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IN THE SUPREME COURT OF THE UNITED STATES

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NORFOLK SOUTHERN :

RAILWAY COMPANY, :

Petitioner :

v. : No. 05-746

TIMOTHY SORRELL. :

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Washington, D.C.

Tuesday, October 10, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of the Petitioner.

MARY L. PERRY, ESQ., St. Louis, Mo.; on behalf of the Respondent.

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Norfolk Southern Railway versus Sorrell. Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS  
ON BEHALF OF THE PETITIONER

MR. PHILLIPS: Thank you, Mr. Chief Justice, and may it please the Court:

The fundamental question in this case is whether the common law doctrine of equivalence between defendant negligence and plaintiff negligence applies under the FELA. The doctrine of equivalence is, I think, most clearly stated in the Restatement (Second) of Torts, which is reproduced on page 19 of our blue brief in the middle paragraph. And I think it is worth taking a second to read it.

The rules which determine the causal relation between a plaintiff's negligent conduct and the harm resulting to him are the same as those determining the causal relation between the defendant's negligent conduct and resulting harm to others. That is a principle of law that has been in effect long before the Federal Employers Liability Act was enacted. It is obviously a restatement of the law in 1965, and it is an absolutely clear

1 statement of the law as it applies today.

2           There is nothing in the Federal Employers  
3 Liability Act that remotely modifies the doctrine of  
4 equivalence. The two provisions, section 51 talks about  
5 negligence resulting from -- or negligence in whole or in  
6 part. And section 53, which describes the contributory  
7 negligence portion or comparative negligence talks about  
8 negligence attributable to. None of that deviates at all  
9 from any kind of common law doctrines. Negligence  
10 inherently calls for an analysis of proximate causation.

11           JUSTICE SCALIA: Except that the -- what was it,  
12 the Rogers case, which said that the -- well, you debate  
13 whether it said that, but let's assume that it said that  
14 the rule of proximate causality doesn't apply to the  
15 negligence of the defendant.

16           The basis for that holding was that in whole or in  
17 part language which is used for the negligence of the  
18 defendant, but not used for the contributory negligence.  
19 So if you believe that that case was at least decided for  
20 the right reason, it seems to me there's a good argument  
21 that it changed it for the one, but not for the other.

22           MR. PHILLIPS: Well, even if that were true, we  
23 would still, of course, be entitled to -- I mean, it  
24 doesn't change the doctrine of equivalence. It doesn't  
25 say that we're not entitled to the same rule with respect

1 to the -- our clients --

2 JUSTICE SCALIA: But nobody does --

3 MR. PHILLIPS: The plaintiff would be. That  
4 doctrine is unaffected by that holding. Now, I'd like  
5 to take issue with the interpretation of Rogers, if you  
6 want, at this point. But it seems to me the doctrine of  
7 equivalence is fundamentally different from the doctrine  
8 of proximate causation. And therefore, you can change one  
9 without affecting the other one whatsoever.

10 JUSTICE GINSBURG: Mr. Phillips, the fundamental  
11 problem, at least for me, in this case is that there was  
12 no objection at all at trial to the instruction that the  
13 judge gave on negligence. There was an instruction  
14 requested by the defendant on contributory negligence,  
15 which read, "such negligence of plaintiff contributed in  
16 whole or in part to cause his injury." That was the  
17 only instruction objected to, because the refusal to  
18 give that instruction. But you seem to be using that as  
19 a lever to attack the instruction on negligence to which  
20 no objection was made.

21 MR. PHILLIPS: That's not our attack, Justice  
22 Ginsburg. Our objection, which is reproduced in 28A of  
23 the cert -- of the petition's appendix, that says -- and  
24 I think the current MAI instruction has a different  
25 causation standard for comparative fault, meaning that

1 under Missouri's rules, we must prove that such  
2 negligence of plaintiff directly contributed to the cause  
3 -- to cause the injury. And that misstates the law,  
4 because of the doctrine of equivalence.

5 That's our initial argument, is that no matter how  
6 you analyze this, whether you do it from a proximate  
7 cause or a slightest cause standard as the appropriate  
8 way to evaluate our negligence, that same standard has to  
9 be applied in evaluating the plaintiff's negligence.  
10 That's the core doctrine. That's what we sought  
11 certiorari on.

12 The argument with respect to Rogers was not an  
13 argument we put into this case, Justice Ginsburg. It's  
14 an argument that the Respondent put into this case.

15 JUSTICE SOUTER: I take it you would be satisfied  
16 -- not wholly satisfied, but substantially satisfied if  
17 we said, yeah, we accept the doctrine of equivalence, and  
18 we think the instruction on contributory negligence was  
19 correct. Because that would mean in the next case, you  
20 would get a proximate cause instruction on defendant's  
21 negligence.

22 MR. PHILLIPS: We would regard that as certainly  
23 at least half a loaf, maybe more than half a loaf. But  
24 at the end of the day, I think the right answer in this  
25 case is that the Court ought to go ahead and decide

1 whether or not Rogers really did work a sea change in the  
2 law.

3 JUSTICE SOUTER: If we came out the way I just  
4 described --

5 MR. PHILLIPS: You wouldn't have to address that  
6 issue.

7 JUSTICE SOUTER: We wouldn't have to.

8 MR. PHILLIPS: Absolutely don't have to address  
9 that issue. On the other hand, the question is squarely  
10 presented. And --

11 JUSTICE KENNEDY: But I thought you argued the  
12 Rogers standard was a correct standard in the Missouri  
13 court?

14 MR. PHILLIPS: We clearly did that, Justice  
15 Kennedy. And we didn't raise -- we are not here  
16 complaining about Rogers as an argument for why we  
17 shouldn't be liable. That's not our -- we're not  
18 criticizing that.

19 What we're saying is, in response to the  
20 Respondent's argument which seeks to undermine the  
21 doctrine of equivalence based on an overreading, I would  
22 argue, of Rogers, that that interpretation is incorrect.  
23 And if we're right that that interpretation is incorrect,  
24 we would win on the doctrine of equivalence for two  
25 different reasons.

1           The first one that Justice Souter described. And  
2 the second one would be that to the extent that there's  
3 any equivalence, there's no problem here because  
4 proximate cause is required in every case. And we think  
5 that that's an issue that the Court doesn't have to  
6 decide, but certainly could. I'm sorry, Your Honor.

7           JUSTICE GINSBURG: Mr. Phillips, the defendant  
8 requested a charge on contributory negligence that read,  
9 "such negligence of plaintiff contributed in whole or in  
10 part to cause his injuries." You didn't want the direct  
11 relationship, you didn't ask for that. You asked for one  
12 that said, "such negligence of plaintiff contributed in  
13 whole or in part to his injury." Now you are saying that  
14 that was -- what you asked for was an incorrect charge.

15           MR. PHILLIPS: No, what we're saying, Justice  
16 Ginsburg, is that we were entitled to the same -- if they  
17 were going to use slight negligence with respect to our  
18 negligence, then with respect to the plaintiff's  
19 negligence, we were entitled to slight negligence as  
20 well.

21           That's our fundamental argument. That's the issue  
22 we have put on the table. And candidly, I don't think  
23 there's an answer to that that's been offered in this  
24 case, other than a harmless error argument, which I think  
25 is candidly without substance.



1           The issue, then, is whether in evaluating the  
2 doctrine of equivalence, do you want to then entertain  
3 the plaintiff's or the Respondent's counter argument,  
4 which is that somehow Rogers requires this fundamental  
5 change, and indeed overrules the doctrine of equivalence  
6 as it applies to FELA.

7           And I would say, one, Rogers doesn't speak to the  
8 doctrine of equivalence at all. And, two, to the extent  
9 it does speak to it, it was never meant to change the  
10 fundamental rule with respect to proximate causation.

11           JUSTICE SCALIA: Except we've rejected petitions  
12 for certiorari on that issue at least a couple of times.  
13 Eleven circuits are in agreement as to what Rogers  
14 required. You --

15           MR. PHILLIPS: Well, at least one circuit clearly.

16           JUSTICE SCALIA: Do you really expect to get five  
17 votes for the railroad on this, what would be a massive  
18 change of what is assumed to be the law for, what, 50  
19 years?

20           MR. PHILLIPS: Well, I think the -- well, the  
21 answer is yes, of course, I expect to get five votes for  
22 that.

23           JUSTICE SCALIA: But you were wise enough not to  
24 ask for that.

25           (Laughter)

1           MR. PHILLIPS: But you know, the basic -- the  
2 point here is that if you look at the decisions that have  
3 analyzed this Court's opinion in Rogers, I don't think  
4 any of them has analyzed it with much care. And the  
5 reality is the Third Circuit has analyzed this case with  
6 care, and reached the opposite conclusion.

7           We think there is a split in the circuits. And at  
8 some point, if not through this vehicle to address that  
9 issue, then through another vehicle to address that  
10 issue. But, yes, it seems reasonably clear that, first  
11 of all, there were at least 20 decisions of this Court  
12 dealing not only with the sufficiency evidence, but also  
13 with the adequacy of the jury instructions prior to  
14 Rogers that refer specifically to proximate causation.

15           There is nothing in the statute that remotely  
16 meant to change that. There is nothing that's been  
17 identified in that context. It is at least clear to me,  
18 and I hope clear to five of you --

19           JUSTICE SCALIA: Rogers said, in whole or in part.  
20 Now, I agree with you, that I don't see how that does it.  
21 But Rogers said that it did it.

22           MR. PHILLIPS: But what Rogers saying in whole or  
23 in part eliminated was the specific proximate causation  
24 standard existing in Missouri. And Missouri's proximate  
25 cause standard talked about sole causation. And this

1 Court said, no, in whole or in part means sole causation  
2 can not be the right standard for proximate cause.

3 The Court was not asked to decide, and I don't  
4 think it did decide, that proximate causation, as it is  
5 traditionally understood, was also thrown out the door,  
6 or more fundamentally, that you can never ask for a jury  
7 instruction that calls for proximate causation to be  
8 given to both parties -- I'm sorry.

9 CHIEF JUSTICE ROBERTS: Mr. Phillips, I may be  
10 lost a bit here. But I mean, which -- I'm looking at the  
11 instructions that were given. And it seems to me it is  
12 hard to take issue with the instruction on the railroad's  
13 part because it tracks the statutory language. The  
14 statute says in whole or in part, and the instruction  
15 says in whole or in part.

16 So if you're pushing the doctrine of equivalence,  
17 your objection seems to be to the directly contributed  
18 language with respect to the employee, the plaintiff.  
19 Now, but doesn't directly contributed, isn't that a  
20 typical proximate cause instruction?

21 MR. PHILLIPS: Yes, that is a typical proximate  
22 cause instruction, and that meant that our burden was  
23 heavier than the plaintiff's burden, which is why we're  
24 saying that under the doctrine of equivalence, we're  
25 entitled to the equivalent instructions. Whatever they

1 are. If it is slight cause or proximate cause.

2 CHIEF JUSTICE ROBERTS: Right. But on the other  
3 hand, you're also arguing in favor of proximate cause. You  
4 are saying Rogers didn't change proximate cause.

5 MR. PHILLIPS: Right. But we are only doing that  
6 in response to the Respondent's argument. I'm not -- we  
7 didn't bring to this Court an affirmative argument that  
8 said we are entitled to no liability because of proximate  
9 cause. That's not the argument we made. The argument --

10 JUSTICE KENNEDY: How is the blue brief in  
11 response to Respondent's argument?

12 MR. PHILLIPS: Because if you look at the  
13 opposition to the cert petition, which took us to task  
14 for not discussing Rogers in our petition, it says on  
15 page 6, "inexplicably, petitioner does not cite, let  
16 alone discuss Rogers, an omission that enfeebles its  
17 entire discussion of FELA's causation standards."

18 Against that kind of an attack, we felt it  
19 incumbent on us to deal with Rogers.

20 JUSTICE BREYER: As we're supposed to decide the  
21 case, in your view, there was instruction 13.  
22 Instruction 13 used the word direct.

23 MR. PHILLIPS: Yes.

24 JUSTICE BREYER: You object to 13. You said it  
25 should use the word in whole or in part.

1 MR. PHILLIPS: Yes.

2 JUSTICE BREYER: You then argued to the lower  
3 courts, 13 should use the word in whole or in part. And  
4 then you say you've argued that here. So what you're  
5 saying is now we're supposed to decide, should  
6 instruction 13 use the word in whole or in part. That's  
7 what it is.

8 I have to admit, I didn't quite get that out of  
9 the blue brief. I thought you were arguing something  
10 else about railroad negligence. But you're not now, you  
11 say, arguing about railroad negligence. You're arguing  
12 about plaintiff negligence.

13 MR. PHILLIPS: Right, we're arguing both.

14 JUSTICE BREYER: All right. So if I reread the  
15 blue brief, what I'll discover on closer examination,  
16 that your real objection, not responding to the other  
17 side, has simply been about the standard to use in  
18 respect to plaintiff's contributory negligence. And what  
19 you want this Court to say is, you're right about that,  
20 we want the more relaxed standard used for contributory  
21 negligence. End of case.

22 MR. PHILLIPS: Right.

23 JUSTICE BREYER: Yes?

24 MR. PHILLIPS: Yes.

25 JUSTICE BREYER: It says that in the blue brief?

1           MR. PHILLIPS: Yes, it does say that in the blue  
2 brief. Because what we say is that the doctrine  
3 of equivalence is the principle that should apply. And  
4 you know, it is not specifically before the Court whether  
5 that means slight cause or proximate cause.

6           JUSTICE BREYER: I would say it sure is before the  
7 Court, because what we are considering before the Court  
8 is your objection to instruction 13. And you said it  
9 should use the words in whole or in part. And I have to  
10 admit, I don't know why it shouldn't. But I'll have to  
11 ask them that.

12           MR. PHILLIPS: That's fair.

13           JUSTICE BREYER: You're going to say yes.  
14 So all this other stuff is quite extraneous about whether  
15 -- the railroad standard of negligence, the railroad  
16 should be in a relaxed standard of negligence, in whole  
17 or in part.

18           MR. PHILLIPS: Well, I don't know that it's --

19           JUSTICE BREYER: Causation.

20           MR. PHILLIPS: I don't know that it's extraneous.  
21 It clearly is not something that the Court needs to  
22 decide. On the other hand, it is something that the  
23 Respondents, to my mind at least, put into the case. And  
24 then we responded, to be sure, somewhat aggressively in  
25 urging the Court to rethink whether Rogers was right --

1 whether Rogers really decided this issue as some courts  
2 of appeals have.

3 JUSTICE GINSBURG: Perhaps my memory is faulty,  
4 but as I recall your opening brief, many pages were  
5 devoted to what instruction should have been given on  
6 railroad negligence. You were dealing not simply with  
7 what seems to be the question presented, that is, was the  
8 instruction on contributory negligence wrong, because it  
9 said -- it didn't use the in whole or in part language.  
10 Instead it said directly caused.

11 So that's the limit of what we can deal with,  
12 whether the in whole or in part should have been in the  
13 contributory negligence. But it was your brief that  
14 spent a lot of time talking about the proper standard for  
15 the railroad's negligence.

16 MR. PHILLIPS: There is no question about that,  
17 Justice Ginsburg. But the point is that we made both  
18 arguments. And they are in some ways intertwined, in  
19 part because so much of the doctrine of equivalence  
20 itself is based on proximate cause as the standard. And  
21 so if you go back and look at all of the common law  
22 analyses here, which are the predicate --

23 JUSTICE GINSBURG: But you didn't object to the  
24 charge that was given on negligence. You didn't object  
25 to the in whole or in part. So that should be out of the

1 case.

2 MR. PHILLIPS: Except to the extent that the  
3 Respondents are asking you to interpret Rogers as a  
4 mechanism for getting at the doctrine of equivalence.  
5 Now, it seems to me you can answer that in one of two  
6 ways.

7 You can say simply, as I said to Justice Scalia,  
8 Rogers doesn't speak to the doctrine of equivalence, and  
9 therefore, you don't have to entertain that, you should  
10 just reaffirm a doctrine that every court except the  
11 courts in Missouri have recognized for a very long time.  
12 Or alternatively, you can say, well, look, they say that  
13 in order to properly analyze the doctrine of equivalence,  
14 you should examine whether or not Rogers worked a sea  
15 change in the law.

16 And we took them up on that argument, and said, we  
17 don't think it did. And that if it didn't work a sea  
18 change in the law, then there is no basis at all for  
19 doubting that you would grant equivalent instructions in  
20 these two cases. And that's the guidance you would give  
21 to the lower courts on remand. Because this case would  
22 have to go back for a new trial.

23 JUSTICE GINSBURG: You're not taking them up on  
24 any argument when you spent half your brief arguing about  
25 what the proper standard was for the railroad's



1 negligence.

2 JUSTICE KENNEDY: And I would add to that that we  
3 don't usually look at a BIO to see the issues that the  
4 Petitioner is presenting.

5 MR. PHILLIPS: And you know, Justice Kennedy, I  
6 understand that. But the reality is we raised the  
7 doctrine of equivalence as our question presented. The  
8 other side raises and uses a substantial amount of its  
9 pages for the issue of the meaning of Rogers. We answer  
10 that in the reply brief. The Court grants certiorari.  
11 We decided under those circumstances that the sensible  
12 way to proceed was to address the Rogers issue.

13 Now, to be sure, I suppose we could have said,  
14 here's -- section one is the doctrine of equivalence.  
15 That's a 10 page brief. Maybe the better way to do it is  
16 just write a 15 page brief, wait for their 47 page brief  
17 on Rogers, and then 20 pages on Rogers.

18 But we anticipated that they were going to do  
19 precisely what they did, which is --

20 CHIEF JUSTICE ROBERTS: So you would have us  
21 announce a decision on the doctrine of equivalence  
22 without saying which way it should be made equivalent?  
23 Raising the railroad's standard or lowering the  
24 employee's?

25 MR. PHILLIPS: Well, because -- courts of appeals

1 have been doing that for years. There have been a lot --  
2 you know, a lot of them assume that there's a lower  
3 standard, and they say that the doctrine of equivalence  
4 requires that if the plaintiff gets to go with slight  
5 cause, then the defendant gets slight cause. So that's a  
6 ruling that's been rendered for years and years.

7 Is that the most sensible way? I don't know. I  
8 think it would make sense for this Court to address the  
9 more fundamental issue of Rogers. Because I think it is  
10 an important issue that needs to be decided. I don't  
11 think the Court needs to decide it. I do think it has  
12 been thoroughly vetted for the Court on both sides, and  
13 it would certainly provide significant guidance to the  
14 lower courts.

15 JUSTICE STEVENS: Mr. Phillips, may I ask you this  
16 question. Assuming you're right on the doctrine of  
17 equivalence and you're wrong on proximate cause, for the  
18 moment. Now, you said earlier in your argument, it is  
19 perfectly clear there was no harmless error here.

20 MR. PHILLIPS: Yes.

21 JUSTICE STEVENS: It seemed to me that a possible  
22 interpretation of the record -- and I'd like you to comment  
23 of the record -- is that the jury either believed the one --  
24 one truck driver or the other. And that the direct causation  
25 thing really didn't have an impact on the calculation of

1 damages.

2           And I was going to ask you to comment on that and  
3 to tell me whether during the argument of the case before  
4 the jury, did the plaintiff's lawyer argue, in effect,  
5 that he had -- the railroad has a much heavier burden of  
6 proving a causation than we do?

7           MR. PHILLIPS: Let me take the first question  
8 first, and then I'll address the second one. There were  
9 three theories that the plaintiff put forward of the  
10 negligence of the railroad. Not just that the one driver  
11 drove the other driver off the side of the road. There  
12 was also a claim that the road wasn't constructed  
13 properly, and there was a claim that he wasn't given  
14 adequate safety instructions.

15           And there's no way, given that this was a general  
16 verdict, to remotely figure out which of those theories  
17 was the one the jury thought was correct, and how that  
18 theory might line up with a causation theory, based on  
19 the plaintiff's own particular view and the defendant's  
20 arguments in this particular case.

21           So it is not as cut and dried as he said, he said,  
22 and that's it. They were more theories in it. And you  
23 know, if you accept the idea that jury instructions  
24 count, and there's clearly a very different burden that's  
25 imposed on one as opposed to the other, then it seems to

1 me the answer is there's no way for the Court to make a  
2 harmless error determination.

3 It is also a question of State law. It ought to  
4 be decided by the Missouri courts in the first instance  
5 in any event, I would think, rather than this Court  
6 trying to sort through the record.

7 With respect to the argument at the close of  
8 the case, I don't remember any specific arguments that  
9 either side made with respect to the burdens, because the  
10 jury instructions were what they were. And I think each  
11 side was saying, you know, we really didn't do anything  
12 wrong. And so that's basically the way that it was  
13 presented.

14 But I think given the way the jury instructions  
15 played out, that there's no way at this time to  
16 unscramble that.

17 JUSTICE BREYER: I think I'm seeing now, I think  
18 the structure of your brief is -- perhaps a gloss put on  
19 it, but saying this: Look, we objected to the  
20 contributory negligence instruction on the ground that it  
21 couldn't be different from the direct instruction -- from  
22 the railroad instruction. And we said they should be the  
23 same and they should both be in whole or in part.

24 MR. PHILLIPS: Correct.

25 JUSTICE BREYER: And we now want you to say that

1 the refusal of the court to do that was wrong, because it  
2 violated the equivalence. But as soon as you do that,  
3 you're going to have to think about what the right  
4 standard should be for a new trial.

5 MR. PHILLIPS: Right.

6 JUSTICE BREYER: And if you stop there, probably,  
7 they will put the in whole or in part, but that's not the  
8 right standard.

9 MR. PHILLIPS: Correct.

10 JUSTICE BREYER: And if you really think about it,  
11 you will see that the one we didn't ask for, but the one  
12 that the court gave, is the right standard and should  
13 have been given in the other case, too. Now, we wouldn't  
14 have to say that.

15 MR. PHILLIPS: Right.

16 JUSTICE BREYER: But you're saying unless you say  
17 that, you're not going to give proper instruction to what  
18 happens in the future. Now --

19 MR. PHILLIPS: You know, that's --

20 JUSTICE BREYER: Now let's think back for a minute  
21 on the merits.

22 MR. PHILLIPS: I'm sorry?

23 JUSTICE BREYER: How could it be wrong? How could  
24 it be wrong to have instructed the jury with the in whole  
25 or in part language for the railroad, since that's the

1 language of the statute itself?

2 MR. PHILLIPS: Well, I think if we were entitled  
3 to go back to the trial court, and if the issue was  
4 what's the proper instruction, we would have asked for  
5 and we should have properly received a proximate cause  
6 instruction. And that's what -- that's the question that  
7 will be at issue on the remand.

8 JUSTICE BREYER: What possible -- you have two  
9 sides. One, you write a proximate cause instruction in  
10 whatever language you like.

11 MR. PHILLIPS: Right.

12 JUSTICE BREYER: The other side submits a proposed  
13 instruction with in whole or in part. I'm a trial  
14 judge. I've never heard of this case, kind of case  
15 before. I just was appointed. I read the statute. And  
16 I say, well, here, theirs says what the statute says, and  
17 yours doesn't. I'll play it safe. I'll go with the  
18 statute. All right? Now, how could that be an error?

19 MR. PHILLIPS: Well, it is not a correct statement  
20 of the law.

21 JUSTICE BREYER: All right.

22 MR. PHILLIPS: Is the answer.

23 JUSTICE BREYER: In other words, what the statute  
24 said it is not a correct statement of the law?

25 MR. PHILLIPS: Well, because it doesn't adequately

1 explain to the jury what decisionmaking it has to go  
2 through in order to evaluate this case. I mean, it is  
3 true, it is not an incorrect statement in the sense that  
4 there's nothing wrong with it. But it is not an adequate  
5 statement because it doesn't deal, it is not sufficient,  
6 it doesn't deal with the proximate cause issue. I mean,  
7 it seems to me --

8 JUSTICE SOUTER: Mr. Phillips, may I interrupt on  
9 exactly the point that I think you're addressing with  
10 Justice Breyer? As I understand your argument, you're  
11 saying one view of Rogers is that the in whole or in part  
12 language eliminates the proximate cause instruction. We  
13 all agree that that is one view of Rogers.

14 MR. PHILLIPS: Right.

15 JUSTICE SOUTER: But it also does something else.  
16 And I don't think we disagree about that either. It  
17 specifically instructs the jury that multiple causation  
18 may be present. And if it is, if the defendant is at  
19 least one, the source of one of those causes under Rogers  
20 even slightly --

21 MR. PHILLIPS: Right.

22 JUSTICE SOUTER: -- that that will suffice. The  
23 problem I have with -- in a way with your response to  
24 Justice Breyer, and the problem that I have with the  
25 instruction that your side requested on contributory

1 negligence is this: It seems to me that the in whole or  
2 in part language would be wrong on contributory  
3 negligence, or at least it would be very misleading, for  
4 the simple reason that you never get to contributory  
5 negligence unless you found the defendant was negligent  
6 in the first place.

7 MR. PHILLIPS: Right.

8 JUSTICE SOUTER: And therefore, if the plaintiff  
9 is also negligent, it will necessarily be in part. It  
10 couldn't be wholly or in part. If it were wholly  
11 negligent, you would never have found the defendant was  
12 negligent in the first place.

13 MR. PHILLIPS: I --

14 JUSTICE SOUTER: So that to the extent the  
15 instruction addresses multiple causation, it would be  
16 misleading to the jury, and it would assume a possibility  
17 that couldn't happen. Therefore, if you are not going to  
18 mislead the jury on multiple causation when you instruct  
19 on contributory negligence, you've got to have some other  
20 way of addressing the proximate cause language. Is that  
21 analysis right or wrong?

22 MR. PHILLIPS: Well, I think it is wrong on two  
23 levels. One is, I don't know why you would need to have  
24 proximate cause as your fallback, the last comment you  
25 just made, because it seems to me if you're saying slight



1 cause, which is what Missouri thinks the in whole or in  
2 part means, then you can just say slight cause when  
3 you're describing the contributory negligence.

4 JUSTICE SOUTER: Okay. But the instruction that your  
5 side asked for, as I understand it, was not a slight  
6 cause instruction, it was an in whole or in part  
7 instruction.

8 MR. PHILLIPS: What we asked for was an  
9 equivalence.

10 JUSTICE SOUTER: Okay, and that -- all right. But  
11 if you're asking for the in whole or in part instruction  
12 on contributory negligence, it seems to me the judge has  
13 got to have been correct in saying no to that, because to  
14 the extent that it addresses multiple causation, it would  
15 be addressing a problem that couldn't even occur in  
16 contributory negligence which will always be in part.

17 MR. PHILLIPS: That was not the basis on which the  
18 judge rejected it. He didn't reject it on the basis --

19 JUSTICE SOUTER: Well, maybe that was not the  
20 basis on which he rejected it, but if -- we've got to  
21 consider it in deciding whether to reverse it.

22 MR. PHILLIPS: Well, the point here that remains  
23 is we said we are entitled to an equivalent instruction.  
24 Now, if there's some variant of that, we could certainly  
25 argue about that.

1 JUSTICE SOUTER: But that's not what he said. He  
2 said equivalence instruction was not on multiple  
3 causation. It was the equivalence instruction on either  
4 proximate cause or not proximate cause. It was the  
5 causation issue, it was the proximate causation issue,  
6 not the multiple causation issue that concerned you,  
7 right?

8 MR. PHILLIPS: Well, that is the specific issue in  
9 this case.

10 JUSTICE SOUTER: They don't have to have  
11 proximate, we don't have to have proximate.

12 MR. PHILLIPS: Right. That's our argument.

13 JUSTICE SOUTER: Okay. But because the  
14 instruction addresses both, in one view, proximate cause  
15 and multiple cause, it would have been misleading so far  
16 as the multiple cause issue was concerned, and a request  
17 for an instruction in whole or in part on contributory  
18 negligence really should have been denied. Is that  
19 correct?

20 MR. PHILLIPS: Well -- I think -- I think the  
21 argument would be that that cuts it too fine, candidly.  
22 I think you can make an argument that what, you know,  
23 what we were entitled to was some variant. And that --  
24 our objection here is not --

25 JUSTICE SOUTER: You were entitled -- your

1 argument is you were entitled to an equivalent  
2 instruction on the issue of the need to prove --

3 MR. PHILLIPS: The slightest cause.

4 JUSTICE SOUTER: -- proximate cause or no need to  
5 prove proximate cause.

6 MR. PHILLIPS: Right.

7 JUSTICE SOUTER: That's your basic argument.

8 MR. PHILLIPS: That's our basic argument.

9 JUSTICE SOUTER: Okay.

10 MR. PHILLIPS: And we didn't get that.

11 JUSTICE SOUTER: And I don't think you could have  
12 gotten where you want to go with the instruction that  
13 your side requested, which was an in whole or in part  
14 instruction. That's my only point.

15 MR. PHILLIPS: Well, it may be that the in whole  
16 part of this may have been slightly misleading, although  
17 I think you can make an argument that you can end up with  
18 in whole on both sides as a conceptual matter. But  
19 that's not the -- that wasn't the complaint at trial. It  
20 wasn't the basis for the trial judge's decision, wasn't  
21 the basis for the court of appeals decision.

22 If the Court wants to send it back and say, is  
23 there another objection to this instruction, that's fine.  
24 But it seems to me, this Court ought to address this  
25 issue in the way it has been presented.

1 JUSTICE GINSBURG: What was wrong with the  
2 instruction, in your view of the case, that was given,  
3 instruction number 13, negligence of plaintiff directly  
4 contributed to cause his injuries?

5 MR. PHILLIPS: Because that's proximate causation.  
6 And that's higher than we were required to prove under a  
7 doctrine of equivalence, Your Honor.

8 JUSTICE SOUTER: That's the direct  
9 language?

10 MR. PHILLIPS: Yes.

11 JUSTICE SOUTER: Yeah.

12 MR. PHILLIPS: I would like to reserve the balance  
13 of my time.

14 CHIEF JUSTICE ROBERTS: Thank you, Mr. Phillips.  
15 Ms. Perry?

16 ORAL ARGUMENT OF MARY L. PERRY

17 ON BEHALF OF THE Respondent

18 MS. PERRY: Mr. Chief Justice, and may it please  
19 the Court:

20 The controlling question raised here is whether  
21 instruction 13 accurately states Federal law. That's  
22 exactly what petitioner said in their reply brief to the  
23 Missouri Court of Appeals. They could not have been any  
24 clearer that their challenge was to instruction 13. In  
25 John versus Poulin, this Court said that State courts

1 have the authority to prescribe the rules of procedure in  
2 their courts even when Federal issues are at stake.

3           The requirements in the Missouri courts were not  
4 complied with here. No abstract question was presented.  
5 The sole question presented and preserved was with  
6 respect to instruction 13. And that can again be seen in  
7 their opening brief in the Missouri Court of Appeals,  
8 which specifically says the trial court erred in giving  
9 instruction 13 based on MAI 32.07(b).

10           JUSTICE ALITO: Is the question whether  
11 instruction 13 is flawed viewed in isolation, or whether  
12 it is flawed when it's viewed together with the  
13 instruction on employer negligence?

14           MS. PERRY: It is viewed in conjunction with the  
15 instruction on employer negligence, but a fixed concept  
16 of what it was, they did not challenge the language of  
17 instruction 12. They accepted that. Holding that  
18 language constant, what should we do to instruction 13?

19           They could have objected to instruction 12 and 13,  
20 and they could have said, here are a pair of instructions  
21 both in proximate cause, and here are a pair of  
22 instructions both in -- resulting in whole or in part,  
23 and then they could have preserved this issue. But they  
24 did not do that. They accepted instruction 12 as a  
25 correct statement of the law, and said, now let's look at

1 instruction 13.

2 JUSTICE ALITO: But do you agree that they set out  
3 different causation standards, 12 and 13?

4 MS. PERRY: Yes, they do. Rogers concluded that  
5 50 years ago and the courts in the Federal and State  
6 system have nearly uniformly interpreted Rogers as  
7 reaching that decision.

8 JUSTICE ALITO: So if the causation standards are  
9 in fact the same, then instruction 13 is defective; isn't  
10 that right?

11 MS. PERRY: Yes, if you can reach that decision  
12 without interpreting instruction 12, or the propriety of  
13 instruction 12, particularly since instruction 12  
14 contained the exact language of the statute. Whatever  
15 judicial gloss has been put on that language was not told  
16 to the jury.

17 Justice Stevens, the question you asked, whether  
18 there was any argument about the different standards, the  
19 answer is no. There was no argument. The only way in  
20 which the jury learned of this difference was in the  
21 language of the instruction. And instruction 12 --

22 JUSTICE STEVENS: Let me ask you this question, if  
23 I may. Perhaps I should have asked Mr. Phillips. Is  
24 there such an animal as the doctrine of equivalence? I  
25 understand the restatement describes what the plaintiff's

1 burden is on proving causation, and then it says the same  
2 rules apply to defendant's contributory negligence.

3 But that doesn't sound to me like any overriding  
4 doctrine of equivalence. It just says when they wrote  
5 the restatement, the rules were the same. Is there such  
6 a thing as the doctrine of equivalence?

7 MS. PERRY: There wasn't in the early 1900s for  
8 certain, Your Honor, because at that time, even  
9 petitioners recognized the doctrine was emerging. And if  
10 we look at the language of 53, it talks about the type of  
11 contributory negligence that used to be a bar. And that  
12 certainly was a type of contributory negligence that only  
13 arose with the traditional proximate cause. It certainly  
14 wasn't on the slightest cause standard.

15 CHIEF JUSTICE ROBERTS: Well, doesn't there have  
16 to be a doctrine of equivalence when you're running a  
17 comparative negligence regime? Because, you know, you  
18 talk about the plaintiff's negligence causing the harm to  
19 a certain degree and the defendant's negligence causing  
20 it to a certain degree. And if you're not dealing with  
21 apples and apples, it seems to me you can't conduct the  
22 comparison.

23 MS. PERRY: No, Your Honor. You can conduct the  
24 comparison, and it happens all the time in cases where  
25 one party has committed intentional misconduct and

1 another party has had negligent misconduct. The  
2 causation standards are different in that instance.  
3 There's a --

4 CHIEF JUSTICE ROBERTS: Right. But we're talking  
5 about comparative negligence here, where there's  
6 negligence on both sides. And I just don't know how you  
7 say one party's 20 percent -- contributed 20 percent to  
8 the harm and the other 80 percent, if you're using  
9 different causation standards.

10 MS. PERRY: Well, the causation standard is used  
11 to decide what negligence you use in the balance and in  
12 the comparison. For example, if a party is negligent,  
13 but the negligence had no causative effect, that  
14 negligence falls out of the analysis.

15 JUSTICE SCALIA: Yeah, but your example of other  
16 instances including having to compare a defendant who did  
17 the tort intentionally with negligent -- contributory  
18 negligence, that's not what we have here. We have here a  
19 difference in the causation. Intentional or  
20 non-intentional has nothing to do with causation.

21 But once you say that there's a difference in the  
22 causation, it seems to me you cannot compare the two.  
23 You cannot compare the two sensibly, unless you are using  
24 the same kind of a standard.

25 I mean, let's assume that you find that the



1 railroad did not directly, but nonetheless caused the  
2 injury to some extent, but the defendant was directly  
3 contributory to it. What do I do? Do I add another 40  
4 percent to his culpability because it was -- his  
5 causation was more direct than the plaintiff's causation?

6 MS. PERRY: No.

7 JUSTICE SCALIA: Why not?

8 MS. PERRY: It just affects which negligence was  
9 in the balance. And --

10 JUSTICE SCALIA: No, it doesn't. It certainly  
11 bears considerably upon the culpability of the two, it  
12 seems to me.

13 MS. PERRY: Well, in responding -- going back to  
14 your question about intentional conduct, the petitioner's  
15 reply brief, in fact, states that a broader range of  
16 harms are considered proximately caused by intentional  
17 torts. So there is a different conception of proximate  
18 cause in that context.

19 But in any event, their merits brief consistently  
20 argues for a proximate cause standard. In fact, it  
21 closes with that. And its criticism of instruction 13 in  
22 this case was precisely that it was a proximate cause  
23 standard. So if they are now before this Court asking  
24 for a proximate cause standard, they conceded that  
25 instruction 13 was a proximate cause standard, they in

1 fact complained about it precisely because it was a  
2 proximate cause standard, that issue really isn't before  
3 this Court anymore.

4 CHIEF JUSTICE ROBERTS: You don't have any  
5 conceptual difficulty with adding in whole or in part to  
6 instruction 13, which is the employee's instruction,  
7 because it's comparative negligence. It seems to me that  
8 necessarily implies in whole or in part. If you can  
9 reduce his recovery because he's in part negligent, what  
10 would be wrong with saying in whole or in part in  
11 instruction 13?

12 MS. PERRY: Well, I think Justice Souter hit the  
13 nail on the head on that one, in that it does create  
14 confusion and it can mislead the jury that the railroad  
15 worker is responsible for other parties' culpability as  
16 well. Moreover --

17 CHIEF JUSTICE ROBERTS: No, no. I thought Justice  
18 Souter's point was that taking it out of the railroad's  
19 instruction might cause confusion because of it. But I  
20 don't see how adding it to both of them when you're  
21 dealing with comparative negligence, and it's necessarily  
22 the case that partial negligence on either of their parts  
23 can enter into the verdict, I don't see how that can be  
24 confusing.

25 MS. PERRY: Well, in --

1 CHIEF JUSTICE ROBERTS: You can answer it.

2 MS. PERRY: I don't want to interrupt anybody.

3 JUSTICE SCALIA: Answer the question, Justice  
4 Souter. Yes or no.

5 JUSTICE SOUTER: The point that I was trying to  
6 make about it being misleading is that if you use the in  
7 whole or in part language for a contributory negligence  
8 instruction, you are misleading the jury into thinking  
9 that at least there might be whole contributory  
10 negligence. There never will be. You don't get the  
11 contributory negligence unless you've already found the  
12 defendant was negligent, at least to some degree.  
13 Therefore, if the plaintiff is negligent, it can only be  
14 in part. That's all I was trying to say.

15 CHIEF JUSTICE ROBERTS: Under that scenario, then,  
16 what objection could there be to a recognition that the  
17 negligence of the plaintiff can contribute in part to the  
18 accident?

19 MS. PERRY: If petitioner had asked for an  
20 instruction that said directly contributed in part, the  
21 inclusion of the phrase in part there might not have any  
22 impact. It could still potentially mislead the jury, but  
23 they were seeking not just to add the words "resulting in  
24 whole or in part," but remove the word "directly" because  
25 it connoted proximate cause, and that they felt proximate

1 cause was not the appropriate standard for contributory  
2 negligence, even though now that is the standard that  
3 they solely are seeking.

4 JUSTICE KENNEDY: Well, two things you might  
5 comment on. First, the in whole or in part, you might  
6 take account of the fact that there are other negligent  
7 actors, third parties, who have contributed to the injury  
8 to the employee.

9 Secondly, Section 53 does not contain the language  
10 in whole or in part.

11 MS. PERRY: Absolutely, Your Honor. It does not.  
12 In section --

13 CHIEF JUSTICE ROBERTS: But that's what Justice  
14 Souter has identified, right? That's not because they're  
15 adopting different standards.

16 MS. PERRY: I disagree, Your Honor. I think it is  
17 because they are adopting different standards. The  
18 contributory negligence --

19 CHIEF JUSTICE ROBERTS: Well, you just told me, a  
20 good reason for not putting in whole or in part in  
21 instruction 13 is because it doesn't make sense, the  
22 whole part doesn't make sense with contributory  
23 negligence. That's a good reason not to put it in  
24 Section 53 either.

25 MR. PERRY: That's one reason. But another reason

1 is that it's a different standard. In Section 53,  
2 they're talking about contributory negligence that was a  
3 bar to liability. That type of contributory negligence  
4 was the kind that was more than -- it wasn't caused by  
5 slight causation. It required proximate cause. That was  
6 a pretty harsh result.

7 And it certainly didn't arise in instances where  
8 the plaintiff had just had the slightest causal  
9 connection. And that certainly was the conclusion in  
10 Rogers.

11 JUSTICE SOUTER: Well, no, no. May I pick you up  
12 on that? Because there's a point at which you and I are  
13 disagreeing about Rogers. And in all candor, I think  
14 it's because you are ignoring one part of Rogers, and if  
15 I'm wrong, I want you to tell me. You quote the  
16 slightest bit language from Rogers on both page 26 and 33  
17 of your brief. And you take that as being language that  
18 eliminates the proximate cause requirement.

19 What you don't include in your quotation is the  
20 footnote in Justice Brennan's opinion following that  
21 slightest cause language. And the footnote was to a  
22 citation, the citation was to the Coray case. The  
23 opinion in Coray was written by Justice Douglas and --  
24 I'm sorry, Justice Black. And in the very language that  
25 Justice Black used, he said expressly that if proximate

1 cause is shown, there can be recovery.

2 Now, given the fact that in Rogers, the very  
3 citation to the language which you say eliminated the  
4 proximate cause requirement cited a case in which  
5 proximate cause was part of the very sentence relied on,  
6 I don't see how you can read Rogers -- maybe later cases,  
7 but I don't see how you can read Rogers as eliminating  
8 the proximate cause requirement.

9 And therefore, I think you have to read Rogers as  
10 addressing the issue of multiple causation, not proximate  
11 causation. Now, am I going wrong there somewhere?

12 MS. PERRY: I have two responses, Your Honor.  
13 First, Justice Brennan wrote Crane twelve years later.

14 JUSTICE SOUTER: Absolutely right.

15 MS. PERRY: And he, you know, definitely clearly  
16 said that a railroad worker does not have to prove common  
17 law proximate causation relying on Rogers.

18 JUSTICE SOUTER: He did, but he was also pointing  
19 out, just to make it simpler, he was pointing out in  
20 Crane that the liability arose in Crane out of -- I  
21 forget the full name of it -- the Appliance Act. And the  
22 Appliance Act had its own set of standards. And  
23 therefore, you cannot, from an Appliance Act case, you  
24 cannot infer anything one way or the other about the  
25 general standard in FELA. And to make it even more

1 complicated, as I recall, Rogers was an Appliance case,  
2 too, but he didn't get into that there.

3 But my only point is, you are right about the  
4 two Brennan opinions, Rogers and the -- Crane. But given  
5 the fact that it was an Appliance case, I don't think you  
6 can infer one thing or another about an ultimate FELA  
7 standard in the absence of an Appliance action.

8 What remains is that the citation in Rogers was to  
9 Coray, and Coray spoke about there still being proximate  
10 cause.

11 MS. PERRY: Yes. But if we look at those earlier  
12 cases, particularly Coray, we can see that Rogers  
13 articulated what was meant by that proximate cause  
14 language. Proximate cause is, in a sense, a label for  
15 scope of liability or legal cause, as the restatement  
16 says. It doesn't have any singular conception. And in  
17 Coray, the Court found --

18 JUSTICE SOUTER: Well, it is understood by  
19 everybody, isn't it, that at least it has the conception  
20 which is captured by using the word "direct" as in  
21 instruction 13, and at least it has that core of meaning  
22 whenever it is used, doesn't it?

23 In other words, it may not have a lot of bells and  
24 whistles associated with it in the prior law, but at  
25 least it requires some direct causation as opposed to

1 indirect, right?

2 MS. PERRY: Yes, Your Honor.

3 JUSTICE SOUTER: Okay. And that's -- I don't know  
4 that Justice Brennan's citation to Coray, or Coray's use  
5 of the language carries you any further than that. But  
6 that's as far as Mr. Phillips wants to go.

7 MS. PERRY: We don't accept that, but even if  
8 that's the case, the Rogers -- the parties to Rogers  
9 immediately interpreted that decision as affecting  
10 proximate cause. Twelve years later, this Court did say  
11 that in Crane. The lower courts have uniformly, nearly  
12 uniformly interpreted Rogers in a certain way. And at  
13 this point, stare decisis suggests that this Court should  
14 not overrule.

15 JUSTICE SOUTER: That may be. That may be. But  
16 it seems to me that that's a different argument from  
17 saying Rogers requires it, because I don't think you can  
18 get that out of Rogers.

19 MS. PERRY: Well, and I also think, though, that  
20 by lightening -- by saying the slightest cause possible  
21 or, you know, a slight cause would create liability, that  
22 does affect proximate cause.

23 CHIEF JUSTICE ROBERTS: You don't have to say  
24 that. I mean, you know, when in doubt, we ought to  
25 follow the words of the statute. And so whole or in part



1 makes sense with the railroad, but directly doesn't  
2 appear in Section 53. Why don't we just -- why shouldn't  
3 the instruction just say, "such negligence of the  
4 plaintiff contributed to cause his injury." It's not  
5 going to be a complete bar because we know the  
6 immediate -- the next instruction talks about reducing  
7 the award by the amount of the negligence. Why wouldn't  
8 that be preferable to introducing extraneous terms?

9 MS. PERRY: Because Section 53 refers to  
10 contributory negligence that created a bar. And that was  
11 the type of negligence that required proximate cause.  
12 Moreover, the type of instruction you are positing is not  
13 at all what petitioner requested in this case.

14 CHIEF JUSTICE ROBERTS: Well, no, but he requested  
15 that the instructions be the same, and the directly is  
16 what causes the problem, and directly doesn't appear in  
17 the statute.

18 MS. PERRY: But under Missouri procedures, you  
19 have to be clear in the nature of your objection, and the  
20 objection was that we want the same language, we want the  
21 language resulting in whole or in part.

22 And out of respect for the State courts and their  
23 right to create the rules that govern in those courts,  
24 that was not satisfactory under Missouri rules. Missouri  
25 rules also have specific requirements for what you have

1 to do in the court of appeals. There's a "Point Relied  
2 On" which is the argument heading in the brief, and it's  
3 required by Rule 84.04. And it sets forth a very  
4 specific format, and it's supposed to start with "The  
5 trial court erred in," and then you give your reasons.

6 And it says that negligence -- it erred in  
7 instructing the jury to find plaintiff negligent only if  
8 it concluded that his negligence directly contributed to  
9 cause his injury, rather than cause his injury in whole  
10 or in part.

11 You know, there is no issue that was preserved in  
12 the Missouri courts other than that challenge. Cook  
13 versus Caldwell which we cite in our brief, in Missouri,  
14 not only do you have to object, but you have to keep  
15 consistent with the basis of the objection. You can't  
16 just object to instruction 13 on one ground, go up to the  
17 court of appeals, and raise a completely different  
18 challenge to instruction 13. You have to stay  
19 consistent. And out of respect --

20 CHIEF JUSTICE ROBERTS: Do you think they raised  
21 an objection based on the doctrine of equivalence?

22 MS. PERRY: That was a justification for rewriting  
23 instruction 13 to include the words "resulting in whole  
24 or in part." I do not think they raised an abstract  
25 argument about equivalency; that in order to do that,

1 they would have had to object to instruction 12 and  
2 instruction 13, because equivalency in the abstract would  
3 require modification of both instructions, and they  
4 clearly chose to accept the language of instruction 12  
5 and only object to instruction 13.

6           So no, not in the abstract, it hasn't been raised.  
7 It was a justification for one particular result, and  
8 that was a result that would have modified instruction  
9 13. And in a particular way, too, modified it in a way  
10 of including the words "resulting in whole or in part."

11           JUSTICE BREYER: I guess they want to make the  
12 argument now, whether they did or not, that if we look at  
13 Section 53, which I think is the part dealing with  
14 contributory negligence. I don't see anything else. It  
15 doesn't speak of causation at all.

16           MS. PERRY: Exactly, Your Honor.

17           JUSTICE BREYER: It just says if there's some  
18 contributory negligence, the damages will be diminished  
19 according to the negligence attributable to the employee.

20           So I take it their argument was, maybe with  
21 hindsight, Judge, don't give this direct language,  
22 because nothing requires it. And since, other things  
23 being equal, nothing requires it, you ought to give the  
24 same language you gave for the other side.

25           And they said the judge rejected that argument, so

1 now they tell us, well, that was wrong, he should have  
2 accepted it. And all the rest of what he's saying is  
3 just in case the Court wants to reach it, or something  
4 like that. But what about that one?

5 MS. PERRY: I'm sorry, Your Honor. Could you --

6 JUSTICE BREYER: Well, I mean, should we answer  
7 the question he now -- perhaps in his minimalist  
8 position -- might want to raise, or maybe did, that  
9 Section 53 doesn't speak of causation, the judge gave a  
10 causation instruction. The judge's causation instruction  
11 in their view was wrong, and the law requires the judge's  
12 causation instruction on contributory negligence, if  
13 there is one, to be the same as it was on direct, the  
14 defendant's negligence. And he says that isn't what  
15 happened, we objected to it, we produced arguments, one  
16 of them was this equivalence thing.

17 So he's saying to us: Decide it, say that they  
18 were wrong. What's your view of that?

19 MS. PERRY: We disagree with petitioner.

20 JUSTICE BREYER: I'm not surprised.

21 (Laughter.)

22 MS. PERRY: The abstract question of equivalency

23 --

24 JUSTICE BREYER: No, no. That's just an argument.

25 MS. PERRY: Right.

1 JUSTICE BREYER: It was not, but they say,  
2 nonetheless, we did object that this instruction was  
3 wrong. One reason it was wrong is because it speaks of  
4 causation differently than when they spoke of causation  
5 in respect to the railroad. We thought that was a reason  
6 why it was wrong then. We think that's a reason why it  
7 is wrong now, and we would like the Missouri court, but  
8 they wouldn't do it, so we want you to say it was wrong  
9 for that reason.

10 MS. PERRY: Well, I think we're in a difficult  
11 position right now, because they're asking for proximate  
12 cause in their blue brief --

13 JUSTICE BREYER: Oh, we say, well, we'll abandon  
14 all that, that's just a series of different arguments  
15 that we'd like the Court to say.

16 MS. PERRY: Okay. If we're putting aside the blue  
17 brief then --

18 JUSTICE BREYER: If you read it carefully, you'll  
19 see it, basically.

20 (Laughter.)

21 MS. PERRY: But if the question goes to the fact  
22 that Section 53 doesn't have an express causation  
23 standard in it, what you fall back on is traditional  
24 proximate cause, that Congress departed from the  
25 traditional proximate cause standard by using the words

1 "resulting in whole or in part" in Section 51. It didn't  
2 create the same departure in Section 53.

3 In fact, by referring to the kind of contributory  
4 negligence that creates a bar, it was pretty much  
5 pointing right back to proximate cause.

6 JUSTICE SCALIA: Can you have more than one  
7 proximate cause?

8 MS. PERRY: I believe the treatises that say yes.

9 JUSTICE SCALIA: Of course. So then how can "in  
10 whole or in part" possibly eliminate the proximate cause  
11 requirement, because it could be in part and still be a  
12 proximate cause. How can that language possibly be  
13 interpreted to eliminate the proximate cause requirement?

14 MS. PERRY: Because when a cause that -- when a  
15 slightest cause can give rise to liability, that has  
16 effectively reduced or relaxed that causation standard.  
17 There is still a legal cause requirement, yes.

18 JUSTICE SOUTER: But it could be the slightest  
19 direct cause, which is Justice Scalia's point.

20 MS. PERRY: Well, but if we look at like the first  
21 --

22 JUSTICE SOUTER: Now, it may mislead the jury if  
23 that's all you say. But as a matter of analyzing the  
24 statute or even of analyzing what the Court meant in  
25 Rogers, you can have a slight but direct cause, and that

1 would be proximate cause in the traditional analysis;  
2 isn't that so?

3 MS. PERRY: Well, no. The Restatement, for  
4 example, at the time of Rogers talked about substantial  
5 factors, and talked, in other words --

6 JUSTICE SCALIA: How can you say no when you  
7 acknowledge that the prior law when there was  
8 contributory negligence used to require proximate cause  
9 for both the negligence of the defendant and for the  
10 contributory negligence of the defendant? Such a  
11 situation could not exist unless proximate cause doesn't  
12 have to be the sole cause. It can be just the cause in  
13 part, right?

14 MS. PERRY: Right.

15 JUSTICE SCALIA: So the mere fact that we had  
16 contributory negligence statutes that were applying  
17 proximate cause requirements demonstrates that a  
18 proximate cause can be a cause in part.

19 MS. PERRY: Yes, Your Honor, but what Rogers and  
20 the statute recognizes that it can be a very, very slight  
21 cause. And what it was understood, for example, in the  
22 --

23 CHIEF JUSTICE ROBERTS: That's what Rogers might  
24 have said, but the statute doesn't say anything about  
25 slight cause. It only says in whole or in part.

1 MS. PERRY: And neither did the instruction. It  
2 just used the words "resulting in whole or in part" also.  
3 But Rogers did interpret the language "resulting in whole  
4 or in part" as meaning playing any part, even the  
5 slightest. And that has been the law for 50 years. And  
6 it would be a massive change in the law, as Justice  
7 Scalia said earlier, for this Court to depart from that  
8 at this point in time.

9 JUSTICE SCALIA: It doesn't seem to me that slight  
10 is the opposite of proximate. It could be a slight  
11 proximate cause.

12 MS. PERRY: The Restatement at the time of Rogers  
13 talked about substantial factors, and in the comment to  
14 that, it explains that sometimes the other causes can be  
15 so predominant that one causation is just not  
16 sufficiently significant or of sufficient quantum to  
17 constitute a legal cause.

18 So there is a component of quantity within the  
19 concepts of proximate cause. I believe their reply brief  
20 talks about substantial factor, and to talk about  
21 something as being a substantial factor does have a  
22 quantum component to it, just as slight has a quantum  
23 component to it. A slight cause could not be a  
24 substantial factor, or oftentimes would not be a  
25 substantial factor. So the two really do go hand in



1 glove.

2 JUSTICE SOUTER: But under the old rule that  
3 plaintiff's negligence in whatever degree was an absolute  
4 bar to recovery, wasn't the rule customarily stated that  
5 plaintiff's negligence, however slight, was a total bar  
6 to recovery?

7 MS. PERRY: I'm not aware of that, Your Honor. It  
8 may be.

9 JUSTICE SOUTER: I thought it was. I may be wrong  
10 about that.

11 MS. PERRY: I am not aware of that. So that would  
12 be a pretty harsh remedy if that were the case.

13 JUSTICE SOUTER: That's what I thought. Yes, I  
14 thought it was a pretty harsh rule.

15 MS. PERRY: And clearly, Congress in this statute  
16 was trying to move away from the common law in many  
17 respects to protect the railroad worker. And the  
18 interpretation of Section 51 as lightening the causation  
19 standard for the defendant's negligence, but leaving  
20 intact the traditional proximate cause standard for  
21 plaintiff's contributory negligence completely comports  
22 with the purpose of Congress in enacting the statute.

23 CHIEF JUSTICE ROBERTS: Why isn't "in whole or in  
24 part" simply the logical corollary of introducing  
25 comparative negligence? Why do you have to read that as

1 departing from proximate cause, instead of simply  
2 recognizing that under 53, negligence on the part of the  
3 employee can reduce recovery which -- without barring it?

4 MS. PERRY: I reach that conclusion on the basis  
5 of Rogers. And in the petitioner's brief --

6 JUSTICE STEVENS: Beyond that, if the plaintiff's  
7 negligence was in whole the cause of the action, then the  
8 -- there was no reason to get to comparative negligence  
9 or contributory negligence, because by hypothesis, there  
10 would have been no negligence by the defendant.

11 MS. PERRY: Yes, Your Honor.

12 CHIEF JUSTICE ROBERTS: That's why you don't have  
13 "in whole or in part" in 53, not because they wanted to  
14 depart from proximate cause there, but because, as  
15 Justice Stevens pointed out, you wouldn't have it in  
16 whole or in part.

17 MS. PERRY: Even the petitioner's brief describes  
18 the language "resulting in whole or in part" as an  
19 elaboration of proximate cause. They recognize that it  
20 has bearing on proximate cause. And so if it has bearing  
21 on proximate cause in Section 51, it certainly would have  
22 bearing on proximate cause if it was incorporated into  
23 the language of the instruction on contributory  
24 negligence.

25 So that may be one reason for not including the

1 language, but another reason is that it does affect the  
2 causation standard and Congress did not incorporate it in  
3 Section 53, whereas it did have it in Section 51. And  
4 when it modified the statute in 1939 for assumption of  
5 the risk, to abolish assumption of the risk, it did not  
6 equate proximate cause and "resulting in whole or in  
7 part" necessarily as the same thing because one version  
8 had proximate cause and it was not adopted. The phrase  
9 "resulting in whole or in part" was used in its place.

10 So suggesting that Congress may, in fact, have  
11 seen a difference, just as Rogers concluded, and I think  
12 rightly so.

13 Moreover, as I said, that has been the law for 50  
14 years, and it's pretty settled in this country and it  
15 would create a massive change if this Court were to  
16 depart from that. Moreover, this is not the right case  
17 to decide that because the language in instruction 12  
18 said, "resulting in whole or in part." And petitioner  
19 has never --

20 JUSTICE SCALIA: It is not the kind of change  
21 anybody would have relied on, is it? I mean, I find it  
22 hard to see reliance interest on this interpretation.

23 MS. PERRY: Excuse me, Your Honor?

24 JUSTICE SCALIA: I find it hard to see any  
25 reliance interest on this 50 year old interpretation.

1 Is there anybody doing something differently because they  
2 believe that the railroad does not have to be accused of  
3 proximate causality? Does anybody act differently  
4 because of that rule? I don't think so.

5 MS. PERRY: Well, for Mr. Sorrell in particular, I  
6 mean, he acted, that he allowed that instruction to be  
7 used, and now they're attempting to disrupt this  
8 judgment.

9 JUSTICE STEVENS: I suppose employees have been  
10 under the rule for a long time.

11 MS. PERRY: Yes.

12 JUSTICE KENNEDY: I suppose employee associations,  
13 workman compensation schemes and Congress have all relied  
14 on it.

15 MS. PERRY: Yes, you're absolutely right, Your  
16 Honor. And there is employees' compensation for railroad  
17 workers, and that may be very well be because of this  
18 interpretation of Rogers that was adopted 50 years ago.

19 CHIEF JUSTICE ROBERTS: Thank you, Ms. Perry.

20 MS. PERRY: Thank you.

21 CHIEF JUSTICE ROBERTS: Mr. Phillips, you have two  
22 minutes remaining.

23 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

24 ON BEHALF OF THE PETITIONER

25 MR. PHILLIPS: Thank you, Mr. Chief Justice. I'd

1 like to address just sort of two issues. One is the  
2 minimalist issue that Justice Breyer asked about. It  
3 seems to me that the minimalist way to look at this case  
4 is we raised the question of whether or not the Missouri  
5 standard which says that you cannot deviate from our  
6 designated instructions creates a disparity in the way  
7 you approach negligence and contributory negligence, that  
8 disparity is inconsistent with the common law doctrines,  
9 and nothing in FELA modifies it, and it's wrong. And  
10 that by itself warrants the case being set aside and a  
11 new jury being -- and a new trial. That's the simplest  
12 way to resolve the issue.

13           If the Court wishes to go forward and deal with  
14 the issue that Justice Souter addressed, then the  
15 question is, what does Rogers mean and what do you do  
16 with this "in whole or in part" language. And if you go  
17 back -- you asked the question, Justice Souter, you know,  
18 what does the common law say. We cite this on page 38.  
19 If its negligence contributes proximately to the injury,  
20 no matter how slightly -- there must be a dozen cases  
21 that we cite in those briefs that talk about no matter  
22 how slightly. And they refer to "in whole or in part" as  
23 language that still recognizes that you still require  
24 proximate causation.

25           The reality is nothing in Rogers remotely casts

1 doubt on cases like Brady that say but-for causation is  
2 not enough, you have to have proximate causation, or  
3 Earnest, where this Court said that proximate causation  
4 is the correct jury instruction that has to be given.  
5 This Court said nothing about that in Rogers.

6 JUSTICE GINSBURG: Would you have in your ideal  
7 instruction the words proximate cause given to the jury,  
8 that defendant's negligence must be the proximate cause  
9 of plaintiff's injury?

10 MR. PHILLIPS: No, Justice Ginsburg. We didn't  
11 ask for that. All I'm saying to you --

12 JUSTICE GINSBURG: Would you?

13 MR. PHILLIPS: -- is that the guidance of the  
14 Court on remand, you could, and we would ask you to  
15 address that issue and to resolve it. It is fairly in  
16 front of you.

17 JUSTICE GINSBURG: But in your model instruction,  
18 in your correct instruction, would the jury be told, in  
19 order to hold the defendant liable, you must find the  
20 defendant's negligence is the proximate cause of  
21 plaintiff's injury?

22 MR. PHILLIPS: Yes. That would be my preferred  
23 instruction on remand, yes.

24 JUSTICE GINSBURG: Even though almost universally,  
25 the term proximate cause has been criticized as totally

1 incomprehensible to juries?

2 JUSTICE STEVENS: Let me ask this one very brief  
3 question, Mr. Chief Justice.

4 In your view, would the doctrine of equivalence be  
5 satisfied if we simply directed that the word directly be  
6 omitted from the instruction 13?

7 MR. PHILLIPS: I think that would certainly go a  
8 long way. I don't know exactly how strictly you want to  
9 do it, but sure. I mean, that's the pivotal problem with  
10 the way that instruction reads today, Justice Stevens.

11 CHIEF JUSTICE ROBERTS: Thank you, Mr. Phillips.  
12 The case is submitted.

13 (Whereupon, at 2:01 p.m., the case in the  
14 above-entitled matter was submitted.)

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