

STATE OF MINNESOTA
IN SUPREME COURT

A09-2212
A09-2213
A09-2214
A09-2215

Michael D. Frazier, as Trustee for the Next-of-Kin of Brian L. Frazier, deceased, (A09-2212), Harry James Rhoades, Sr., as Trustee for the Next-of-Kin of Harry James Rhoades, Jr., deceased, (A09-2213), Denise Renee Shannon, as Trustee for the Next-of-Kin of Bridgette Marie Shannon, deceased, (A09-2214), Elizabeth Chase, as Trustee for the Next-of-Kin of Corey Everett Chase, deceased, (A09-2215),

Plaintiffs-Petitioners,

vs.

Burlington Northern Santa Fe Corporation, et al.,

Defendant-Respondent,

Richard P. Wright, as Special Administrator of the Estate of Corey E. Chase, deceased, Respondent (A09-2212), Cristy Y. Frazier, as Special Administrator for the Estate of Brian Frazier, deceased, Respondent (A09-2213, A09-2214, A09-2215),

and

BNSF Railway Company, third party plaintiff, (A09-2213, A09-2214, A09-2215),

vs.

Richard P. Wright, as Special Administrator for the Estate of Corey Everett Chase, deceased, third party defendant, Respondent (A09-2213, A09-2214, A09-2215).

BRIEF OF MINNESOTA ASSOCIATION FOR JUSTICE, *Amicus Curiae*

Appearances on inside cover

Wilbur W. Fluegel, #30429
FLUEGEL LAW OFFICE
150 South 5th St., Suite 3475
Minneapolis, MN 55402
(612) 238-3540
*Attorney for Minn. Ass'n for Justice,
Amicus*

Sharon L. Van Dyck, #183799
VAN DYCK LAW FIRM, PLLC
5354 Parkdale Drive, Suite 103
St. Louis Park, MN 55416
(952) 746-1095
Attorney for Appellant Chase

Paul E. Godlewski, #0035567
SCHWEBEL, GOETZ & SIEBEN
80 South Eighth Street, Suite 5120
Minneapolis, MN 55402-2246
(612) 344-0327
Co-Counsel for Appellant Chase

Robert L. Pottroff, KS#10220
POTTROFF LAW OFFICES, P.A.
320 Sunset Avenue
Manhattan, KS 66502
(785)539-4656
Attorney for all Appellants

Patrick J. Sauter, #0095989
Mark R. Bradford, #0335940
BASSFORD REMELE, P.A.
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402
(612) 333-3000
Co-Counsel for Appellants Frazier

Burke J. Ellingson, #249294
BRENDEL & ZINN, LTD.
8519 Eagle Point Blvd., Suite 110
Lake Elmo, MN 55042
(651) 224-4959
Attorney for Defendant Wright

William O. Bongard, #0133826
**SIEBEN, GROSE, VONHOLTUM
& CAREY, LTD.**
800 Marquette Avenue, Suite 900
Minneapolis, MN 55402
(612) 333-4500
Attorney for Appellant Rhoades

Allan F. Shapiro, #0099661
FINN SHAPIRO
1660 South Highway 100, Suite 340
St. Louis Park, MN 55416
(952) 541-1000
Attorney for Appellant Shannon

Timothy R. Thornton, #109630
Sam Hanson, #41051
Jonathan P. Schmidt, #0329022
Tara Reese Duginske, #0389450
BRIGGS AND MORGAN, P.A.
80 South Eighth Street, Suite 2200
Minneapolis, MN 55402
(612) 977-8550
Attorney for Respondent BNSF

Paul E. D. Darsow, #285080
**ARTHUR, CHAPMAN, KETTERING,
SMETAK & PIKALA, P.A.**
500 Young Quinlan Building
81 South Ninth Street
Minneapolis, MN 55402-3214
(612-339-3500
*Attorneys for Amicus Curiae
Association of American Railroads*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

 I. History of the Plain Error Rule in Minnesota 3

 II. Minnesota Does not Allow a Civil Party to “Invite Error”
 and still Claim Application of the “Plain Error” Rule in a Civil
 Context 7

 III. Minnesota Allows a Criminal Defendant to Assert “Plain Error”
 even when the Aggrieved Party “Invited Error.” 11

 IV. Public Policy Reasons Justify a Different Approach between
 Criminal and Civil Cases for Operation of the “Plain Error” Rule 13

 V. In a Civil Law Context, “Invited Error” should Disqualify a
 Party from Seeking New Trial on the Basis of “Plain Error”
 given the Differing Public Policy Considerations 15

CONCLUSION 18

TABLE OF AUTHORITIES

RULES AND STATUTES

FED.R.CIV.P. 51	4, 7,
Fed.R.Civ.P. 51(d)	6
FED.R.CIV.P. 51, Advis. Comm. Notes - - 2003 Amend.	7
FED.R.CIV.P. 52(b)	4
FED. R. CRIM. P. 52(b)	3
MINN.R.CIV.APP.P. 129.03	1
MINN.R.CIV.APP.P. 103.04	6
MINN. R. CIV. P. 51	6, 8
MINN.R.CIV.P. 51.01	7
MINN. R. CIV. P. 51.03	7
MINN.R.CIV.P. 51.04	6, 7
MINN. R. CIV. P. 51.04(a)(1)	7
MINN. R. CIV. P. 51.04(a)(2)	7
MINN. R. CIV. P. 51.04(b)	1, 9, 18
MINN.R.CIV.P. 51, Advis. Comm. Notes (2006)	7
MINN. R. CRIM. P. 31.02	3

CASES

<i>Alholm v. Witt</i> , 394 N.W.2d 488, 493 (Minn. 1986)	5
---	---

<i>Allen v. State</i> , 89 Md. App. 25, 43, 597 A.2d 489, 498 (1991) <i>cert. denied</i> , 325 Md. 396, 601 A.2d 129 (1992)	2
<i>Allied Mut. Ins. Co. v. Western Nat'l Mut. Ins. Co.</i> , 552 561, 563 (Minn. 1996)	16
<i>American Reliable Ins. Co. v. Modern Homes, Inc.</i> , 311 Minn. 1, 3, 247 N.W.2d 39, 40 (1976)	5
<i>Danforth v. State</i> , 718 N.W.2d 451, 455 (Minn. 2006)	5
<i>Exxon Corp. v. Exxeen Corp.</i> , 696 F.2d 544, 548-49 (7 th Cir. 1982)	2, 16
<i>Heise v. J.R. Clark Co.</i> , 245 Minn. 179, 191, 71 N.W.2d 818, 826 (1955)	11
<i>Hilligoss v. Cargill, Inc.</i> , 649 N.W.2d 142, 147 (Minn. 2002)	5
<i>Javor v. United States</i> , 724 F.2d 831, 833 (9 th Cir.1984)	17
<i>Klauenberg v. State</i> , 355 Md. 528, 544, 735 A.2d 1061, 1069 (1999)	2
<i>Krenik v. Westerman</i> , 201 Minn. 255, 262, 275 N.W. 849, 852 (1937)	11
<i>McAlpine v. Fidelity & Cas. Co. of New York</i> , 134 Minn. 192, 199, 158 N.W. 967, 970 (1916)	11, 12, 13
<i>Miller v. Tongen</i> , 281 Minn. 427, 161 N.W.2d 686 [(1968)]	9, 10, 18
<i>Mjos v. Village of Howard Lake</i> , 287 Minn. 427, 178 N.W.2d 862 (1970)	8-10, 17

<i>Puckett v. United States</i> , 129 S.Ct. 1423, 1426 (2009)	4
<i>Silber v. United States</i> , 370 U.S. 717, 717-18 (1962)	3, 4
<i>State v. Billington</i> , 241 Minn. 418, 427, 63 N.W.2d 387, 392-93 (1954)	5
<i>State v. Gisege</i> , 561 N.W.2d 152 (Minn. 1997)	12, 13, 18
<i>State v. Goelz</i> , 743 N.W.2d 249, 258 (Minn. 2007)	12
<i>State v. Goodloe</i> , 718 N.W.2d 413, 424 (Minn. 2006)	12
<i>State v. Griller</i> , 583 N.W.2d 736, 740-42 (Minn. 1998)	10
<i>State v. Gruber</i> , 264 N.W.2d 812, 817 (Minn.1978)	3
<i>State v. Helenbolt</i> , 334 N.W.2d 400, 407 (Minn.1983)	12
<i>State v. Ramey</i> , 721 N.W.2d 294, 299 (Minn. 2006)	3, 6
<i>State v. Smith</i> , 674 N.W.2d 398, 400-401 (Minn., 2004)	10
<i>State v. Taylor</i> , 264 N.W.2d 157, 159 (Minn.1978)	3, 6
<i>U.S. v. Atkinson</i> , 297 U.S. 157, 160 (1936)	1, 4

<i>United States v. Arkansas</i> , 297 U.S. 157, 160 (1936)	16
<i>United States v. Brannan</i> , 562 F.3d 1300, 1306 (11th Cir. 2009)	2
<i>United States v. Castillo</i> , 430 F.3d 230, 234-35 (5 th Cir. 2005)	5
<i>United States v. Frady</i> , 456 U.S. 152, 163 (1982)	6
<i>United States v. Young</i> , 470 U.S. 1, 15, & n. 12 (1985)	4, 6
<i>Yakus v. United States</i> , 321 U. S. 414, 444 (1944)	4

OTHER AUTHORITIES

Alexis de Tocqueville, <i>Democracy in America</i> , 224-25, J.P. Mayer, ed. (Anchor Books 1969)	15
Barry Sullivan, et al., <i>Preserving Error in Civil Cases: Some Fundamental Principles</i> , 32 Trial Lawyer’s Guide 1, 16 (1988)	16
<i>Bylaws of MAJ</i> , art. II (2010)	1
C. WRIGHT & A. MILLER, 9 C FEDERAL PRACTICE & PROCEDURE, § 2558, at 199-207 (3d ed. 2008)	2
D. HERR & R. HAYDOCK, 2 MINNESOTA PRACTICE: CIVIL RULES ANNOTATED, § 51.19, at 19 (4 th ed., Supp. 2010)	6
FED.CIV.JUD. PROC. & RULES 227 (West 2005 ed.)	7

George L. Priest, *Justifying the Civil Jury*,
VERDICT: ASSESSING THE CIVIL JURY SYSTEM,
109, Robert E. Liten, ed. (Brookings Institute 1993) 14

ARGUMENT

This *amicus* brief of the Minnesota Association for Justice,¹ has as its main purpose to acquaint the court with the rationale for the “plain error” rule in civil jurisprudence as embodied in MINN.R.CIV.P. 51.04(b), relating to the impact of errant jury instructions.

While a contrary argument may be possible on the facts,² this *amicus* brief assumes that the instruction on common-law negligence as given by the trial court was in error. It also assumes that as outlined by Appellants,³ the decision to defend the case at trial on common-law negligence rather than federal regulations was a tactical one rather than an inadvertent mistake by Respondent. Where *Amicus* MAJ hopes to be helpful to the court is in delineating the “exceptional”⁴ or “extraordinary”⁵ circumstances in which the “plain error”

¹ This brief, submitted on behalf of *amicus* Minnesota Association for Justice (MAJ), is authored exclusively by counsel for MAJ, and no monetary contribution to the preparation or submission of this brief was made by any other person or entity. This disclosure is made pursuant to MINN.R.CIV.APP.P. 129.03. MAJ is an organization of approximately 1,000 trial attorneys whose shared goals include “to uphold and defend the principles of the Constitution of the United States; to advance the science of jurisprudence . . . , to promote the administration of justice for the public good; to uphold the honor and dignity of the profession of law; and . . . to uphold and improve the adversary system and trial by jury.” *Bylaws of MAJ*, art. II (2010). The organization consists mainly of attorneys advocating on behalf of defendants in criminal cases and plaintiffs in civil claims. *Id.*, art. III, § 1(a).

² See APPELLANTS’ BRIEF at 29-33.

³ See APPELLANTS’ BRIEF at 9-12, 16-18.

⁴ See *U.S. v. Atkinson*, 297 U.S. 157, 160 (1936) (“In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise substantially affect the fairness, integrity, or public reputation of judicial

rule applies,⁶ and to address the role of “invited error” as a consideration in its application in a civil case.⁷

This brief first traces the history of the “plain error” rule in Minnesota as it evolved from federal law. Second, it summarizes how Minnesota has chosen not to allow a civil

proceedings.”).

⁵ See *Exxon Corp. v. Exxeen Corp.*, 696 F.2d 544, 548-49 (7th Cir. 1982) (“plain error” as applied to jury instructions seeks “extraordinary relief from the consequences of . . . lawyers’ mistakes”).

⁶ The rarity of the application of the “plain error” rule in civil or criminal practice is a point that must be fully appreciated:

Findings of plain error, both to the explicit authorization to consider them found in the text of Rule 51 and also under the rule as it currently stands, have been confined to the exceptional case in which the error seriously has affected the fairness, integrity, or public reputation of the trial court’s proceedings; the courts of appeal are deferential to the work of the district court. Not surprisingly, it is not unusual to see words in the judicial opinions characterizing the requisite severity of the error such as “fundamental,” or “miscarriage of justice,” or “egregious,” or “patently erroneous.” The burden on the party invoking the plain error principle, therefore, is a heavy one.

C. WRIGHT & A. MILLER, 9 C FEDERAL PRACTICE & PROCEDURE, § 2558, at 199-207 (3d ed. 2008)(citing cases).

⁷ The “invited error” doctrine is a “shorthand term for the concept that a defendant who himself invites or creates error cannot obtain a benefit -- mistrial or reversal -- from that error.” *Klaunberg v. State*, 355 Md. 528, 544, 735 A.2d 1061, 1069 (1999), quoting *Allen v. State*, 89 Md. App. 25, 43, 597 A.2d 489, 498 (1991) *cert. denied*, 325 Md. 396, 601 A.2d 129 (1992). “The doctrine stems from the common sense view that where a party invites the trial court to commit error, he cannot later cry foul on appeal.” *United States v. Brannan*, 562 F.3d 1300, 1306 (11th Cir. 2009).

party to “invite error” and still claim application of the “plain error” rule in a civil context. Third, it explains how Minnesota - - in a criminal law context - - allows the “plain error” doctrine to operate even when the aggrieved party “invited error.” Fourth, it outlines the public policy reasons for the differences between a criminal and civil law contexts for operation of the “plain error” rule. Finally, it respectfully suggests that in a civil law context, “invited error” should disqualify a party from seeking new trial on the basis of “plain error” given the differing public policy considerations at issue in civil and criminal cases.

I. History of the Plain Error Rule in Minnesota

While it adopted a criminal procedural rule in 1975,⁸ Minnesota first applied the “plain error” doctrine in 1978 in *State v. Taylor*,⁹ in a criminal case in which a trial court had allowed a prosecutor to reference a six-year old marijuana possession conviction during the course of a case brought for the defendant’s alleged terroristic bomb threats.¹⁰ The court said “when the interests of justice require, we can take judicial notice of errors in the proceedings below” even when they have not been raised by a party, and quoted from the U.S. Supreme

⁸ “The plain error doctrine is derived from the rules of criminal procedure.” *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006), *citing* FED. R. CRIM. P. 52(b) *and* MINN. R. CRIM. P. 31.02. “In 1975, we adopted Minnesota Rule of Criminal Procedure 31.02, which states: ‘Plain errors or defects affecting substantial rights may be considered . . . on appeal although they were not brought to the attention of the trial court.’” *Id.*, *quoting* MINN. R. CRIM. P. 31.02.

⁹ 264 N.W.2d 157, 159 (Minn.1978) (quoting *Silber v. United States*, 370 U.S. 717, 717-18 (1962)); *See State v. Gruber*, 264 N.W.2d 812, 817 (Minn.1978).

¹⁰ *Id.* at 157.

Court decision of *Silber v. United States*:¹¹

While ordinarily we do not take note of errors [that were] not . . . properly raised here, that rule is not without exception. The Court has “the power to notice a ‘plain error’ though it is not assigned or specified,” . . . [and] “[i]n exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.”¹²

The so-called *Silber* or “plain error” rule of federal practice operated as an exception to the general requirement for contemporaneous objection,¹³ as usually a party must object to an alleged error at the time it occurs,¹⁴ or it is waived as a ground for post-trial or appellate

¹¹ 370 U.S. 717 (1962).

¹² *Silber v. United States*, 370 U.S. 717, 717-18 (omissions and modifications in original), quoting *U.S. v. Atkinson*, 297 U.S. 157, 160 (1936).

¹³ *United States v. Young*, 470 U.S. 1, 15, & n. 12 (1985)(failure to abide by the contemporaneous-objection rule ordinarily precludes the raising on appeal of the unpreserved claim of trial error). “If a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue. If he fails to do so in a timely manner, his claim for relief from the error is forfeited.” *Puckett v. United States*, 129 S.Ct. 1423, 1426 (2009)(parenthetical in original). “No procedural principle is more familiar to this Court than that a . . . right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” *Yakus v. United States*, 321 U.S. 414, 444 (1944).

¹⁴ The federal “plain error” rule provided at the time in Federal Rule of Civil Procedure 52(b), that “Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” FED.R.CIV.P. 52(b) (1985). This was in contrast to the general requirement expressed in Rule 51 that “No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.” FED.R.CIV.P. 51 (1985).

review.¹⁵ The reason is that a contemporaneous objection affords the trial court the opportunity to correct a mistake before it can affect the jury's decision and thus avert an appeal.¹⁶

Since a party is "entitled to a fair trial, not a perfect trial,"¹⁷ generally unless an error is of sufficient impact or prejudice, it will be deemed "harmless" and may not serve as the basis for a new trial,¹⁸ and thus when jury instructions read "as a whole" are sufficiently to inform a jury of the law, new trial is to be denied, given the discretion afforded to the trial court.¹⁹

¹⁵ See *American Reliable Ins. Co. v. Modern Homes, Inc.*, 311 Minn. 1, 3, 247 N.W.2d 39, 40 (1976).

¹⁶ See, e.g., *United States v. Castillo*, 430 F.3d 230, 234-35 (5th Cir. 2005) ("the purpose of a contemporaneous objection is to enable the district court to correct its error in a timely manner."); *American Reliable Ins. Co. v. Modern Homes, Inc.*, 311 Minn. 1, 3-4, 247 N.W.2d 39, 41 (1976) ("The rationale for imposing what is in effect a sanction upon counsel for failing to alert the court to its error is explained in the Authors' Comments to Rule 51, [in] 2 HETLAND & ADAMSON, MINNESOTA PRACTICE, p. 366: . . . "The party is as much at fault as the court for the failure to instruct particularly if the error was relatively apparent and the law relatively simple. If the error was difficult to notice and the failure to object was excusable, then the propriety of the objection in the new trial motion becomes more clearly a matter of fundamental law. Courts are reluctant to grant a new trial if they believe that the party is using the failure to object as a tactical device by waiting for the jury verdict before raising the error").

¹⁷ *Danforth v. State*, 718 N.W.2d 451, 455 (Minn. 2006); see *State v. Billington*, 241 Minn. 418, 427, 63 N.W.2d 387, 392-93 (1954)(constitutional guarantee of a fair trial does not require a perfect trial, but rather one that is fair and does not prejudice the substantial rights of the accused).

¹⁸ See *Alholm v. Witt*, 394 N.W.2d 488, 493 (Minn. 1986) ("Normally, there is no ground for reversal unless prejudice exists.").

¹⁹ See *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002)("An instruction that is so misleading that it renders incorrect the instruction as a whole will be

The “plain error” rule may thus be seen as balancing the contemporaneous objection rule, as fundamentally it

“tempers the blow of a rigid application of the contemporaneous-objection requirement.” . . . The doctrine employs a “careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.”²⁰

In adopting the “plain error” rule in a criminal context, the Minnesota Supreme Court noted that in addition to its inherent power, the authority for such “action is also within our scope of review as contemplated by Rule 103.04 [of the] Rules of Civil Appellate Procedure”²¹ as well as the rule of criminal procedure it had adopted.

As to application of the “plain error” rule in civil contexts for errant jury instructions, “Rule 51.04 provides that an error in instructions [may be reviewed] with respect to ‘plain error,’” and “[t]his phrase comes directly from Fed.R.Civ.P. 51(d),” with “the standard [being] roughly the same as the pre-2006 standard allowing error to be assigned ‘with respect to fundamental law or controlling principle.’”²²

reversible error, but a jury instruction may not be attacked successfully by lifting a single sentence or word from its context. Where instructions overall fairly and correctly state the applicable law, appellant is not entitled to a new trial.”).

²⁰ *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006), quoting *United States v. Young*, 470 U.S. 1, 15 (1985), and *United States v. Frady*, 456 U.S. 152, 163 (1982) (citations omitted).

²¹ *State v. Taylor*, 264 N.W.2d 157, 159 (Minn. 1978).

²² D. HERR & R. HAYDOCK, 2 MINNESOTA PRACTICE: CIVIL RULES ANNOTATED, § 51.19, at 19 (4th ed., Supp. 2010), quoting MINN.R.CIV.P. 51 (1999).

The current “plain error” rule in civil law that is applicable to the instant case, provides:

- (a) *Assigned Error.* A party may assign as error:
 - (1) an error in an instruction actually given if that party made a proper objection under Rule 51.03, or
 - (2) a failure to give an instruction if that party made a proper request under Rule 51.01, and - - unless the court made a definitive ruling on the record rejecting the request - - also made a proper objection under Rule 51.03.
- (b) *Plain Error.* A 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).²³

According to its drafters, the 2006 Minnesota changes to rule 51 were “modeled on [their] federal counterpart, Fed.R.Civ.P. 51, as it was amended [by the federal system] in 2003”²⁴ and the federal rule changes were “intended primarily to provide detailed procedural guidance where the existing rule is either silent or vague.”²⁵

With this basic background, the application of the “plain error” rule in a civil context may now be described.

II. Minnesota Does not Allow a Civil Party to “Invite Error” and still Claim Application of the “Plain Error” Rule in a Civil Context.

²³ MINN.R.CIV.P. 51.04 (2008).

²⁴ MINN.R.CIV.P. 51, Advis. Comm. Notes (2006).

²⁵ MINN.R.CIV.P. 51, Advis. Comm. Notes (2006), *citing* FED.R.CIV.P. 51, Advis. Comm. Notes - - 2003 Amend., *reprinted in* FED.CIV.JUD. PROC. & RULES 227 (West 2005 ed.).

The “plain error” rule was embraced by the Minnesota Supreme Court in a civil context in the 1970 case of *Mjos v. Village of Howard Lake*,²⁶ a matter in which both the trial judge and very experienced civil advocates on both sides of a dram shop case had overlooked a recent legislative change to the Civil Damages Act. The new law had expanded the basis for a cause of action beyond proof that the bar had served an already “obviously intoxicated” patron to allow relief on other theories, yet the jury was instructed only on that single ground for relief due to “inadvertence” on all sides.²⁷

Ruling that the error “was so fundamental as to have a potentially determinative influence upon the lawsuit,” the court ordered a new trial as the “fundamental error of law . . . was so highly prejudicial” that core principles of fairness and justice were implicated.²⁸ *Mjos* did not call this the “plain error” rule, but noted that in 1970, when *Mjos* was decided, Rule 51 provided that “[a]n error in the [jury] instructions with respect to fundamental law or controlling principle may be assigned in a motion for a new trial though it was not otherwise called to the attention of the court.”²⁹ In the interim since *Mjos*, Rule 51 has been amended to provide that a “court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required” by the rule of contemporaneous

²⁶ 287 Minn. 427, 178 N.W.2d 862 (1970).

²⁷ *Id.* at 435-37, 178 N.W.2d at 868-69.

²⁸ *Id.* at 437, 178 N.W.2d at 869.

²⁹ *Id.* at 436 n.7, 178 N.W.2d at 868 n.7, quoting MINN. R. CIV. P. 51 (1970).

objection.³⁰

While the *Mjos* court - - and any trial court operating today - - would have authority to order a new trial under a “plain error” analysis based on either formulation of the rule, a footnote in *Mjos* is most instructive as to the circumstances in which the Minnesota Supreme Court allowed the “plain error” rule to operate in the context of jury instructions. The importance of this condition cannot be overstated as it leads to a clear understanding of the operation of the Minnesota civil “plain error” doctrine.

The *Mjos* court said:

The recent case of *Miller v. Tongen*, 281 Minn. 427, 161 N.W.2d 686 [(1968)], must be distinguished on the ground that appellant’s request for instructions in that case was made with full knowledge of the state of the law relevant thereto.³¹

Miller was a medical malpractice case in which the plaintiff sought compensation from a surgeon who had left a sponge inside him and an issue arose at trial about what type of jury instruction should be given regarding the standard of care owed by the doctor - - a professional standard of care or an ordinary standard of care. The Minnesota Supreme Court observed that

Counsel for plaintiff [had] asked the [trial] court whether it was going to require the jury to apply the professional standard of care required of a thoracic specialist. The court inquired whether counsel was requesting such a charge, to which counsel replied, “No, I am not. Ordinary negligence is better for

³⁰ MINN. R. CIV. P. 51.04(b) (2008).

³¹ *Id.* at 436 n.7, 178 N.W.2d at 868 n.7 (emphasis added).

me.”³²

He then lost on an “ordinary negligence” theory and since the law entitled him to a “professional standard” against a professional such as the doctor, he asked under Rule 51 for a new trial based on the “plain error” of the court having given the instruction he had invited.

The Supreme Court said,

we are of the opinion that Rule 51 has no application where the charge is not the result of an unintentional misstatement or verbal error or omission. This was a matter which was called to the court’s attention and in which plaintiff acquiesced. Under such circumstances, he is not now in a position to claim an inadvertent oversight.³³

When *Mjos* distinguished *Miller* as it applied the “plain error” rule to an errant civil jury instruction, it clearly indicated that errant jury instructions that were “invited” or “acquiesced” in by the aggrieved party and that occurred due to “inadvertence” were subject to the relief of new trial under the civil application of the “plain error” doctrine.

This ruling is consistent with the ordinary application of the “plain error” in which counsel for the aggrieved party neglects to ask for an instruction,³⁴ or otherwise inadvertently

³² *Miller v. Tongen*, 281 Minn. 427, 430, 161 N.W.2d 686, 688 (1968).

³³ *Id.* at 427, 430, 161 N.W.2d at 688 (emphasis added).

³⁴ See *State v. Smith*, 674 N.W.2d 398, 400-401 (Minn., 2004) (failure to object to presumption of innocence instruction did not satisfy “plain error” because while a specific instruction was not specifically requested the trial court’s instructions as a whole adequately explained the substantial legal concept); *State v. Griller*, 583 N.W.2d 736, 740-42 (Minn. 1998) (it was conceded that the all but the last element of “plain error” was met, but the court found there was no showing that the “substantial rights” of the parties were adversely affected by the court’s neglecting to give and the defendant’s failure to ask for a “defense of dwelling” instruction, in that there was no showing by the

overlooks some fundamental legal principle.

When a civil litigant makes a conscious choice to elect one of a series of alternative approaches or theories in a trial, it may not “invite error” by later seeking to claim error for the path it has chosen to take.³⁵

Longstanding Minnesota law prohibits a party from benefitting by error it has invited.³⁶

From its inception in a civil context, therefore, the Minnesota Supreme Court has not allowed a party to gain a tactical advantage by making a conscious choice among options at trial and then arguing a fundamental or “plain error” on appeal.

III. Minnesota Allows a Criminal Defendant to Assert “Plain Error” even when the Aggrieved Party “Invited Error.”

The approach outlined above for civil cases differs from the approach of the Minnesota Supreme Court to the “plain error” rule in a criminal context. While noting that

aggrieved party that there was a “reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury”).

³⁵ See *McAlpine v. Fid. & Cas. Co.*, 134 Minn. 192, 199, 158 N.W. 967, 970 (1916) (“The settled general rule is that a party cannot avail himself of invited error.”).

³⁶ See *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”); *Krenik v. Westerman*, 201 Minn. 255, 262, 275 N.W. 849, 852 (1937)(the invited error doctrine prevents a party from asserting an error on appeal that he invited or could have prevented in the court below).

a criminal defendant cannot on appeal raise his own trial strategy as a basis for reversal,³⁷ the court has expressly rejected the idea that the “invited error” doctrine applies to stop a criminal defendant from asserting the “plain error” rule, saying “[t]he invited error doctrine, however, does not apply to plain errors.”³⁸

In *State v. Gisege*,³⁹ the State argued “that invited error and unobjected-to-error are different, and that the doctrines of plain error and fundamental law do not apply to invited error.” The Minnesota Supreme Court noted that

the state is asking that this court refuse to review any case in which a party appeals the validity of an instruction requested by the same party. But that is not the law in this state. As this court has stated, “conceding the right of the court to review, in a special case, the correctness of an instruction at the instance of a party who has procured it to be given, a new trial should not be granted unless the charge was substantially wrong and apparently prejudicial to the defendant.”⁴⁰

It is clear, therefore, that even if a criminal defendant invites error, he may still seek resort to the remedy of a new trial under the “plain error” doctrine.

Given the difference in approach of the Minnesota Supreme Court to civil and criminal matters on the role of “invited error” in a “plain error” analysis, an exploration of

³⁷ See *State v. Helenbolt*, 334 N.W.2d 400, 407 (Minn.1983).

³⁸ *State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007), citing *State v. Goodloe*, 718 N.W.2d 413, 424 (Minn. 2006), in turn citing *State v. Gisege*, 561 N.W.2d 152, 158 n. 5 (Minn. 1997)).

³⁹ 561 N.W.2d 152 (Minn. 1997).

⁴⁰ *Id.* at 158 n.5, quoting *McAlpine v. Fidelity & Cas. Co. of New York*, 134 Minn. 192, 199, 158 N.W. 967, 970 (1916).

the public policy reasons behind the varied treatment is worthwhile.

IV. Public Policy Reasons Justify a Different Approach between Criminal and Civil Cases for Operation of the “Plain Error” Rule.

The criminal *Gisege* case distinguished in a footnote an earlier Minnesota Supreme Court decision involving the application of “plain error” in a civil claim - - *McAlpine v. Fidelity & Cas. Co. of New York*.⁴¹ The 1916 *McAlpine* case involved a claim for insurance benefits under a death and dismemberment policy. The *McAlpine* court had noted:

In view of the construction adopted we find it unnecessary to discuss the question whether the plaintiff having invited the instruction given can complain of error in giving it. The settled general rule is that a party cannot avail himself of invited error. [Citations omitted] We only remark that, conceding the right of the court to review, in a special case, the correctness of an instruction at the instance of a party who has procured it to be given, a new trial should not be granted unless the charge was substantially wrong and apparently prejudicial in result.⁴²

In *Gisege*, the court said that

[i]n *McAlpine*, this court did not find a result prejudicial to the appellant, but it did not reject the appellant’s claims out of hand. Instead it chose to examine the erroneous instruction at issue and determined that it “was not the important question in the case from the viewpoint of the jury.” [Citation omitted] The same cannot be said in the case at bar, where the jury convicted the defendant of the crime included in the erroneous instruction.⁴³

The above discussion helps to point to the essential difference between civil and criminal cases and to the public policy justification for a different approach to “invited error” in the

⁴¹ 134 Minn. 192, 158 N.W. 967 (1916).

⁴² *Id.* at 199, 158 N.W. at 970.

⁴³ *Gisege, supra*, 561 N.W.2d at 158 n. .

two types of matters: in a criminal case all the resources of the State are arrayed against an individual defendant who - - should he lose - - will be deprived of his liberty and may be incarcerated for a lifetime.

Quite frankly, that's a lot to lose. This is not to say that civil litigation is unimportant, as a system that fairly adjudicates the property and personal rights of citizens is one of the hallmarks of the American justice system.⁴⁴ Still, a natural divide in treatment of those

⁴⁴ Much has been written about the vital role of the civil jury system in America, in fulfilling the challenging roles that it serves:

[T]he civil jury is a superior adjudicative institution for defining liability and evaluating damages when complex or conflicting social values are involved. Many aspects of a factfinder's work in civil litigation require judgments that are in some sense difficult, either because there is no empirical or conceptual basis for them (such as pain and suffering) or because they involve projection into the future (such as lost income or medical costs).

George L. Priest, *Justifying the Civil Jury*, VERDICT: ASSESSING THE CIVIL JURY SYSTEM, 109, Robert E. Liten, ed. (Brookings Institute 1993). Such has historically been the case, making America's civil justice system, the "envy of the world," as witnessed by the laudatory commentary of 19th century political philosopher and historian Alexis de Tocqueville:

[D]e Tocqueville . . . summ[ed] up his [1835-1840] study *Democracy in America*, conclud[ing] that "the main reason for the practical intelligence and the political good sense of the American [citizen] is their long experience with juries in civil cases." De Tocqueville's admiration for civil jury service was unbounded: "civil juries . . . instill some of the habits of the judicial mind into every citizen"; "[spread] respect for the courts' decisions and for the idea of right throughout the classes"; "teach men equity in practice"; "make all men feel that they have duties toward society and that they take a share in government"; and "are wonderfully effective in shaping a nation's judgment and increasing its natural lights."

accused of a crime by the State and those litigants who seek to resolve disagreements over property and personal rights seems intuitively obvious: the criminal court gets to lock you up and the civil court doesn't.

Allowing a criminal defendant who has "invited" an error - - by taking an improvident tactical approach at trial - - to object on appeal that he now regrets what he wished for, seems inherently more to accord with the core interest of an impartial judiciary to "see justice done," than affording a civil litigant a "do over" because of a bad tactical choice at trial.

The prospective loss of liberty is so onerous and constitutes such a readily distinguishing factor, that the difference in the Minnesota Supreme Court's treatment of civil and criminal litigants on "plain error" seems to be a fully rational and deliberate one.

V. **In a Civil Law Context, "Invited Error" should Disqualify a Party from Seeking New Trial on the Basis of "Plain Error" given the Differing Public Policy Considerations.**

The typical application of "plain error" occurs when less-than-capable counsel omits some fundamental objection that was necessary for his client to succeed, and the court "re-balances" the scales of justice:

In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Id. at 110, quoting Alexis de Tocqueville, *Democracy in America*, 224-25, J.P. Mayer, ed. (Anchor Books 1969).

United States v. Arkansas, 297 U.S. 157, 160 (1936). The general reluctance of courts to apply the doctrine in civil cases,

is the perceived unfairness to the prevailing party of threatening his entitlement to the judgment he won below when the appellant had the opportunity to seek to correct errors at trial, but failed to do so.⁴⁵

Thus, for example, in the seventh circuit trade infringement claim of *Exxon Corp. v. Exxeen Corp.*,⁴⁶ the court observed:

If a lawyer in a civil case who has agreed to instructions may ever get a federal appellate court to order a new trial because the instructions were erroneous, it would have to be in an exceptional case. None has yet arisen in this circuit, and this is not one. Exxon, the party asking for extraordinary relief from the consequences of its lawyers' mistakes, is a huge company whose resources for litigation are for all practical purposes unlimited The mouse is not even a competitor. Its name is similar to Exxon's but by no means identical and is not even used as a trade name. . . . There is no evidence that Exxon was trying to wear out Exxene; but we are not moved to rescue Exxon from its lawyers' mistakes so that it can take another whack at its tiny foe.⁴⁷

To create a judicial measure of fairness based only on the comparative size or fiscal strength of the litigants risks fashioning "the equity that depended on the length of the chancellor's foot,"⁴⁸ yet there is obviously a difference in the size of a civil and criminal hammer that no

⁴⁵ Barry Sullivan, et al., *Preserving Error in Civil Cases: Some Fundamental Principles*, 32 Trial Lawyer's Guide 1, 16 (1988).

⁴⁶ 696 F.2d 544 (7th Cir. 1982).

⁴⁷ *Id.* at 548-49.

⁴⁸ *Allied Mut. Ins. Co. v. Western Nat'l Mut. Ins. Co.*, 552 561, 563 (Minn. 1996) (Justice Coyne's opinion, colorfully invoking the admonition that justice should not depend on know-it-when-you-see-it variables such as the proverbial "length of the chancellor's foot," who measures equity by pacing it off).

one must lose sight of.

American justice, like few other approaches to judicial administration, errs in a criminal case in favor of the accused, making guilt turn on proof “beyond a reasonable doubt,” and giving the benefit of that considerable doubt to the accused before their freedom is forfeited. Their liberty is taken only after every reasonable legal avenue has been thoroughly explored. Civil justice works on a preponderance of the evidence approach. It is fair, but in the context of the “plain error” rule for civil claims there is a substantial justification for a litigant to “reap what you sow.” The exception: when everyone blinks - - like the overlooked statutory change in *Mjos*.

In the instant case, the trial judge invited BNSF to cite any federal regulations it wished to contend served as a defense and it produced none.⁴⁹ While the “plain error” doctrine has been applied when one’s counsel falls asleep,⁵⁰ the trial court affording counsel the opportunity to specifically raise whatever regulations they wished must be considered a fairly sound rousing. There is no indication here that defense counsel were anything less than wholly alert, capable and proficient in representing their client’s interests. Rather than being “asleep at the switch,” here, the railroad simply appears to have decided to deliberately throw the switch in a consciously selected direction, and now has complained that they are off on

⁴⁹ See Transcript at 4321-22.

⁵⁰ See, e.g., *Javor v. United States*, 724 F.2d 831, 833 (9th Cir.1984) (where defense counsel slept through a substantial portion of the trial, no showing of prejudice is required to establish plain error).

an unanticipated siding.

Since a rationale justification exists for different treatment of civil and criminal litigants as regards the “plain error” rule and its interface with “invited error,” *Amicus* MAJ urges the Minnesota Supreme Court to keep the prior case law distinction in effect, given the minor changes effectuated by the 2006 amendments to Minnesota Rule of Civil Procedure 51. In a civil case, when a deliberate course of action has been selected - - like the medical malpractice claimant’s choice of “ordinary” versus “professional” negligence jury instructions in *Miller v. Tongen* - - the party who elects that remedy must be made to live with the error they invited. There is no compelling reason, however, to change the wider approach to legal protection afforded criminal litigants by *Gisege*.

As a reason exists for allowing consideration of “invited error” in “plain error” claims in civil cases, that does not apply in criminal cases, this court should apply “invited error” here to bar Respondent’s access to new trial for instructions they proposed and acquiesced in.

CONCLUSION

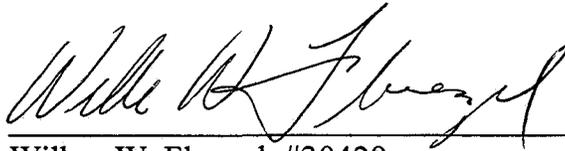
Rule 51.04(b) allows a party who neglected to object to a jury instruction to move for new trial when - - in the trial court’s sound discretion - - it was “plain error” to give the jury the version of instructions that was provided, and when they did not as a whole fairly and adequately state the law.

When a record shows that a party in a civil dispute made a fundamental choice to use

one approach in jury instructions for its theories of the case and that choice was “error,” the invitation to commit the error that has been made with deliberation and not through inadvertence or neglect, should disqualify a litigant (on either side of the legal contest) from re-litigating a case under a new theory.

Respectfully Submitted,

Dated: 12-30-10



Wilbur W. Fluegel, #30429

FLUEGEL LAW OFFICE

150 South 5th Street, Suite 3475

Minneapolis, MN 55402

(612) 238-3540

Attorney for Minnesota Ass'n for Justice, Amicus

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional front. The length of this brief is 482 lines and 5,706 words. This brief was prepared using Corel WordPerfect Office X4.

Dated: 12-30-10



Wilbur W. Fluegel, #30429

FLUEGEL LAW OFFICE

Suite 3475

150 South 5th Street

Minneapolis, MN 55402

(612) 238-3540

Attorney for Minnesota Ass'n for Justice, Amicus