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

RESPONDENT'S SUBSTITUTE BRIEF

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INTRODUCTION

Timothy Sorrell ("Sorrell") was permanently disabled on November 1, 1999, approximately eight years ago, due to the negligence of Norfolk Southern Railway Company ("Norfolk Southern"). A jury determined Norfolk Southern's negligence in its verdict on November 7, 2003, approximately four years ago. During the last four years, Norfolk Southern has pursued a never-ending series of appeals which has finally made its way to this Court. The issue, distilled down to its essence, is whether the approved MAI instruction that was given by the trial court, was prejudicial to Norfolk Southern because it instructed the jury to find Sorrell contributorily negligent if his actions were a "direct" cause of the incident. The Court of Appeals in the Eastern District of Missouri found no prejudice under the facts of this case, because there was no evidence that Sorrell was negligent in a manner that indirectly caused his injury.

Although this is a Federal Employer's Liability Act ("FELA") case, the facts of this case required the jury to determine fault between two truck drivers, Sorrell and Norfolk Southern's employee, Keith Woodin. This was not a case involving indirect causes. Woodin was in direct control of his truck and Sorrell was in direct control of *his* truck. The jury compared the actions of the two truck drivers. Whether Sorrell "failed to stop his truck" or "failed to keep his truck on the roadway" (the only allegations of contributory negligence submitted to the jury), Sorrell was in *direct* control of his truck, a point distinctly made by the Eastern District in affirming the judgment.

Simply put, the jury had to decide whether Woodin ran Sorrell off the road or whether Sorrell ran himself off the road—or some combination of both. But whatever the jury found, its finding was based upon *direct* actions of the two truck drivers. Furthermore, the jury was instructed to reduce Sorrell's damages in proportion to his fault, under the MAI approved damages instruction for FELA cases.

PROCEEDINGS BELOW

1. Introduction

The history of the multiple proceedings below is important so that this current appeal can be put into context. Norfolk Southern, throughout the appellate process, has attempted to change the "issue" on appeal from the narrow issue that it preserved in the trial court to a very broad issue which is attempting to change a fifty-year old fundamental concept of FELA which it did not preserve for appeal. The only issued preserved at the trial court level was whether or not the MAI contributory negligence instruction was error because it contained the language that the negligence of Sorrell "directly contributed to cause his injury" as compared to the negligence of Sorrell "contributed in whole or in part to cause his injury." Tr. 574-75. The only issue remaining in this Court is whether the difference in the language of this one phrase of this one instruction materially altered the jury deliberation.

However, Norfolk Southern, not satisfied with its success in altering the language of the MAI instruction for employee contributory negligence in Missouri

FELA cases, is attempting to get in front of this Court what the United States Supreme Court concluded it could not do because it failed to preserve the issue for appeal. Norfolk Southern's true motivation for this appeal is an attempt to have this Court, or perhaps the trial court on remand, decide the issue of a different causation standard on the railroad's negligence in FELA cases.

In attempt to show this point, Sorrell has provided some detail of the appellate history.

2. The trial court and the first appeal (the original issue on appeal)

On the last day of testimony, the trial court discussed the instructions with the parties. *See* Tr. 571-78. Norfolk Southern objected to only *one* instruction: Instruction 13, based on Missouri Approved Instruction ("MAI") 32.07(B), which set forth the required elements for contributory negligence.[1] *See* Tr. at 574-75. Notably, Norfolk Southern neither objected to Instruction 12, based on MAI 24.01, setting forth the required elements for defendant's negligence, nor offered any alternative language for that instruction. *See* Tr. 571-78.

Not only did Norfolk Southern not object to the language of the Verdict Director (Instruction 12), it embraced this instruction as a proper statement of the FELA in arguing why it believed the contributory negligence instruction was wrong. With respect to the contributory negligence instruction (Instruction 13),

[1] Norfolk Southern also challenged the general verdict form (Tr. 576-77), but his issue is not part of this appeal.

Norfolk Southern claimed the language requiring that the jury must find plaintiff's negligence "directly contributed to cause his injury" before it could use that negligence to reduce plaintiff's damages should be changed to allow a finding of contributory negligence if Sorrell's negligence "contributed in whole or in part to cause his injury." Tr. 574-75. Norfolk Southern justified this modification of Instruction 13 on the ground that the FELA, 45 U.S.C. §§ 51, 53, under which Sorrell brought his action, is a pure comparative fault system and thus, the causation standard for plaintiff's contributory negligence should match the less exacting standard of causation applicable to defendant's negligence. Tr. 574-75. The trial court overruled Norfolk Southern's objection to Instruction 13 and gave the MAI approved instruction. Tr. 576; *see also* Tr. 633.

Later that day, the trial court provided an additional opportunity for objecting to instructions. Norfolk Southern reiterated its objection to Instruction 13, which the trial court again overruled. Tr. 633. Norfolk Southern conceded the accuracy of Instruction 12 (the Verdict Director) and the sufficiency of the evidence to support instructing the jury regarding Norfolk Southern's alleged failure to use ordinary care, but it objected that the evidence did not support instructing on the theory that it may have failed to provide reasonably safe methods for work. Tr. 632-33. The trial court overruled this objection as well. Tr. 633.

After the jury returned its $1.5 million verdict in favor of Sorrell, Norfolk Southern moved for a new trial, reiterating that "Instruction 13 and MAI 32.07(B)

misstate the law." L.F. 46-47, 75. Norfolk Southern again made no complaint with respect to Instruction 12. *See* L.F. 75. The trial court denied the motion for new trial. L.F. 189.

In its first appeal to the Eastern District of Missouri, Norfolk Southern maintained its focus on Instruction 13 and MAI 32.07(B), stating the following in its "Point Relied On" (a required portion of an appellate brief in Missouri courts): "The Trial Court Erred In Giving Instruction 13, Based On MAI 32.07(B), Because MAI 32.07(B) Misstates The FELA Causation Standard For Contributory Negligence In That It Instructed The Jury To Find Plaintiff Negligent Only If It Concluded That His Negligence 'Directly Contributed To Cause His Injury' Rather Than Caused His Injury 'In Whole Or In Part.'"[2] Norfolk Southern's 2004 Opening Brief ("App. 2004 Br.") 26, *Sorrell v. Norfolk Southern Ry. Co.*, 170 S.W.3d 35 (2005). The only instruction that Norfolk Southern quoted in full in this section of its brief was Instruction 13, the instruction based on MAI 32.07(B).

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[2] *See also* App. 2004 Br. 31 ("Whether by oversight or design, the point is that MAI 32.07(B) misstates the causation standard because it applies a higher standard of causation to the plaintiff's negligence than that applied to the defendant's negligence."); L.F. 195 (identifying as a potential appellate issue, "Whether the trial court erred in submitting Missouri Approved Instruction 32.07(B) to the jury, in that the causation standards articulated in the instruction misstate applicable federal law.").

See App. 2004 Br. 27-28. Norfolk Southern did not quote Instruction 12, concerning *defendant's* negligence, anywhere in its entire brief, even though Missouri rules require that "[i]f a point relates to the giving, refusal or modification of an instruction, such instruction shall be set forth in full in the argument portion of the brief." Mo. S. Ct. R. 84.04(e).

In fact, Norfolk Southern raised not a single complaint about Instruction 12. App. 2004 Br. 26. Quite to the contrary—and diametrically opposite to the position it tried to argue later before the United States Supreme Court—Norfolk Southern explained that in *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 507 (1957), the Supreme Court held that "the traditional proximate cause test . . . is not appropriate in an FELA case." App. 2004 Br. 30. Thus, it contended the Missouri committee responsible for drafting the MAI properly removed "directly" from the causation paragraph in MAI 24.01 (defendant's negligence), but erred in not *also* removing that word from the causation paragraph in MAI 32.07(B) (plaintiff's contributory negligence). App. 2004 Br. 28-30. To support this contention, Norfolk Southern cited a number of cases, each of which concluded the causation standard for the plaintiff's contributory negligence in an FELA case is something less than proximate cause. App. 2004 Br. 32-35 .

In its memorandum opinion affirming the judgment, the Missouri Court of Appeals explained that Norfolk Southern contended "the trial court erred in giving Instruction No. 13, an affirmative defense instruction for FELA cases that was based on MAI 32.07(B)." Appendix A 11. The appellate court found the

instruction proper. A 12. In doing so, it made no mention of "proximate cause" or that the instruction for defendant's negligence imposed a causation standard less than proximate cause. A 12. Nor did the appellate court express any opinion on whether MAI 24.01 did or did not state the proper causation standard for defendant's negligence because this issue was not before the court on appeal. *See id.*

When Norfolk Southern moved for rehearing, it neither challenged the appellate court's characterization of its argument nor contended that the court failed to consider the propriety of MAI 24.01. *See* Motion for Rehearing 1-5, A 27-28. Instead, it reiterated the arguments it had made in its brief on appeal. *Compare id. with* App. 2004 Br. 26-37. The Missouri Court of Appeals denied rehearing. A 32. Norfolk Southern sought a transfer of the case to the Missouri Supreme Court, listing just two issues, both of which focused on MAI 32.07(B).[3]

[3] The two issues were: "1. Whether MAI 32.07(B), which in an action under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.*, requires a jury in reducing damages due to the plaintiff's contributory negligence to find that the "negligence of plaintiff *directly contributed to cause his injury*," correctly submits causation when the FELA requires that the standard of causation for contributory negligence and the defendant's primary negligence be the same. ¶ 2. Whether MAI 32.07(B), which uses a traditional 'proximate cause' standard of causation for submitting the plaintiff's contributory negligence should be followed

See Motion for Transfer ("MFT") A 33; Application for Transfer ("AFT") A 45[4]. Norfolk Southern continued to argue that "MAI 32.07(B), the approved instruction for submitting contributory negligence in an FELA case, uses the traditional 'proximate cause' standard of causation rather than the more relaxed FELA standard of causation." MFT at 2; AFT at 2. While Norfolk Southern explained that it had "objected to Instruction No. 13 as contrary to the FELA," it made no reference to Instruction 12. MFT at 3; AFT at 3. Moreover, Norfolk Southern continued to argue that *Rogers* had lightened the causation standard for defendant's negligence and therefore the causation standard for plaintiff's contributory negligence should be similarly lightened. MFT at 4-5; AFT at 5 ("MAI 32.07(B) misstates the causation standard because it applies a higher standard of causation to the plaintiff's negligence"). This Court denied transfer at that time.

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rather than the Court's prior opinion in *White v. St. Louis-San Francisco Ry. Co.*, 539 S.W.2d 565, 570 (Mo. App. 1976), which requires the same standard of causation for both the plaintiff and the defendant's negligence." MFT at 1; *see also* AFT at 1.

[4] The MFT sought an order from the Missouri Court of Appeals, transferring the case to the Missouri Supreme Court. The AFT requested that the Missouri Supreme Court order the case's transfer to that court.

3. Norfolk Southern's appeal to the United States Supreme Court (the evolving and changing issue on appeal).

Norfolk Southern added lawyers on its appeal to the United States Supreme Court, hiring the Washington D.C. Supreme Court specialists, Sidley Austin, LLP. With a change of lawyers, Norfolk Southern saw an opportunity to change the issue on appeal to a much broader issue. Through a series of iterations of the "issue on appeal" which will be set out below, Norfolk Southern attempted to get the United States Supreme Court to consider whether "proximate cause" should be the causation standard for the railroad's negligence in FELA cases, as opposed to the "slightest cause" which has been the law in FELA jurisprudence since *Rogers,* 352 U.S. at 506.

Norfolk Southern's Petition for a Writ of Certiorari to the United States Supreme Court, presented two questions for review:

> 1. Whether the court below erred in determining—in conflict with this Court an multiple courts of appeals—that the causation standard for employee *contributory negligence* under the Federal Employers Liability Act ("FELA") differs from the causation standard for railroad *negligence.*
>
> 2. Whether, under the comparative negligence scheme of FELA, state courts may rely upon a jury instruction and verdict form mandated by state law that make it impossible for defendants and court to determine whether and to what extent a jury found contributory negligence on the

part of the plaintiff, and which treat FELA defendants differently from all other litigants.

(emphasis in original). On May 15, 2006, the United States Supreme Court granted certiorari limited to question one.

Despite this limitation, Norfolk Southern attempted to enlarge the question presented, asking the United States Supreme Court to consider the issue of the causation grounds as applied to the railroad's negligence instruction. *See Norfolk Southern Ry. Co. v. Sorrell*, 127 S.Ct. 799, 804 (2007). The United States Supreme Court saw through Norfolk Southern's attempt to include this issue and did not allow it to "smuggle" the issue into the appeal and decision. *Id.* at 804-05. Accordingly, the United States Supreme Court only ruled on the narrow and the preserved issue, that the same standard of causation applies to railroad negligence as to plaintiff contributory negligence. *Id.* at 808-809. The United States Supreme Court remanded the case to Missouri to determine whether the error in the contributory negligence instruction caused prejudice to Norfolk Southern under the facts of this case. *Id.* at 809.

In the second trip through the Missouri Court of Appeals, the Eastern District once again affirmed the judgment of the trial court, holding that there was no way that any action on the part of Sorrell "indirectly" caused his injury. Therefore the words "directly contributed to cause" as opposed to "caused in whole or in part" did not materially affect the outcome. *Sorrell v. Norfolk Southern Ry. Co.*, 2007 WL 1064233 at *2 (April 10, 2007). Application for

transfer to Supreme Court was denied June 2007, by the Eastern District. However, this Court sustained the application for transfer on August 21, 2007.

4. Conclusion of the proceedings below—the accurate issue on appeal.

The only issue that is preserved in this tortuous history is whether or not the language of the then-approved MAI FELA contributory negligence, (MAI 32.07(B); Instruction Number 13), materially altered the jury decision because it contained the language "directly contributed to cause" as opposed to the language "caused in whole or in part." The issue of whether the causation standard for FELA cases should be something different, i.e. "proximate cause" has not been preserved for this Court's review. Therefore, Norfolk Southern's "Point Relied On" does not accurately state the issue in this appeal because it combines two instructions, one of which was never objected to at trial.

ARGUMENT

I. The Trial Court Committed Harmless Error In Giving Jury Instruction 13, MAI 32.07(B)[1996 Revision] Because This Was An Approved MAI Instruction At The Time of Trial, And Norfolk Southern Has Not Shown That The Instruction Given Materially Affected The Jury's Verdict, And Therefore Norfolk Southern Has Not Shown Any Prejudice.

A. Introduction

Norfolk Southern argues that, "[t]he United States Supreme Court judicially determined the combination of MAI instructions was erroneous under federal

law." App. Subst. Br. 19. Based on this statement, Norfolk Southern extends and enlarges the narrow finding to mean, "[t]herefore, the jury not only 'may have' been misdirected or misled by the jury instruction, the Supreme Court found that they *were.*" App. Subst. Br. 19-20. (emphasis in original). This is patently untrue. Norfolk Southern makes no citation for this contention, which lays bare the absurdity of this statement.

The United States Supreme Court held only that the same standard of causation applies to railroad negligence as to plaintiff contributory negligence. *Sorrell,* 127 S.Ct. at 808. It remanded the case to Missouri to determine whether a new trial was required; i.e. to determine whether the erroneous instruction affected the outcome at trial. *Id.* at 809. Justice Ginsburg certainly pointed this out in her opinion. *Id.* at 815. If the United States Supreme Court had concluded that the jury was in fact misled, it would not have remanded the case to Missouri to consider the issue. Instead, it would have remanded the case for a new trial which is what Norfolk Southern sought as its relief but failed to obtain.

B. The correct standard of review.

Norfolk Southern spends quite a bit of time in its brief trying to change the standard of review as determined by the Eastern District below. App. Subst. Br. at 20-26. Norfolk Southern completely ignores *Jone v. Coleman Corp.,* upon which the Eastern District relied for its view of the standard of review on instructional error. 183 S.W.3d 600, 605 (Mo. App. E.D. 2005). *Jone* holds that, "[a] judgment will be reversed because of instructional error if the error materially affected the

merits *and* outcome of the case." *Id.* The *party claiming instructional error* has the task of showing that the instruction misdirected, misled, or confused the jury. *Id.* (emphasis added). In its brief Norfolk Southern does not even mention, let alone try to distinguish *Jone*, or for that matter even discuss the holding of the Eastern District on the proper standard of review. Other cases are also consistent with the Eastern District's decision, which have said"[t]he standard of review when reviewing claimed instructional error is that the court views the evidence most favorably to the instruction, disregards contrary evidence, and reverses only where the party challenging the instruction shows that the instruction misdirected, misled, or confused the jury. *Twin Chimneys Homeowners Ass'n. v. J.E. Jones Constr. Co.*, 168 S.W.3d 488, 498 (Mo. App. E.D. 2005); *accord, Kopp v. Home Furnishing Ctr.*, 210 S.W.3d 319 (Mo. App. W.D. 2006). *See also Syn, Inc. v. Beebe,* 200 S.W.3d 122, 128 (Mo. App. W.D. 2006). (The party challenging the instruction must show that the instruction misled, misdirected, or confused the jury, and that prejudice resulted from the error).

Norfolk Southern does not even try to respond to this. Instead it attempts to make a pathetic stab at convincing this Court that the giving of an erroneous jury instruction is presumptively prejudicial and therefore tries to change the standard of review. This attempt to "shift" the burden on appeal to Sorrell, is said to be supported by *Brown v. St. Louis Pub. Serv. Co.*, 421 S.W.2d 255, 259 (Mo. banc 1967). In *Brown*, the court held that where there was deviation from an applicable

MAI instruction, prejudice would be presumed. *Id.*[5] What Norfolk Southern tries to bury in a footnote, however, is that this holding in *Brown* has changed over the last forty years. In a later case, this Court re-analyzed this issue. In *Hudson v. Carr*, 668 S.W.2d 68 (Mo. banc 1984), this Court held that "it is not enough to show erroneous deviation unless prejudice *also* appears." *Id.* at 71. (emphasis added).

Four years later, in *Goff v. St. Luke's Hosp.*, 753 S.W.2d 557, 564 (Mo. banc 1988), this Court refined the concept further. In *Goff*, this Court stated that Rule 84.13(b) of the Missouri Rules of Civil Procedure was the governing Rule for judicial determination of prejudice in a deviation from an MAI instruction. *Id.* Rule 84.13 provides, in pertinent part, "[n]o appellate court shall reverse any judgment unless it finds that error was committed by the trial court against the appellant materially affecting the merits of the action." Mo. Rules. Civ. P. 2007. *See also Cornell v. Texaco*, 712 S.W.2d 680, 682 (Mo. banc 1986). ("To reverse a jury verdict on the ground of instructional error, the party challenging the instruction has the burden to show the offending instruction misdirected, misled or confused the jury.").

[5] Norfolk Southern also cites to *Murphy v. Land.* 420 S.W.2d 505, 507 (Mo. 1967). *Murphy*, too, concerns *deviation* from an approved MAI, as well as the giving of two converse instructions for one jury instruction. *Id.* (emphasis added).

Norfolk Southern, throughout its brief, propounds multiple statements of law with no authority to back them up. It states that once it is shown that the trial court's action was error and that it affected a material *issue* (as opposed to the outcome) in the case, the burden shifts to Sorrell to show that the error did not affect the outcome of the case. App. Subst. Br. 16. To support this self-constructed point of law, the only authority Norfolk Southern cites is a nearly forty year old case, *Hamilton v. Petroleum Prods. Inc.,* 438 S.W.2d 197 (Mo. 1969). *Hamilton* has absolutely nothing to do with the giving of approved MAI instructions, but considers the issue of hearsay testimony. In fact, the word "shift" is nowhere in the opinion. *Id.* Norfolk Southern further contends that, "[t]he Court has directed that a similar process be followed in considering the prejudicial effect of erroneous jury instructions," App. Subst. Br. 16, but it spews this self-constructed point of law with no citations of authority whatsoever!

Moreover, Norfolk Southern's assertion that "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" is outrageous. App. Subst. Br. 25. Norfolk Southern cites to cases concerning the trial court's giving of an erroneous instruction *sua sponte*. *See Scheinbein v. First Boston Corp.,* 670 S.W.2d 872, 878 (Mo. App. E.D. 1984); *McLaughlin v. Hahn,* 199 S.W.3d 211, 211 (Mo. App. W.D. 2006). Additionally, they attempt to liken this case to the trial court's giving of *non*-MAI

instructions. *See e.g. Ploch v. Hamei,* 213 S.W.3d 135 (Mo. App. E.D. 2006). Neither of these situations is relevant to the case presently before this Court.

Even the cases cited by Norfolk Southern recognize that an instructional error must materially or prejudicially (as courts sometimes describe it) affect the action before reversal is allowed. This requirement exists because "retrials are burdensome" and the trend, therefore, is "away from reversal for error in instruction, unless there is a substantial indication of prejudice." *Hutson v. BOT Inv. Co.,* 3 S.W.3d 878, 883 (Mo. App. S.D. 1999). This case demonstrates the wisdom of those concerns. Sorrell sustained his injuries approximately eight years ago, yet Norfolk Southern would have this case start all over.

C. Regardless of the standard of review, the jury could not have been misled under the facts of this case and, therefore, there is no prejudice.

Regardless of the standard of review, there are no facts in this case that could have possibly misdirected, misled or confused the jury. In support of their contention that the jury was confused, Norfolk Southern presents seven ridiculous "permutations of how the jury could have assessed the evidence" each one more preposterous than the next.[6] App. Subst. Br. 34-36. Norfolk Southern also claims

[6] In its opinion affirming the judgment after remand, the Court of Appeals stated that, "Norfolk has not articulated any theory supported by evidence explaining how the jury could have found Sorrell negligent, but that his negligence did not directly contribute to cause his injuries." *Sorrell,* 2007 WL at * 2. Thus, it

that "the jury could have believed Sorrell, believed Woodin, or believed neither…" App. Subst. Br. 34. How could the jury deliver a verdict in Sorrell's favor if it did not believe his version of the accident? In any case, there can be no *indirect* actions of Sorrell in the way he operated his truck, as found by the Court below, and Norfolk Southern makes no attempt to suggest to the contrary.

The contributory negligence instruction based on MAI 32.07(B) given at trial read:

> You must find plaintiff contributorily negligent on his November 1, 1999 injury 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.

The word at issue here is "directly." Norfolk Southern would have us believe that it was possible for the jury to have found that Sorrell contributed to his injury in a non-direct manner. This is impossible. Given the facts of this case

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appears that Norfolk Southern was compelled to come up with its list of absurd "theories" to explain how the jury could have found Sorrell negligent, but only indirectly.

and the instruction above, to find Sorrell contributorily negligent, the jury would have had to find that Sorrell either "failed to stop his truck," or "failed to keep his truck on the roadway." These are both direct actions and the only allegations of Sorrell's negligence submitted to the jury. Indeed, Justice Ginsburg articulated in her concurrence that, "[u]nder the facts of this case, it is difficult to imagine that a jury could find Sorrell negligent in a manner that contributed to his injury, but only indirectly." *Sorrell*, 127 S.Ct. at 815. For Norfolk Southern to suggest that the jury could have found Sorrell negligent, but not directly so, is nonsensical.

Norfolk Southern nevertheless contends that the inclusion of the single word "directly" in the contributory negligence instruction resulted in application of a "different standard of causation" for contributory negligence than for defendant's negligence. Neither the trial court nor counsel informed the jury of any judicial interpretation of that statutory language or argued a "different standard of causation." *See Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500 (1957). Specifically, the jury was never told that Woodin's negligence could be a "slight" cause and Sorrell's negligence had to be "more than slight." Thus, as far as the jury was aware, it was comparing the actions of two truck drivers. Neither trial counsel in any way suggested to the jury during argument that they were comparing fault with "different causation standards."

Moreover, during closing arguments, when Norfolk Southern's attorney addressed the jury concerning comparative negligence, there was no mention of

the word "slight" and no mention of any differing standards of causation between Norfolk Southern and Sorrell:

> Was it just an accident? Was either side negligent? You're asked to decide all those things. But there are some things we know in talking about comparative fault.
>
> ….
>
> Mr. Sorrell's truck was the one that ended up in the ditch. We do know that. We don't know the explanation for how it got in the ditch…
>
> ….
>
> So when you're asked to consider the fault of Mr. Sorrell…think about those questions.
>
> ….
>
> You're going to be asked to consider the fault of Norfolk Southern, but consider the fault of Tim Sorrell.

Tr. 666-67. Later, Norfolk Southern raised contributory negligence and stated:

> On this contributory negligence, did he [Sorrell] fail to stop his truck? Could he have stopped his truck and avoided the collision, avoided going in the ditch? Did he fail to keep his truck on the roadway? Was he negligent?

Tr. 678.

These questions are exactly what the jury was asked to consider in Instruction 13, whether Sorrell either failed to stop his truck or failed to keep his truck on the roadway. There was no mention in either side's closing of the different standards of causation for negligence. Thus, that issue was never before the jury and could not have affected its verdict.

Furthermore, the word "directly" is not repeated in Instruction 14, an instruction based on MAI 8.02. *See* A 66. That instruction advised the jury that if it found "plaintiff contributorily negligent," it should reduce plaintiff's total damages "in proportion to the amount of negligence attributable to plaintiff." That the word "directly" does not appear in this instruction advising the jury how to use the plaintiff's contributory negligence to reduce his damages further diminishes its significance. In other words, the jury was comparing the fault of two truck drivers and nowhere did the jury have any hint that it was using two "different causation standards" in making its decision.

Norfolk Southern states that, "[t]his Court and the courts of appeal [sic] have uniformly held that the use of *different* causation standards in jury instructions where they should have been the *same* is prejudicial error, and...not harmless." App. Subst. Br. 27. First, Norfolk Southern cites to *Hiers v. Lemley* to support this. 834 S.W.2d 729 (Mo. banc 1992). But *Hiers* was a medical malpractice case where the plaintiff alleged that the defendant had misdiagnosed her spouse as having cancer; improperly treated him with chemotherapy even though the cancer diagnosis was in doubt; and failed to promptly inform him of

the misdiagnosis when discovered. *Id.* at 730-31. Further, the instruction in question was a *converse* instruction of an affirmative defense that was not a true converse. *Id.* at 733-34. The facts are very different in this case; the jury instruction at issue is not a converse instruction, and as such, *Hiers* provides no guidance whatsoever.

Next, Norfolk Southern looks to *Snyder v. Chicago Rock Island & Pacific R.R. Co.* for support. 521 S.W.2d 161 (Mo. App. KCD 1975). In *Snyder*, the jury instruction at issue was once again an incorrect converse of a given MAI instruction. *Id.* at 164. The MAI 24.01 instruction submitted read, in part, "[defendant's] negligence directly resulted in whole or in part in injury to plaintiff…" *Id.* The converse instruction given was not a true converse, reading, in part, "…unless you believe that defendant was negligent and that plaintiff sustained damage as a direct result thereof." *Id.* The court found that the converse instruction submitted was the converse of a *different* instruction, one involving multiple negligent acts. *Id.* at 165. Because the defendant failed to comply with the requirements for a true converse, the court held that the instruction was prejudicial error to the plaintiff. *Id.* Again, not a similar issue.

Norfolk Southern endeavors to convince this Court that a third case concerning a converse of an affirmative defense will support its contention that the submission of Jury Instruction 13 resulted in prejudicial error. In *Leake v. Burlington Northern R.R. Co.*, the defendant submitted a converse instruction of MAI 24.01 that was not a true converse. 892 S.W.2d 359, 364 (Mo. App. E.D.

1995), , . The court stated that, "a true converse jury instruction should mirror the language of the verdict director." *Id.* at 365. But in *Leake*, the defendant did not mirror the plaintiff's language, "but instead provided the jury with a confusing instruction…" *Id.*

The affirmative converse instruction, although an approved MAI instruction, has generally been disfavored by Missouri courts and for good reason. *Jone*, 183 S.W.3d at 605. The instruction tends to resemble a prohibited sole cause instruction; it often is a resubmission of the issues found in the verdict director, and it tends to mislead the jury. *Id.* But Sorrell is not a case of converse instructions, and there is no showing that the contributory negligence instruction misled Sorrell's jury in making its decision.

Perhaps Norfolk Southern believes that because these three cases involve jury instructions with some form of the word "direct" in the converse instruction, they are useful to the resolution of our case.[7] Nevertheless, courts holding that the giving of a converse jury instruction that is not a true converse results in prejudicial error, is unconvincing that the giving of two instructions, both MAI approved, neither a converse of the other, also results in prejudicial error.

[7] In fact, Norfolk Southern argues that "in both *Hiers* and *Carlson*[,] both challenged instructions included the word 'direct' or 'directly.'" App. Subst. Br. 28.

Additionally, Norfolk Southern mistakenly relies on *Carlson v. K-Mart Corp.*, 979 S.W.2d 145 Mo. banc 1998). In *Carlson*, the two jury instructions at issue were a verdict director and a damage instruction. *Id.*146-47. The plaintiff had a back injury that could be attributed to three separate causes, for only one of which K-Mart had potential liability. *Id.* at 146. The verdict director used the phrase that defendant's failure to use ordinary care "directly caused or directly contributed to cause damage to the plaintiff." *Id.* The damage instruction asked the jury to award plaintiff a sum to compensate her for "any damages you believe she has sustained…as a direct result of the K-Mart occurrence" *Id.* at 147. The court held that the difference between "direct result" and "directly caused or contributed to cause" was sufficient to retry the case "solely to determine the amount of damages." *Id.* at 148. But in Sorrell, Norfolk Southern made no objection to the damage instruction, so this case is of no help to it in this appeal.

Finally, *Dickerson v. St. Louis Southwestern Ry Co.* is not instructive here either. 697 S.W.2d 210 (Mo. App. E.D. 1985). The court in *Dickerson* could not state with certainty what effect the trial court's failure to give a present value instruction had on the jury's damage instruction relating to lost future wages. *Id.* at 212. But *Dickerson* involved the failure to instruct on a specific subject, i.e. a reduction of future damages to prevent cash value. In Sorrell, the jury in fact weighed the relative fault of the two drivers - - it is not as if Sorrell's contributory fault was not instructed upon. Once more, Norfolk Southern tries to equate a case with very different issues to the one before this Court.

D. Conclusion

The trial court gave an approved MAI instruction which was correct at the time. Nearly eight years later, Norfolk Southern is quibbling over one word in a jury instruction and endeavoring to convince this Court that without its use, the outcome of the trial would have been different. As found below, Norfolk Southern has failed to "articulate[] any theory supported by [the] evidence explaining how the jury could have found Sorrell negligent, but that his negligence did not directly contribute to cause his injuries." *Sorrell*, 2007 WL 1064233 *2. Consequently, any error in the contributory negligence instruction in this case could be only harmless error. Sorrell's actions contributing to his injury could *only* have been direct. The use of the word "directly" to describe Sorrell's actions as contributorily negligent was certainly not outcome determinative.

II. The Trial Court Did Not Commit Error In Giving Jury Instruction 12 Based On MAI 24.01 As It Was And Is Still A Correct Statement Of The Law—The Broader Issue That Norfolk Southern Has Not Preserved For Appeal.

Norfolk Southern has never properly raised an objection to Instruction 12, but has attempted to smuggle the question of *what* the FELA causation standard should be for this Court to determine. In the United States Supreme Court's opinion, Chief Justice Roberts noted that:

> Norfolk [Southern] did not object below on causation grounds to the railroad liability instruction, but only to the employee contributory

> negligence instruction. Now, Norfolk [Southern] wants to argue the opposite—that the disparity in the standards should be resolved by applying the more rigorous contributory negligence standards to the railroad's negligence as well.

Id. at 804. Chief Justice Roberts added that the Court is "typically reluctant to permit parties to smuggle additional questions into a case before us after the grant of certiorari." *Id.* at 805.

Now Norfolk Southern, like a serial smuggler, is making another attempt to sneak an additional question into this case. It is doing it under the guise of seeking to equalize the standard for negligence between the railroad and the contributory negligence of the railroad employees. Norfolk Southern nonchalantly states that the error lies in "the pair of instructions" in a desperate shot at duping this Court into ruling on a claim of error that has never been preserved below. App. Subst. Br. 17.

It is apparent that Norfolk Southern would like the causation standard for the railroad's negligence in FELA cases raised to "proximate cause" and to that end it is using the pretense of "differing causation standards" to try to sneak the question before this Court. In its brief, Norfolk Southern argues that under MAI 24.01 (Instruction12), the railroad is liable if its negligence played any part in the employee's injury. They contrast that with Instruction 13, the only instruction properly at issue in this brief, *before its recent revision,* that Norfolk Southern

avers "expressly used a 'proximate cause' or 'legal cause' standard…" App. Subst. Br. 30.

As a result of the *Sorrell* decision by the United States Supreme Court, the Missouri Supreme Court revised MAI 32.07(B) amended the affirmative defense of contributory negligence and replaced the word "directly" with the words "in whole or in part" as Norfolk Southern originally requested. *See* MAI 32.07(B)[2008 Revision]. In the pretext of maintaining that the use of the word "directly" in Instruction 13 constituted prejudicial and reversible error, Norfolk Southern sidetracks into a discussion first raised by its supreme court lawyers, Sidley Austin LLP, of how an FELA case uses a different standard than a traditional non-FELA negligence case, which requires a proximate cause instruction. Then, Norfolk Southern casually segues into a mention of *Rogers* and a footnote explaining that three justices[8] on the *Sorrell* Court believed that *Rogers* "did not change the proximate cause standard historically applied in FELA cases." App. Subst. Br. 32. Norfolk Southern further states, "[t]he issue would have to be resolved by the trial court on remand." This footnote lays bare, its true intent in continuing to use Mr. Sorrell and his case as a vehicle to attempt to change the FELA causation standard for railroad negligence to "proximate cause." What the

[8] Northfolk Southern does not mention that the other six justices did not agree with this position. Therefore, there is no suggestion that the United States Supreme Court would overrule *Rogers* if the issue were properly before it on appeal.

United States Supreme Court found was not preserved for appeal, Norfolk Southern attempts to resuscitate in a retrial of this case.

Justice Ginsburg stated in her concurring opinion that if the Court "took up Prosser and Keaton's suggestion to substitute 'legal cause' for 'proximate cause,' we can state more clearly what *Rogers* held: Whenever a railroad's negligence is the slightest cause of the plaintiff's injury, it is a legal cause, for which the railroad is properly held responsible." *Id.* at 813. Looking to *Rogers,* which remains good law after more than fifty years, Justice Ginsburg stated, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought." *Id.* at 812. *See also Coffey v Northeast Illinois Regional Commuter R. R. Corp.*, 479 F.3d 472, 476 (7th Cir. 2007). ("The fact that there may have been a number of causes of the injury is ... irrelevant as long as one cause may be attributable to the railroad's negligence.") With its very narrow holding that Missouri must apply the same standard of causation to railroad negligence as to plaintiff contributory negligence, the United States Supreme Court did absolutely nothing to change its holding in *Rogers. Sorrell,* 127 S.Ct. at 808. Certainly this Court should not allow Norfolk Southern to attempt to change FELA law by ordering a new trial.

It is blatantly apparent that were this case to be remanded for a new trial, Norfolk Southern will make a determined effort to get the verdict director changed, so that Sorrell (and all FELA plaintiffs) will have to prove a higher

standard of "proximate cause." In other words Norfolk Southern will take the opposite position on re-trial! This is the same tactic it unsuccessfully attempted to do in the United States Supreme Court. It will argue that the MAI verdict director is wrong because it contains the statutory language "in whole or in part" instead of "proximate cause." Even more ironic it will then necessarily have to argue that the former contributory negligence MAI instruction that it successfully changed in this case was a correct statement of the law because it provided a "proximate cause" standard. This type of gamesmanship cannot be condoned by this Court and should not have to be endured by Sorrell.

Throughout its brief, Norfolk Southern has done everything possible, short of shooting off fireworks, to plant the idea that the standard of causation for the railroad's negligence should be "proximate cause." Their far too obvious use of the words "slight" or "slightest" none of which was heard by Sorrell's jury has nothing to do with Sorrell or his incident. Actually, either the word "slight" or "slightest" appears in Norfolk Southern' brief no less than sixteen times, but neither of these words was in any jury instructions. *See* App. Subst. Br. The jury never heard these words! The jury knew nothing about "differing standards of causation."

CONCLUSION

Having prevailed in the United States Supreme Court on the only point upon which they appealed, and accomplished having MAI Instruction 32.07(B) amended, one is left to wonder why else Norfolk Southern continues with this

appeal, when it is clear that under the facts of this case, any negligent actions of Sorrell had to directly contribute to cause his injury.

The answer is clear. Norfolk Southern is attempting to use this case to change FELA causation law for all cases. In other words, this appeal has nothing to do with Sorrell, other than he is the victim of Norfolk Southern's assault of trying to overturn *Rogers*. This Court should follow the example of the United States Supreme Court and refuse to allow Norfolk Southern to smuggle this additional question that is not properly before this Court. This is not the appropriate case to re-examine the fifty-year old standard of causation under the FELA. The issue was never preserved on appeal.

At the end of the day, this case truly comes down to a vehicle accident between two truck drivers who met on a too-narrow road. Sorrell's actions in driving his truck could only have been direct. The jury compared the fault of the two drivers under MAI 8.02. There was no prejudicial error in this case. The Sorrells should be able to collect their judgment and Norfolk Southern can continue its assault on changing FELA causation standards in another case where it properly preserves the issue.

For the foregoing reasons, the judgment of the trial court should be affirmed with all the finality that is long overdue.

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 7,795 words; 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.

/s/ Kathy A. Reichbach

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of Respondent's Substitute rief and a virus-free diskette were mailed this 22nd day of October, 2007, to James W. Erwin, Thompson Coburn, LLP, One US Bank Plaza, St. Louis, Missouri 63101.

/s/ *Roger C. Denton*