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	)	

REPLY BRIEF OF APPELLANT/DEFENDANT CSX TRANSPORTATION, INC.

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INTRODUCTION

The requirement that a plaintiff prove his alleged fear of cancer to be "genuine and serious" protects defendants from "excessive verdicts based on appeals to jurors' passions with respect to the deeply emotional issue of cancer." *Hensley v. CSX Transp., Inc.*, 278 S.W.3d 282, 300 (Tenn. Ct. App. 2008). Hensley's evidence that *he* harbored a genuine and serious fear of cancer was "notably thin" (*Norfolk & W. Ry. v. Ayers*, 538 U.S. 135, 158 (2003)), consisting mainly of his own testimony that he felt some "concern" and "anxiety" about the possibility of contracting the disease and the fact that he took anxiety medication that had been prescribed before he was diagnosed with asbestosis (T.E. 1245, 1369, 1462, 1464-65). Hensley's counsel nevertheless made fear of cancer a central issue, arguing to the jury that it was one of the things that the case was "about," one of the "basic questions" in the case, and, indeed, one of the "most important questions." (T.E. 52, 55, 2753-54, 2799). He then asked for several million dollars as "compensation for brain damage, for lung damage, [and] for the increased risk of cancer." (T.E. 2799). The trial court refused to give the "particularly important" instruction (*CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139, 2141 (2009) (per curiam)) that Hensley could recover for a fear of cancer only if the fear was genuine and serious. Instead, it charged the jury—erroneously—that Hensley could recover for "*any* pain and suffering" (T.E. 2897 (emphasis added)); the trial court did not even mention fear of cancer. In a general verdict, the jury awarded Hensley $5 million in damages. (T.R. 2233; T.E. 2905-06). The U.S. Supreme Court has since held that the trial court's refusal to instruct on fear of cancer was "clear error." *Hensley*, 129 S. Ct. at 2141.

In light of this record, and in light of the nature of the error, it is unsurprising that Hensley never argued, in any of the three prior appeals, that any instructional error was harmless; instead, on each occasion Hensley argued solely and exclusively that the trial court did not err.

For the same reasons, it is unsurprising that, when it held that the trial court *did* commit clear error in refusing to instruct the jury on fear of cancer, the U.S. Supreme Court gave no indication that the error could be harmless, and in fact gave every indication that the error requires a new trial. Finally, in light of the record and the nature of the error, it is unsurprising that, although Hensley now claims, for the first time, that the clear instructional error was harmless, he offers no remotely persuasive argument in support of that claim.

The judgment of the trial court must therefore be reversed, and the case remanded for a new trial before a properly instructed jury, for three independent reasons: (1) the U.S. Supreme Court has already determined that the instructional error requires reversal; (2) Hensley has waived any claim of harmless error; and (3) the error manifestly was not harmless.

ARGUMENT

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

CSXT's opening brief explains (at 7-9) why the Supreme Court's decision precludes harmless-error review. Hensley makes a number of arguments in response, but none has merit.

Hensley first argues that instructional errors are ordinarily subject to review for harmlessness. HB 23-26.[1] But CSXT does not contend otherwise. CSXT's position is that this Court is precluded from conducting harmless-error review, not because the trial court's instructional error is unsusceptible of such review, but because the U.S. Supreme Court has already decided that the error was not harmless.

Hensley next argues that, had the Supreme Court wished to foreclose harmless-error review, it would have "remand[ed] with clear and unequivocal instructions to order a new trial." HB 17. That argument ignores the mandate rule, which permits a lower court to consider only

[1] CSXT's opening brief is cited as "CB __" and Hensley's brief as "HB __."

those issues "not decided expressly *or impliedly*" by the higher court. *Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir. 1992) (emphasis added); *see* HB 18 (quoting this very language). For this Court to be precluded from conducting harmless-error review, therefore, it is not necessary that the Supreme Court decided "expressly" that the instructional error requires a new trial; it is sufficient that the Court did so "impliedly." And for the reasons set forth in CSXT's opening brief (at 7-9), that is the best interpretation of the Supreme Court's mandate.

Hensley suggests that the Supreme Court could not have made a determination on harmlessness, because (according to him) it did not "review[] the entire record." HB 21; *see also* HB 15. That suggestion is refuted by the Supreme Court's judgment order (mailed to the Clerk of this Court on July 6, 2009), which explicitly states that its decision is based on "consideration" of the petition-stage briefs and "the transcript of the record."

Hensley also relies (HB 15, 19-20) on the statement in Justice Stevens' dissenting opinion that "the question whether the instructional error was * * * harmless remains open to review on remand by the Tennessee Court of Appeals." *Hensley*, 129 S. Ct. at 2144 n.2 (Stevens, J., dissenting). But "[t]he comment[] in the dissenting opinion * * * [is] just that: [a] comment[] in a dissenting opinion." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 177 n.10 (1980). The Court's opinion did not endorse Justice Stevens' dissenting view.

Hensley argues that the result here should be the same as in *Norfolk Southern Railway v. Sorrell*, 549 US. 158 (2007), which permitted harmless-error review on remand. HB 20-21. But *Sorrell* differs from this case in two critical respects. First, unlike in this case, the Court in *Sorrell* explicitly directed the lower court to conduct harmless-error review; second, unlike in this case, the Court in *Sorrell* merely vacated the judgment below, rather than reversing it outright. *See* CB 9.

Hensley seeks to distinguish the state-court decisions holding that, when (as in this case) 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. HB 21-23; *see* CB 9 (citing cases). But the cases are not distinguishable.

Hensley contends that *People v. Phillips*, 58 Cal. Rptr. 752 (Ct. App. 1967), is distinguishable because the U.S. Supreme Court did not "remand for further proceedings" in that case and because *Phillips* "did not involve an instructional error," which "clearly can be reviewed for harmless error." HB 22-23. In fact, however, the mandate in *Phillips did* "remand[] the case to [the California court] 'for further proceedings.'" 58 Cal. Rptr. at 753. And the error at issue—involving "comments on the failure of the defendant[] to testify" (*id.*)—is no less susceptible of harmless-error review than the instructional error here. *See State v. Transou*, 928 S.W.2d 949, 960 (Tenn. Crim. App. 1996).

As for the other case, *State v. Anderson*, 255 So. 2d 348 (La. 1971), Hensley contends that it is distinguishable because it "involved a constitutional error" and because the U.S. Supreme Court reversed and remanded after "reject[ing] [a] harmless error argument." HB 22. But the constitutional error at issue in *Anderson*—one involving the admission of a co-defendant's confession—is clearly subject to harmless-error review. *See King v. State*, 989 S.W.2d 319, 329-30 (Tenn. 1999). And while it is true that the state-court decision that the Supreme Court reversed had found the error to be harmless, that was not the main justification for the state court's conclusion that it was precluded from conducting harmless-error review on remand. The court relied on the broader principle that the Supreme Court "reverses, not merely vacates, when * * * the federal question clearly prevents the affirmance of the appealed

judgment's decision of the federal question presented—that is, where the judgment could not, even on the remand, be reinstated without a new trial." *Anderson*, 255 So. 2d at 349-50.

In short, the Supreme Court's mandate in this case demonstrates that it took the "extraordinary action" of summarily reversing (*Quern v. Jordan*, 440 U.S. 332, 340 n.9 (1979)) "to correct [a] wrong judgment[], not [merely] to revise [an] opinion[]" (*Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)). A new trial is therefore required.

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

As CSXT's opening brief explains (at 10-11), even if the U.S. Supreme Court's decision does not preclude this Court from determining whether the instructional error was harmless, the Court should decline to reach the issue, because Hensley has waived it. Hensley's arguments to the contrary lack merit.

Hensley first argues that he "cannot have waived his right to argue harmless error," because CSXT "has the burden of demonstrating that it suffered prejudice as a result of the instructional error." HB 28. As the U.S. Supreme Court has made clear, however, "burden of proof" has little meaning in this context, because harmlessness *vel non* is a legal conclusion to be made by a court after reviewing the appellate record, not a fact that a party proves by presenting evidence to the factfinder. *See O'Neal v. McAninch*, 513 U.S. 432, 436-37 (1995); *see also Shinseki v. Sanders*, 129 S. Ct. 1696, 1704-05 (2009) ("We have * * * warned against courts' determining whether an error is harmless through the use of mandatory presumptions * * *."). The concept of "burden" is relevant, if at all, only when the record is so evenly balanced that the reviewing court harbors substantial uncertainty about whether an error was harmless (in which case the party with the "burden" loses). *See O'Neal*, 513 U.S. at 436-37.

In any event, Hensley's conclusion does not follow from his premise. That the appellant may bear the ultimate burden of demonstrating that a particular error likely affected the outcome of the case does not relieve the appellee of the initial burden of raising the claim that the error was harmless. There are many contexts in which one party bears the burden of raising a claim and the other party bears the burden of disproving it. *See, e.g., Everson v. Leis*, 556 F.3d 484, 494 (6th Cir. 2009) (qualified immunity in civil-rights actions); Tenn. Code Ann. § 39-11-201(a)(3) (defenses in criminal cases). This is one of them. As Hensley acknowledges (HB 29-30), federal courts have sometimes said that the appellant bears the burden of demonstrating prejudice (at least in civil cases), and yet they routinely have found that an appellee can waive a claim of harmless error. *See* CB 10 (citing cases).

Hensley next argues that there was no waiver, because he did raise a claim of harmless error at the earlier stages of the case. HB 30-32. But Hensley's briefs do not bear that argument out. In his initial brief in this Court, Hensley argued that CSXT "fails to direct the Court to any case, or authority which says the jury must specifically be instructed that the plaintiff's fear of cancer has to be serious and genuine" and that the trial court's instruction on pain and suffering "was an accurate and correct statement of the law." Brief of Appellee at 61-62, *Hensley v. CSX Transp., Inc.*, 278 S.W.3d 282 (Tenn. Ct. App. Nov. 13, 2007). Hensley made the same argument in both the Tennessee Supreme Court and the U.S. Supreme Court. Answer in Opposition of Appellee at 8-9, *Hensley v. CSX Transp., Inc.*, No. E2007-00323-SC-R11-CV (Tenn. June 17, 2008); Brief in Opposition, *CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139 (No. 08-1034), 2009 WL 720924, at *16 (Mar. 16, 2009). His argument in all three courts went to whether the trial court committed error, not to whether any error was harmless. This interpretation is confirmed by the fact that Hensley *did* make a harmless-error argument, in the

alternative, in responding to a *different* claim of instructional error in his initial brief in this Court; indeed, he devoted an entire section to the argument. *See* Brief of Appellee at 50 ("IV. Any Error In The Trial Court's Instruction Was Harmless * * *."); *id.* at 52-53 ("if it was an error for the Trial Court not to use the language 'even the slightest' in describing the negligence applicable to Hensley's negligence, it was harmless and therefore not reversible").

Hensley contends that he had no obligation to raise a harmless-error claim in opposing requests for discretionary review in the Supreme Courts of Tennessee and the United States. HB 30-31. But that is not correct. Under the Rules of the Supreme Court of the United States, "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition." U.S. Sup. Ct. R. 15.2. That surely covers an argument that the error asserted in the petition for certiorari was harmless. And while there does not appear to be a similar rule in Tennessee, this State's Rules of Appellate Procedure do provide that an answer in opposition to an application for permission to appeal "shall set forth the reasons why the application should not be granted." Tenn. R. App. P. 11(d). That would likewise include any argument that the error of which the applicant complains is harmless. Even if Hensley was not obligated to raise a harmless-error claim in responding to CSXT's requests for discretionary review, however, there is no justification for his failure to raise such a claim in *this* Court, on CSXT's appeal as of right.

Hensley's final argument is that this Court should excuse any waiver, because Tenn. R. App. P. 13(b) affords the Court discretion in certain circumstances to decide issues that were "not presented for review." HB 32-33. That discretion, however, is intended to be "sparingly exercised" (Tenn. R. App. P. 13 advisory commission comment), and this is not one of the "rare"

and "exceptional" cases in which its exercise would be appropriate (*Waller v. State*, 2006 WL 2956515, at *8 (Tenn. Ct. App. Oct. 16, 2006); *Zahreddine v. Choi*, 2001 WL 55772, at *3 (Tenn. Ct. App. Jan. 24, 2001)).

As CSXT has already explained (CB 10-11), 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, the parties should be required to "present their cards at the outset; as [a] matter of fundamental fairness and judicial economy, hidden hands should not be encouraged." *Id.* If, on Hensley's initial appeal, this Court had held that the trial court erred in failing to give an appropriate instruction on fear of cancer, and if Hensley had then filed a petition for rehearing arguing, for the first time, that the error was harmless, this Court surely would have found that the new argument was waived. *See, e.g., Tallent v. Cates*, 45 S.W.3d 556, 565 (Tenn. Ct. App. 2000) ("declin[ing] to consider" issues "raised * * * for the first time in [a] Petition for Rehearing"). The result should be no different merely because it was the U.S. Supreme Court, rather than this Court, that held that the trial court erred. Hensley should be held to his waiver, and the case should be remanded for a new trial.

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

As CSXT's opening brief explains (at 11-21), 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, the trial court's failure to give a proper instruction on fear of cancer manifestly was not harmless. CSXT's opening brief identifies a number of considerations that bear on whether an instructional error is harmless (CB 11) and then explains why each consideration weighs heavily in favor of a conclusion that the error here was *not*

harmless (CB 12-21). Hensley does not dispute that the factors CSXT identifies are the ones that courts consider in deciding whether an instructional error is harmless, but he does deny that they support a finding of reversible error here. As explained below, Hensley's arguments do not come close to establishing harmlessness.[2]

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

Reversal is required, first and foremost, because of the nature of the error: 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. *Hensley*, 129 S. Ct. at 2141; *Hensley*, 278 S.W.3d at 300; *see* CB 12-13. The failure to give a proper instruction on fear of cancer is thus virtually *inherently* prejudicial, and could be deemed harmless only in rare cases. *See* CB 13; *see also Sanders*, 129 S. Ct. at 1707 (courts may find that certain "kinds of errors are likely * * * to prove harmful"). Remarkably, in a 47-page brief devoted entirely to the issue of harmlessness, Hensley offers no direct response to this point.

Hensley does note, in passing, that the trial court instructed the jury that it "must not be influenced by any personal likes or dislikes, prejudice, or sympathy." HB 38 (quoting T.E.

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[2] Hensley correctly recognizes that, if the Tennessee harmless-error standard differs from the federal standard, "then federal law should apply." HB 34. But he mistakenly argues that, in "determining whether an error affected the outcome of a trial," Tennessee's "more probably than not" standard is "the same" as the federal "reasonable probability" standard. HB 37. The U.S. Supreme Court has explicitly stated that "[t]he reasonable-probability standard is *not* the same as * * * a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004) (emphasis added); *see Teter Republic Parking Sys., Inc.*, 181 S.W.3d 330, 341 (Tenn. 2005) ("preponderance of the evidence" and "more probable than not" are equivalent). Because the error here clearly was not harmless under Tennessee law, there is no need for this Court to decide whether it was harmless under federal law. If the Court concludes that the error *was* harmless under Tennessee law, however, it must then decide whether the error was harmless under federal law. In that event, the Court should hold that the error was not harmless, because, even if the error did not "more probably than not" affect the judgment, there is surely a "reasonable probability" that it did.

2882). But surely that general instruction, some version of which is given in every case tried in an American court, cannot remove the profoundly prejudicial effect of the failure to instruct on fear of cancer. Otherwise, telling the jury that its verdict may not be based on prejudice or sympathy would render harmless even errors of an "exceptionally prejudicial character." *Stockman v. Oakcrest Dental Ctr.*, 480 F.3d 791, 804 (6th Cir. 2007). That is obviously not the law.

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

The trial court's failure to give a "genuine and serious fear" instruction also requires reversal because the issue of fear of cancer "went to the heart of the case." *Hughes v. Lumbermens Mut. Cas. Co.*, 2 S.W.3d 218, 225 (Tenn. Ct. App. 1999); *see* CB 13-15. Hensley denies that that is so, arguing that (i) CSXT "ignored [the issue] during the trial" and (ii) "the opening and closing statements of Hensley's counsel * * * dealt with *all* issues in the case." HB 39, 40 (emphasis added). These arguments are meritless.

As to the first, what is relevant for purposes of the harmless-error inquiry is that fear of cancer was a central issue in the case; it is not relevant which party made it a central issue. It is enough to defeat a claim of harmlessness that, as in this case, the issue was "referred to repeatedly in the presence of the jury, in both argument and in eliciting testimony," and that the issue therefore "permeated the entire trial." *Gorman v. Earhart*, 876 S.W.2d 832, 837 (Tenn. 1994). In any event, it is hardly surprising that it was Hensley—the plaintiff—that injected the issue into the case and gave it such prominence. After all, it was he who brought the lawsuit; he who made the decision to seek damages for fear of cancer; and he who wanted to maximize the amount of damages awarded.

As to Hensley's second argument, while it may be true that his counsel "dealt with all issues in the case," it is just as true that fear of cancer was one of the few issues on which he

placed particular emphasis. According to Hensley's counsel, fear of cancer was not merely *an* issue in the case; it was one of the things that the case was "about," one of the "basic questions" in the case," and, in fact, one of the "most important questions." (T.E. 52, 55, 2753-54, 2799). Indeed, in his arguments on damages, Hensley's counsel emphasized fear of cancer every bit as much as he emphasized Hensley's *physical* injuries (toxic encephalopathy and asbestosis). *See, e.g.,* T.E. 55 (opening) ("[W]hat 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. 2799 (summation) ("[What is] [t]he proper compensation for brain damage, for lung damage, for the increased risk of cancer[?]"). In light of these statements to the jury, which were obviously designed to increase the size of the award, Hensley cannot plausibly maintain that fear of cancer did not play a central role in the case.

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

The trial court's failure to give an appropriate fear-of-cancer instruction also requires reversal because the error was not "corrected in other parts of the charge" (*Gorman*, 876 S.W.2d at 837)—and, indeed, was exacerbated by repeated misstatements of the legal standard in Hensley's counsel's summation (T.E. 2782-83, 2799); *see* CB 15-16. Hensley nevertheless argues that "the entire jury charge * * * adequately instructed the jury as to the law of the case." HB 37. But the Supreme Court necessarily rejected that argument in holding that the trial court was required to give a specific instruction on fear of cancer. In any event, Hensley does not point to any portion of the charge that conveyed the substance of the information erroneously omitted by the trial court. Instead, Hensley makes the extraordinary assertion that the court corrected the error through its *general* instructions—in particular, that the jury must decide the case "only on the evidence before it"; that counsel's summations "are not evidence"; that Hensley must prove his claims "by a preponderance of the evidence"; that the jury's decision

may not be based upon "speculation or conjecture"; that any damages must reflect "a reasonable sum to compensate [Hensley]"; and that the jury must not be influenced by "personal likes or dislikes, prejudice, or sympathy." HB 38.

This argument is wildly off the mark. The general instructions to which Hensley refers are given in every civil case; they have nothing to do with—and thus are no substitute for—the specific legal requirement on which the trial court was required to instruct the jury under the U.S. Supreme Court's decision in this case. Even assuming that there is some overlap between these general instructions and the Supreme Court's "rationale" for requiring a fear-of-cancer instruction, as Hensley maintains (at 37, 38), it is not the "rationale" for the instruction about which the jury must be informed. Instead, as the Supreme Court squarely held, 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). The trial court did not convey that information to the jury in any way, shape, or form; indeed, the court did not even mention that Hensley was seeking recovery for fear of cancer.

This is therefore not remotely a case in which the trial court committed instructional error but the charge "as a whole leaves no doubt as to the law to be applied by the jury." *In re Estate of Elam*, 738 S.W.2d 169, 175 (Tenn. 1987). The jury simply had no idea that it could award damages for fear of cancer only if the fear was genuine and serious. Hensley thus could not be more wrong when he says that "[n]othing in the trial court's charge misled the jury" and that no "confusion [was] created by the omission of the requested charge." HB 39. The error clearly misled the jury, and accordingly necessitates a new trial. *See, e.g., Ladd v. Honda Motor Co.*, 939 S.W.2d 83, 103-04 (Tenn. Ct. App. 1996); *Denton v. S. Ry.*, 854 S.W.2d 885, 888 (Tenn. Ct. App. 1993).

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

Hensley also argues that the instructional error was harmless because (i) the jury probably did not "award[] any damages for fear-of-cancer" and (ii) even if it did, the award probably "encompass[ed] damages" for a fear that the jury necessarily would have "found to be genuine and serious." HB 41. Both arguments are mistaken.

1. After emphasizing the "deeply emotional issue" of fear of cancer (*Hensley*, 278 S.W.3d at 300) in his opening statement, his questioning of witnesses, and his summation, Hensley's counsel asked the jury for compensation "for brain damage, for lung damage, [and] for the increased risk of cancer" (T.E. 2799). Under these circumstances, Hensley's assertion that the jury probably did not include any compensation for fear of cancer in its $5 million award is not credible. *See* CB 17-18. On the contrary, the most reasonable conclusion is that the jury compensated Hensley for the injuries for which he *asked* to be compensated.

Unable to explain why the jury would have ignored his repeated exhortations to award damages for fear of cancer, Hensley faults CSXT for not seeking "verdict control device[s]" *other* than a jury instruction—in particular, a "special interrogatory or verdict to separate any fear-of-cancer damages" and a "request for remittitur." HB 41. This is a *non sequitur*. CSXT's decision not to seek other verdict-control devices has no bearing on whether the trial court's erroneous refusal to employ the device *at issue here* likely "affected the judgment." Tenn. R. App. P. 36(b). Indeed, Hensley's argument has nothing to do with harmless error at all, and thus falls outside the scope of the issues on which this Court directed briefing in its June 11, 2009 Order. Hensley made the same argument, moreover, in opposing certiorari (Brief in Opposition, 2009 WL 720924, at *20-*21), and the Supreme Court necessarily rejected it in holding that

CSXT had the right to an appropriate charge on fear of cancer. In any event, the verdict-control devices 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.

Appellate review for excessiveness of the verdict is no substitute for a jury charge either. Had the trial court given a proper instruction, 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. *See* CB 18-21. An after-the-fact excessiveness challenge could not have remedied the failure to instruct, because, in addressing such a challenge, this Court 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)).

In the end, 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), where the plaintiffs made a number of claims for damages, including one for emotional distress; the jury returned a general verdict; the Western Section of this Court concluded that the trial court had erroneously permitted the jury to award damages for emotional distress; and the court then held that the error was not harmless, because a component of the award "may well have been" for emotional distress even though there was "no way to know" for sure. *Id.* at *14; *see* CB 18. Hensley argues that *Whaley* is "clearly distinguishable," because "[t]here is no question that emotional distress damages were proper and recoverable in the present action." HB 43. That misses the point by a wide margin. The point is that an error in instructing a jury that it may award a particular type of damages—there, for emotional distress; here, for fear of cancer—is not harmless when the jury returns a general verdict, because in that circumstance it cannot be known whether the award included the forbidden damages. If anything, this is an even stronger case for reversal, because a component of the award here not only "may well have been" for fear of cancer, but very likely was.

2. Because there is every reason to believe that at least some portion of the damages was for fear of cancer, the trial court's instructional error could be deemed harmless only if the evidence was such that a properly instructed jury necessarily would have found that Hensley's fear of cancer was genuine and serious. *See* CB 20-21. Hensley does not deny that that is the applicable standard; he argues, instead, that the standard is satisfied. The "facts" and the "evidence," according to Hensley, were such that his "fears were genuine and serious," and "the jury could not reach any other conclusion." HB 41. That assertion cannot withstand scrutiny.

Hensley relies on this Court's conclusion, in its prior decision, that "the evidence * * * supported the verdict." HB 42. As CSXT has already explained (CB 20-21), however, that conclusion provides no support for Hensley's position on harmless error. In its prior decision, the Court answered the very different question whether there was sufficient evidence to support a finding that Hensley had a genuine and serious fear of cancer. The Court held that there was, because the evidence was such that a reasonable jury "could have found that a genuine and serious fear of cancer existed." *Hensley*, 278 S.W.3d at 301. But as the Supreme Court has made clear, "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 (emphasis added). It is only when the evidence is so one-sided that a reasonable jury would *necessarily* find that the plaintiff's fear of cancer was genuine and serious that a failure to give the required instruction can be deemed harmless. That cannot possibly be said of Hensley's evidence, which was not appreciably stronger than the "notably thin" evidence of fear of cancer in *Ayers*. 538 U.S. at 158; *see* CB 19.

Hensley also 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 to be 'genuine and serious.'" HB 44. He relies on this Court's statement in its prior decision that "[j]uries 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 dissent 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." HB 43 (quoting *Hensley*, 278 S.W.3d at 300, and *Hensley*, 129 S. Ct. at 2144 (Stevens, J., dissenting)). As CSXT has already explained (CB 19-20), however, those statements cannot

support a finding of harmless error, because they were made in support of a proposition that the Supreme Court *rejected*—namely, that a jury need not be given 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.

E. CSXT's Proposed Instructions Correctly Stated The Law

Hensley also argues that the trial court properly refused to give CSXT's proffered instructions, because they were "incorrect statements of law." HB 45. This argument is flawed on multiple levels.

First, the argument goes to whether there was error in the first place, not to whether the error was harmless. It is therefore beyond the scope of the issues on which this Court ordered briefing.

Second, Hensley raised the same argument in opposing certiorari (Brief in Opposition, 2009 WL 720924, at *16-*19), and the U.S. Supreme Court necessarily rejected it in holding that the trial court erred. It was Justice Ginsburg's *dissent* (*Hensley*, 129 S. Ct. at 2144 (Ginsburg, J., dissenting))—on which Hensley unabashedly relies (HB 45)—that took the position that the proposed instructions misstated the law.

Third, Hensley has never previously challenged the instructions on the ground that they misstated the law. Consistent with his position up until the Supreme Court's decision, the basis for Hensley's objection in the trial court was that the jury should not be instructed on fear of cancer *at all*. (T.E. 2411, 2413-14). Had Hensley raised the claim at trial that he seeks to raise now, CSXT would have been in a position to propose an alternative charge. It would be

profoundly unfair for the Court to accept Hensley's argument that the instructions misstated the law when he never put CSXT on notice that there was anything remotely inaccurate about them. Hensley's challenge to the instructions should therefore be deemed waived.

Fourth, Hensley is wrong on the merits. As explained below, the instructions correctly stated the law.

Hensley complains that the first proposed instruction—No. 30—was erroneous because it "injected the term 'reasonable' into the instruction" and would have informed the jury that it could award damages for fear of cancer if "plaintiff has a reasonable fear of cancer stemming from plaintiff's asbestos disease and * * * the reasonable fear [is] genuine and serious." HB 44; *see* HB App. C1 (text of instruction). But *Ayers* held that "the trial judge *correctly stated the law* when he charged the jury that an asbestosis claimant, upon demonstrating a *reasonable* fear of cancer stemming from his present disease, could recover for that fear as part of asbestosis-related pain and suffering damages," and that "[i]t is incumbent upon such a complainant * * * to prove that his alleged fear is genuine and serious." 538 U.S. at 145, 157 (emphasis added); *see also id.* at 143 (quoting trial court's instruction on "reasonable fear of cancer"); *id.* at 149 ("Physically injured plaintiffs * * * may recover for 'reasonable fears' of a future disease." (quoting Dan B. Dobbs, THE LAW OF TORTS 822 (2000))). Instruction No. 30 was therefore consistent with *Ayers* in every particular; indeed, it closely tracked the opinion's language.

It is difficult to understand how the use of "reasonable" could be impermissible, since Hensley cannot seriously maintain that he is entitled to recover for an *un*reasonable fear of cancer. But even if the word "reasonable" somehow rendered instruction No. 30 misleading, that "does not alone permit the [trial court] to summarily refuse to give *any* instruction" on the legal requirements for recovery. *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1017 (9th Cir.

2007) (emphasis added). When, as in this case, "a proposed instruction is supported by law and not adequately covered by other instructions, the court should give a non-misleading instruction that captures the substance of the proposed instruction." *Id.* (emphasis omitted) (citing *Ragsdell v. S. Pac. Transp.*, 688 F.2d 1281, 1283 (9th Cir. 1982) (per curiam) (involving a failure to give an instruction required by FELA)); *see Hensley*, 129 S. Ct. at 2142 ("The trial court should have given the substance of the requested instructions."). The rule is the same under Tennessee law. *See Butler v. Ballard*, 696 S.W.2d 533, 540 (Tenn. Ct. App. 1985) (rejecting claim that trial court permissibly refused to deliver charge that was not "exactly correct" and noting that "the trial court very simply could have omitted the erroneous sentence from the charge").

Hensley complains that the second proposed instruction—No. 33—was erroneous because it would have charged that, in deciding whether he had a genuine and serious fear of cancer, the jury "must take into account" certain considerations that CSXT supposedly "made up." HB 44-45; *see* HB App. C2 (text of instruction). Far from having been "made up," however, the considerations identified in instruction No. 33—including whether the plaintiff experienced any physical symptoms and whether other witnesses could corroborate his fear—were derived from federal court of appeals decisions cited in the request to charge. HB App. C2-C3; *see also Ayers*, 538 U.S. at 158 n.18 (indicating that "corroborative objective evidence" of fear of cancer would be proof that it was genuine and serious). The instruction, moreover, would not have informed the jury that it "must" take the considerations into account, but only that it "may." HB App. C2. It was surely not an incorrect statement of the law to inform the jury that it "may" take certain judicially recognized considerations into account.

Even if the trial court was not obligated to give instruction No. 33, however, that could not have justified its refusal to give instruction No. 30, a separate charge that was clearly

required by *Ayers*—and thus by the Supreme Court's decision in this case. *Williams v. Philip Morris Inc.*, 176 P.3d 1255 (Or. 2008), on which Hensley relies (HB 45), held that, under Oregon law, the trial court had properly refused to give a single proposed jury charge that was correct in some respects but not in others. There is no such rule under either federal law or Tennessee law, however, and in any event CSXT's instruction No. 30 was correct in *all* respects.[3]

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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[3] We agree with Hensley (*see* HB 46) that the retrial should be limited to damages.

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 24th day of July, 2009.

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