

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

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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, third party defendant,

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

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**APPELLANTS' JOINT REPLY BRIEF**

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## **ARGUMENT**

Laying blame exclusively with the trial court and opposing counsel, BNSF advocates for a new application of the invited-error doctrine that directly contravenes precedent, does not advance public policy, and is entirely dependent on skewed and incomplete citations to the record. While pronouncing that the trial court “inflicted” fundamental error, BNSF never requested in its proposed jury instructions, in its proposed special-verdict form, or in the charging conference, that the trial court instruct the jury to determine the railroad’s liability based exclusively on compliance with federal regulations. This is invited error.

BNSF’s trial counsel cemented the invited error by openly acquiescing to the standard of care ultimately read to the jury. BNSF simply ignores that portion of the record.

An honest reading of the record and of the law leads to the inescapable conclusion that blame for any alleged error in the instructions lies with BNSF—and with BNSF alone.<sup>1</sup> Trial courts in this State should not be tasked with second-guessing instructions to which the parties have agreed and to which no objection was lodged,

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<sup>1</sup> Throughout its brief, BNSF refuses to acknowledge responsibility for anything—even the egregious conduct that led the trial court to impose \$4.2 million in sanctions. BNSF downplays that conduct and instead appears to blame the Minnesota State Patrol: “A few BNSF employees failed to appreciate the importance of maintaining all signal functionality evidence. The Patrol’s causation conclusion unfortunately engendered some laxity regarding evidence prevention.” [BNSF Br. at 10].

lest they be charged with committing error. The majority's decision below should be reversed.

Tacitly acknowledging as much, BNSF seeks shelter behind purported "additional errors" it claims necessitate a new trial. But BNSF failed to include any of these purported "additional errors" in its Petition for Review or Conditional Cross-Petition for Review, and this Court did not solicit argument on those issues. BNSF's unsolicited argument should be disregarded, and this Court should focus solely on the issue properly presented: the legal effect of BNSF's invited error.

**I. BNSF INVITED ANY ALLEGED ERROR.**

**A. BNSF Never Requested A Federal Standard of Care.**

Regardless of its attempts to massage the record, BNSF cannot escape the real problem: it never requested a federal standard of care. BNSF proposed jury instructions and a special verdict form that were entirely silent on the subject of federal regulations. BNSF did not propose a single federal regulation to be read to the jury—not even the signal-system-inspection regulations with which it now claims "complete regulatory compliance."

In its post-trial memorandum, submitted some ten months after trial, BNSF nonetheless took the trial court to task for failing to include this question on the verdict form: "On September 26, 2003, did BNSF comply with the applicable federal regulations that cover track and warning signal maintenance and inspection allegations at the Ferry Street Crossing?" [R.App.55]. BNSF did not ask the court to include this question on the special verdict form at any time before

the jury deliberated. It certainly could have. Instead, BNSF proposed a special-verdict form that asked the jury to decide only if the railroad was “negligent.” [APP.225]. BNSF’s proposed jury instructions contained but a single definition of negligence: the failure to use reasonable care.<sup>2</sup> [APP.208].

While BNSF and its amicus argue that in all railroad cases “juries must be instructed that a federal regulatory violation is the *sine qua non* of railroad liability,” the truth of the matter is that BNSF did not request that the trial court give any such instruction or directive. This alone should spell the end of BNSF’s complaints.

This Court has long held that “there is some obligation on the part of experienced trial lawyers to assist the court in submitting issues which they believe are involved in the case.” *Knutson v. Arrigoni Bros.*, 275 Minn. 408, 415, 147 N.W.2d 561, 466 (1966); *see also DelMedica v. Coats*, 295 Minn. 226, 230-31, 203 N.W.2d 860, 863 (1973) (stating that “no relief can be given” where the defendant never sought the instruction it alleges it was error to omit). The real problem here is that BNSF never requested the standard of care it now alleges was error for the trial court to omit. BNSF completely ignores this facet of the invited-error analysis.

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<sup>2</sup> BNSF now suggests that it intended that standard of care to apply only to the vehicle driver. But the railroad did not make that distinction in its proposed instructions or in the charging conference. The 4,869-page trial transcript contains no reference to such a distinction.

**B. BNSF Affirmatively Agreed To Instruction 25.46 As A Matter Of Trial Strategy.**

The Court of Appeals majority ordered a new liability trial solely on the basis of Instruction 25.46. BNSF contends that, while it failed to lodge any objection to this instruction, it “never agreed” that the instruction should be read to the jury. [BNSF Br. at 12]. The record tells a different story.

The parties exchanged proposed liability instructions a full six weeks before the jury was charged. [APP.203, 206]. Several days before the charging conference, the trial court explicitly directed counsel to meet to discuss the instructions, and to identify any remaining points of disagreement upon which they wanted a ruling:

JoAnn [BNSF’s counsel] and Sharon [counsel for the families] and I will be working over the weekend on the jury instructions via computer. Lydia will be fine-tuning. And the areas we can’t have agreement, we will make a record of, and I will simply make the rulings on the instructions.<sup>3</sup>

[T.4044; APP.455 (emphasis added)].

Following this directive, counsel conferred at length and ultimately reached agreement on the vast majority of the liability instructions, including Instruction 25.46. At the charging conference, BNSF’s attorney acknowledged that the final product was a joint effort: “[W]hat we did, to make it easy for everybody to have a record, is we put all the pages in order with page numbers at the bottom.” [T.4264; APP.456]. The court proceeded to review the instructions in the order in which they were paginated and ultimately given. Counsel

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<sup>3</sup> Lydia was Judge Maas’ legal intern.

discussed any remaining disagreements, and made objections to those instructions upon which agreement was not reached. Tellingly, Instruction 25.46 was not among them. The sole reference to 25.46 in the charging conference encompasses a mere two lines in the record:

THE COURT: Are we up to [page] 41 now?

MS. VAN DYCK: That's in.

[T.4322; App.471]. There was no discussion and no objection because, as directed by Judge Maas several days earlier, the parties had already agreed that the instruction should be given; thus it was "in." BNSF's statement that it never agreed to the instruction is simply false.

This acquiescence was not a matter of mere inadvertence or oversight, as BNSF would now have this Court believe. It was entirely consistent with BNSF's failure to request a federal standard of care at all until it lost at trial. BNSF pursued a trial strategy, for good or ill, based on a "reasonable care" standard.

This trial strategy is confirmed by the discussion with respect to Instruction 25.47, the instruction that immediately followed 25.46. Instruction 25.47 informed the jury that it could consider evidence of custom in the industry in deciding whether BNSF exercised "reasonable care." [APP.151]. BNSF's attorney openly acquiesced in this instruction, too, suggesting only that it should apply to the driver as well as to the railroad. [T.4322-24; APP.471].

In contrast, at no time during the charging conference did BNSF request that the trial court instruct the jury to assess liability based exclusively on compliance with federal regulations. The trial court

cannot be charged with “error” under these circumstances. Any “error” to speak of in the instructions was plainly invited by the railroad and its experienced trial counsel. BNSF’s arguments to the contrary find no support in the record.

**II. INVITED ERROR PRECLUDES PLAIN-ERROR REVIEW IN CIVIL CASES.**

BNSF declares that “Minnesota law countenances plain error review, in appropriate circumstances, even when the error was ‘invited.’” [BNSF Br. at 41]. This is not the law in Minnesota with respect to civil cases. Nor should it be.

As support for its position, BNSF refers to nothing more than a smattering of criminal cases and a single civil case—*Mjos v. Village of Howard Lake*, 287 Minn. 427, 178 N.W.2d 862 (1970). A fair reading of *Mjos* only underscores that, where a party having knowledge of the governing law invited the alleged error, as BNSF did here, plain-error review is not available. The *Mjos* court said as much: “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.” 287 Minn. at 437, 178 N.W.2d at 869, n.7.

Instructively, in *Miller*, this Court expressly declined to undertake Rule 51 plain-error review because the party acquiesced in the instructions given at trial: “Plaintiff now asserts that the charge given was error involving fundamental law within the meaning of Rule 51 . . . . However, 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.” 281 Minn. at 430, 161

N.W.2d at 688 (emphasis added). The *Miller* court continued: “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.” *Id.*

Unlike *Mjos*,<sup>4</sup> the Court’s decision in *Miller* does not stand alone. A long line of civil cases echoes the same principle. See, e.g., *Erickson v. Sorenson*, 297 Minn. 452, 455, 211 N.W.2d 883, 885 (1973) (holding that Rule 51 plain-error review is not available where the party invited the error and recognizing that the “controlling principle was clearly stated” in *Miller*); *Gordon v. Hoffman*, 303 N.W.2d 250, 252 (Minn. 1981) (reasoning that, despite the broad language of Rule 51, “there is some obligation on the part of experienced trial lawyers to assist the court in submitting issues which they believe are involved in the case,” and holding that, “the court should instruct the jury on all issues, but a nondirection or failure to cover some particular feature is not reversible error where no special request for an instruction was made”).

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<sup>4</sup> *Mjos* presented the truly unique situation where neither the trial court nor counsel was aware of intervening events—the amendment of a statute—that affected the propriety of the jury instructions. This Court has accordingly declined to apply the holding in *Mjos* beyond the limited context in which it was made. See, e.g., *Wolner v. Mahaska Indus., Inc.*, 325 N.W.2d 39, 42 (Minn. 1982) (declining to apply *Mjos* in context of invited error and stating that *Mjos* “presented a situation in which neither the parties nor the court was aware of a new statutory amendment existing at the time of trial”); *Erickson v. Sorenson*, 297 Minn. 452, 456, 211 N.W.2d 883, 885 (1973) (declining defendant’s invitation to apply *Mjos* because, unlike in *Mjos*, the defendant had full knowledge of the status of negligence law when it acquiesced in the instructions).

This Court's statements in *Knutson v. Arrigoni Brothers Co.* are particularly instructive:

While Rule 51, Rules of Civil Procedure, does permit errors in instructions with respect to fundamental law to be raised on a motion for new trial, it was never intended that experienced counsel could tacitly agree to instructions of the court which omit a theory that might have been submitted had it been requested, and then, after an adverse verdict, seek shelter under the rule for the purpose of gaining another chance at victory. In spite of this rule, we feel that there is some obligation on the part of experienced trial lawyers to assist the court in submitting issues which they believe are involved in the case. While we are convinced that in this case the court correctly refrained from submitting the defense of assumption of risk, we mention in passing that where counsel deliberately try a case on one theory or permit it to be submitted to the jury with an omission of one of the issues that ought to be submitted, they will find little sympathy here if they seek review under Rule 51.

275 Minn. at 415, 147 N.W.2d at 566-67 (emphasis added).

These cases plainly reflect that invited error precludes Rule 51 plain-error review in civil cases. Nothing in *Mjos* calls for a different result.<sup>5</sup>

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<sup>5</sup> Similarly, while invited error may not preclude plain-error review in the criminal context, appellants articulated in their opening brief the legitimate reasons to differentiate between the civil and criminal contexts. Criminal defendants are guaranteed a higher degree of protection than civil litigants in judicial proceedings due to the Sixth Amendment. Public policy supports the notion that a criminal defendant should not be stripped of his liberty based solely on an erroneous jury instruction. BNSF has not identified any concerns of similar import that exist in the civil context, and this Court's civil decisions have clearly articulated that a party to a civil lawsuit should not be allowed two bites at the proverbial apple.

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

**A. Evidence of Federal Regulatory Violation Abounded.**

The jury was read a list of federal regulations and was instructed that federal law imposes duties on BNSF, the railroad that owned the track at the Ferry Street Crossing. [APP.145-49]. The inclusion of the federal-regulatory list was first proposed by the families, not BNSF. [APP.188-90]. BNSF's primary objections to the originally proposed instruction were the inclusion of state regulations and the families' failure to include the full text of each potentially applicable regulation. [T.4307-08; APP.467]. The trial court sustained BNSF's objections. All references to state regulations were removed, and the full text of each federal regulation was read to the jury. [T.4319-20; APP.470]. BNSF was invited to add any additional regulations it felt were appropriate. [T.4322; APP.471]. Significantly, BNSF did not add any of the regulations it now claims establish "complete regulatory compliance."

BNSF's argument effectively requires this Court to ignore all evidence of regulatory violation—evidence the jury obviously found persuasive. BNSF's argument that total statutory compliance was not disputed at trial is incorrect. The case was tried and argued on the basis of BNSF's failure to comply with federal regulations and internal company rules. ["We've only been talking about federal" – Judge Maas, T.4307; APP.467; "The Federal Regs are what applies here. That's what people have talked about, and the witnesses have talked about" – Julius Gernes, T.4312; APP.468].

The crux of BNSF's continued post-trial insistence that it was fully compliant with all federal regulations is premised on evidence that it complied with only a small portion of the federal regulatory scheme that applies to this case: the final one-third of 49 C.F.R. Part 234 (the section that regulates active warning devices). The portion upon which BNSF relies focuses on "inspections and tests." See 49 C.F.R. 234.247-.273. The periodic inspections addressed in these regulations constitute less than one-third of the federal regulations that applied to BNSF's conduct.

BNSF made no request to add any of these to the regulatory jury instruction. The only inspection regulations included in the jury instructions were 49 C.F.R. §§ 234.271 and .273, which govern the inspection of insulated rail joints, bond wires, and track connections, as well as the records that must be kept of those inspections. Those two regulations were included at the families' request because BNSF lacked any evidence that such inspections were performed for an entire year before the accident. The jury was never instructed about the regulations governing the inspections and tests BNSF now argues mandate a finding of "complete regulatory compliance." The failure to provide the jury with that information must be laid at BNSF's door.

The justification for BNSF's statement that "the record demonstrates adherence to the applicable regulations" appears to be based in part on a cherry-picked section of the cross-examination of one of the families' experts, Larry Farnham. BNSF's brief makes reference to a portion of Mr. Farnham's testimony in which he responded to questions about whether he had evidence of non-compliance with specific inspection requirements. [T.2700-2705].

The inspections referred to in that testimony are inspections for which BNSF had retained records, and for which the families had never asserted a violation. What BNSF fails to mention is that throughout his testimony, Mr. Farnham noted that records of significant federally-required inspections were missing. Of particular importance to the families' liability theory, records of the inspection of insulated rail joints, bond wires, and track connections, required by 49 C.F.R. § 234.271 to take place on a quarterly basis, were missing for the entire year prior to the accident. [T.2478-79, 2520-21]. Federal law requires such records to be retained for at least one year. 49 C.F.R. § 234.273. BNSF's own expert witness confirmed both that these quarterly inspections are required and that the corresponding records were missing. [T.3762].

The record contains additional evidence of federal regulatory violation. [see Appellants' Joint Brief at 3-4, 8-9, 33-34]. The jury heard evidence that all of the substantive regulations listed in the jury instructions were violated. Tellingly, BNSF made no argument to exclude any of those regulations due to a lack of evidence of a violation. [T.,4306-4322; APP.467-71].

The most significant violation of the federal-regulatory scheme, however, is the one BNSF does not want to talk about. The families' theory of the case was simple: the lights and gates at the Ferry Street Crossing failed to operate at the time of the accident, thereby giving Brian Frazier inadequate warning of the oncoming train. In assigning 90% of the fault to BNSF, the jury obviously believed that these active warning devices failed, and disbelieved BNSF's allegation that the car drove around a fully functioning and fully lowered gate.

The failure of the gate to drop as the train roared through the Ferry Street Crossing was, by federal regulatory definition, an activation failure. 49 C.F.R. § 234.5. The failure of an active warning system to give a minimum of 20 seconds warning of an oncoming train is a violation of 49 C.F.R. § 234.225. The jury was instructed about this specific regulatory requirement. [APP.149]. The jury, by its verdict, found BNSF to have violated this federal law. Judge Maas specifically noted during the post-trial motion hearing that BNSF's theory that the car drove around the gates "just didn't add up with the physical evidence. When you combine that with the physical evidence of [sic] the accident reconstructionists work with, they [the jury] have more than enough reason to suggest that the gate was indeed up." [APP.451-52.] The causal relationship between the activation failure on September 26, 2003, and the deaths of the four young people at the Ferry Street Crossing is not disputable.

To avoid the significance of the evidence of an activation failure on the night of the accident, BNSF suggests that it cannot be held liable for an activation failure in violation of 49 C.F.R. § 234.225. Leaving aside the irony of an argument that requires this Court to ignore the fact that violation of 49 C.F.R. § 234.225 constitutes regulatory non-compliance, BNSF goes a step further. The railroad argues that it cannot be liable for this regulatory violation because the law does not permit the imposition of strict liability for regulatory non-compliance, though it cites no legal authority for this proposition. BNSF is tacitly suggesting that with respect to this particular regulatory violation, BNSF needed "reasonable notice" that such a failure would or could occur before it can be held liable for its

violation. Reasonable notice, of course, is a common-law negligence principle, one that BNSF needs to avoid strict liability for violation of 49 C.F.R. § 234.225. BNSF relied upon the common-law notion of “reasonable notice” to excuse the possibility of being held liable in the event the jury believed that an activation failure had occurred.

In an attempt to eliminate the possibility of actual notice, BNSF argued vehemently that none of the three “prior incidents” about which the jury heard evidence had anything to do with what happened on September 26, 2003. The railroad argued that each of the prior malfunctions was unrelated to a federally-defined “activation failure,” was not a malfunction at all, or had been appropriately investigated. BNSF’s arguments with respect to these three incidents seek to take advantage of the common law reasonable care standard, which permits a jury to decide that a regulatory violation may not be negligence when the circumstances reasonably excuse it.

In the end, BNSF did not want to be held to a standard of care that requires complete regulatory compliance because it realized that, in this case, the federal standard could not be met. So it hedged its bets, seeking first the advantages of the common-law definition of negligence, and then, after losing at trial, seeking a do-over on the basis of alleged error deliberately inserted into the first trial. Minnesota law ought not reward such conduct.

**B. The Families Presented No Evidence Of And Made No Argument Based On Common-Law Negligence From Which Error Could Have Occurred.**

Preemption is an affirmative defense. *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 715 (8<sup>th</sup> Cir. 2008). As the proponent of

the defense, BNSF carries the burden of demonstrating preemption's application, including crafting jury instructions that accurately reflect preemption's affect on the standard of care. Since the Federal Railroad Safety Act (FRSA) does not preempt all state-law tort claims involving railroad safety matters, BNSF must identify each and every regulation it claims "covers" the subject matter of each tort claim identified by a plaintiff. 49 U.S.C. § 20106; *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 665 (1993). Absent a "covering" regulation, a claim is not preempted and the state common law standard of care applies. Only when there is a regulation that "covers" the specific subject of a plaintiff's tort allegation does the federal standard of care come into play. Thus, determining which standard of care governs in any given state tort action against a railroad must begin with the default. The state law reasonable care standard applies unless and until the railroad identifies a "covering" regulation that applies to each claim. As noted, BNSF did not identify any covering regulations in its proposed jury instructions.

The families' primary claim against BNSF was one of intermittent signal-system malfunction. That claim invoked a host of federal regulatory standards, hence the five-page regulatory jury instruction. Evidence was also introduced that Engineer Bellmore failed to apply the emergency brake until after impact, primarily to impeach his credibility with respect to his testimony about the identity of the driver, and his statement that he saw the car go around the gate. Such operational conduct is generally not covered by federal regulation, and thus is subject to the common-law negligence standard of care. The families expressly stated, however, that they

were not placing any fault, liability, or “blame” on the crew. [T.962-63; 4486]. BNSF can identify no evidence introduced or argument made by the families that asked the jury to decide the railroad’s negligence on the basis of anything other than a violation of a federal regulation or regulatory-approved rule. There were none. That being the case, even if Instruction 25.46’s reference to reasonable care was error, it was harmless.

**III. THIS COURT SHOULD NOT ALLOW BNSF TO UNILATERALLY EXPAND THE SCOPE OF REVIEW.**

Perhaps recognizing that a proper application of the invited-error doctrine will conclude this case, BNSF allocates thirteen pages of its brief to a discussion of “additional errors” that purportedly warrant a new trial. [See BNSF Br. at 44-57]. The purported “additional errors” are not properly before this Court.<sup>6</sup>

This Court only accepted review of the narrow issues identified by the appellants. The Court declined review of every issue identified in BNSF’s Petition for Review and Conditional Cross-Petition for Review. BNSF never requested, either in its Petition for Review or in

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<sup>6</sup> Because these issues are not properly before the Court, appellants will not respond comprehensively on the merits. A few points, however, are worth noting. None of the alleged “newly discovered witnesses” actually saw the accident or observed whether the gates and lights were functioning at the time of the accident. Furthermore, the trial court’s refusal to order a new trial based on statements offered more than five years post-accident came on the heels of BNSF’s trial attorneys paying \$10,000 and \$5,000 for statements that were demonstrably false. Similarly, while BNSF bemoans that it was ambushed by the testimony of Sergeant Drevnick [BNSF Br. at 53-55], BNSF itself included Drevnick on its witness list, and specifically reserved the right to elicit expert testimony from him. There was no error in any of the trial court’s discretionary decisions.

its Conditional Cross-Petition for Review, review of the “additional errors” it now claims warrant this Court’s attention. Instead, the railroad’s Conditional Cross-Petition was limited to the issue of federal preemption.

The Minnesota Rules of Civil Appellate Procedure foreclose BNSF’s unilateral effort to expand the scope of this Court’s review. Rule 117 provides that, if a party alleges it has been aggrieved by a trial court’s decision on an issue not addressed by the intermediate appellate court, the proper course is to file a conditional cross-petition for review: “Any responding party may, in its response, also conditionally seek review of additional designated issues not raised by the petition.” Minn. R. Civ. App. 117, subd. 4.

Case law confirms that the scope of discretionary review is limited to those issues this Court expressly agrees to review. In *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 653 N.W.2d 204 (Minn. App. 2002), for example, the Court of Appeals concluded that the district court should have granted summary judgment to the defendant manufacturers on the issue of plaintiff’s standing to bring the lawsuit. Accordingly, the court vacated “as moot the summary judgment to [the manufacturers] on other grounds,” which included the issue of whether defendants’ conduct caused any compensable damage. *Id.* at 205.

The plaintiff filed a petition, seeking review of the standing issue. *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320,, 323 (Minn. 2003). The manufacturers filed a conditional cross-petition, asking this Court to review causation in the event it reversed the Court of Appeals on the standing issue. *Id.* This Court stated:

“We granted [plaintiff’s] petition but denied Manufacturers’ cross-petition. Thus, the standing issue is before us, but the causation issue is not.” *Id.*

Here, unlike the defendant in *Motorsports Racing Plus*, and despite filing a cross petition requesting conditional review, BNSF chose not to include a request for review of the purported “additional errors”. BNSF has, therefore, waived review of those issues. BNSF’s unsolicited arguments should be disregarded in their entirety.

### **CONCLUSION**

Sound public policy demands that the Court of Appeals majority be reversed. The primary purpose of Rule 51 is to give trial courts, with knowledgeable assistance from trial counsel, the opportunity to cure allegedly defective jury instructions before error occurs. The plain-error exception is intended to be a limited safety net, permitting trial judges to address fundamental errors that were inadvertently missed by all before putting the parties and the court system through unnecessary appeals.

The rule BNSF successfully convinced the majority below to adopt creates an affirmative obligation on the part of every trial court in Minnesota to *sua sponte* uncover erroneous jury instructions that one of the parties has covertly hidden or knowingly ignored. It requires every trial court to independently search for error, unable to rely on agreements and stipulations made by experienced counsel. This has never been the law in Minnesota. It should not be the law now.

BNSF affirmatively blessed every jury instruction in this case that addressed the standard of care. BNSF should, therefore, be compelled to accept the result. Appellants respectfully request this Court reverse the majority below, and reinstate both trial court judgments in all respects.

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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, subsds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,672 words. This brief was prepared using Microsoft Word 2007.

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