

**Nos. A09-2212, A09-2213, A09-2214, A09-2215**

State of Minnesota  
**In Supreme Court**

Michael D. Frazier, as Trustee for the  
 Next-of-Kin of Brian L. Frazier,

*Appellant (A09-2212),*

Harry James Rhoades, Sr., as Trustee for the  
 Next-of-Kin of Harry James Rhoades, Jr., deceased,

*Appellant (A09-2213),*

Denise Renee Shannon, as Trustee for the  
 Next-of-Kin of Bridgette Marie Shannon, deceased,

*Appellant (A09-2214),*

Elizabeth Chase, as Trustee for the  
 Next-of-Kin of Corey Everett Chase, deceased,

*Appellant (A09-2215),*

vs.

Burlington Northern Santa Fe Corporation, et al.,

*Respondents,*

Richard P. Wright, as Special Administrator  
 of the Estate of Corey E. Chase,

*Appellant (A09-2215),*

Cristy Y. Frazier, as Special Administrator  
 for the Estate of Brian Frazier,

*Appellant (A09-2213, A09-2214, A09-2215),*

and

BNSF Railway Company, third party plaintiff,

*Respondent (A09-2213, A09-2214, A09-2215),*

vs.

Richard P. Wright, as Special Administrator  
 for the Estate of Corey Everett Chase, deceased,

*Appellant (A09-2213, A09-2214, A09-2215).*

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## **STATEMENT OF LEGAL ISSUES**

1. Under Minnesota law, an assignment of error in a notice of motion for new trial is a prerequisite to appellate review of jury instructions. BNSF failed to assign as error in its Notice of Motion and Motion for New Trial any instructions addressing the standard of care. Did BNSF waive its right to challenge those instructions?

### **Issue Preservation and Resolution Below:**

Trial Court: This issue was not before the trial court; thus the trial court did not address waiver.

Court of Appeals: Because it incorrectly assumed that BNSF had preserved the issue, the court of appeals did not address waiver.

### **Apposite authority:**

Minn. R. Civ. P. 59.03;

*Bowman v. Pamida, Inc.*, 261 N.W.2d 594 (Minn. 1977);

*Sauter v. Wasemiller*, 389 N.W.2d 200 (Minn. 1986).

2. The doctrine of invited error provides that a party who procures error may not use that error to obtain a new trial. Before the trial court, BNSF repeatedly insisted that the only predicate to railroad liability is the failure to act with reasonable care, and the trial court so instructed the jury. Is BNSF barred from challenging the standard of care it proposed?

### **Issue Preservation and Resolution Below:**

Trial Court: Because BNSF did not seek a new trial based on the standard of care, the trial court did not address invited error.

Court of Appeals: The majority held that the doctrine of invited error may not be considered in the face of plain or fundamental error.

**Apposite authority:**

*McCarvel v. Phenix Insurance Co. of Brooklyn*, 64 Minn. 193, 66 N.W.2d 367 (1896);

*In re Estate of Forsythe*, 221 Minn. 303, 22 N.W.2d 19 (1946);

*LaValle v. Aqualand Pool Co.*, 257 N.W.2d 324 (Minn. 1977).

3. The plain-error rule, as set forth in Rule 51.04(b) of the Minnesota Rules of Civil Procedure, allows a trial court to review unobjected-to errors in jury instructions for the purpose of considering whether to grant a new trial if: (1) there is error; (2) the error is plain; (3) the error affects substantial rights; and (4) the error should be corrected to ensure fairness and integrity of the judicial process. None of these factors are satisfied here. Is a new liability trial warranted?

**Issue Preservation and Resolution Below:**

Trial Court: This issue was not before the trial court; thus the trial court did not address plain error.

The Court of Appeals: The majority held that instructing the jury to apply a common-law negligence standard of care to the railroad was an “error of fundamental law” warranting a new trial on liability, even though BNSF did not preserve the issue and “offered or acquiesced in the erroneous jury instruction.”

**Apposite authority:**

*State v. Ihle*, 640 N.W.2d 910 (Minn. 2002);

*State v. Strommen*, 648 N.W.2d 681 (Minn. 2002);

*CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993).

## **STATEMENT OF THE CASE AND FACTS**

On September 26, 2003, a Burlington Northern Santa Fe (“BNSF”) freight train slammed into the side of a car at the Ferry Street crossing in Anoka, Minnesota. The impact instantly killed the car’s driver, Brian Frazier, and his three passengers, Corey Chase, Harry Rhoades, Jr., and Bridgette Shannon.

Because the lights, bells, and gates failed to activate to alert Frazier to the oncoming train, trustees for the next-of-kin of each of the decedents brought wrongful-death actions against BNSF. The four lawsuits were consolidated for discovery, trial, and appeal.

### **I. THE FERRY STREET CROSSING.**

Even before the accident, the Ferry Street crossing had a troubled history of signal-system malfunctions. On April 29, 2001, a 9-1-1 emergency operator advised BNSF of a report that the gates at the crossing were sporadically moving up and down. [Exs. 9, 10].<sup>1</sup> Randy During, a BNSF signal maintainer, was dispatched to the crossing. [Ex. 10. T.2884]. After watching a few trains go through, During concluded the signal system was functional and left the scene. Shortly thereafter, BNSF received a second report that the gates were going up and down with no train present, and During was again dispatched to the crossing. [Ex. 9; T.329-30]. After several hours, During concluded the malfunctions were caused by “AC<sup>2</sup> interference.” [T.2946-47]. Notwithstanding During’s assessment, Craig Hildebrandt,

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<sup>1</sup> “Ex.” refers to exhibits admitted at trial.

<sup>2</sup> “AC” is an acronym for alternating current.

a BNSF signal technician, could not find the cause of the problem and, in violation of 49 C.F.R. §§ 234.103 and 234.207, simply closed the matter. [Ex. 9; T.331-35].

The signal system malfunctions did not cease. On March 9, 2002, Pam Elliott was nearly killed by an oncoming train. [T.183-88]. Elliott told the jury that, before she proceeded through the crossing, none of the lights, gates, or bells activated. [*Id.*]. She first noticed the steadily-approaching train when her vehicle was positioned squarely in the middle of the crossing. [*Id.*]. Elliott had to quickly press the accelerator to avoid a collision. [*Id.*]. Elliott's husband reported the activation failure<sup>3</sup> to law enforcement, who in turn notified BNSF. [T.192]. BNSF had already received an earlier, separate report of a false activation<sup>4</sup> at the Ferry Street crossing earlier that afternoon but had done nothing to diagnose the problem. [Ex. 5; T.3052-53].

Despite reports of both an activation failure and a false activation, no signal maintainers went to the crossing to investigate. [Ex. 4; T.3044-55]. Instead, a BNSF dispatcher contacted the crews of two later trains and asked them to visually confirm signal-system

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<sup>3</sup> Federal law defines "activation failure" as "the failure of an active highway-rail grade crossing warning system to indicate the approach of a train at least 20 seconds prior to the train's arrival at the crossing." 49 C.F.R. § 234.5.

<sup>4</sup> Federal law defines "false activation" as "the activation of a highway-rail grade crossing warning system caused by a condition that requires correction or repair of the grade crossing warning system." 49 C.F.R. § 234.5.

activation. [*Id.*]. When those train crews confirmed that the lights and gates were working as they passed through the crossing, BNSF closed the matter without further investigation. [*Id.*]. In direct violation of 49 C.F.R. § 234.9, BNSF did not report the activation failure to federal authorities. [Ex. 4].

The problems recurred. On February 7, 2003, an emergency dispatcher again notified BNSF of a signal-system malfunction at Ferry Street. [Exs. 11, 12]. This time, the lights and bells activated, but the gates never lowered as a train careened through the crossing. [*Id.*]. Although 49 C.F.R. § 234.103 expressly required BNSF to investigate the partial activation<sup>5</sup> to determine its cause, the railroad simply closed the matter without investigating or determining the cause of the problem. [Ex. 12; T.2911-13].

Thus, for more than two years before the accident, the Ferry Street crossing had a history of intermittent signal-system malfunction that BNSF both ignored and denied.

## **II. THE ACCIDENT AND THE PHYSICAL EVIDENCE.**

On September 26, 2003, the signal system at the Ferry Street crossing failed again. This time, it stole the lives of four people.

The physical evidence unmistakably pointed to a complete signal-system malfunction. Other than a few pieces of stray glass from the taillight of the car, all physical evidence of impact was

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<sup>5</sup> Federal law defines “partial activation” as “activation of a highway-rail grade crossing warning system indicating the approach of a train, however, the full intended warning is not provided” due to a list of reasons that include the failure of a gate to lower fully. 49 C.F.R. § 234.5.

located in the southbound lane, the car's proper lane of travel, and west of the crossing. [T.1130-34, 1147]. Scuff marks, gouge marks, and fluid-splatters were identified only in the southbound lane, completely discrediting any notion that the car had maneuvered around a fully-lowered gate and was in the northbound lane at the time of impact. [T.1147]. A mark left by the car's right rear tire was located close to the fog line in the southbound lane. [T.1079]. Experts agreed that it would have been physically impossible for the car to have driven to a position that matched that right rear tire mark if the gate had been down. [T.680, 1148, 1867-68].

In the face of this compelling physical evidence, BNSF and its expert asserted the theory that the car, having driven around a fully lowered gate, was struck in the northbound lane and instantly lifted off the ground, without leaving so much as a scuff mark in the road at the point of impact. [T.4200-4202]. Then, the theory went, the car was deposited neatly into the proper lane of travel some thirteen feet away with the right rear wheel in precisely the same position it would have been had the vehicle been traveling in the proper lane. [T.4097-99]. Only then did the car split apart, causing debris and splatter marks to populate the southbound lane and scatter across the tracks and railroad right of way to the west. [*Id.*]. In the end, BNSF took this improbable theory to the jury.

### **III. BNSF LOSES, DESTROYS, HIDES, AND FALSIFIES EVIDENCE, LEADING TO SANCTIONS.**

Within minutes of the accident, BNSF embarked on what would become a five-year effort to thwart discovery and hide the truth. In a 45-page sanctions memorandum, the trial court exhaustively

described BNSF's repeated misconduct which, by any measure, was of a degree seldom seen in civil litigation. [APP.75-119].

BNSF claimed to have "lost" electronic data from the signal system downloaded the night of the accident—data that would have definitively established whether the gates were up or down. [APP.77-82]. BNSF "recycled" the original laptop used to download the data, and lost the disk onto which the data was copied. [APP.78-79].<sup>6</sup> Neither was ever produced. And years later, when BNSF claimed to have "found" authentic electronic copies of the data, the material it produced had been manipulated by cutting-and-pasting from other downloads. [T.2527-30].

But that is not all. It was not until just before trial—nearly four years into discovery—that BNSF finally disclosed that it had replaced an eight-foot section of rail in the approach circuit to the Ferry Street crossing the day before and the morning of the accident. [APP.85-86]. BNSF then "lost" all but a few pages of the corresponding repair records, and BNSF personnel could not recall the details of the repairs. [*Id.*].

BNSF compounded these omissions by repeatedly advancing misrepresentations and false affidavits throughout the proceedings. The trial judge, the Honorable Ellen L. Maas, observed that she had "lost count of the total number of misrepresentations BNSF made to counsel, the parties, and this Court throughout the proceedings."

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<sup>6</sup> BNSF's internal rules required the disk to be kept for seven years. [T.1376-77].

[APP.84]. BNSF's misconduct included the "fabrication of electronic and physical records," the "obstruction of and interference with Plaintiffs' investigation," and the "interference with Plaintiffs' access to witnesses and the accident site." [APP.95]. In short, BNSF did what it could to defile the integrity of the proceedings below.

#### **IV. BNSF VIOLATES FEDERAL RAILROAD REGULATIONS AND ITS OWN INTERNAL STANDARDS.**

Much of the information the railroad did produce showed that BNSF repeatedly violated federal regulations and its own internal standards with respect to operations at the Ferry Street crossing. In addition to its complete failure to investigate, diagnose, and repair prior signal-system malfunctions, BNSF failed to maintain current signal plans at the crossing. Indeed, although the signal circuitry at the crossing had been significantly changed in 2000, the plans stored at the crossing did not reflect those changes, in violation of 49 C.F.R. § 234.201. [T.3218]. BNSF supervisor Anthony Grothe conceded at trial the importance of updated plans: "Oh, [BNSF personnel] could use it for a wide variety of things, the wiring diagrams on these pages back here, for troubleshooting, so they know what kind of ampere battery they have. It gives them some knowledge of what's out there and how it is connected." [T.3221]. Accordingly, for three full years before the accident, all troubleshooting at the crossing was based on incorrect and outdated plans.

The condition of the track was also a significant issue. Federal law requires inspections at least once every three months of all insulated joints within an approach circuit. 49 C.F.R. § 234.271. At the time of the accident, the approach circuit at the Ferry Street

crossing included six insulated joints. [Ex. 23B; T.2520, 2718]. The integrity of insulated joints is critical to proper functioning of the signal system. Yet for the year preceding the accident, BNSF conceded at trial it had no records confirming that the required inspections had been completed. [T.2478, 2717].

Expert testimony also established that the condition of the ballast on the night of the accident violated both federal law and BNSF's own Engineering Instructions. [T.1542-44, 1615-17]. Dirt and mud were allowed to be in contact with the rails, thereby reducing ballast resistance. [T.1557-58]. In addition, anchor nails were present on ties supporting insulated joints, adversely affecting current flow. [Exs. 179, 180; T.1558]. In short, as one expert told the jury, "the condition of the track has everything to do with this case." [T.1536].

**V. BNSF INSISTS ON A COMMON-LAW STANDARD OF CARE AND THE JURY RETURNS ITS VERDICT.**

In light of BNSF's repeated violations of federal law and its inability to locate a host of records, it could not pursue a defense based on compliance with federal regulations. BNSF therefore insisted that the only predicate to railroad liability was the failure to use reasonable care—a common-law standard.

BNSF proposed jury instructions that included the standard definitions of "reasonable care" and "negligence." [APP.208]. BNSF similarly proposed Minnesota's standard comparative fault instruction, which defines "fault" simply as "negligence." [*Id.*]; CIVJIG 28.15.

BNSF proposed several custom instructions, each of which requested that the jury determine only whether BNSF was “negligent” based on common-law notions of “reasonable care.” [APP.212, 215]. BNSF requested, for example, that the jury be instructed as follows: “Since a corporation can act only through its officers, or employees, or other agents, the burden is on plaintiff to establish, by a greater weight of the evidence in the case, that the negligence of one or more officers, or employees, or other agents of defendant was a cause of the September 26, 2003, accident at issue in this case.” [APP.212] (emphasis added).

Consistent with its common-law approach to liability, BNSF proposed a special verdict form that asked: “Was BNSF Railway Company negligent in its operations on September 26, 2003?” [APP.225]. It followed with the question: “Was BNSF’s negligence a direct cause of the September 26, 2003 accident?” [*Id.*]. BNSF never asked the jury to determine whether it had complied with federal railroad regulations—in its proposed special verdict form or otherwise. In fact, BNSF’s proposed instructions and special verdict form did not include a single federal regulation. In contrast, appellants proposed that, in addition to definitions of “reasonable care” and “negligence,” the jury should be informed of a number of federal regulations governing railroads. [APP.188-190]. The court left it to counsel to identify the specific regulations to be included. [T.4321-22].

After an extensive charging conference, the trial court accepted BNSF’s invitation to impose a common-law standard of care, and asked the jury to determine only if BNSF was negligent. [APP.48]. The court gave standard negligence instructions right out of

Minnesota's Jury Instruction Guides and, in most instances, right out of BNSF's proposed instructions. [APP.143-44, 151, 154]. The trial court also read five pages of federal regulations the parties had agreed on and, consistent with standard civil instruction 25.46, instructed the jury that, if it determined BNSF complied with those regulations, such compliance was evidence of due care. [APP.145-150]. BNSF never objected—either in the charging conference or at any other time before the jury retired—to any of the instructions regarding its standard of care. [APP.455-479].

At trial, BNSF did not pursue compliance with federal regulations as its defense. During opening statements, BNSF's attorney explained instead that plaintiffs have the burden to prove that the railroad was "negligent." [T.168]. In his closing argument, BNSF's attorney claimed that plaintiffs had "failed to meet their burden of proving that there was any negligence by the BNSF that in any way caused or contributed to this accident." [APP.493]. BNSF's attorney never mentioned the federal-regulation instruction (25.46) in his closing. [APP.480-494]. Nor could he. Evidence of violations of federal regulations was overwhelming. Instead, counsel declined to discuss the federal regulations the jury had heard, calling them "difficult to listen to." [T. 4454-55]. He then acknowledged that BNSF had violated some governing federal regulations, but attempted to discount those violations as "technical things" that were of no importance. [T.4454-55].

Answering questions on the special verdict form that, for the most part, mirrored those proposed by BNSF, the jury found that BNSF was negligent and was the primary cause of the accident.

[APP.48-49]. Then, in its Notice of Motion and Motion for New Trial, BNSF did not assign as error any of the instructions regarding the standard of care. [ADD.62-65].

## **VI. THE COURT OF APPEALS.**

Shortly after trial, BNSF hired a new complement of attorneys and changed strategies completely. It argued on appeal that railroad liability could exist only in the form of noncompliance with federal regulations—a standard BNSF never requested below. Accordingly, the argument went, the jury instructions regarding BNSF’s standard of care that the railroad agreed to and, in large part, proposed, were erroneous and required a new trial.

Focusing primarily on standard instruction 25.46, the majority agreed and rewarded BNSF with a new trial. Turning the doctrine of invited error on its head, the majority pronounced: “When an error of fundamental law in a jury instruction affects a party’s right to a fair trial, the party is entitled to a new trial even if the party offered or acquiesced in the erroneous jury instruction.” [ADD.3].

Judge Minge dissented. He pointedly stated: “When one of the largest railroads in our country and its legal counsel decline the opportunity to object or even comment on instructions that on appeal are characterized as a fundamental error of basic railroad law, this posture is fairly characterized as acquiescing in the instructions given.” [ADD.29]. This Court granted review.

## **ARGUMENT**

For more than a century, this Court has consistently enforced the principle that litigants who invite error—particularly in the context of civil jury instructions—cannot use that error to secure a new trial. The continued vitality of this principle is now being challenged.

Before the jury was charged, BNSF insisted that the only predicate to railroad liability is the failure to act with reasonable care—the common-law standard. The trial court accepted BNSF’s invitation, and instructed the jury to apply a common-law standard of care. Then, after the jury returned its liability verdict, the railroad chose not to assign as error in its Notice of Motion and Motion for New Trial any instructions regarding the standard of care.

On appeal, however, BNSF changed course. BNSF demanded a “do over,” belatedly arguing that the assessment of railroad liability should be based exclusively on compliance with federal regulations—a standard BNSF never even hinted at before the jury deliberated.

The majority sided with the railroad and pronounced: “The error was instructing the jury on the wrong standard of care to be applied to BNSF.” [ADD.17]. Completely discarding the doctrine of invited error, the majority rewarded BNSF with a new liability trial.

Minnesota law does not—and cannot—countenance the new rule announced by the majority’s decision. Civil litigants should not be allowed to utilize errors they deliberately and strategically inject into a case to obtain a legal mulligan. As Judge Minge articulated in his dissent, Minnesota should not allow parties “the opportunity to stand-by, not object to erroneous jury instructions, and see how the first

trial will turn out, expecting that if the result is adverse the judge's error will enable them to secure a new trial." [ADD.30].

The circumstances of this case are particularly egregious. In addition to requesting a common-law standard of care, BNSF never voiced any objection to instructions incorporating that standard before the trial court, and did not assign that standard of care as error in its Notice of Motion and Motion for New Trial. [ADD.62-64]. BNSF should have been precluded from attacking the standard it not only endorsed, but specifically requested. In other words, the doctrine of invited error should have been preserved, not cast aside.

Even if invited error did not bar BNSF from challenging the agreed-to instructions, the challenge should be rejected. The standard of care given to the jury correctly reflected the law of the case. Further, any perceived error was harmless and a far cry from plain error. For a multitude of reasons, this Court should reverse and reinstate the trial-court judgment.

**I. BNSF WAIVED ANY ARGUMENT THAT AGREED-TO JURY INSTRUCTIONS REGARDING THE STANDARD OF CARE WARRANT A NEW TRIAL.**

**A. BNSF Failed to Assign As Error in Its Notice of Motion and Motion for New Trial Any Instructions Regarding the Standard of Care.**

Rule 59.01(f) of the Minnesota Rules of Civil Procedure allows a trial court to review allegedly erroneous jury instructions. In most cases, the rule requires the complaining party to have first objected during trial. Minn. R. Civ. P. 59.01(f). Absent an objection during trial, the court may only review an instruction for plain error, and

even then, only if the alleged error is “plainly assigned in the notice of motion” within thirty days of the verdict. Minn. R. Civ. P. 59.01(f), 59.03; *see also* Minn. R. Civ. P. 51.04(b).

The thirty-day time limit prescribed by Rule 59.03 is jurisdictional. *Bowman v. Pamida, Inc.*, 261 N.W.2d 594, 597 (Minn. 1977).<sup>7</sup> As this Court has held repeatedly, any alleged errors not included in a notice of motion and motion for new trial are waived. *See, e.g., Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986) (“[U]pon an appeal from a judgment, matters involving trial procedure and evidentiary rulings, objections to instructions and the like are not subject to review unless there was a motion for a new trial in which such matters were assigned as error.”) (quoting 3 J. Hetland and O. Adamson, Minn. Practice 54 (Supp.1983) (emphasis added)).

Here, BNSF filed a Notice of Motion and Motion for New Trial that assigned error to only two jury instructions. The first pertained to an adverse-inference instruction, the second to the effect of prior settlements. [ADD.63]. Importantly, BNSF’s Notice of Motion and Motion for New Trial did not include any challenge to the instructions regarding the railroad’s standard of care. [*Id.*]. This failure alone should have ended any challenge to those instructions.

Notwithstanding BNSF’s failure to properly preserve the issue, the majority below stated: “BNSF moved for a new trial on the ground that the jury had been erroneously instructed on preemption.”

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<sup>7</sup> At the time *Bowman* was decided, the time limit for service of the notice of motion was 15 days. Rule 59.03 was amended in 2000 to extend the time limit from 15 to 30 days, but did not change the legal effect of failure to meet the time requirement.

[ADD.12]. Then, relying on this procedural misunderstanding, the majority rewarded BNSF with a new liability trial—something it had never properly requested. This Court should reverse the majority’s decision below and reinstate the judgment on this basis alone.

**B. BNSF Invited the Alleged Error.**

Even if BNSF had properly preserved the standard-of-care issue, the railroad’s complaints about the jury instructions should have been rejected. BNSF invited the alleged error, not once, but repeatedly. The majority should be reversed on this alternative basis.

**1. This Court bars civil litigants from obtaining new trials based on errors they actively procured.**

The doctrine of invited error has long been embedded in the fabric of this Court’s civil jurisprudence. At its core, the doctrine provides that “[o]ne who procures error may not assert such error as the basis for obtaining a new trial.” *Isler v. Burman*, 305 Minn. 288, 296, 232 N.W.2d 818, 822 (1975) (declining to reach merits of assigned error because error had been invited by the party seeking relief); *see also In re Estate of Forsythe*, 221 Minn. 303, 312, 22 N.W.2d 19, 25 (1946) (“The error, however, was procured by proponents, and is neither prejudicial nor available to them as a basis for obtaining a new trial.”).

This Court has applied the doctrine of invited error in the context of civil jury instructions for more than a century. In *McCarvel v. Phenix Insurance Co. of Brooklyn*, 64 Minn. 193, 199, 66 N.W.2d 367, 370 (1896), the Court considered whether a party may complain on appeal that the trial court failed to give a jury instruction the party

never requested: “The next question to be considered is whether the appellant is in a position to take advantage of the court’s error in submitting the case to the jury on an immaterial issue, and not on the real issue in the case.” After concluding that “[t]he issue made in the trial was largely of the defendant’s own choosing,” the Court stated instructively:

[The issue set forth in the jury instructions] was presented to the court as the sole controversy in the case. If the defendant claimed that there were other reasons why plaintiff should not recover, it should have called the court’s attention to them by requests to charge, or in some other proper manner. Instead of doing this, [the defendant] permitted the case to go to the jury on the single question of waiver . . . , and by its conduct led the court to believe that this was the real question, and the only question in the case.

*Id.*, 64 Minn. at 199, 200, 66 N.W.2d at 370. The Court concluded, “[i]f the verdict is sustained by the evidence,<sup>8</sup> an appellate court will not set aside [a verdict] merely because the trial court wholly omitted to charge the jury on a point to which its attention had never in any manner been called.” *Id.*, 64 Minn. at 200, 66 N.W.2d at 370. Instead, “[b]y failure to raise the point it is waived.” *Id.*

More recently, this Court has reaffirmed the doctrine of invited error in the context of civil jury instructions. In *LaValle v. Aqualand Pool Co.*, 257 N.W.2d 324 (Minn. 1977), for example, the defendant claimed on appeal that the trial court improperly instructed the jury

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<sup>8</sup> BNSF did not challenge the sufficiency of the evidence below.

on the measure of damages available in a breach-of-contract action. Rejecting the argument out of hand, the Court observed: “[I]t is clear that the instructions were generally discussed and approved by all counsel prior to the charge to the jury, that counsel waived the right to be present during the charge, and that the trial court gave the instructions as previously discussed and approved without any objection by counsel.” *Lavalle*, 257 N.W.2d at 327. Accordingly, the Court stated: “Under all these circumstances, we will not consider on this appeal any allegation of erroneous instructions.” *Id.* at 327-28 (emphasis added). *See also Zylka v. Leikvoll*, 274 Minn. 435, 446-67, 144 N.W.2d 358, 366-67 (1966) (“On appeal, however, we cannot consider Leikvoll’s theory that he was a volunteer. No such theory was asserted at trial or pleaded as a defense, no instruction was requested to that effect, and no objections were taken to the court’s instructions . . . . We must, therefore, consider Leikvoll’s liability by the law of the case as set out in the trial court’s charge.”) The same rationale applies here.

**2. BNSF insisted that the only predicate to railroad liability was the failure to use reasonable care, and the trial court so instructed the jury.**

During discovery and at trial, evidence mounted that BNSF had violated federal railroad regulations. BNSF’s principal attorney acknowledged as much during his closing argument, conceding “there are technical things that were not complied with.” [T.4454-55].

Compounding these acknowledged violations, BNSF misplaced or destroyed documents that would have established compliance or noncompliance with other federal regulations. As the trial court

admonished in a post-trial order, “BNSF’s claims of absolute compliance with federal regulations carry little persuasive weight because BNSF often relies on evidence that it mishandled, misplaced, destroyed, or fabricated to support its claims of compliance.” [ADD.49].

Unable to mount a defense at trial based on compliance with federal regulations, BNSF sought to divert the jury’s attention away from those regulations. BNSF insisted that the only predicate to railroad liability is the failure to act with reasonable care. BNSF proposed jury instructions that included the standard definitions of “reasonable care” and “negligence.” [APP.208]. BNSF similarly proposed Minnesota’s standard comparative fault instruction, which defines “fault” simply as “negligence.” [*Id.*].

BNSF proposed several custom instructions, each of which requested that the jury determine only whether BNSF was “negligent” based on common-law notions of “reasonable care.” [APP.212, 215]. In contrast, BNSF’s proposed instructions did not include a single federal regulation, much less delineate a request that the jury be provided a federal standard of care predicated on compliance with federal regulations. [APP.204-219].

And as set forth above, BNSF proposed a special verdict form that simply asked: “Was BNSF Railway Company negligent in its operations on September 26, 2003?” [APP.225]. It followed with the question: “Was BNSF’s negligence a direct cause of the September 26, 2003 accident?” [*Id.*]. BNSF never asked—in its special verdict form or otherwise—that the jury determine whether the railroad had complied with federal regulations. Similarly, in his opening and

closing statements, BNSF's trial attorney stayed away from arguing that BNSF had complied with any specific federal regulations. [T.130-168; APP.460-494]. Instead, he asserted only that BNSF had not been "negligent." [T.168, 4448]. And despite a lengthy charging conference in which the instructions were discussed in detail, BNSF did not lodge a single objection to any of the instructions regarding its standard of care. [APP.455-479].

Even after the jury returned its liability verdict finding BNSF primarily at fault, the railroad did not assign as error in its Notice of Motion or Motion for New Trial any of the instructions regarding the standard of care. [ADD.63]. But BNSF then hired new counsel, changed strategies, and argued on appeal that railroad liability turns exclusively on compliance with federal regulations—a standard BNSF never requested below.

After pursuing, insisting on, and agreeing to a common-law standard of care, BNSF's request for appellate relief on this issue should have been rejected. *Lavalle*, 257 N.W.2d at 327 (declining to address merits of challenge to jury instructions and stating: "It is clear that the instructions were generally discussed and approved by all counsel prior to the charge to the jury, that counsel waived the right to be present during the charge, and that the trial court gave the instructions as previously discussed and approved without any objection by counsel.").

Indeed, BNSF's belated attempt to seek relief after a transparent change in strategy (and attorneys) is one of the primary evils the doctrine of invited error was intended to prevent. *See Guidance Endodontics, LLC v. Dentsply Int'l, Inc.*, --- F. Supp. 2d ---, 2010 WL

4340806 at \*35 (D.N.M. Oct. 14, 2010) (applying doctrine of invited error to bar challenge to jury instruction and stating: “[T]he Defendants asked the Court to let the jury award punitive damages if it found a breach of the implied covenant of good faith and fair dealing and bad faith. What the Defendants apparently did not expect was that the jury would find that the Defendants did those things.”). Rather than calling BNSF’s post-trial strategy what it was, the majority below rewarded BNSF with a new trial.

The time-honored doctrine of invited error should not so easily be cast aside. The doctrine serves a number of important functions and advances a host of sound public policies, each of which is implicated here. Foremost, if parties can obtain a new trial based on errors they agree to or otherwise procure, litigants will have a strong incentive to intentionally introduce reversible error into the proceedings. Self-injected error would, in effect, serve as insurance against adverse verdicts. *See United States v. Boyd*, 86 F.3d 719, 721-22 (7th Cir. 1996) (“Many a defendant would like to plant an error and grow a risk-free trial. . . . But steps the court takes at the defendant’s behest are not reversible, because they are not error; even the ‘plain error’ doctrine does not ride to the rescue when the choice has been made deliberately.”); *Alabama Great Southern R.R. Co. v. Johnson*, 140 F.2d 968, 971 (5th Cir. 1944) (stating that the doctrine of invited error “prevents a litigant from speculating on a verdict, and then, when the speculation turns out badly, escaping the consequences of having done so”); *Krenik v. Westerman*, 201 Minn. 255, 263-64, 275 N.W.2d 849, 853 (1937) (Peterson, J., dissenting) (“To reverse is to permit defendant to profit by his own wrong. He should have requested the

instruction at the proper time . . . . After having provoked counsel and engaged in such arguments, he should not be permitted, after an adverse verdict, to take advantage of the situation he himself has created. . . . It offends all principles of justice and fairness.”).

As Judge Minge articulated in his dissent below, Minnesota law should not permit civil litigants to “stand-by, not object to erroneous jury instructions, and see how the first trial will turn out, expecting that if the result is adverse the judge’s error will enable them to secure a new trial.” [ADD.30]. This logic is inescapable.

Beyond this very real concern, the doctrine of invited error recognizes that, if the law permitted parties to obtain new trials based on errors they invited, trial courts would have to shoulder undue burdens resulting in impractical trial proceedings. The new rule announced by the majority places trial courts in the impossible position of constantly second-guessing litigants’ strategy decisions. Unable to rely on the parties’ submissions, trial courts are faced with the need to conduct their own research, often during trial, expanding the time needed for charging conferences from a few hours to a few days. And as one federal appellate judge observed, if trial courts risk reversal even in the face of invited error, trial proceedings will be saturated with bench conferences if judges “think defense counsel is making a mistake.” *United States v. Perez*, 116 F.3d 840, 852 (9th Cir. 1997) (Kleinfeld, J., concurring). If allowed to stand, the majority’s new rule would impose on opposing counsel a similar requirement to oversee not only their own conduct, but also their adversary’s conduct, to protect against reversal.

The doctrine of invited error also preserves the efficient use of ever-diminishing judicial resources. Attorneys are, in most cases, more knowledgeable than trial courts about the intricacies of the specific laws governing the claims and defenses at issue. *See id.* at 853 (“Lawyers usually are very intelligent and capable people. They necessarily know more about their cases than the judges trying them.”). Absent an objection drawing the trial court’s attention to a specific dispute, or, even worse, where the parties have agreed on civil jury instructions, trial courts should not be tasked with expending scant resources to scour legal treatises during trial to confirm that agreed-to instructions are, in every respect, correct. Instead, correct or not, agreed-to civil jury instructions simply become the law of the case. *Heise v. J.R. Clark Co.*, 245 Minn. 179, 191, 71 N.W.2d 818, 826 (1955) (“A party is concluded by an instruction given at his own request . . . . [T]he trial court’s charge, even though it be erroneous, becomes the law of the case.”); *Zylka*, 274 Minn. at 447, 144 N.W.2d at 367.

In light of these policies, and particularly against the backdrop of this Court’s precedent in the area of civil jury instructions, there is little question BNSF invited the alleged error. There should likewise have been little question that the railroad’s post-trial challenge to the agreed-to jury instructions should fail, since it was never raised in BNSF’s Notice of Motion or Motion for New Trial. Instead, relying primarily on this Court’s decision in *Mjos v. Village of Howard Lake*, 287 Minn. 427, 178 N.W.2d 862 (1970), the majority concluded that “BNSF is not precluded from challenging” the standard of care it proposed. [ADD.14].

But *Mjos* did not even discuss—let alone overrule—the doctrine of invited error. Instead, the Court in *Mjos* remanded for a new trial because intervening legal events of which the parties and the trial court were entirely unaware affected the propriety of the jury instructions. 287 Minn. at 435, 178 N.W.2d at 868 (“It is apparent that experienced counsel for both parties and the trial court were unaware of the 1967 changes in the Civil Damage Act which are pertinent to this action.”). The same can hardly be said here. Unlike the parties in *Mjos*, BNSF was acutely aware of the concept of federal preemption—it raised it in each of its answers, and relied on it, in part, when seeking a directed verdict. But as evidence of noncompliance with federal regulations mounted, BNSF chose instead to request a common-law standard of care at trial. BNSF simply did not believe the jury would find it at fault under that standard—hardly a basis for undoing four years of discovery and six weeks of trial.

Using *Mjos* as its springboard, the majority proceeded to review the agreed-to jury instructions for plain-error and rewarded the railroad with a new liability trial. This Court should reverse and reinstate the trial-court judgment.

### **3. Invited error precludes plain-error review.**

As amended in 2006, Rule 51.04(b) provides that a trial court “may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51.04(a)(1) or (2).” Minn. R. Civ. P. 51.04(b). Plain-error review provides a limited, discretionary exception to the general rule that a party’s failure to object to an instruction at trial constitutes waiver. *See, e.g.*, Minn. R.

Civ. P. 51.03 (providing that objections must be timely); *Zylka*, 274 Minn. at 446, 144 N.W.2d at 366 (1966) (recognizing that failure to object to instruction generally constitutes waiver).

But by its express terms, Rule 51.04(b) contemplates review only where there was a passive failure to object. Nothing in the rule provides that review is available where, as here, the party seeking review not only failed to object, but actively procured and invited the alleged error. In the same vein, nothing in the rule suggests the amendment was intended to abrogate this Court's prior decisions, which have consistently recognized that where a party's conduct surpasses the mere failure to object, the doctrine of invited error bars review of civil jury instructions.<sup>9</sup>

Further, the lower court's conclusion that invited error does not bar plain-error review finds no support in the advisory committee comments to Rule 51.04(b). Instead, the comments state that the amendment to Rule 51 was "modeled on its federal counterpart, Fed. R. Civ. P. 51, as it was amended in 2003." In turn, the federal rule was itself modeled on its criminal counterpart, Fed. R. Crim. P. 52(b). *See Wright & Miller*, 9C Fed. Prac. & Proc. Civ. § 2558 (3d ed.) (discussing Fed. R. Crim. P. 52(b) and observing that "[t]he 2003

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<sup>9</sup> In criminal cases, this Court permits plain-error review even where the alleged error is invited. *See, e.g., State v. Everson*, 749 N.W.2d 340, 348 (Minn. 2008). But in the criminal context, the defendant's liberty is at stake. Accordingly, there is good reason to depart from the general rule that invited error precludes plain-error review. There is no equally compelling reason to depart from the general rule in the civil context, and this Court has never done so.

revision of Civil Rule 51 brings the rule into line with the Criminal Rules at least in the context of jury instructions.”).

In both civil and criminal cases, federal courts have repeatedly distinguished between invited error and the mere failure to preserve an objection, and have held that invited error bars even plain-error review. The Eighth Circuit, for example, has explained: “Only when the right is inadvertently left unasserted is the defendant saved by Rule 52(b)’s plain error review.” *United States v. Murphy*, 248 F.3d 777, 779 (8th Cir. 2001); *accord United States v. Thompson*, 289 F.3d 524, 526 (8th Cir. 2002) (“The plain error standard only applies when a defendant inadvertently fails to raise an objection to the district court.”).

Echoing the same principle, the Seventh Circuit has reasoned instructively:

Plain error analysis may be invoked to review a forfeited objection because mere forfeiture does not extinguish an “error” under Fed. R. Crim. P. 52(b). Where there has been a valid waiver, however, plain error analysis does not apply because there is technically no “error” to correct. Here Ross actually proposed (and thereby implicitly approved) the district court’s instructions . . . rather than merely failing to object to them. As a result, he has voluntarily waived any objection that he might have to these instructions, and we will not review his argument even for plain error.

*United States v. Ross*, 77 F.3d 1525, 1541-42 (7th Cir. 1996).

The same rule applies in the Second Circuit. That court explained, in a context similar to that presented here, that the

defendant “not only failed to object to the challenged charge—an omission that would normally limit our review to plain error, see Fed. R. Crim. P. 30(d), 52(b)—his counsel specifically ‘endorse[d]’ it. . . . Such endorsement might well be deemed a true waiver, negating even plain error review.” *United States v. Hertular*, 562 F.3d 433, 444 (2d Cir. 2009); see also *United States v. Young*, 745 F.2d 733, 752 (2d Cir. 1984) (recognizing that “not even plain error doctrine permits reversal on the ground that the trial court *granted* a defendant’s request to charge”) (emphasis in original).

Other federal courts have reached the same conclusion. See *Glasscock v. Wilson Constructors, Inc.*, 627 F.2d 1065, 1068 (10th Cir. 1980) (“Wilson urges as reversible error the trial court’s acceptance of the position for which Wilson argued vigorously below. Even assuming error, Wilson is hardly in a position to invoke the exception to Rule 51, and we decline to apply it to the facts of this case.”); *2660 Woodley Road Joint Venture v. ITT Sheraton Corp.*, 369 F.3d 732, 744 (3d Cir. 2004) (“We have held that this type of error is fundamental error entitling a defendant to a new trial . . . . However, Sheraton submitted proposed jury instructions that did not include an instruction that entitlement to punitive damages must be established by clear and convincing evidence. Therefore, assuming that the instruction was wrong, it was tantamount to invited error.”); *United States v. Frank*, 599 F.3d 1221, 1240 (11th Cir. 2010) (“However, when a party agrees with a court’s proposed instructions, the doctrine of invited error applies, meaning the review is waived even if plain error would result.”); *United States v. Thurman*, 417 F.2d 752, 753 (D.C. Cir. 1969) (“Appellant not only failed to raise any objection to the

trial court charge, but it is clear that his retained trial counsel specifically requested and urged the trial court to give the instruction now objected to. In such circumstances we decline to find error, plain or otherwise.”). *See also* Wright & Miller, *supra*, at § 2558 (“Thus, a party who requests a jury instruction cannot complain if the instruction, or one substantially like it, is given by the trial judge.”) (emphasis added).

This Court should reach the same result. Because the advisory committee comments contemplate consistency with federal law, Minn. R. Civ. P. 51.04(b) was intended to apply only where a party inadvertently fails to raise an objection to the trial court. The merit of such a conclusion is evident. Interpreting Rule 51.04(b) broadly so as to allow plain-error review even in the context of affirmatively invited errors would undermine every public policy the doctrine was intended to advance. The majority’s decision, which endorses this undesirable result, should be reversed.

## **II. EVEN IF AVAILABLE, PLAIN-ERROR REVIEW DOES NOT JUSTIFY A NEW LIABILITY TRIAL.**

### **A. Standard Of Review.**

Plain-error review is discretionary. The language of Rule 51.04(b) says as much: “A court may consider a plain error in the instructions affecting substantial rights that has not been preserved.” Minn. R. Civ. P. 51.04(b) (emphasis added). Because BNSF never noticed a new trial motion based on instructions setting forth the railroad’s standard of care, the trial court was never asked to exercise its discretion under Rule 51.04(b). But even if BNSF had raised the

issue before the trial court, there was no basis upon which to order a new liability trial.

**B. BNSF Cannot Meet The Demanding Criteria For A New Trial.**

Under this Court's plain-error framework, the party challenging jury instructions despite its failure to object during trial has the burden to show: (1) there was error; (2) the error was plain; and (3) the error affected substantial rights. *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). If these three factors are satisfied, the court must assess a fourth factor: whether it is necessary to correct the error "to ensure fairness and the integrity of the judicial proceedings." *Id.* None of these factors are satisfied on this record.

**1. The instructions were correct.**

A trial court has "considerable latitude in selection of language in the jury charge." *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986) (internal quotations omitted). "All that is required . . . is that the charge as a whole convey to the jury a clear and correct understanding of the law of the case." *Barnes v. Northwest Airlines, Inc.*, 233 Minn. 410, 421, 47 N.W.2d 180, 187 (1951).

Here, the trial court's instructions were correct. Because BNSF insisted on a common-law standard of care, the trial court provided the jury with standard definitions of "reasonable care" and "negligence" that mirrored those set forth in BNSF's proposed instructions and in Minnesota's Jury Instruction Guides. [APP.143]. The court also provided the jury with standard instruction 25.46, which reads:

There is evidence in this case that [BNSF] followed a legal duty written into law as a statute.

It is not conclusive proof of reasonable care if you find that [BNSF] followed such a legal duty.

It is only evidence of reasonable care.

Consider this evidence along with all the other evidence when you decide if reasonable care was used.

[APP.150]; CIVJIG 25.46.

Having specifically requested a common-law standard of care, BNSF is hardly in a position to complain that the trial court erred in giving this instruction. Where a common-law standard of care applies, instruction 25.46 is indisputably a correct recitation of Minnesota law. *See Blasing v. P.R.L. Hardenbergh Co.*, 303 Minn. 41, 49, 226 N.W.2d 110, 115 (1975) (“[T]he fact that a person causing an accident has complied with a statute or ordinance regulating conduct under the circumstances is not conclusive that he was in the exercise of due care.”); *Leisy v. Northern Pac. Ry. Co.*, 230 Minn. 61, 65, 40 N.W.2d 626, 629 (1950) (“Requirements prescribed by statute, or by administrative order under statutory authorization, are specific and minimum requirements, which may satisfy the requirements of due care, but not necessarily so.”). The trial court cannot be faulted for giving an instruction that correctly reflected the very standard of care BNSF requested.

But even looking past BNSF’s post-trial revisionism, the instructions were not erroneous, let alone “plainly” erroneous. This Court has long recognized a presumption against federal preemption. *See In re Estate of Barg*, 752 N.W.2d 52, 63 (Minn. 2008) (stating that

preemption is generally disfavored); *Midwest Motor Exp., Inc. v. International Bhd. of Teamsters*, 512 N.W.2d 881, 892 (Minn. 1994) (recognizing a “strong presumption” against preemption). The United States Supreme Court recently affirmed that the long-standing presumption against preemption applies in all preemption cases. *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009); *see also Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008). This necessarily includes the limited preemption clause contained in the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20106.

FRSA preemption applies only to specific claims that are expressly “covered” by a specific federal regulation. *CSX Trans., Inc. v. Easterwood*, 507 U.S. 658, 665 (1993) (“The sole issue here is preemption, which depends on whether the regulations issued by the Secretary cover the subject matter of the two allegations [train speed and adequacy of the warning devices].”) (emphasis added). Each individual claim of negligence must be subjected to the “covering” analysis for FRSA preemption to come into play. And since the 2007 amendment to the FRSA’s preemption clause, even when there is a “covering” regulation or internal railroad rule, the limited preemption afforded under the FRSA of a common-law claim applies only where the railroad has fully complied with those regulations. *See* 49 U.S.C. § 20106(b)(A) and (B) (2008).

Here, based on evidence actually adduced at trial as well as evidence BNSF “lost” or otherwise failed to produce, BNSF recognized there were no circumstances under which it could prove compliance with federal regulations relating to the proper maintenance of the track and signal system. Even when appellants proposed an

instruction to advise the jury that BNSF owns the track at the crossing and is responsible for maintaining the active signal-system pursuant to federal law [T.4315-16]—an instruction the trial court ultimately gave [APP. 145.]—BNSF opposed the instruction. [T.4316-4320]. Indeed, BNSF raised preemption only in a very limited context—via a motion for directed verdict on a complete preemption theory, and on a custom instruction regarding the train’s horn.

The manner in which BNSF addressed the preemption of a common-law negligence claim based on the loudness of the horn is instructive. Concerned that appellants would assert that BNSF was negligent because the train’s horn was not loud enough to notify a driver of the oncoming train, the railroad filed a motion in limine contending that a state-law negligence claim based on inadequate horn volume was preempted. Because there is a federal regulation “covering” horn volume,<sup>10</sup> and since the horn on the involved train met minimum federal requirements, no state common-law claim for inadequate horn volume survived. BNSF accordingly requested and received an instruction informing the jury that evidence of horn volume was pertinent only to the comparative fault of the driver, and that there was no negligence claim against the railroad related to the horn. [APP.137].

Any other negligence allegation that BNSF believed to be “covered” by a federal regulation should have been handled the same way. But BNSF failed to identify other regulations that it complied with and that expressly “covered” the specific aspects of appellants’

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<sup>10</sup> 49 C.F.R. § 229.129.

negligence claims—a requirement for preemption of the common-law standard of care with respect to those claims. It did not do so because it could not. Evidence of violations of federal regulations abounded. Absent specific proof by BNSF of the preemption of each of appellants’ remaining claims, the proper standard of care was the default common-law standard—something BNSF repeatedly acknowledged on the record. The instructions given were neither erroneous nor “plainly” erroneous.

**2. BNSF cannot show prejudice.**

Even if the agreed-to jury instructions regarding BNSF’s standard of care did somehow constitute plain-error, BNSF still cannot show that it suffered any prejudice. Under the third factor of the plain-error analysis, an error in instructions will warrant a new trial only if the party seeking relief can show that the error affected “substantial rights.” In practice, this requires a showing of prejudice, which this Court has found to exist only where there is “a reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury.” *State v. Glidden*, 455 N.W.2d 744, 747 (Minn. 1990).

Here, even had the jury been instructed as BNSF now demands—*i.e.*, that the only predicate to railroad liability is noncompliance with federal regulations—the jury heard exhaustive testimony regarding BNSF’s repeated violations of federal regulations and of the company’s own rules. This testimony included, among other things, BNSF’s failure to maintain the condition of the ballast (in violation of 49 C.F.R. § 213.103) [T.1542-44]; its failure to maintain

the insulation on rail joints within the crossing's approach circuit (in violation of 49 C.F.R. § 234.235 and BNSF's own standards) [T.2466, 2530, 2718; Exs. 179, 180, 181 and 23B]; its use of an improper setting on the HXP for the Ferry Street approach circuit per the manufacturer's specifications (a violation of 49 C.F.R. § 234.227(a)) [T.2538]; its failure to properly respond to credible reports of warning-system malfunctions (in violation of 49 C.F.R. §§ 234.103, 234.105 and 234.107) [T.189-92, Exs. 4, 9, 10, 11, 12]; and its failure to keep proper plans at the crossing for maintenance and testing (in violation of 49 C.F.R. § 234.201) [T.3218].

Thus, even if the jury had been asked to determine whether BNSF violated federal regulations—something BNSF never requested the jury do—the answer most assuredly would have been “yes.”

BNSF similarly cannot show prejudice with respect to the instruction that the trial court did give—standard instruction 25.46. The antecedent to that instruction provides: “If you find that BNSF followed such a legal duty . . . .” [APP.150]. Because there is ample evidence in the record that BNSF violated a host of federal regulations, the remainder of the instruction (“It is only evidence of reasonable care . . . .”) never became operative. After all, BNSF's own attorney admitted in closing argument that BNSF violated federal regulations. Whether the jury was instructed that compliance with federal regulations is conclusive proof of due care is of little consequence in light of the significant evidence of multiple violations of federal regulations. Thus, the alleged error, if any, was harmless.

In short, BNSF's belated attempt to seek refuge behind a standard of care it never proposed is a fruitless exercise. The record

plainly reflects noncompliance with federal regulations and BNSF's own internal rules. Accordingly, any perceived error in the instructions was far from prejudicial. It was most assuredly harmless.

**3. The fairness and integrity of the judicial proceedings are ensured by reinstating the trial-court judgment.**

The final factor of the analysis definitively forecloses BNSF's grievance. That factor requires an independent analysis of whether the assigned error should be corrected "to ensure fairness and the integrity of the judicial proceedings." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The majority's decision below reduced this factor to a nullity.

Because, in the majority's view, the first three factors were satisfied, that majority summarily concluded that the final factor was necessarily satisfied as well: "Because of the error of fundamental law in the jury instruction relative to preemption [first two factors] and the resulting affect (sic) on BNSF's substantial right to a fair trial [third factor], we are compelled to conclude that, to ensure fairness and the integrity of this proceeding, BNSF is entitled to a new liability trial [fourth factor]." [ADD.18]. The majority's decision renders the fourth factor illusory. Its analysis should accordingly be rejected.

Applying the same four factors, the United States Supreme Court has rejected the notion that, if the first three factors are satisfied, the fourth factor is necessarily satisfied. See *United States v. Loan*, 507 U.S. 725, 736 (1993) ("[A] plain error affecting substantial rights does not, without more, satisfy the *Atkinson* standard, for

otherwise the discretion afforded by Rule 52(b) would be illusory.”). This Court should also demand more—particularly where, as here, a civil litigant seeks to un-ring the bell based on purported errors it procured.

Even if the doctrine of invited error does not preclude plain-error review altogether, it is certainly relevant to the final factor of the analysis. Conceptually, if a party who affirmatively requests that its conduct be assessed under a particular standard of care (as BNSF did here) can be assured of a new trial in the event of an adverse result, the public’s trust in the finality and integrity of judicial proceedings will undoubtedly be compromised. Here, it is difficult to fathom how BNSF could have been deprived of a “fair trial” when its conduct was assessed under the very common-law standard it requested. Requiring parties, judges, and jurors to re-litigate disputes due to invited errors would substantially undermine—not ensure—judicial fairness and integrity.

Perhaps even more compelling, BNSF did everything it could to guarantee that the proceedings below were devoid of integrity and fairness. As the trial court found, BNSF repeatedly engaged in pervasive misconduct that itself undermined the integrity of the proceedings. The railroad’s misconduct included, among many other things: (1) the failure to disclose previous problems with the signal system at the railroad crossing [APP.82]; (2) the failure to disclose repair work undertaken at the crossing the day before and the day of the accident, including the removal of an eight-foot section of rail [APP.85]; (3) the “fabrication of electronic and physical records” [APP.95]; (4) the “obstruction of and interference with Plaintiffs’

investigation” of the accident [*Id.*]; (5) the “interference with Plaintiffs’ access to witnesses and the accident site” [*Id.*]; and (6) “knowingly advancing lies, misleading facts, and/or misrepresentations . . . in depositions, sworn affidavits, and/or trial testimony” [*Id.*]. BNSF so saturated the record below with its stream of misconduct that the trial court “lost count of the total number of misrepresentations BNSF made to counsel, the parties, and this Court through the proceedings.” [APP.84]. And the trial court made an express finding that BNSF’s misconduct was perpetrated in bad faith. [APP.95].

BNSF’s conduct—both in inviting the error of which it now complains and in perpetrating substantial misconduct—struck at the heart of the fairness and integrity of the proceedings below, and resulted in significant sanctions. The fairness and integrity of these proceedings can only be ensured by reinstating the trial-court’s judgment, not by rewarding BNSF with a new trial.

In summary, even if BNSF had properly preserved its challenge to the jury instructions, which it did not, and even if the first three factors of the plain-error analysis were satisfied, which they are not, BNSF would still not be entitled to a new trial.

### **CONCLUSION**

The majority’s decision below is problematic for the entire bench and trial bar in Minnesota. The decision is based on the inaccurate notion that BNSF properly preserved its right to challenge jury instructions regarding the railroad’s standard of care. Equally disturbing, however, the decision endangers the continued vitality of the doctrine of invited error in the civil context, and abandons

compelling public policy that has served Minnesota's trial courts for over a century. Finally, the decision substantially misapplies this Court's plain-error framework. The majority's decision should be reversed on any of these independent grounds.

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**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 9,485 words. This brief was prepared using Microsoft Word 2007.

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