IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE
EASTERN SECTION AT KNOXVILLE

THURSTON HENSLEY,	)	
	)	
Appellee/Plaintiff	)	**No. E2007-00323-COA-R3-CV**
	)	
v.	)	
	)	**On Remand from the Supreme**
CSX TRANSPORTATION, INC.,	)	**Court of the United States**
a corporation,	)	**Case No. 08-1034**
	)	
Appellant/Defendant	)	

BRIEF OF APPELLANT/DEFENDANT CSX TRANSPORTATION, INC.

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES AND RULES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

1. Does the United States Supreme Court's opinion of June 1, 2009 preclude this Court from now reviewing the record of the trial court's proceedings to determine whether, under Tenn. R. App. P. 36(b), the failure to charge the jury on the standard for fear-of-cancer damages is an "error involving a substantial right [that] more probably than not affected the judgment"?

2. Did Hensley waive any argument that the failure to charge the jury on the standard for fear-of-cancer damages is not an "error involving a substantial right [that] more probably than not affected the judgment"?

3. Did the trial court's failure to charge the jury on the standard for fear-of-cancer damages amount to an "error involving a substantial right [that] more probably than not affected the judgment"?

STATEMENT OF THE CASE

On January 10, 2002, Appellee/Plaintiff Thurston Hensley filed this action against Appellant/Defendant CSX Transportation, Inc. ("CSXT") in the Circuit Court of Hamilton County at Chattanooga, seeking recovery under the Federal Employers' Liability Act ("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, this Court 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, the Supreme Court of Tennessee denied CSXT's application for permission to appeal. On June 1, 2009, after requesting and receiving the record, the Supreme Court of the United States granted CSXT's petition for a writ of certiorari, reversed the judgment of this Court, and

remanded the case for further proceedings. *CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139 (2009) (per curiam). On June 11, 2009, this Court issued an order directing the parties to file briefs addressing the first and third issues set forth above.

STATEMENT OF FACTS

A. Proceedings In The Trial Court

In his amended complaint, 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). Hensley 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—and, indeed, before Hensley was diagnosed with toxic encephalopathy. (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—*i.e.*, "physical" and "emotional" 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).

The jury found that CSXT was negligent; that its negligence was a cause, in whole or in part, of his 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. *Id.* It did not specify how much of the award was compensation for Hensley's toxic encephalopathy and how much for his 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. Proceedings On Appeal

1. In its appeal to this Court, CSXT raised several arguments, one of which was that it was entitled to an instruction that the jury could award damages for fear of cancer only if the fear was genuine and serious. Hensley's sole response was that the trial court did not commit error in refusing to give the charge. *See* Brief of Appellee at 61-63, *Hensley v. CSX Transp., Inc.*, 278 S.W.3d 282 (Tenn. Ct. App. Nov. 13, 2007). Although CSXT had argued in its brief that it "was harmed by the trial court's refusal to instruct the jury on the fear of cancer issue," Brief of Appellant at 51, *Hensley* (Tenn. Ct. App. Oct. 12, 2007), Hensley did not take the position in *his* brief that the error (if there was one) was harmless.

In its application for permission to appeal to the Tennessee Supreme Court, CSXT again argued that it was entitled to a "genuine and serious fear of cancer" instruction. Hensley's sole response—again—was that there was no error. *See* Answer in Opposition of Appellee at 8-10, *Hensley v. CSX Transp., Inc.*, No. E2007-00323-SC-R11-CV (Tenn. June 17, 2008). Although CSXT had argued in its application that the instructional error "more likely than not affected the outcome of the trial," Application for Permission to Appeal of Appellant at 24-25, *Hensley* (Tenn. June 2, 2008) (quoting *Bara v. Clarksville Mem'l Health Sys., Inc.*, 104 S.W.3d 1, 3 (Tenn. Ct. App. 2003)), Hensley did not argue harmless error in his answer.

In its petition for certiorari in the U.S. Supreme Court, CSXT again argued that it was entitled to a proper instruction on fear of cancer, and it again argued that the instructional error likely affected the outcome. *See* Petition for Writ of Certiorari, *CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139 (No. 08-1034), 2009 WL 379112 at *27-*29 (Feb. 13, 2009). Once again, Hensley did not respond to the latter argument in his brief in opposition or otherwise take the position that any instructional error was harmless. *See* Brief in Opposition, *Hensley*, 2009 WL 720924 at *13-*21 (Mar. 16, 2009).

2. In holding that the instruction at issue was required, the U.S. Supreme Court disagreed with this Court's 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." *Hensley*, 129 S. Ct. at 2141 (quoting *Hensley*, 278 S.W.3d at 300) (brackets 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 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 this Court's 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.*

ARGUMENT

In its Order of June 11, 2009, this Court directed the parties to address two questions: whether the decision of the U.S. Supreme Court precludes this Court from conducting harmless-error review; and, if it does not, whether the trial court's instructional error requires reversal. If the answer to either question is yes, the case must be remanded for a new trial before a properly instructed jury. As explained below, the answer to *both* questions is yes—as is the answer to a third question not specifically posed by the Court: whether Hensley has waived any argument that the trial court's instructional error was harmless. Because the U.S. Supreme Court has already determined that the instructional error was not harmless, because Hensley has waived any argument that it was, and because, in any event, the error likely affected the judgment, a new trial is required.

I. THE DECISION OF THE U.S. SUPREME COURT PRECLUDES THIS COURT FROM CONDUCTING HARMLESS-ERROR REVIEW

"The customary procedure on remand creates a duty on the part of lower courts, which obtain jurisdiction after receiving the mandate of [a higher] court, to obey the terms of the mandate and to carry it into effect." *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 71 F.3d 1197, 1202 (6th Cir. 1995). The U.S. Supreme Court remanded this case to this Court for "further proceedings not inconsistent with [its] opinion." *Hensley*, 129 S. Ct. at 2142. "Such a pronouncement incorporates the Court's opinion into the mandate." *Fort Gratiot Sanitary Landfill*, 71 F.3d at 1202. After receiving the mandate, a lower court "may consider

those issues not decided expressly or impliedly by the [higher] court." *Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir. 1992); *see also* 18 James Wm. Moore, MOORE'S FEDERAL PRACTICE § 134.23[1][a], at 134-59 n.1.2 (2009) (citing cases). Conversely, a lower court may *not* consider issues expressly or impliedly *decided* by the higher court.

In this case, the Supreme Court decided expressly that the trial court committed error in failing to give the jury a "genuine and serious fear of cancer" instruction. Although it did not expressly use the term "harmless error," there are a number of factors, described below, establishing that it did deem the error prejudicial. And this Court is bound by that determination.

CSXT presented, without rebuttal, the issue of "harm" (*i.e.*, prejudice) to the Supreme Court. The petition for certiorari argued that the trial court's failure to give a proper instruction on fear of cancer likely affected the outcome, *see* Petition for Writ of Certiorari, *Hensley*, 2009 WL 379112 at *27-*29, and Hensley did not dispute the point in his brief in opposition, *see* Brief in Opposition, *Hensley*, 2009 WL 720924 at *13-*21. The Court then requested, received, and reviewed the record. *See* Dkt. in No. 08-1034, 4/17/09 & 5/4/09 Entries; *Hensley*, 129 S. Ct. at 2140-41. Given the briefing and record before the Court and the Court's opinion, it is logical to conclude that the Court decided that the trial court's erroneous failure to instruct on fear of cancer constituted prejudicial error.

The Supreme Court exercises its certiorari authority sparingly. *See The Supreme Court, 2007 Term—The Statistics*, 122 HARV. L. REV. 516, 523 (2008) (noting that Court granted approximately one percent of certiorari petitions in 2007 Term). It ordinarily does not grant review if it believes that its decision ultimately will not change the outcome. The Court's "power is to correct wrong judgments, not to revise opinions. * * * [I]f the same judgment would be rendered by the state court after [the Supreme Court] corrected its views of federal

laws, [the Court's] review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945). It is particularly unlikely that the Supreme Court acted without regard to prejudice in a case, like this one, in which the Court not only granted certiorari but took the "extraordinary action," *Quern v. Jordan*, 440 U.S. 332, 340 n.9 (1979), of reversing the judgment below without any briefing on the merits or oral argument.

Three additional considerations buttress the conclusion that the Supreme Court impliedly decided that the instructional error was not harmless. First, the Court explicitly held that "[i]nstructing the jury on the standard for fear-of-cancer damages would not have been futile," *Hensley*, 129 S. Ct. at 2141, a conclusion that would be difficult to reconcile with a belief that the failure to do so may have been harmless. Second, the Court did not state that the court below should conduct harmless-error review on remand, something that it *did* do in *Norfolk Southern Railway v. Sorrell*, 549 U.S. 158, 172 (2007), another recent FELA case in which it found instructional error. Third, the Court did not "vacate" the judgment below, as it did in *Sorrell*, 549 U.S. at 160, 171, 172, where harmless-error review was explicitly contemplated, but instead "reversed" this Court's judgment outright, *Hensley*, 129 S. Ct. at 2142. Other States' courts have concluded that, when the U.S. Supreme Court has summarily "reversed," rather than "vacated," a judgment and remanded for further proceedings, it has necessarily determined that the error of federal law was not harmless. *See People v. Phillips*, 58 Cal. Rptr. 752, 752-53 (Cal. Ct. App. 1967); *State v. Anderson*, 255 So.2d 348, 348-50 (La. 1971).

For these reasons, the Supreme Court's mandate requires that this Court, "without further ado, remand this matter to the trial court for a new trial." 6/11/09 Order 1.

II. HENSLEY HAS WAIVED ANY ARGUMENT THAT THE TRIAL COURT'S INSTRUCTIONAL ERROR WAS HARMLESS

Even if the U.S. Supreme Court's decision does not preclude this Court from conducting harmless-error review, the Court should decline to reach the issue because Hensley has waived it.

As the Ninth Circuit reiterated just a few weeks ago, when an appellee "fail[s] to address prejudice in his answering brief, declining to advance any argument or identify any evidence to support a harmless error finding," he has "waived the argument." *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009). That is a well-established principle of appellate procedure. *See, e.g., Hargrave v. McKee*, 248 Fed. Appx. 718, 728 (6th Cir. Sept. 27, 2007); *United States v. Johnson*, 467 F.3d 559, 564 (6th Cir. 2006). The justification for the principle is that a party should not be permitted to "'save' claims for strategic purposes, * * * plac[ing] the harmless error defense in an arsenal for safekeeping in the event that [his] substantive * * * arguments fail." *Calvert v. Wilson*, 288 F.3d 823, 836 (6th Cir. 2002) (Cole, J., concurring). Instead, "[b]oth parties must present their cards at the outset; as [a] matter of fundamental fairness and judicial economy, hidden hands should not be encouraged." *Id.*

Hensley not only failed to advance any harmless-error argument in his brief in this Court, *see* Brief of Appellee at 61-63, he failed to do so in his opposition to CSXT's application for permission to appeal in the Tennessee Supreme Court, *see* Answer in Opposition of Appellee at 8-10, and in his opposition to CSXT's petition for certiorari in the U.S. Supreme Court, *see* Brief in Opposition, *Hensley*, 2009 WL 720924 at *13-*21. In all three appellate courts, Hensley argued only that the trial court's failure to give a "genuine and serious fear of cancer" instruction was not error; he has *never* taken the position that, if there was error, it was harmless. If Hensley were permitted to make that argument for the first time now, on his fourth try, he would pay no price for his "hidden hands" strategy. *Calvert*, 288 F.3d at 836 (Cole, J., concurring). To

discourage the practice of "'sav[ing]' claims for strategic purposes," *id.*, this Court should hold that Hensley has waived the right to assert harmless error and remand the case for a new trial.

III. THE TRIAL COURT'S INSTRUCTIONAL ERROR WAS NOT HARMLESS

Even if the U.S. Supreme Court's decision does not preclude this Court from conducting harmless-error review, and even if this Court is willing to overlook Hensley's waiver of any harmless-error argument, the trial court's failure to give a proper instruction on fear of cancer manifestly was not harmless.

Under Tennessee's harmless-error rule, a judgment must be reversed if, "considering the whole record," the error "more probably than not affected the judgment." Tenn. R. App. P. 36(b). The courts of this State have indicated that the following considerations bear on whether an instructional error has "affected the judgment": (a) the likelihood that the error resulted in a verdict based on the jurors' emotions and passions; (b) how central the issue was at trial; (c) whether the erroneous or omitted information was corrected or included elsewhere in the court's charge; and (d) whether the evidence was such that a properly instructed jury would have reached the same result. As explained below, each of these considerations weighs heavily in favor of a conclusion that the error here likely "affected the judgment" and therefore was not harmless.*

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* This Court's June 11, 2009 Order refers to Tennessee's harmless-error standard. In FELA cases, however, there are circumstances in which a state court is obligated to apply federal law, even on an issue that would ordinarily be regarded as procedural, if state and federal law are materially different. In *Blackburn v. CSX Transportation, Inc.*, 2008 WL 2278497 (Tenn. Ct. App. May 30, 2008), the Middle Section of this Court held that "federal law provides the standard to determine whether to grant a new trial in a FELA case tried in state court." *Id.* at *11. The court relied on decisions of the U.S. Supreme Court "reiterat[ing] the preeminence of jury decisions in FELA matters" and "holding that a procedural rule cannot be used to interfere with a substantive right." *Id.* at *11, *7. In a subsequent decision, the Western Section expressed the view that *Blackburn* was "thorough and well-reasoned" and "agree[d] with the Court's conclusion that federal law provides the proper standard for determining whether to grant a new trial in a FELA case." *Jordan v. Burlington N. Santa Fe R.R.*, 2009 WL 112561, at *17 n.12 (Tenn. Ct. App. Jan. 15, 2009). The same reasoning applies to the harmless-error standard. If a FELA verdict infected by an error of federal law would be affirmed under a State's harmless-error standard but reversed under the federal standard (or vice versa), the federal standard should apply because "any interference with a jury determination must be made pursuant to uniform federal laws." *Blackburn*, 2008 WL 2278497, at *11.

A. The Instructional Error Increased The Likelihood That The Verdict Was Based On The Jurors' Emotions And Passions

As this Court observed in its prior decision in this case,

> [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. Because the mere suggestion of a possibility of cancer has the potential to evoke raw emotions, a juror 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.

Hensley, 278 S.W.3d at 300. Agreeing with this Court on that point, the U.S. Supreme Court explained 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 Supreme 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.* In other words, the trial court erred in this case by failing 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. *See, e.g., State v. James*, 81 S.W.3d 751, 764 (Tenn. 2002) (reversal required where error was "likely

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The error in this case clearly was not harmless under Tennessee law, and so this brief analyzes the issue under this State's harmless-error standard. It does appear, however, that there is a difference between that standard and the federal one. Under Tennessee law, an error requires reversal if it "more probably than not affected the judgment." Tenn. R. App. P. 36(b). Under federal law, in contrast, *see* 28 U.S.C. § 2111; Fed. R. Civ. P. 61, there need only be "a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004) (internal quotation marks and brackets omitted). "The reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *Id.* at 83 n.9. The difference between the two standards is unlikely to be outcome-determinative in most cases, however, and we do not believe that it is here. *Cf. id.* at 86 (Scalia, J., concurring in the judgment) ("Such ineffable gradations of probability [are] quite beyond the ability of the judicial mind (or any mind) to grasp * * *."). But if this Court disagrees, it should apply the federal standard.

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").

Given the inherently inflammatory "nature of [fear-of-cancer] claims," *Hensley*, 129 S. Ct. at 2141, and the concomitant risk that, without proper guidance, a jury will overcompensate the plaintiff based on emotions and passions rather than the facts and the law, the failure to instruct on the standard for awarding fear-of-cancer damages almost always requires reversal. A refusal to instruct on the standard ordinarily could be deemed harmless only when the issue played an extremely limited role at trial, the jury was clearly informed of the substance of the "genuine and serious" limitation through some other means, there was little doubt that the jury did not take fear of cancer into account in awarding damages, or the evidence that the plaintiff had a genuine and serious fear was overwhelming. As we now explain, none of those circumstance is remotely present here.

B. Fear Of Cancer Played A Central Role In The Trial

As this Court has previously made clear in holding that an instructional error required reversal, an erroneous charge generally will not be found harmless if the issue on which the jury was misinstructed "went to the heart of the case." *Hughes v. Lumbermens Mut. Cas. Co.*, 2 S.W.3d 218, 225 (Tenn. Ct. App. 1999). That is indisputably true here. As in *Gorman v. Earhart*, 876 S.W.2d 832 (Tenn. 1994), which also found reversible error, the issue was "referred to repeatedly in the presence of the jury, in both argument and in eliciting testimony," and thus "permeated the entire trial." *Id.* at 837; *see also Godbee v. Dimick*, 213 S.W.3d 865, 882 (Tenn. Ct. App. 2006) (instructional error concerning expert testimony in medical malpractice case required reversal because such testimony is "an essential requirement" in most medical-malpractice cases); *Jordan v. Medley*, 711 F.2d 211, 219 (D.C. Cir. 1983) (Scalia, J.)

(reversal was required, in part, because of "the centrality" of "the issue which the error * * * affected").

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).

The record in general, and Hensley's counsel's own words in particular, thus demonstrate beyond any doubt that fear of cancer was one of the things that this case was "about," one of the "basic questions" in the case, and, indeed, one of the "most important questions." Fear of cancer thus "went to the heart of the case," *Hughes*, 2 S.W.3d at 225, and the trial court's erroneous failure to instruct on the issue accordingly cannot be deemed harmless.

C. The Omitted Information Was Not Included Elsewhere In The Charge

An erroneous instruction may be found harmless if the omitted or incorrect information "is explained or corrected in other parts of the charge so that the jury would not be mislead." *Gorman*, 876 S.W.2d at 837. At the same time, courts in this State have held that instructional error requires reversal where the error was *not* "corrected or explained in another portion of the charge" and therefore *did* mislead the jury. *Ladd v. Honda Motor Co.*, 939 S.W.2d 83, 103-04 (Tenn. Ct. App. 1996). For example, in *Denton v. Southern Railway*, 854 S.W.2d 885 (Tenn. Ct. App. 1993), a FELA case, this Court held that an erroneous instruction that permitted the jury to improperly "discount its award" required reversal because it was "misleading on the issue of damages." *Id.* at 888. The error here is reversible for a similar reason: the instruction permitted the jury to improperly *increase* its award and was therefore "misleading on the issue of damages."

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)). Nor did the court convey the *Ayers* requirement to the jury in any other

form. This is therefore not a case in which the instructions that were *given* could be said to have adequately informed the jury of the principle of law in the instructions that were *refused*. On the contrary, by instructing the jury that it could award damages for "*any* pain and suffering" (*id.* (emphasis added)), the trial court 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. "[E]stablishing [an] increased risk is not enough." *Hensley*, 278 S.W.3d at 301.

On the critical issue of fear of cancer, in short, the jury was misguided both by the trial court and by plaintiff's counsel, and the error was not "explained or corrected" elsewhere. *Gorman*, 876 S.W.2d at 837.

D. The Evidence Does Not Permit A Conclusion That A Properly Instructed Jury Would Likely Have Reached The Same Result

A failure to deliver a required instruction may also be found harmless if the evidence is such that the jury likely would have reached the same result had the omitted charge been given. *E.g., Grandstaff v. Hawks*, 36 S.W.3d 482, 495-98 (Tenn. Ct. App. 2000); *see also id.* at 497 n.28 (citing cases). In this case, that means that the instructional error—the failure to charge the jury that it could award damages for fear of cancer only if the fear is genuine and serious—could be found harmless either if (i) it is probable that no portion of the $5 million damages award was

for fear of cancer or (ii) it is probable that at least some of the award was for fear of cancer but the evidence on that issue was so one-sided that a properly instructed jury would necessarily have found that Hensley's fear of cancer was genuine and serious. As explained below, neither of those conditions is remotely satisfied. On the contrary, there is a very substantial probability that the jury awarded damages to compensate Hensley for a fear of cancer that it would not have found to be genuine and serious had it been properly instructed.

1. 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 (T.E. 2802), which was the greatest part of the "proper compensation," according to him, "for brain damage, for lung damage, for the increased risk of cancer" (T.E. 2799). That amount did not include damages for medical expenses and lost earnings. (T.E. 2799-2801). The jury made a total award of $5 million. Because there was no special verdict, it cannot be known for certain what the specific components of the award were or how much was attributable to each component. But it would be unrealistic to believe that none of the award was for fear of cancer. On the contrary, it is highly probable that a significant proportion of it *was* for fear of cancer.

As already explained, *see supra* Point II.B, fear of cancer was a central part of Hensley's case. His counsel emphasized that "deeply emotional issue," with its "potential to evoke raw emotions," *Hensley*, 278 S.W.3d at 300, in his opening statement, in his questioning of witnesses, and in his summation, at the end of which he specifically asked for damages for fear of cancer. He 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, indeed, that it was one of "the most important question[s]." (T.E. 52, 55, 2753-54, 2799).

These facts, by themselves, preclude a conclusion that the jury probably did not award damages for fear of cancer.

Any such conclusion is all the more unwarranted because the jury easily could have discounted the claimed pain and suffering resulting from Hensley's toxic encephalopathy—another possible basis for a large award. The evidence bearing on that issue showed, for example, that Hensley never misrepaired a locomotive due to memory problems or injured himself or a co-worker due to inattention or lack of concentration; that he continued to hold a second job as a successful preacher and delivered sermons on a popular radio program; that he gave intelligent and medically sophisticated testimony; and that he was still driving a car at the time of trial, when he was 67. (T.E. 240-241, 1367, 1377, 1389-90, 1429, 1434-38, 1441-42, 1451-52). Given this evidence, there is every reason to believe that the jury awarded little or nothing for the toxic encephalopathy and made a large award for fear of cancer.

On the issue of harmlessness, this case is indistinguishable from *Whaley v. Perkins*, 2005 WL 1707970 (Tenn. Ct. App. July 21, 2005), *rev'd in part on other grounds*, 197 S.W.3d 665 (Tenn. 2006). In that case, the plaintiffs made a number of claims for damages, including one for emotional distress, and the jury returned a general damages verdict. The Western Section of this Court concluded that the trial court had erroneously permitted the jury to award damages for emotional distress. It also concluded that the error was not harmless, because a component of the award "may well have been for emotional distress" even though the verdict form left the court "with no way to know" for certain. *Id.* at *14. In this case, a component of the damages award not only "may well have been" for fear of cancer, but very likely was.

2. There is also no basis for concluding that a properly instructed jury necessarily would have found that Hensley's fear of cancer was genuine and serious. On the contrary, it is

highly probable that a properly instructed 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 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 the disease. (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. An instructional error is not harmless if "[t]he question of liability was close," *Carney v. Coca-Cola Bottling Works of Tullahoma*, 856 S.W.2d 147, 150 (Tenn. Ct. App. 1993), and, from Hensley's point of view, that is the *most* that can be said about the question of CSXT's liability for fear of cancer.

It is true that, in its prior decision, this Court expressed the view that "[j]uries do not routinely grant multimillion-dollar awards for injuries that the jurors regard as non-genuine or unserious." *Hensley*, 278 S.W.3d at 300. Likewise, in his dissenting opinion, Justice Stevens argued 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." *Hensley*, 129 S. Ct. at 2144 (Stevens, J., dissenting). But those statements were made in support of the proposition that a jury need not be given a "genuine and serious fear" instruction, a proposition

that the Supreme Court rejected. In holding that such an instruction is required, the Court necessarily concluded that, without one, a jury might well award damages for a fear of cancer that is less than genuine and serious. Indeed, the Court made that point explicitly, finding it "particularly important" to give the instruction because the nature of the claim enhances the danger that a jury could award damages based on only a "slight" fear of cancer. *Id.* at 2141.

It is also true that, in its prior decision, this Court held that there was sufficient evidence to support a jury finding that Hensley had a genuine and serious fear of cancer. *Hensley*, 278 S.W.3d at 300-01. But as the Supreme Court made clear in *its* decision, "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." *Hensley*, 129 S. Ct. at 2141. Accordingly, the fact that the evidence was such that a jury "could have found" an element erroneously omitted from the charge, *Hensley*, 278 S.W.3d at 301, does not render the omission harmless. *See, e.g., Ching-Ming Chen v. Advantage Co.*, 713 S.W.2d 79, 81 (Tenn. Ct. App. 1986) (finding reversible error even though the result "might still have" been the same "had there been an adequate charge").

Instead, an instructional error is harmless only if the evidence was such that a properly instructed jury necessarily *would* have found the element. The test is "whether [the] record contains evidence that could rationally lead to a contrary finding with respect to the omitted element," *State v. Ducker*, 27 S.W.3d 889, 899 (Tenn. 2000) (quoting *Neder v. United States*, 527 U.S. 1, 19 (1999))—in this case, a finding that there was *not* a genuine and serious fear of cancer. "If the answer to that question is 'no,' * * * the error [is] harmless * * *." *Id.* (quoting *Neder*, 527 U.S. at 19); *see, e.g., Cardwell v. Golden*, 621 S.W.2d 774, 775 (Tenn. Ct. App. 1981) ("[T]he refusal to charge remote contributory negligence is harmless error because the jury

could not reasonably have found from the evidence [that] the negligence ascribed to the plaintiff was remote."). Because, on this record, a properly instructed jury easily could have found that Hensley did not have a genuine and serious fear of cancer, the answer to the relevant question here is "yes," and the error therefore was not harmless.

CONCLUSION

The judgment of the Circuit Court should be reversed and the case remanded for a new trial before a properly instructed jury.

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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 26th day of June, 2009.