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.

C O N T E N T S

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

statement of the law as it applies today.

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

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

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

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

to the -- our clients --

JUSTICE SCALIA: But nobody does --

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: We wouldn't have to.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter)

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

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

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

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

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

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

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

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

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

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

are. If it is slight cause or proximate cause.

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

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

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

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

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

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

MR. PHILLIPS: Yes.

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

MR. PHILLIPS: Yes.

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

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

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

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

MR. PHILLIPS: Right.

JUSTICE BREYER: Yes?

MR. PHILLIPS: Yes.

JUSTICE BREYER: It says that in the blue brief?

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

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

MR. PHILLIPS: That's fair.

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

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

JUSTICE BREYER: Causation.

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

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

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

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

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

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

case.

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

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

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

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

negligence.

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

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

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

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

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

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

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

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

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

MR. PHILLIPS: Yes.

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

damages.

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

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

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

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

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

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

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

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

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

MR. PHILLIPS: Correct.

JUSTICE BREYER: And we now want you to say that

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

MR. PHILLIPS: Right.

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

MR. PHILLIPS: Correct.

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

MR. PHILLIPS: Right.

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

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

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

MR. PHILLIPS: I'm sorry?

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

language of the statute itself?

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

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

MR. PHILLIPS: Right.

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

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

JUSTICE BREYER: All right.

MR. PHILLIPS: Is the answer.

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

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

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

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

MR. PHILLIPS: Right.

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

MR. PHILLIPS: Right.

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

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

MR. PHILLIPS: Right.

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

MR. PHILLIPS: I --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: You were entitled -- your

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

MR. PHILLIPS: The slightest cause.

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

MR. PHILLIPS: Right.

JUSTICE SOUTER: That's your basic argument.

MR. PHILLIPS: That's our basic argument.

JUSTICE SOUTER: Okay.

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

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

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

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

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

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

JUSTICE SOUTER: That's the direct language?

MR. PHILLIPS: Yes.

JUSTICE SOUTER: Yeah.

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Phillips.

Ms. Perry?

ORAL ARGUMENT OF MARY L. PERRY

ON BEHALF OF THE Respondent

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

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

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

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

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

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

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

instruction 13.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. PERRY: No.

JUSTICE SCALIA: Why not?

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

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

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

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

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

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

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

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

MS. PERRY: Well, in --

CHIEF JUSTICE ROBERTS: You can answer it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

cause is shown, there can be recovery.

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

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

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

JUSTICE SOUTER: Absolutely right.

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

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

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

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

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

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

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

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

indirect, right?

MS. PERRY: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. PERRY: Exactly, Your Honor.

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

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

And they said the judge rejected that argument, so

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

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

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

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

MS. PERRY: We disagree with petitioner.

JUSTICE BREYER: I'm not surprised.

(Laughter.)

MS. PERRY: The abstract question of equivalency --

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

MS. PERRY: Right.

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

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

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

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

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. PERRY: Right.

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

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

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

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

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

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

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

glove.

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

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

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

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

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

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

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

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

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

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

MS. PERRY: Yes, Your Honor.

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

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

So that may be one reason for not including the

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

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

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

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

MS. PERRY: Excuse me, Your Honor?

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

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

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

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

MS. PERRY: Yes.

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

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

CHIEF JUSTICE ROBERTS: Thank you, Ms. Perry.

MS. PERRY: Thank you.

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

REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONER

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

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

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

The reality is nothing in Rogers remotely casts

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

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

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

JUSTICE GINSBURG: Would you?

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

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

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

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

incomprehensible to juries?

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

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

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

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

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