't count because they involved language found in either affirmative converse instructions or damage instructions. This contention ignores the reason *why* those instructions were held to be erroneous and prejudicial.

In *Hiers v. Lemley*, 834 S.W.2d 729 (Mo. banc 1992), the verdict director required the jury to find that defendant's negligence "directly caused or directly contributed to cause" plaintiff's injury. *Id*. at 733. The defendant submitted a combination true converse and affirmative converse. The true converse portion was erroneous because it directed the jury to find for the defendant unless it believed that plaintiff's injury was "a direct result"

of defendant's negligence. *See id*. This was prejudice, the Court said, because the true converse portion did not use substantially the same language as the verdict director, as required by MAI 33.01. "Since the jury may have perceived that this instruction required plaintiff to prove that Dr. Lemley could not be liable if his negligence only contributed to plaintiff's damages, plaintiff was prejudiced by the error." *Id*. at 734.

Sorrell says that *Carlson v. K-Mart Corp.*, 979 S.W.2d 145 (Mo. banc 1998) is inapplicable because the causation language that conflicted with the verdict director came in a damage instruction. Resp. Br. at 27. Again, plaintiff ignored *why* the language was prejudicial. In *Carlson*, there was evidence that plaintiff's injuries may have come from more than one cause. This required a modification of MAI 4.01 "to refer specifically to the negligent conduct of the defendant mentioned in the verdict director." *Id*. at 147.

The verdict director required the jury to find that the defendant's negligence "directly cause or directly contributed to cause" her injuries. *See id*. at 146. The damage instruction, however, required the jury to award only those damages that she sustained "as a direct result" of the defendant's negligence. *See id*. at 147. "Thus, it is, as Ms. Carlson argues, confusing to instruct the jury that, on the one hand, a defendant is liable if he 'directly caused or contributed to cause damage' to the plaintiff, but that the measure of such damage is only that which 'directly resulted' from such conduct." *Id*. at 148. The Court concluded that "the confusion engendered by the conflict between the instructions prejudiced Ms. Carlson, entitling her to a new trial." *Id*.

The defendant in *Leake v. Burlington Northern R. Co.*, 892 S.W.2d 359 (Mo. App., E.D. 1995) did not attempt to submit an affirmative converse. Rather, it submitted an erroneous true converse. It was erroneous because it did not "mirror" the verdict director. The verdict director was the usual MAI 24.01 that required the jury to find the railroad liable if its negligence "in whole or in part" resulted in plaintiff's injury. *See id*. at 364. The converse instructed the jury to find for defendant unless it believed that plaintiff was injured as "a direct result" of the defendant's negligence. *See id*. Relying upon *Snyder v. Chicago, Rock Island & Pacific R. Co.*, 521 S.W.2d 161 (Mo. App., W.D. 1975)(see below), the court held that the giving of the converse instruction was prejudicial error because "it forced upon the plaintiff a *different* and more burdensome legal theory of causation." *Id*. at 365 (emphasis added).

Finally, *Snyder v. Chicago, Rick Island & Pacific R. Co.*, 521 S.W.2d 161 (Mo. App., W.D. 1975) also involved an attempt to submit a true converse. The verdict director — patterned on MAI 24.01 — required the jury to find defendant liable if the railroad's negligence "directly resulted in whole or in part in injury to the plaintiff." *Id*. at 164. The converse said that the jury's verdict must be for the defendant unless they believed that the plaintiff sustained damage "as a direct result" of the railroad's negligence. *Id*.

The language in the converse was error "because it imposes 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.

It apparent from *Hiers*, *Carlson*, *Leake*, and *Snyder* that the prejudice resulting from these errors did not depend upon whether the improper language was in an affirmative converse, a true converse, or a damage instruction. Rather, the prejudice came from misdirecting the jury by giving them conflicting instructions as to causation. In each of these cases, the error was the failure of the challenged instruction to "mirror" the causation element of the verdict director. And that is exactly what the United States Supreme Court held was the error in this case. *See Norfolk Southern Ry. Co. v. Sorrell*, 127 S.Ct. at 808.

The failure to mirror the causation elements of the verdict director and the contributory negligence instruction was error. It was error that concerned a material issue in the case — damages. It was therefore error that affected the outcome of the case.

It was not harmless error. The FELA requires the jury to compare the parties' fault to arrive at a final damage figure. The purpose of a contributory negligence instruction is to direct the jury's attention to whether the plaintiff's conduct played any role in causing his injury — whether it was a cause "in part." The quoted language was deliberately selected by the MAI Committee and this Court for the verdict director applicable to the defendant to tell the jury that the railroad's negligence need not rise to the level of a proximate cause to hold the railroad liable.

The Supreme Court held that the standard for defendant's negligence and plaintiff's negligence must be the same. Sorrell does not explain how the jury can make a valid comparison when it is instructed to apply standards. Here, the evidence shows that the jury could have found that Sorrell's injury was "in part" the result of his negligence and "in part" the result of the railroad's negligence. But if that is all the jury concluded, it would not have found Sorrell contributorily negligent. The use of *different* causation standards in jury instructions where they must be the *same* is prejudicial error, and therefore, by definition, not harmless.

Based on this record, the Court cannot say that the error was harmless. The judgment should be reversed and remanded for a new trial on all of the issues.

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 3,633 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.

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CERTIFICATE OF SERVICE

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

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