

IN THE SUPREME COURT FOR THE STATE OF TENNESSEE

THURSTON HENSLEY,	)	
	)	
Appellant/Plaintiff	)	No. E2007-00323-SC-R11-CV
	)	
v.	)	
	)	
CSX TRANSPORTATION, INC.,	)	On Appeal from the Court of Appeals
a corporation,	)	for the State of Tennessee, Eastern
	)	Section at Knoxville
	)	
Appellee/Defendant	)	

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APPELLEE/DEFENDANT CSX TRANSPORTATION, INC.'S ANSWER IN  
OPPOSITION TO APPELLANT/PLAINTIFF THURSTON HENSLEY'S  
APPLICATION FOR PERMISSION TO APPEAL

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## INTRODUCTION

Appellant/Plaintiff Thurston Hensley sued Appellee/Defendant CSX Transportation, Inc. (“CSXT”) under the Federal Employers’ Liability Act (“FELA”), 45 U.S.C. §§ 51-60. Hensley alleged, among other things, that CSXT had negligently caused him to develop asbestosis, and he sought damages for, among other things, a fear of developing cancer. In *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003), the U.S. Supreme Court held that a FELA plaintiff suffering from asbestosis may recover for fear of cancer as an element of his damages for pain and suffering, but only if the fear is “genuine and serious.” CSXT asked the trial court to instruct the jury that Hensley must prove that his fear of cancer was “genuine and serious,” but the court denied the request. The jury returned a verdict of \$5 million.

The Court of Appeals affirmed the trial court’s refusal to give a “genuine and serious fear” instruction, and this Court denied review. But the U.S. Supreme Court summarily reversed. Without briefing on the merits or oral argument, the Court held that the instruction was “particularly important” and that the trial court’s refusal to give it was “clear error.” *CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139, 2141 (2009) (per curiam). On remand from the U.S. Supreme Court, the Court of Appeals exhaustively reviewed the trial record and concluded that the clear instructional error identified by the Supreme Court was not harmless and that a new trial on damages was therefore required.

Hensley now asks this Court to engage in a second round of harmless-error review. He contends that the Court of Appeals should have applied the state rather than the federal harmless-error standard and that the error was harmless even under the standard it applied. But Hensley has not come close to showing that either issue is one of “such extraordinary importance as to justify the burdens of time, expense and effort associated with double appeals.” Tenn. R. App. P. 11 advisory commission comment.

In the court below, Hensley conceded that the federal harmless-error standard governs in this FELA case if it differs from the state standard. He also conceded that the federal harmless-error standard requires reversal if there is a “reasonable probability” that the error affected the outcome. The federal standard therefore governs if it differs from Tennessee’s “more probable than not” standard. Hensley contends that it does not, but as the Court of Appeals recognized, the U.S. Supreme Court has unequivocally concluded otherwise: “The reasonable-probability standard is not the same as . . . a requirement that a defendant prove by a preponderance of the evidence that but for the error things would have been different.” *Hensley v. CSX Transp., Inc.*, 2009 WL 2615849, at \*4 (Tenn. Ct. App. Aug. 26, 2009) (quoting *United States v. Benitez*, 542 U.S. 74, 83 n.9 (2004)) (ellipsis added by Court of Appeals). There is no need for this Court to grant review to confirm that the U.S. Supreme Court meant what it said.

That leaves only the question whether the Court of Appeals properly applied the federal standard to the unique facts of this case. But this Court is not “an error-correction court,” *State v. West*, 844 S.W.2d 144, 146 (Tenn. 1992), and it does not grant review to decide fact-bound questions that affect only the parties before the Court. In any event, the Court of Appeals thoroughly reviewed the trial record and correctly concluded that each of the factors that courts consider when conducting harmless-error review weighs against a finding of harmless error here.

There is yet another reason why review should be denied: the Court of Appeals remanded for a new trial on damages, and thus the case is in an interlocutory posture. Even if the issues raised in Hensley’s application were otherwise worthy of review, therefore, the appropriate course would be for this Court to “await final judgment in the lower courts before exercising [its discretionary] jurisdiction.” *Va. Military Inst. v. United States*, 508 US. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari).

## STATEMENT OF THE ISSUES

1. Whether the Court of Appeals correctly determined that the harmless-error standard applicable in this FELA case is whether there is a reasonable probability that the result would have been different if the error had not been made.

2. Whether the Court of Appeals correctly determined, after reviewing the trial record, that there is a reasonable probability that the result in this case would have been different if the error had not been made.

## STATEMENT OF THE CASE

On January 10, 2002, Hensley filed this action against CSXT in the Circuit Court of Hamilton County at Chattanooga, seeking recovery under FELA. On September 29, 2006, after a two-and-a-half-week trial, the jury returned a verdict for Hensley, awarding \$5 million in damages. On October 2, 2006, the trial court entered judgment, and on January 23, 2007, it denied CSXT's motion for a new trial. On March 14, 2008, the Court of Appeals affirmed the trial court's judgment, and on April 3, 2008, it denied CSXT's petition for rehearing. *Hensley v. CSX Transp., Inc.*, 278 S.W.3d 282 (Tenn. Ct. App. 2008). On November 17, 2008, this Court denied CSXT's application for permission to appeal. On June 1, 2009, the Supreme Court of the United States granted CSXT's petition for a writ of certiorari, reversed the judgment of the Court of Appeals, and remanded the case for further proceedings. *CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139 (2009) (per curiam). On June 11, 2009, the Court of Appeals directed the parties to brief the question whether the trial court's error was harmless, and on August 6, 2009, it heard oral argument. On August 26, 2009, the Court of Appeals reversed the trial court's judgment and remanded the case for a new trial on damages. *Hensley v. CSX Transp., Inc.*, 2009 WL 2615849 (Tenn. Ct. App. Aug. 26, 2009). On October 26, 2009, Hensley filed an application for permission to appeal in this Court.

## STATEMENT OF FACTS

### A. Proceedings In The Trial Court

Hensley worked for CSXT's predecessor and then for CSXT. He sued CSXT under FELA, which authorizes a railroad employee to recover for workplace injuries "resulting in whole or in part from the negligence" of the railroad. 45 U.S.C. § 51. The Act provides for concurrent jurisdiction of state and federal courts, 45 U.S.C. § 56, but substantively FELA actions are governed by federal law, *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 165 (2007).

Hensley alleged that CSXT and its predecessor had negligently exposed him to solvents, which caused him to develop toxic encephalopathy (a neurological disorder), and to asbestos, which caused him to develop asbestosis (a lung disease). (T.R. 31-36). He sought damages for medical expenses, lost earnings, and pain and suffering. (T.R. 33-34, 36). The claimed pain and suffering included Hensley's alleged fear of developing cancer in the future as a result of asbestosis. (T.R. 36).

At trial, Hensley's evidence of fear of cancer consisted almost entirely of his own testimony. He testified that he had "some concern" that he might get cancer "in the back of [his] mind," like "a little cloud" hanging over him. (T.E. 1462-63). He also testified that he had experienced anxiety, that he took medication for it, and that the anxiety arose from his fear of contracting cancer. (T.E. 1369). Hensley admitted, however, that he had begun taking the medication before he was diagnosed with asbestosis and before he was told by the diagnosing physician that his exposure to asbestos increased the risk of cancer. (T.E. 1464-65). Another physician confirmed that he had first prescribed the anxiety medication before Hensley was diagnosed with asbestosis. (T.E. 1245). That physician also testified that the cause of Hensley's anxiety had never been apparent. (T.E. 1255, 1305).

In *Norfolk & Western Railway v. Ayers*, 538 U.S. 135 (2003), the U.S. Supreme Court held that a FELA plaintiff may “seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages,” but only if he “prove[s] that his alleged fear is genuine and serious.” *Id.* at 157. CSXT asked the trial court to instruct the jury that it could not award damages for Hensley’s alleged fear of cancer unless it found that the fear was “genuine and serious,” but the court refused to do so. (T.E. 2410-14, 2720, 2725-26, 2740; Supp. T.R. 4-6).

Both in his opening statement and in his summation, Hensley’s counsel referred repeatedly to Hensley’s fear of cancer and urged the jury to award damages for that fear. (T.E. 52, 55, 65, 69, 70, 77, 79, 84-85, 2754, 2782-83, 2797, 2799). Among other things, counsel told the jury that fear of cancer was one of the things that this case “is about”; that the appropriate compensation for fear of cancer was one of the “basic questions” in the case; and that it was in fact one of “the most important question[s].” (T.E. 52, 55, 2753-54, 2799).

At the same time, Hensley’s counsel misstated the governing legal standard. At one point, he suggested that the jury could award damages for a “real and genuine fear,” omitting the requirement that the fear also be “serious.” (T.E. 2782). At other points, he omitted the requirement of “fear” altogether, suggesting that the jury could—and should—award damages for an “increased *risk* of cancer” and for a “real and genuine *risk*” of the disease. (T.E. 2799, 2783 (emphasis added)). *Ayers* explicitly distinguishes between a compensable “fear” and a non-compensable “risk.” 538 U.S. at 153.

At the end of his summation, Hensley’s counsel asked the jury to award more than \$3 million for past and future pain and suffering, including fear of cancer. (T.E. 2799, 2802). That amount did not include damages for medical expenses and lost earnings. (See T.E. 2799-2801).

In its instructions to the jury, the trial court did not mention Hensley's fear-of-cancer claim or *Ayers*' "genuine and serious" limitation. Instead, the court delivered the following instruction on pain and suffering:

Mr. Hensley would be entitled to recover separately for any pain and suffering. Pain and suffering is simply what it means. This amount compensates Mr. Hensley for any physical suffering and emotional suffering which he has sustained.

(T.E. 2897).

After deliberating for two and a half hours, the jury returned its verdict. (T.E. 2902-04). It found that CSXT was negligent; that its negligence was a cause, in whole or in part, of Hensley's toxic encephalopathy and asbestosis; that Hensley was not contributorily negligent; and that he was entitled to \$5 million in damages. (T.R. 2232-33; T.E. 2905-06). The jury's verdict on damages was a general one. It did not specify how much of the award was for toxic encephalopathy and how much for asbestosis; it did not specify how much was for medical expenses, how much for lost earnings, and how much for pain and suffering; and it did not specify how much was for fear of cancer.

#### **B. Initial Proceedings In the Court Of Appeals**

CSXT appealed. It raised several claims, including the claim that the trial court erred in refusing to instruct the jury that it could award damages for a fear of cancer only if the fear was "genuine and serious." The Court of Appeals rejected all of CSXT's claims and affirmed. *Hensley v. CSX Transp., Inc.*, 278 S.W.3d 282 (Tenn. Ct. App. 2008).

In upholding the trial court's refusal to give the instruction, the Court of Appeals determined that the U.S. Supreme Court's decision in *Ayers* "does not require . . . instructions detailing or explaining damages based on a fear of developing cancer." *Id.* at 300 (quoting *Hedgecorth v. Union Pac. R.R. Co.*, 210 S.W.3d 220, 228-29 (Mo. Ct. App. 2006)) (ellipsis

added by Court of Appeals). The Court of Appeals also declined to impose on its own “a requirement that the *Ayers* test or a similar standard be communicated to the jury,” because it believed that “such a requirement would make little sense.” *Id.*

One purpose of the “genuine and serious” limitation, the court explained, “is to protect defendants from excessive verdicts based on appeals to jurors’ passions with respect to the deeply emotional issue of cancer.” *Id.* Because “the mere suggestion of a possibility of cancer has the potential to evoke raw emotions,” the court said, “a juror may be swayed by the barest shred of evidence that a defendant has caused a plaintiff to suffer an increased \* \* \* fear of cancer, and may be tempted to overcompensate the plaintiff for such a \* \* \* fear.” *Id.* “In light of this reality,” the court thought that “little if any purpose would be served by instructing the jury that the plaintiff’s fear must be ‘genuine and serious,’” because “[a]ny juror who might be predisposed to grant a large award based on shaky evidence of a fear of cancer is unlikely to be swayed by the language of *Ayers*.” *Id.* Rather than instructing juries that damages may be awarded only if the fear is “genuine and serious,” the Court of Appeals reasoned, courts must “serve as gatekeepers \* \* \* to ensure that fear of cancer claims do not go to the jury unless there is credible evidence of a ‘genuine and serious’ fear.” *Id.*

### **C. Proceedings In The Supreme Court Of The United States**

After this Court denied CSXT’s application for permission to appeal, CSXT filed a petition for a writ of certiorari in the U.S. Supreme Court, again contending that it was entitled to an instruction that the jury could award damages for a fear of cancer only if the fear was “genuine and serious.” Without requiring merits briefs or oral argument, the Supreme Court summarily reversed. *CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139 (2009) (per curiam). It held that “[t]he ruling of the Tennessee Court of Appeals, and the refusal of the trial court to give an instruction, were clear error” and “conflict[] with *Ayers*.” *Id.* at 2141, 2142. In so holding, the

Court found that “[t]he reasons given by the Tennessee Court of Appeals for upholding the denial of an instruction \* \* \* do not withstand scrutiny.” *Id.* at 2141.

As an initial matter, the U.S. Supreme Court disagreed with the Court of Appeals’ conclusion that “instructing the jury on the legal standard for fear-of-cancer damages would have been futile because cancer touches many lives and therefore ‘evoke[s] [jurors’] raw emotions.’” *Id.* (quoting *Hensley*, 278 S.W.3d at 300) (alterations added by Supreme Court). The Supreme Court explained that “[t]he jury system is premised on the idea that rationality and careful regard for the court’s instructions will confine and exclude jurors’ raw emotions”; that “[j]urors routinely serve as impartial factfinders in cases that involve sensitive, even life-and-death matters”; and that, “[i]n those cases, as in all cases, juries are presumed to follow the court’s instructions.” *Id.* The Court went on to say that “[i]nstructing the jury on the standard for fear-of-cancer damages would not have been futile” and that, “[t]o the contrary, the fact that cancer claims could ‘evoke raw emotions’ is a powerful reason to instruct the jury on the proper legal standard.” *Id.* The Court emphasized that “[g]iving the instruction on this point is particularly important in the FELA context,” both because of “the volume of pending asbestos claims” and because “the nature of those claims enhances the danger that a jury, without proper instructions, could award emotional-distress damages based on slight evidence of a plaintiff’s fear of contracting cancer.” *Id.* The Court reiterated that, under *Ayers*, a FELA plaintiff must “satisfy a high standard” to obtain fear-of-cancer damages, and stressed that “[r]efusing defendants’ requests to instruct the jury as to that high standard would render it all but meaningless.” *Id.*

The Supreme Court also disagreed with the Court of Appeals’ conclusion that it is enough for courts to “apply the *Ayers* standard when ruling on sufficiency-of-the-evidence challenges.” *Id.* The Supreme Court explained that “a determination that there is sufficient

evidence to send a claim to a jury is not the same as a determination that a plaintiff has met the burden of proof and should succeed on a claim outright.” *Id.* Making the same point “another way,” the Court said that “a properly instructed jury could find that a plaintiff’s fear is not ‘genuine and serious’ even when there is legally sufficient evidence for the jury to rule for the plaintiff on the issue.” *Id.* That, the Court added, “is why *Ayers* recognized that sufficiency reviews and jury instructions are important and separate protections against imposing unbounded liability on asbestos defendants in fear-of-cancer claims.” *Id.* at 2141-42.

The Supreme Court ended its opinion with the observation that *Ayers* “struck a delicate balance between plaintiffs and defendants—and it did so against the backdrop of systemic difficulties posed by the ‘elephantine mass of asbestos cases.’” *Id.* at 2142 (quoting *Ayers*, 538 U.S. at 166). The Court explained that “[j]ury instructions stating the proper standard for fear-of-cancer damages were part of that balance,” and it therefore held that “courts must give such instructions upon a defendant’s request.” *Id.*

#### **D. Proceedings In The Court Of Appeals On Remand**

On remand from the U.S. Supreme Court, the Court of Appeals held that the instructional error was not harmless. It therefore reversed the judgment of the trial court and remanded the case for a new trial on damages. *Hensley v. CSX Transp., Inc.*, 2009 WL 2615849 (Tenn. Ct. App. Aug. 26, 2009).

1. The Court of Appeals first determined that it should apply the federal harmless-error standard rather than Tennessee’s. *Id.* at \*4-\*5.

The court began its analysis by observing that “[t]he parties have appropriately reminded us” that “[s]tate procedural rules give way to federal law if application of [state] rules would interfere with a party’s substantive federal rights or defenses.” *Id.* at \*4 (internal quotation marks omitted). The court went on to say that, “where a procedural rule determines the outcome

of an FELA verdict, \* \* \* the federal standard should be applied if it is materially different from the state standard.” *Id.* In support of the latter proposition, the court cited two decisions of the Court of Appeals, one from the Middle Section and one from the Western Section, holding that the federal standard governs the question whether to grant a new trial in a FELA case tried in state court. *Id.* (citing *Blackburn v. CSX Transp., Inc.*, 2008 WL 2278497, at \*11 (Tenn. Ct. App. M.S. May 30, 2008), and *Jordan v. Burlington N. Santa Fe R.R. Co.*, 2009 WL 112561, at \*17 n.12 (Tenn. Ct. App. W.S. Jan. 15, 2009)).

The Court of Appeals then described the state and federal harmless-error standards. It pointed out that Tennessee’s harmless-error rule “looks at whether or not the error ‘more probably than not affected the judgment.’” *Id.* (quoting Tenn. R. App. P. 36(b)). And it noted that “[t]he parties agree that the federal standard is, as stated in *United States v. Benitez*, 542 U.S. 74, 82 (2004), ‘a reasonable probability that, but for the error claimed, the result of the proceeding would have been different.’” *Id.*

The Court of Appeals then identified the only disagreement between the parties concerning the choice-of-law issue. The parties agreed that federal law applies if the state and federal harmless-error standards are not equivalent, and they agreed that the Tennessee standard is whether the error “more probably than not” affected the outcome, while the federal standard is whether there is a “reasonable probability” that it did. *Compare* CSXT C.A. Br. on Remand, 2007 WL 6798265, at \*11 n.\* (June 26, 2009), *with* Hensley C.A. Br. on Remand, 2009 WL 2405181, at \*34-\*36 (July 13, 2009). As the court observed, “[t]he parties \* \* \* disagree [only] as to \* \* \* [whether] the federal standard is equivalent to [the] state standard.” *Hensley*, 2009 WL 2615849, at \*4. Hensley took the position that it is; CSXT took the position that it is not. *Id.*

The Court of Appeals held that the standards are not equivalent. The court explained that “language in *Benitez* supports [CSXT’s] contention that the federal standard requires something less than a showing by a preponderance of the evidence that the error affected the outcome.” *Id.* That language is the following: “The reasonable-probability standard is not the same as . . . a requirement that a defendant prove by a preponderance of the evidence that but for the error things would have been different.” *Id.* (quoting *Benitez*, 542 U.S. at 83 n.9) (ellipsis added by Court of Appeals). The court therefore held that the federal harmless-error standard governs.

2. Applying that standard, the Court of Appeals then held that the trial court’s instructional error was not harmless. *Id.* at \*5-\*7. The court considered several factors to which appellate courts have looked in deciding whether a particular trial error is harmless and determined that each of them weighs against a finding of harmlessness here.

The first factor that “undermine[d] [the court’s] confidence that the verdict would be the same with the instruction as without it” was “the [U.S.] Supreme Court’s pronouncement” in this case that “‘rationality and careful regard for the court’s instructions will confine and exclude jurors’ raw emotions.’” *Id.* at \*5 (quoting *Hensley*, 129 S. Ct. at 2141). Observing that “passion and prejudice are real problems to be dealt with in these type[s] of cases,” the Court of Appeals explained that “[t]he record in this case is certainly susceptible to the interpretation that some overcompensation, based on passion and prejudice, occurred in th[e] verdict,” particularly given the substantial evidence that Hensley “continued to function despite his injuries and fears” and the fact that “[t]he jury awarded a total of \$5,000,000.” *Id.*

The second factor that “weigh[ed] against finding the error was harmless” was that “the evidence on the fear of cancer claim, while legally sufficient to sustain the verdict, was close.” *Id.* at \*6. As the Court of Appeals explained, that evidence was limited to Hensley’s own

testimony that he had “some concern” that he might get cancer “in the back of [his] mind,” like “a little cloud” hanging over him, and that he experienced anxiety for which he took medication. *Id.* The court also pointed out that Hensley admitted, on cross-examination, that he had begun taking the medication before he was diagnosed with asbestosis and that Hensley’s physician testified that the cause of Hensley’s anxiety had never been apparent. *Id.*

The third factor on which the court relied was that the omitted information was not “covered or explained in other \* \* \* parts of the jury charge.” *Id.* The court pointed out that there was “nothing \* \* \* in the charge that deals with the nature of the fear that must be proven.” *Id.*

The final factor that was found to “weigh[] against a finding of harmless error” was that fear of cancer was “definitely one of the ‘matters at issue’ upon which the jury probably based its award.” *Id.* at \*7. As the court observed, Hensley’s counsel argued to the jury that fear of cancer was one of the things that “[t]his case is about” and one of the “basic questions” in the case. *Id.* The Court of Appeals thus concluded that, while it may not have been the “heart” of the case, fear of cancer was at least a “vital organ.” *Id.*

#### **REASONS FOR DENYING THE APPLICATION**

Hensley asks this Court to grant review to decide whether the Court of Appeals correctly determined that (1) the applicable harmless-error standard is whether there is a reasonable probability that the result would have been different if the instructional error had not been made and (2) there is a reasonable probability that the result in this case would have been different if the error had not been made. For multiple reasons, Hensley cannot demonstrate that either issue is one of such “extraordinary importance” as to justify the exercise of this Court’s discretionary jurisdiction. Tenn. R. App. P. 11 advisory commission comment. And even if he could, review still would be unwarranted, because the proceedings below have not yet “come to final

judgment.” *Va. Military Inst. v. United States*, 508 US. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari).

**I. THE QUESTION WHETHER THE COURT OF APPEALS APPLIED THE CORRECT HARMLESS-ERROR STANDARD DOES NOT WARRANT REVIEW**

Hensley first contends that the Court of Appeals applied the wrong harmless-error standard. According to him, the court either mistakenly failed to “appl[y] Tennessee’s harmless error rule[.]” (App. 23) or applied “the wrong federal standard” (App. 16). Further review on that issue is unwarranted. The Court of Appeals’ decision to apply the federal “reasonable probability” standard is clearly correct; there is no division of authority on the issue; and the result in this case would be the same under any harmless-error standard.

**A. The Court Of Appeals Clearly Applied The Correct Standard**

The Court of Appeals correctly concluded that a federal harmless-error standard applies, and it correctly concluded that that standard requires reversal when there is a reasonable probability that the error affected the outcome. The court reasoned that (1) the federal harmless-error standard governs if it differs from the state standard; (2) the federal standard asks whether there is a “reasonable probability” that the error affected the outcome, while the state standard asks whether it is “more probable than not” that the error affected the outcome; and (3) the federal “reasonable probability” standard differs from the state “more probable than not” standard. *Hensley*, 2009 WL 2615849, at \*4. Nothing in Hensley’s application calls that reasoning into question. Indeed, Hensley conceded the first two points in the Court of Appeals, and the third point is unequivocally established by the U.S. Supreme Court’s decision in *Benitez*.

1. Hensley acknowledges that “[t]he first inquiry in determining which [harmless-error] standard applies is whether the standards are different” and that, “[i]f they are,” then “federal law should apply.” App. 17. This choice-of-law rule follows from “the preeminence of

jury decisions in FELA matters” and the principle that “any interference with a jury determination must be made pursuant to uniform federal laws.” *Blackburn v. CSX Transportation, Inc.*, 2008 WL 2278497, at \*11 (Tenn. Ct. App. M.S. May 30, 2008).

2. The second inquiry is what the harmless-error standards are. As Hensley recognizes, the Tennessee standard is whether the error “more probably than not affected the judgment.” App. 20 (quoting Tenn. R. App. P. 36(b)). As the Court of Appeals concluded, the federal standard is whether there is “a reasonable probability that, but for the error claimed, the result of the proceeding would have been different.” *Hensley*, 2009 WL 2615849, at \*4 (quoting *United States v. Benitez*, 542 U.S. 74, 82 (2004)).

In this Court, Hensley denies that that is the federal standard. App. 24-26. But in the Court of Appeals, he acknowledged that it is. *See Hensley C.A. Br. on Remand*, 2009 WL 2405181, at \*36 (“Under the Federal harmless error standard[], \* \* \* [t]he defendant must show ‘a reasonable probability that, but for (the error claimed), the result of the proceeding would have been different.’” (quoting *Benitez*, 542 U.S. at 81-82)). That acknowledgment is what led the Court of Appeals to say that “[t]he parties agree” that “reasonable probability” is the federal standard. *Hensley*, 2009 WL 2615849, at \*4. “It is elementary that a party may not take one position regarding an issue in the [Court of Appeals], change his strategy or position in mid-stream, and advocate a different ground or reason in this Court.” *State v. Dellinger*, 79 S.W.3d 458, 488 (Tenn. 2002) (internal quotation marks omitted). It is therefore too late for Hensley to claim that “reasonable probability” is not the federal standard, particularly since the Court of Appeals relied on his contrary position below.

In any event, “reasonable probability” clearly *is* the federal standard. Hensley suggests that *Benitez*, the U.S. Supreme Court decision from which the standard derives, could not have

established a standard for harmless error in civil cases, because *Benitez* was a *criminal* case involving *plain* error. App. 24. But in adopting the “reasonable probability” standard in *Benitez*, the Court was interpreting the phrase “error that affects substantial rights” in the criminal plain-error rule. See 542 U.S. at 81-82 (quoting Fed. R. Crim. P. 52(b)). The same “substantial rights” language appears in the civil harmless-error statute and rule. See 28 U.S.C. § 2111 (“the court shall give judgment \* \* \* without regard to errors or defects which do not affect the substantial rights of the parties”); Fed. R. Civ. P. 61 (“the court must disregard all errors and defects that do not affect any party’s substantial rights”).

Hensley also relies on Justice Scalia’s statement in *Benitez* that the correct standard is whether the error “more likely than not” affected the outcome. App. 25 (quoting *Benitez*, 542 U.S. at 87 (Scalia, J., concurring in the judgment)). But Justice Scalia expressed that view in a separate opinion, which explicitly *disagreed* with the majority’s “reasonable probability” standard. See *Benitez*, 542 U.S. at 87 (Scalia, J., concurring in the judgment) (“I would not \* \* \* extend our ‘reasonable probability’ standard \* \* \*.”).

Finally, Hensley insists that two federal court of appeals decisions “require the party claiming the error” to show that the outcome was “more likely than not affected by the error.” App. 25. But the cases on which he relies (App. 25-26) antedate the Supreme Court’s *Benitez* decision by many years. In any event, the decisions do not in fact hold that an error requires reversal only if it more likely than not affected the outcome.<sup>1</sup>

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<sup>1</sup> The decisions instead hold that an error is *harmless* only if it more likely than not had *no* effect on the outcome. See *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1252-53 (10th Cir. 1988) (“Where the verdict more probably than not was untainted by the error, the error is harmless and a new trial is not required.”) (footnote omitted); *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983) (error is harmless if “the jury’s verdict is more probably than not untainted by the error”). In other words, the decisions in effect apply a presumption that an error requires reversal, not (as Hensley suggests) a presumption that an error is harmless.

3. That leaves only the third inquiry, which is whether the federal standard (“reasonable probability”) and the state standard (“more probable than not”) are different. As the Court of Appeals correctly recognized, the U.S. Supreme Court unambiguously answered that question in the affirmative in *Benitez*: “The reasonable-probability standard is not the same as . . . a requirement that a defendant prove by a preponderance of the evidence that but for the error things would have been different.” *Hensley*, 2009 WL 2615849, at \*4 (quoting *Benitez*, 542 U.S. at 83 n.9) (ellipsis added by Court of Appeals); see *Teter v. Republic Parking Sys., Inc.*, 181 S.W.3d 330, 341 (Tenn. 2005) (“more probable than not” and “preponderance of the evidence” are identical). *Hensley* asserts that “Tennessee’s ‘more probably than not’ standard *is* equivalent to the Federal \* \* \* ‘reasonable probability’ standard” (App. 23 (emphasis added)), but he makes no serious attempt to support that assertion. He certainly makes no effort to persuade this Court that the language in *Benitez* quoted above means something other than what it says—namely, that the two standards are “not the same.”

**B. There Is No Division Of Authority On The Issue**

Suggesting that the decision below conflicts with decisions of other courts, *Hensley* asserts that “[t]here is a series of cases which indicate the state law for harmless error should be applied in FELA cases.” App. 18. That is incorrect.

While the decisions on which *Hensley* relies (App. 18-19) did apply the state harmless-error standard in FELA cases, none addressed the choice-of-law issue decided by the Court of Appeals here. The question whether state or federal law applies does not appear to have been

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Even under those cases, therefore, an error need not more probably than not have affected the outcome to require reversal. In that respect, at least, they are consistent with the “reasonable probability” standard. A third decision that *Hensley* cites (App. 25-26) is likewise consistent with that standard, because it states only that an instructional error requires reversal if it “affected a party’s right to a fair trial to a substantial degree.” *Smith v. Chesapeake & Ohio Ry. Co.*, 778 F.2d 384, 389 (7th Cir. 1985).

raised, and certainly was not decided, in any of those cases. A state-court decision that applies the law of that state without addressing the choice-of-law issue does not stand for the proposition that the state's law applies as a matter of choice-of-law rules, because a court "d[oes] not decide" an issue that is "not before [it]." *Hubbard v. Taylor*, 399 F.3d 150, 163 (3d Cir. 2005). There is thus no conflict between the decision below and the decisions on which Hensley relies.

In any event, there is no indication in any of those cases that the state harmless-error standard applied by the court in fact differed from the federal one. In this case, the Court of Appeals concluded that the federal standard applies if it differs from the state standard and that the federal "reasonable probability" standard does differ from Tennessee's "more probable than not" standard. *Hensley*, 2009 WL 2615849, at \*4. Unlike Tennessee's "more probable than not" standard, none of the state harmless-error standards applied in the cases on which Hensley relies required a greater showing than a "reasonable probability" that the error affected the outcome. Indeed, none suggested *any* particular degree of probability by which the error must have affected the result. There is thus no reason to think that any of these cases are inconsistent with the decision below even apart from the fact that none actually decided the choice-of-law issue.<sup>2</sup>

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<sup>2</sup> See *Phillips v. Ill. Cent. R.R. Co.*, 797 So.2d 231, 238 (Miss. Ct. App. 2000) ("An error may be found harmless if it did not affect the ultimate judgment of the court."); *Sorrell v. Norfolk S. Ry. Co.*, 249 S.W.3d 207, 209 (Mo. 2008) ("prejudice must have resulted from the instructional error"); *Sorrell v. Norfolk S. Ry. Co.*, 2007 WL 1064233, at \*1 (Mo. Ct. App. Apr. 10, 2007) ("A judgment will be reversed because of instructional error if the error materially affected the merits and outcome of the case."); *Kan. City S. Ry. Co. v. Stokes*, 20 S.W.3d 45, 49 (Tex. Ct. App. 2000) ("For the giving of this improper jury instruction to constitute reversible error, the Railway must show not only that the instruction was improper, but also that the error was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment."); *S. Pac. Transp. Co. v. Hernandez*, 804 S.W.2d 557, 561 (Tex. Ct. App. 1991) ("reasonably calculated to cause and probably did cause rendition of an improper judgment") (internal quotation marks omitted). The other decision on which Hensley relies (App. 18), *Hedgecorth v. Union Pacific Railroad Co.*, 210 S.W.3d 220 (Mo. Ct. App. 2006), did not involve any issue of harmless error at all.

We are not aware of any decision other than the one below that has addressed whether a state appellate court should apply the federal or state harmless-error standard to an instructional error in a FELA case. But two other decisions of the Court of Appeals, one from the Middle Section and one from the Western Section, have addressed what Hensley acknowledges is a “similar” question (App. 17): whether the federal or state *new-trial* standard applies in FELA cases tried in state court. *Blackburn v. CSX Transportation, Inc.*, 2008 WL 2278497 (Tenn. Ct. App. M.S. May 30, 2008); *Jordan v. Burlington N. Santa Fe R.R.*, 2009 WL 112561 (Tenn. Ct. App. W.S. Jan. 15, 2009). Both decisions held that the federal rather than the Tennessee new-trial standard applies, *Blackburn*, 2008 WL 2278497, at \*11; *Jordan*, 2009 WL 112561, at \*17 n.12, and the decision below—from the Eastern Section—relied on them in holding that the federal rather than the Tennessee *harmless-error* standard applies, *Hensley*, 2009 WL 2615849, at \*4. Because all three sections of the Court of Appeals have adopted the same approach to choice-of-law issues in FELA cases tried in the courts of this State, there is no need for this Court’s intervention “to secure uniformity of decision.” Tenn. R. App. P. 11(a). Decision on these issues is already uniform.

**C. The Result Would Be The Same Under Any Standard**

Review should also be denied because the result would be the same even under a “more probable than not” standard. While the U.S. Supreme Court has made clear that there is a difference between that standard and a “reasonable probability” standard, it is nevertheless true, as the Court of Appeals observed, that “these ‘gradations of probability’ are not easy to grasp.” *Hensley*, 2009 WL 2615849, at \*4 (quoting *Benitez*, 542 U.S. at 86 (Scalia, J., concurring in the judgment)). That being so, there are not likely to be many cases in which an error would be harmless under one standard but not under the other. This is surely not one of them.

The Court of Appeals carefully considered four separate factors that bear on whether an error has affected the judgment, and concluded, based on a thorough review of the record, that each and every one of them weighs against a finding of harmlessness. *Id.* at \*5-\*7. Indeed, as we explain in Point II.B below, each of the factors weighs *decisively* against a finding of harmlessness. This is therefore not one of the rare cases in which there is a “reasonable probability” that an instructional error affected the verdict but it is not “more probable than not” that it did. There is no reason for this Court to exercise its discretionary jurisdiction to decide an issue that would make no difference to the outcome.

## **II. THE QUESTION WHETHER THE COURT OF APPEALS CORRECTLY FOUND THAT THE ERROR WAS NOT HARMLESS DOES NOT WARRANT REVIEW**

Hensley next contends that, even if the Court of Appeals applied the correct harmless-error standard, it “erred in applying this standard to the record of this case” (App. 16) because there was no “reasonable probability” that the instructional error affected the outcome (App. 24). The Court of Appeals’ resolution of that issue is both entirely fact-bound and clearly correct. Further review is therefore unwarranted.

### **A. Whether The Error Was Harmless Is Entirely Fact-Bound**

This Court is “a law-development court,” not “an error-correction court.” *State v. West*, 844 S.W.2d 144, 146 (Tenn. 1992). It sits to decide legal issues of recurring importance, not to determine whether a lower court correctly applied an accepted legal standard to a unique set of facts. Yet that is precisely what Hensley is asking this Court to do.

The Court should not grant a discretionary appeal for the purpose of reviewing the record to decide whether, on the particular facts of the case, there is a reasonable probability that the trial court’s instructional error affected the outcome. The Court of Appeals performed that task carefully and conscientiously. It conducted an exhaustive review of the trial record and

considered the issue of harmlessness from every conceivable angle. Repeating that exercise would not “justify the burdens of time, expense and effort associated with double appeals.” Tenn. R. App. P. 11 advisory commission comment.

**B. The Error Clearly Was Not Harmless**

Review also should be denied on the question whether there is a reasonable probability that the error affected the verdict because the Court of Appeals correctly concluded that there is. In summarizing the reasons for that conclusion, the court pointed out that it had considered four separate “factors that have proven useful in determining whether instructional error is harmless” and that each of them weighs against a finding of harmlessness. *Hensley*, 2009 WL 2615849, at \*7. First, the court’s “confidence in the verdict [wa]s undermined by the fact that fear of cancer claims are likely to invoke passion and prejudice.” *Id.* Second, “[t]he evidence was close enough that the missing instruction may have turned the tide.” *Id.* Third, the court “d[id] not find other instructions covering the subject matter that the ‘genuine and serious’ instruction was intended to cover.” *Id.* And fourth, “[t]he fear of cancer claim was probably one of the matters in the case that drove the award to \$5,000,000.” *Id.* Each of these determinations was clearly correct, and the Court of Appeals’ ultimate conclusion that “the error was not harmless” (*id.*) was thus necessarily correct as well. *Hensley*’s arguments to the contrary lack merit.

**1. The nature of the error increased the likelihood that the verdict was based on jurors’ emotions and passions**

As the Court of Appeals correctly recognized, “[o]ne purpose of the ‘genuine and serious’ requirement \* \* \* is to protect defendants from excessive verdicts based on appeals to jurors’ passions with respect to the deeply emotional issue of cancer.” *Hensley*, 2009 WL 2615849, at \*5 (internal quotation marks omitted). Because “the mere suggestion of a possibility of cancer has the potential to evoke raw emotions,” the court explained, jurors “may be swayed

by the barest shred of evidence that a defendant has caused a plaintiff to suffer an increased risk and/or fear of cancer, and may be tempted to overcompensate the plaintiff for such a risk or fear.” *Id.* (internal quotation marks omitted). Agreeing with this view, the U.S. Supreme Court emphasized that “the fact that cancer claims could ‘evoke raw emotions’ is a powerful reason to instruct the jury on the proper legal standard.” *Hensley*, 129 S. Ct. at 2141. Giving the instruction “is particularly important,” the Court said, “because the nature of [the] claims enhances the danger that a jury, without proper instructions, could award emotional-distress damages based on slight evidence of a plaintiff’s fear of contracting cancer.” *Id.* The error in this case thus consisted of a failure to give a “particularly important” instruction designed to (i) protect against appeals to jurors’ “passions” and “raw emotions” with respect to a “deeply emotional issue” and thereby (ii) minimize the risk that jurors will be “swayed by the barest shred of evidence” and “overcompensate” the plaintiff as a result.

Because “passion and prejudice are real problems to be dealt with in these type[s] of cases,” *Hensley*, 2009 WL 2615849, at \*5, the failure to give a proper instruction on fear of cancer is one of the “kinds of errors” that “are likely \* \* \* to prove harmful” in virtually every case, *Shinseki v. Sanders*, 129 S. Ct. 1696, 1707 (2009). If, as the U.S. Supreme Court has said, the fact that cancer claims can “evoke raw emotions” is a “powerful reason” to give a “genuine and serious fear” instruction, *Hensley*, 129 S. Ct. at 2141, it is likewise a “powerful reason” to conclude that a *failure* to give the instruction is not harmless. *Cf. State v. James*, 81 S.W.3d 751, 762-63 (Tenn. 2002) (reversal required where error was “likely to provoke the jury’s prejudice”); *Stockman v. Oakcrest Dental Ctr.*, 480 F.3d 791, 804 (6th Cir. 2007) (reversal required where error was of an “exceptionally prejudicial character”). That is particularly true in this case, where the record is “susceptible to the interpretation that some overcompensation, based on

passion and prejudice, occurred in th[e] verdict,” given the substantial evidence that Hensley “continued to function despite his injuries and fears” and the fact that “[t]he jury awarded a total of \$5,000,000.” *Hensley*, 2009 WL 2615849, at \*5.

**2. The evidence was such that a properly instructed jury might well have reached a different result**

There is no basis for concluding that the error was harmless on the ground that a properly instructed jury would have found that Hensley’s fear of cancer was genuine and serious. On the contrary, it is highly probable that such a jury would *not* have so found, because there was little evidence that Hensley had a genuine and serious fear of the disease.

In *Ayers*, the U.S. Supreme Court observed that the evidence of fear of cancer in that case was “notably thin,” because, although the plaintiffs had testified to “varying degrees of concern over developing the disease,” they offered no “corroborative objective evidence of [their] fear.” *Ayers*, 538 U.S. at 158 & n.18. There was not much more than that here. The evidence consisted mainly of Hensley’s testimony that he felt some “concern” and “anxiety” about the possibility of contracting cancer. (T.E. 1369, 1462). Although there also was evidence that Hensley took medication for his anxiety, that medication was prescribed before Hensley was diagnosed with asbestosis, and the prescribing physician was unable to identify the cause of Hensley’s anxiety. (T.E. 1245, 1255, 1305, 1369, 1464-65). Under these circumstances, a properly instructed jury easily could have found that any fear of cancer on Hensley’s part was not genuine and serious.

Hensley argues that a properly instructed jury *would* have made the required finding, because “[s]imple common sense dictates that before a jury will award a sizable verdict it must find the injuries and damages are ‘genuine and serious.’” App. 36. He relies on the Court of Appeals’ statement in its initial decision that “juries do not routinely grant multimillion-dollar

awards for injuries that the jurors regard as non-genuine and unserious” and on Justice Stevens’ statement in his dissenting opinion that, “as a practical matter, it is hard to believe the jury would have awarded any damages for Hensley’s fear of cancer if it did not believe that fear to be genuine and serious.” *Id.* (quoting *Hensley*, 278 S.W.3d at 300, and *Hensley*, 129 S. Ct. at 2144 (Stevens, J., dissenting)). But those statements cannot support a finding of harmless error, because they were made in support of a proposition that the U.S. Supreme Court *rejected*—namely, that a trial court need not give a “genuine and serious fear” instruction at all. In holding that such an instruction is required, the Court necessarily concluded that, without one, a jury might award damages for a fear of cancer that is less than genuine and serious. *See Hensley*, 129 S. Ct. at 2141 (finding it “particularly important” to give instruction because nature of claim enhances danger that jury could award damages based on only “slight” fear of cancer). There is every reason to believe that the jury did that here.

### **3. The omitted information was not included elsewhere in the charge**

There is likewise no basis for concluding that the error was harmless on the ground that the omitted information was “explained or corrected in other parts of the charge.” *Gorman v. Earhart*, 876 S.W.2d 832, 837 (Tenn. 1994). The trial court not only failed to deliver a “genuine and serious” instruction, but failed to give *any* instruction on fear of cancer. Instead, it delivered an extraordinarily broad charge on pain and suffering, which (mis)informed the jury that Hensley could recover for “*any* physical suffering and emotional suffering” and that pain and suffering “is simply what it means.” (T.E. 2897 (emphasis added)). The trial court thereby left the jury with the mistaken impression that it could compensate Hensley for *any* fear of cancer, whether or not it was genuine and serious.

In his summation, Hensley’s counsel exacerbated the error by repeatedly misstating the standard for fear-of-cancer damages. At one point, he suggested that Hensley could recover for a

“genuine” fear of cancer, omitting the additional requirement that the fear be “serious.” (T.E. 2782). At other points, he omitted the requirement of “fear” altogether, suggesting that the jury could—and should—award damages for an “increased *risk* of cancer” and for a “real and genuine *risk*” of the disease. (T.E. 2799, 2783 (emphasis added)). *Ayers* makes clear that it is only a genuine and serious “fear” of cancer for which recovery is available under FELA. 538 U.S. at 153. “[An] increased risk is not enough.” *Hensley*, 278 S.W.3d at 301.

Thus, on the critical issue of fear of cancer, the jury was misguided both by the trial court and by Hensley’s counsel, and the error was not “explained or corrected” elsewhere. *Gorman*, 876 S.W.2d at 837. The Court of Appeals correctly so found, and it correctly rejected Hensley’s remarkable assertion, repeated here (App. 30-32), that the trial court’s general instructions—on burden of proof, the requirement that the verdict be based solely on the evidence, and the like—were an adequate substitute for an instruction on fear of cancer. The U.S. Supreme Court squarely held that CSXT was entitled to an instruction that the “plaintiff must prove any alleged fear [of cancer] to be genuine and serious,” *Hensley*, 129 S. Ct. at 2141 (quoting *Ayers*, 538 U.S. at 159 n.19), and the Court of Appeals rightly concluded that there was nothing in the trial court’s general instructions “that deals with the nature of the fear that must be proven,” *Hensley*, 2009 WL 2615849, at \*6. Indeed, the trial court’s charge did not even mention that Hensley was seeking recovery for fear of cancer.

#### **4. Fear of cancer played a central role in the trial**

In *Gorman v. Earhart*, 876 S.W.2d 832, this Court found that an instructional error required reversal because (among other things) the issue on which the jury was misinstructed was “referred to repeatedly in the presence of the jury, in both argument and in eliciting testimony,” and therefore “permeated the entire trial.” *Id.* at 837. The same is true here.

At the beginning of his opening statement, Hensley's counsel listed the things that "[t]his case is about," one of which was "an increased risk and fear of cancer." (T.E. 52). Soon thereafter, he informed the jury that the case involved "three basic questions," one of which was "what is the proper compensation for all of the damage the railroad has caused to Mr. Hensley's lungs and his brain, including the increased risk and fear of cancer?" (T.E. 55). Counsel later told the jury that "one of the issues that you'll be considering is whether he's at increased risk and fear of this cancer" and that "[y]ou're going to hear about the future mental and physical pain and suffering," including Hensley's "concern[] about cancer, concern[] about dying of his condition, concern[] about the fact that he can't take care of his wife." (T.E. 70, 79). Counsel also referred to the risk and fear of asbestosis-related cancer four other times during his opening. (T.E. 65, 69, 77, 84-85).

The risk and fear of cancer remained a focus of Hensley's case throughout the trial. Both Hensley's witnesses, including Hensley himself, and Hensley's counsel, in questioning the witnesses, referred to asbestosis-related cancer repeatedly. (T.E. 290-92, 608-09, 677, 892-93, 1369, 1462-63, 2077, 2083-91, 2116-20).

At the beginning of his summation, Hensley's counsel again listed the things that the case "is about," one of which was the "risk and fear of cancer." (T.E. 2753-54). He subsequently spent what turned out to be a page and a half's worth of trial transcript "talk[ing] about fear and risk of cancer." (T.E. 2782-83). At the end of the summation, he stated that "the most important question" and "the most difficult question" for the jury to decide was "[t]he proper compensation for brain damage, for lung damage, for the increased risk of cancer." (T.E. 2799). Counsel also referred to the risk and fear of cancer two other times in his summation. (T.E. 2797, 2800). He ultimately asked the jury to award more than \$3 million for past and future pain and suffering

(T.E. 2802), an amount that did not include damages for medical expenses and lost earnings (T.E. 2799-2801).

The record in general, and Hensley's counsel's own words in particular, thus demonstrate beyond any doubt that fear of cancer "permeated the entire trial." *Gorman*, 876 S.W.2d at 837. That is an additional factor that weighs heavily against a finding of harmlessness.

## **5. Hensley's arguments lack merit**

Hensley argues that a new trial on damages is not required because (a) CSXT's proposed instructions misstated the law and (b) CSXT did not seek other verdict-control devices. Neither argument is directly related to the harmless-error issues presented in Hensley's application (App. 1), and so it is not clear that they are even properly before the Court. In any event, both arguments lack merit.

### **a. CSXT's proposed instructions did not misstate the law**

Hensley contends that CSXT "was not prejudiced" by the trial court's refusal to give a "genuine and serious fear" instruction because CSXT "did not submit appropriate instructions" on the issue. App. 39. Hensley raised the same contention in the Court of Appeals, which correctly concluded that this "collateral argument" is foreclosed by the U.S. Supreme Court's holding that "[t]he trial court should have given the substance of [CSXT's] requested instructions." *Hensley*, 2009 WL 2615849, at \*8 (quoting *Hensley*, 129 S. Ct. at 2142). Although the Supreme Court's holding "does not necessarily mean that in the new trial the instructions previously proposed must be given word-for-word," it "does mean" that no court "is free to simply reinstate the verdict." *Id.* Hensley offers no response to the Court of Appeals' decision on this point, and indeed there is none.

**b. CSXT had no obligation to seek other verdict-control devices**

Hensley also contends that the judgment should be upheld because CSXT did not seek “verdict control device[s]” *other* than jury instructions—in particular, a “special interrogatory or verdict to separate any fear-of-cancer damages” and a “request for remittitur.” App. 34-35; *see also* App. 39-44. Hensley raised the same contention in opposing certiorari (Brief in Opposition, 2009 WL 720924, at \*20-\*21 (Mar. 16, 2009)), and the U.S. Supreme Court necessarily rejected it in holding that the jury instructions were required. In any event, the verdict-control mechanisms identified by Hensley are no substitute for a properly instructed jury.

In *Ayers*, the Supreme Court identified three “verdict control devices” in fear-of-cancer cases: “[1] on a defendant’s request, a charge that each plaintiff must prove any alleged fear to be genuine and serious, [2] review of the evidence on damages for sufficiency, and [3] particularized verdict forms.” 538 U.S. at 159 n.19. CSXT sought to avail itself of the first two but not the third. *Ayers* obviously does not put a defendant to the choice of seeking either all three or none; the exercise of the right to a jury instruction and sufficiency-of-the-evidence review is not conditioned upon a request for a particularized verdict form. Even if there had been such a request, moreover, the trial court surely would have denied it, having already refused even to *instruct* the jury on fear of cancer. Indeed, a particularized verdict form would have been pointless without instructions on all the questions the form directed the jury to answer. In any event, Hensley had the same right to request a special verdict, so it is unclear why the trial court’s failure to employ one should be blamed on CSXT.<sup>3</sup>

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<sup>3</sup> For the proposition that CSXT has “no right to complain” about the verdict because it did not seek “special interrogatories” (App. 40), Hensley cites four federal court of appeals decisions (App. 40-41). But the decisions do not support that proposition. In three of them, the court rejected a claim that the verdict could not stand because there was insufficient evidence to support a particular theory of recovery; the court reasoned that there was sufficient evidence to support a different theory of recovery and that there was no way to tell which theory the jury had

Appellate review for excessiveness of the verdict is no substitute for a jury charge either. Had the Court of Appeals been presented with an excessiveness challenge, it would have presumed that there was in fact a genuine and serious fear of cancer that justified *some* award; the most the court would have done was reduce the size of the award; and the court would not have done even that unless, exercising deferential review, it found the award to be “patently excessive” (*Palanki ex rel. Palanki v. Vanderbilt Univ.*, 215 S.W.3d 380, 386 (Tenn. Ct. App. 2006)) or shocking to the conscience (App. 43-44). Had the trial court given a proper instruction, in contrast, the jury easily could have found that any fear of cancer was not genuine and serious and thus awarded *no* damages on that claim at all.

### **III. REVIEW ALSO IS UNWARRANTED BECAUSE THE CASE IS IN AN INTERLOCUTORY POSTURE**

Review also should be denied because the proceedings below are not yet complete. The Court of Appeals reversed the judgment of the trial court and remanded the case for a retrial on damages. Even if the issues presented in Hensley’s application otherwise warranted review, therefore, it would be prudent for this Court to “await final judgment in the lower courts before

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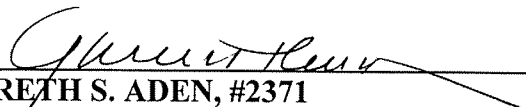
relied upon. *See Kossman v. Ne. Ill. Reg’l Commuter R.R. Corp.*, 211 F.3d 1031, 1037 (7th Cir. 2000); *Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 800-01 (8th Cir. 1987); *Union Pac. R.R. Co. v. Lumbert*, 401 F.2d 699, 701 (10th Cir. 1968). Unlike this case, those cases did not involve an erroneous jury instruction, as to which the law is different. *See, e.g., Whaley v. Perkins*, 2005 WL 1707970, at \*14 (Tenn. Ct. App. July 21, 2005) (plaintiffs made multiple claims for damages, including one for emotional distress; jury returned general verdict; and court of appeals held that trial court had erroneously instructed jury on emotional distress and that error was not harmless, because component of award “may well have been” for emotional distress even though there was “no way to know” for sure), *rev’d in part on other grounds*, 197 S.W.3d 665 (Tenn. 2006). Indeed, Hensley’s fourth case confirms that reversal is *not* barred when “the jury is instructed on an erroneous theory of liability and there is no basis for determining whether it relied on that theory.” *E. Trading Co. v. Refco, Inc.*, 229 F.3d 617, 622 (7th Cir. 2000) (Posner, J.). Because, in that circumstance, “the jury is to take the law as the judge instructs it, however erroneous the instruction is, an erroneous theory of liability supported by the facts is quite likely to commend itself to the jury.” *Id.* That is certainly true in this case, where the jury was instructed that it could award damages for “any” pain and suffering. (T.E. 2897).

exercising [its discretionary] jurisdiction.” *Va. Military Inst. v. United States*, 508 US. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari); *see id.* (citing cases). That is the “normal practice” of the U.S. Supreme Court, *Estelle v. Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting), and it should be followed here, because the proceedings on remand could obviate any need for this Court’s intervention. If Hensley recovers the same or more damages on retrial, for example, he may decide that there is no need to pursue his claim that the instructional error at the initial trial was harmless. Denying Hensley’s interlocutory appeal on this claim will therefore conserve this Court’s scarce resources.

### CONCLUSION

The application for permission to appeal should be denied.

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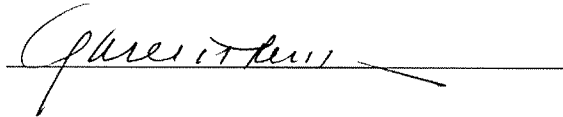
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing has been served by first-class mail, postage prepaid, upon H. Douglas Nichol, Esq., NICHOL & ASSOCIATES, 6759 Baum Drive, Knoxville, TN 37919, and Joseph D. Satterley, Esq., SALES, TILLMAN, WALLBAUM, CATLETT & SATTERLEY, PLLC, 1900 Waterfront Plaza, 325 W. Main Street, Louisville, KY 40202, this 10th day of November, 2009.

A handwritten signature in cursive script, appearing to read "Joseph D. Satterley", is written over a horizontal line.