

IN THE SUPREME COURT OF MISSOURI

No. S.C. 85115

WILLIAM GOMEZ
Respondent-Appellant,

vs.

CONSTRUCTION DESIGN, INC.
Appellant-Respondent

Appeal from the Circuit Court of Jackson County, Missouri
Division 3
Hon. Lee E. Wells

SUBSTITUTE BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is a civil action for personal injury and damages in which a jury in the Circuit Court of Jackson County returned a verdict of \$3,760,000 in compensatory damages. On defendant's post-trial motions, the trial court sustained defendant's Motion for New Trial or, in the Alternative, for Remittitur finding the jury's award excessive (L.F. 050-051). The trial court's decision to remit was conditioned upon plaintiff's acceptance of a new judgment in the amount of \$2,760,000 for compensatory damages or a new trial would be granted. Plaintiff was given up to and including 4:30 p.m. on Friday, May 25, 2001, to file a written pleading of his acceptance of the remitted amount or a new trial would be ordered.

On May 25, 2001 plaintiff faxed and mailed to the trial court and defendant a written pleading denominated "Plaintiff's Acceptance of Remittitur." Accompanying this brief is an Appendix which includes a copy of the facsimile transmission of this pleading received by defendant's counsel on May 25, 2001 (App. A31-32). The mailed original of Plaintiff's Acceptance of Remittitur pleading was not filed by the court clerk until May 31, 2001, (L.F. 052, App. A3). On May 31, 2001, the trial court ordered a remittitur of \$2,760,000 (L.F. 050-051, App. A1-2) under the apparent belief as recited in its Order and Amended Judgment (L.F. 053, App. A4) that the Plaintiff's Acceptance of Remittitur pleading had been filed by plaintiff on May 25, 2001.

The Local Rules of the Circuit Court of Jackson County, Missouri do not authorize the filing by facsimile transmission of this pleading. The facsimile transmission to the court clerk of Plaintiff's Acceptance of Remittitur pleading was not filed on May 25, 2001. Accordingly,

as a preliminary matter, under these facts this Court lacks jurisdiction of this appeal. Defendant CDI, as appellant-respondent has filed its Motion to Remand for lack of appellate court subject matter jurisdiction with this Court.¹ Since there is no jurisdiction, this appeal must be dismissed and remanded back to the trial court for the conduct of a new trial on all issues.

The Missouri Court of Appeals, Western District, held that the trial court committed plain error in its submission of plaintiff's *res ipsa loquitur* verdict directing instruction and reversed the trial court's judgment and remanded this cause for a new trial. Respondent-appellant filed an Application for Transfer to this Court and on March 4, 2003, this Court granted transfer and now decides this case as if upon original appeal. This appeal is within the appellate jurisdiction of the Court under Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

¹The issue of the jurisdiction of this Court is the subject matter of appellant-respondent's Motion to Remand filed with this Court on March 18, 2003 and is incorporated by reference herein together with its Suggestions filed in support thereof.

Introduction

This is an appeal from a remitted judgment of \$2,760,000 on a jury verdict of \$3,760,000 in compensatory damages in a personal injury accident. The plaintiff, cross-appellant and respondent in this Court, is William Gomez (“Gomez”). The defendant, appellant-respondent in this Court is Construction Design, Inc. (“CDI”). On July 23, 1998, Gomez, a resident of El Dorado, Kansas, filed a petition against CDI in the Circuit Court of Jackson County, Missouri seeking damages from CDI for bodily injuries arising out of a fall on May 2, 1994 at the ADM Soybean Processing Plant in North Kansas City, Missouri. In his petition for damages Gomez alleged that, in lifting the heat exchanger, CDI committed several specific acts of negligence, which resulted in the heat exchanger dislodging a section of floor grating, creating a hole through which Gomez fell. Gomez claimed that these specific acts of negligence were a direct and approximate cause of his injuries. Gomez cross-appeals the judgment with respect to the trial court’s remittitur of the jury’s award of damages.

The Accident

On May 2, 1994 Gomez was employed by TMS, Inc., a general maintenance contractor of piping equipment, as a pipefitter helper to work on a project at the ADM Plant in North Kansas City (Tr. 52, 78-79). As a helper, it was Gomez’ job to assist the pipefitters with whatever they were doing, including among other things, carrying tools, piping, bolts or pieces of scaffolding (Tr. 79). On this particular project, TMS, Inc. was a subcontractor and on the accident day its employees were working in the extraction part of the plant changing pipes and valves (Tr. 79-80). The ADM Plant had been shutdown for repairs and modification and TMS,

Inc's work included making repairs, maintenance and modifications on various pipes in the extraction operation of the plant (Tr. 51, 78). TMS, Inc.'s work also included the building of a scaffold in order to perform its work on piping located above the floor (Tr. 52). On May 2, 1994, the day of the accident, Gomez was helping to build a scaffold by carrying wood planks used for the flooring of a scaffold structure being constructed by TMS, Inc. at the plant (Tr. 52, 64, 87).

CDI was also a subcontractor on this project and its employees were using chainfalls in removing a heat exchanger located in the same area where TMS, Inc. and Gomez were working on May 2, 1994 (Tr. 81-82, 339, 345, 352). The heat exchanger was a tube looking piece of equipment weighing approximately 1 ton (Tr. 339). No CDI employees were called to testify by plaintiff and testimony of CDI employees was only presented in defendant's portion of the case. On the day of the accident CDI employees Kevin McDowell and Paul Hamilton had rigged up the heat exchanger with chainfalls and were in the process of lifting it up and off of the metal floor grating where they were working (Tr. 344, 348-349, 352). During this lifting process, a flange on the bottom part of the exchanger got hooked on a section of the metal floor grating (which had not been fastened down), dislodging a section of the grating and creating a hole or space in the grate flooring that opened to the next floor below (Tr. 340-341).

During the same time period that the CDI employees were moving the exchanger, Gomez was carrying wood plank boards to the area nearby where TMS, Inc. was building its scaffold (Tr. 64). After this grating had moved and created a hole or space in the flooring, CDI

employees McDowell and Hamilton immediately stopped their lifting of the exchanger in order to get this metal floor grating back in place and the hole area plugged up (Tr. 351-353, 361). McDowell testified that the hole was the size of a body or person (Tr. 350). McDowell and Hamilton further testified that immediately after the metal floor grating moved they began to take action by standing on each side in front of the hole or space in order to pull the grating back and cover up the hole (Tr. 341, 353). McDowell testified that while he and Hamilton were standing and facing in front of and on both sides of this hole he “felt something nudge” him on his “side or back” (Tr. 341). McDowell testified that Gomez, while carrying planks for the scaffolding, had somehow come up from behind him, gotten around him, and then proceeded to step into the hole and fall some 15 feet to the floor below (Tr. 341-342). McDowell stated that the accident happened “as fast as you blink your eye” and “there was no time” to reach out and grab him (Tr. 342).

The only evidence presented by Gomez in his portion of the case as to the facts of the accident and CDI’s work activities was the testimony of his two TMS, Inc. co-workers, Glenn Frost and Wayne Frye (Tr. 49-94).² Frost testified that this was a temporary job for Gomez while the plant was in shutdown (Tr. 69). Frost identified the accident scene area with the aid of a videotape made a day after the accident (Plaintiff’s Ex. 46, Tr. 52-56). Plaintiff’s

²Gomez testified that he did not remember the accident and that how he fell was “too quick to remember” (Tr 303), that he remembered falling through a hole and hitting the floor below (Tr. 304), and that he had a loss of recall of the immediate events of the accident but no initial loss of consciousness (Defendant’s Exhibits 102 and 103).

Exhibit 46 was admitted into evidence and shown to the jury by Gomez' counsel, over the objections of defendant, made both by Motion in Limine (L.F. 015-017) and at trial (Tr. 53). This videotape depicted the accident scene as well as a bright yellow "CAUTION" tape in, over and around the area where plaintiff fell (Plaintiff's Ex. 46). Gomez' counsel asked Frost to comment during the showing of the videotape as to how the equipment was being used, specifically the pulley that was used to lift the heat exchanger (Tr. 55):

Q. Is that the pulley they were using to lift with?

A. See, this wasn't our part.

Q. That's CDI's part?

A. Right.

CDI and its employees were again mentioned in the following exchange during the direct examination of Frost (Tr. 59):

Q. Had you had any contact with CDI who was working on the vessel next to you?

A. No, I hadn't.

Q. Were you aware that they were there?

A. No, I wasn't.

Q. They were simply in the area but you weren't –

A. They was in the area; I didn't have a clue what they was doing.

Q. On the date of the accident did CDI talk to you about what they were doing?

A. They did not talk to me whatsoever.

Frost also identified the accident scene area through a photograph made from the videotape which did not visibly include the yellow “CAUTION” tape (Tr. 58, Plaintiff’s Ex. 47). During the direct examination of Frye, Gomez’ counsel showed him a photograph of the heat exchanger and asked him to identify it. The following exchange occurred (Tr. 81):

A. I believe that was the exchanger they was attempting to remove.

Q. When you say “they,” do you mean CDI?

A. No, Ma’am. Well, I don’t know what the name of the other company was. It was another company, but it wasn’t our group.

Q. The group that was working next to you?

A. Yes, Ma’am. (Tr. 81)

Frost further testified to his understanding as to how plaintiff fell through the flooring (Tr. 64). Frye testified that his back was turned from the accident scene area when he heard a commotion that brought his attention to plaintiff falling (Tr. 90-91). Frye further testified that the flooring had been moved for only a few minutes before plaintiff fell (Tr. 91).

An oral motion for directed verdict on the issue of the submissibility of plaintiff’s case at the close of Gomez case was denied (Tr. 334) and CDI then proceeded with the presentation of its case by calling Kevin McDowell and Paul Hamilton, the two CDI employees who were involved in lifting the heat exchanger. On cross-examination, Hamilton testified that the individual sections of grating which made up the kind of flooring at the ADM Plant are often fastened to place with clips, but the section of grating that got dislodged by the heat exchanger

did not have any clips. Hamilton also acknowledged that he did not look to see if the section of grating was held in place, testifying (Tr. 360):

Q. And you never tested the grating or the clips?

A. No, it didn't have any clips. I thought it was welded.

Q. You never tested?

A. No.

Q. You never looked to see?

A. (Gestures.)

Q. No?

A. Yeah.

Q. You did not look to see?

A. No, I didn't.

McDowell, during his cross-examination, concurred that the grating had not been checked to see if it was fastened in place (Tr. 344):

Q. And before you began to lift you were sure this piece of equipment was ready to be lifted?

A. Yes, we had it rigged up to be lifted, yes.

Q. But you didn't do any examination of the grating before you lifted, did you?

A. No, that's – you know.

Q. You didn't do it.

A. It should have been put down.

Q. Someone should have checked the grate to go see if it was held down?

A. It shouldn't have been just been laid in there.

Q. Right. Someone should have checked.

A. Right.

At the close of all the evidence, CDI made another oral motion for a directed verdict, which was overruled by the trial court.

Neither Gomez nor CDI offered any evidence or proof that defendant CDI had any control over the area of the accident scene or that CDI was in charge of any of the work being performed. Gomez offered no evidence in his portion of the case as to who had control or ownership of the grate flooring area where plaintiff fell. There was no evidence presented that CDI had any legal duty or breached any duty owed to Gomez that caused or contributed to cause Gomez' accident. There was no evidence presented at trial by any witness establishing that CDI in any way had any control over the area in question or that it was in charge of the work being performed by it or TMS, Inc. Neither plaintiff nor defendant offered any evidence at trial as to control or ownership of the grate flooring area where plaintiff fell. There was no evidence offered at trial establishing that CDI had any time to warn or remedy the situation before plaintiff's fall. The only evidence in this regard was from Hamilton who testified that there was no time to warn anyone or clear anyone out of the area after the grate flooring moved (Tr. 361) and that he didn't see Gomez until he stepped through the hole (Tr. 42; Tr. 361-362).

The testimony of Glenn Frost, Wayne Frye, William Gomez, Jr., Kevin McDowell and Paul Hamilton constituted the entirety of the evidence presented at trial in this case as to the negligence or fault, if any, on the part of defendant.

Injuries and Damages

Following this accident, Gomez was taken by ambulance to North Kansas City Hospital with multiple injuries, including a comminuted fracture dislocation of the left wrist, blunt head trauma, depressed left malar complex fracture, facial lacerations, and tenderness of the temporomandibular joint (TMJ). MRI's of the back, neck and brain were normal as were chest x-rays. Gomez then underwent an open reduction and internal fixation of the distal left radius (wrist), decompression of the left medial nerve (carpal tunnel decompression), open reduction of the left malar fracture and orbital floor fracture (facial bones). Gomez was discharged on May 5, 1994 and was readmitted on May 19, 1994 for orbital fracture repair with a discharge date of May 11, 1994 (Ex. 29).

Most of the testimony in this case as to injuries and damages was presented by way of videotape depositions. Evidence presented in this regard is referenced by exhibits as to each videotape and by transcript reference where there are exhibits or where there was live testimony. Designations to deposition testimony were prepared in writing and are contained in the Legal File (L.F. 009-014). The deposition videotapes were edited to reflect these designations and the Court's rulings on objections.

Gomez' evidence regarding his injuries and damages came from the testimony of one treating physician, internist Dr. Richard Kuhns (Plaintiff's Ex. 59), and six other expert

medical witnesses retained by plaintiff specifically for testimony in this case. These expert witnesses were Dr. Bernard Abrams, a neurologist (Plaintiff's Ex. 56), Dr. Eustiquio Abay, a neurologist (Plaintiff's Ex. 57), Dr. Fernando Egea, a neurologist and psychiatrist (Plaintiff's Ex. 60), Thomas Blasi, PhD., a counseling psychologist (Plaintiff's Ex. 61), David Mouille, PhD., a psychologist (Tr. 115-205), Ronald Gier, DMD, MSD, a dentist (Plaintiff's Ex. 62) and John Bopp, PhD., a psychologist and vocational analyst (Tr. 207-257). These expert witnesses testified that as a result of Gomez' accident on May 2, 1994 he suffered the following injuries: brain damage (axonal injury), commuted fracture dislocation of the left wrist, blunt head trauma, depressed left malar complex fracture, temporomandibular joint damage (TMJ), carpal tunnel decompression, cervical disk damage, herniated disk at L5-S1 and nerve damage. The only medical records offered into evidence were from Dr. Abrams, Dr. Abay, Dr. Gier and the physical therapy records of Gerald Williams, PT (Plaintiff's Exs. 7, 8, 9 11, 13, 14, 17, 19 and 20). The North Kansas City Hospital records (Plaintiff's Ex. 29) were the only hospital records admitted into evidence. Medical records and reports of non-testifying witnesses Dr. Mark Devine, an otolaryngologist (Plaintiff's Ex. 31) and Dr. Steven Vilmer, an orthopedic surgeon (Plaintiff's Ex. 36) were also entered into evidence. No medical bills were offered into evidence.

There was no dispute and Gomez testified that he had been unemployed since the accident. Several of his medical experts testified that since the accident Gomez was either only employable in low-level jobs (Dr. Abrams) or permanently disabled (Dr. Abay, Dr. Kuhns, Dr. Egea and Dr. Bopp). Gomez testified that he was earning between \$15.25 and \$17.00 per

hour on the ADM project (Tr. 302) and that he believed his medical bills to be “close to” \$40,000 (Tr. 315). Dr. Gier testified that there was possibly a need for future surgery for plaintiff’s TMJ problem at “around \$20,000” and possible dental splint therapy costing \$315.00 with additional office visits costing \$180.00 a year for an indefinite time period (Plaintiff’s Ex. 62).

Gomez described his injuries, current pain and condition (Tr. 306-310) and testified that he was not undergoing treatment except for a follow-up with his family doctor, Dr. Kuhns, every four months (Tr. 316). Gomez further testified that he was not taking any pain medication, either prescription or over-the-counter (Tr. 316). During the course of his testimony he claimed that his financial condition and financial distress were reasons why he was not currently receiving additional medical treatment. Doctors Abay and Egea also injected Gomez’ financial condition and financial distress as reasons why he was not receiving additional medical treatment. Based upon this testimony, the trial court properly ruled that Gomez had opened the door (Tr. 325) allowing CDI to present evidence through Gomez himself that he had received a lump sum payment of \$25,606.88 plus weekly checks totaling \$44,700 for his injuries from this accident (Tr. 327).

In summary, there was no evidence of past, present or future medical bills and the only evidence of future medical expenses was the possible TMJ operation and dental work testified to by Dr. Gier. None of Gomez’ treating doctors and experts recommended any additional surgery and there was no evidence offered by Gomez as to the total amount of his medical bills or as to their reasonableness and necessity.

The evidence was that Gomez was 39 years old at the time of the accident and Dr. Bopp, his vocational analyst and psychologist, testified over objection by CDI, that his earning capacity prior to the accident was \$15,586.87 per year (Tr. 227). Dr. Bopp testified that this amount was merely an average of his last five years based upon his social security wage statement which showed in most years he worked for three - eight employers per year (Tr. 285-286). There was no other evidence of lost wages. In summary, there was no direct evidence of total past wage loss or future wage loss other than Dr. Bopp's testimony of Gomez' yearly earnings prior to the accident. There was also no evidence presented calculating his economic loss as a result of this accident.

The only other evidence presented concerning Gomez' injuries came from the testimony of CDI's expert witnesses Dr. Charles Donohoe, a neurologist (Defendant's Exs. 101 and 102), Mitchel Woltersdorf, Ph.D (Defendant's Exs.100 and 101) and Dennis Cowan, Ph.D (Tr. 365-414). Dr. Donohoe found Gomez to be 17% permanently disabled and opined that he could return to work (Ex. 102, [p. 22-23] and Ex. 103). Dr. Woltersdorf, a neuropsychologist, testified that Gomez had mild traumatic brain injury from his accident but would have no problem returning to work (Defendant's Ex. 100 [p. 21, 26]). Dr. Cowan, a psychologist, testified that Gomez suffered a mild head injury with mild impairment from the accident, that he demonstrated significant improvement of his cognitive functions since the accident and that he could return to work (Tr. 380).

Following five days of trial, the case was submitted on the general theory of *res ipsa loquitur*. At the instruction conference, Gomez' attorney submitted the following verdict

director, which the trial court referred to as being “patterned on M.A.I. 31.02(3)(App. A5):” (Tr. 424)

In your verdict you must assess a percentage of fault to defendant, whether or not plaintiff was partly at fault, if you believe:

First, the floor grate was dislodged from its supports by employees of the defendant, and

Second, the floor grate fell while plaintiff was standing on it or as he approached it, and

Third, the collapse of the floor grate and plaintiff’s fall were directly caused by defendant’s negligence, and

Fourth, as a direct result of such negligence, plaintiff sustained damage.

The instruction was marked Instruction No. 7 and was the instruction on which Gomez’ case was submitted. This instruction failed to hypothesize the element of control and did not follow the *res ipsa loquitur* general instruction form required by M.A.I. 31.02(3). (L.F. 023).

In closing argument, Gomez’ counsel made no request or reference to a specific damage amount. Gomez’ counsel argued “They did it, They should pay for it and They should pay a lot” (Tr. 428). Gomez’ counsel then asked the jury to find that CDI should “compensate plaintiff for the pain he has been through and what he is going through and allow him to support himself for the rest of his life and allow him to have medical treatment for the rest of his life and allow him a sum for the suffering and pain he has been through.” (Tr. 479). The jury

returned a verdict for \$3,760,000 in compensatory damages and found CDI 100% at fault (L.F. 030).

On CDI's post trial motions, the trial judge denied CDI's Motion for Judgment Notwithstanding the Verdict but sustained its Motion for New Trial or, in the Alternative for Remittitur conditioned upon Gomez not filing a written acceptance of the Court's proposed remittitur of \$2,760,000 by 4:30 p.m. on May 25, 2001 (L.F. 051); otherwise, a new trial would be granted. On May 25, 2001 plaintiff faxed to both the trial court and defendant's counsel Plaintiff's Acceptance of Remittitur (App. A31-32). The cover page of plaintiff's facsimile transmission of this pleading indicated that "[t]he original will follow in the mail." The Local Rules of the Circuit Court of Jackson County, Missouri, do not authorize filing by facsimile transmission this type of pleading. These local court rules only authorize the transmission of facsimile pleadings in adult abuse and child protection cases, applications for continuance and certain probate matters. (Rules 34.4, 4.8 and 72.3, respectively, Local Rules of the Circuit Court of Jackson County, Missouri, App. A25-30). The Clerk of the Circuit Court, Division 3, received and filed the original pleading of Plaintiff's Acceptance of Remittitur on May 31, 2001, which was after the deadline set by the Court in its Amended Order (L.F. 050-051). Having failed to timely file a written acceptance pleading of the remitted amount by 4:30 p.m., May 25, 2001, a new trial was required to be granted in accordance with the trial court's Amended Order of May 24, 2001 (L.F. 050-051). On May 31, 2001 the trial court entered its Order and Amended Judgment (L.F. 053) overruling CDI's Motion for a New Trial and entering judgment in the amount of \$2,760,000 plus costs even

though Gomez did not file a written acceptance pleading of the remitted amount until May 31, 2001.

CDI, unaware of Gomez' failure to have timely filed his written acceptance pleading by May 25, 2001, appealed from the Court's Order and Amended Judgment of May 31, 2001, by Notice of Appeal filed June 7, 2001 (L.F. 056-057) and Gomez filed his Notice of Cross-Appeal of the remittitur of damages on June 25, 2001. In an order entered July 18, 2001, the Court of Appeals designated CDI as appellant for purposes of briefing and argument. The Missouri Court of Appeals, Western District, following submission of all briefs and oral argument and after having determined that in its opinion that the fax filing of respondent's Acceptance of Remittitur was both proper and timely, held that the trial court committed plain error in its submission of plaintiff's *res ipsa loquitur* verdict directing instruction resulting in manifest injustice and a miscarriage of justice warranting reversal and a remand for a new trial. On March 4, 2003 this Court granted Gomez' Application for Transfer and on March 18, 2003, appellant CDI filed with this Court its Motion to Remand for Lack of Appellate Court Subject Matter Jurisdiction of this appeal.

POINTS RELIED ON

- I. THE TRIAL COURT COMMITTED PLAIN ERROR AFFECTING SUBSTANTIAL RIGHTS OF THE DEFENDANT AND RESULTING IN MANIFEST INJUSTICE AND A MISCARRIAGE OF JUSTICE IN SUBMITTING INSTRUCTION NO. 7, PATTERNED ON M.A.I. 31.02(3) (App. A5), RES IPSA LOQUITUR, THAT

PREJUDICED THE DEFENDANT REQUIRING REVERSAL OF THE TRIAL COURT'S JUDGMENT IN A NEW TRIAL BECAUSE THE PLEADINGS AND PROOF IN THIS CASE CLEARLY DEMONSTRATE THAT PLAINTIFF'S CASE WAS PLED AND TRIED ON A THEORY OF SPECIFIC NEGLIGENCE ONLY AND THE DOCTRINE OF RES IPSA LOQUITUR WAS UNAVAILABLE TO PLAINTIFF UNDER MISSOURI LAW AND THE INSTRUCTION FAILED TO HYPOTHESIZE THE REQUIRED ELEMENTS OF RES IPSA LOQUITUR AND THE EVIDENCE DID NOT SUPPORT THE GIVING OF THIS INSTRUCTION IN THAT:

- (A) IT ASSUMED NEGLIGENCE AND RELIEVED PLAINTIFF OF HIS DUTY OF PROVING AN ESSENTIAL ELEMENT OF HIS CASE;
- (B) IT DID NOT HYPOTHESIZE THAT DEFENDANT CONTROLLED THE AREA WHERE THE ACCIDENT OCCURRED AT THE TIME OF PLAINTIFF'S FALL;
- (C) THERE WAS NO EVIDENCE SUPPORTING SUCH A SUBMISSION OF PLAINTIFF'S CASE ON RES IPSA LOQUITUR; AND

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE REQUISITE PROOF ELEMENTS OF PLAINTIFF'S CLAIM OF SPECIFIC NEGLIGENCE AND THE INSTRUCTION THAT WAS SUBMITTED BY THE COURT WAS EVIDENT, OBVIOUS AND CLEAR ERROR DEPRIVING DEFENDANT OF HIS CIVIL DUE PROCESS RIGHTS BY RELIEVING PLAINTIFF OF THE BURDEN OF PROVING EACH ELEMENT OF HIS

CAUSE OF ACTION AND, THEREFORE, BECAUSE THE TRIAL COURT COMMITTED PLAIN ERROR AFFECTING THE SUBSTANTIAL DUE PROCESS RIGHTS OF DEFENDANT A MANIFEST INJUSTICE AND MISCARRIAGE OF JUSTICE TO DEFENDANT HAS RESULTED THEREFROM.

Bedwell v. Bedwell, 51 S.W.3d 39, 43 (Mo. App. W.D. 2001)

Guffey v. Integrated Health Servs., 1 S.W.3d 509, 514 (Mo. App. W.D. 1999)

Balke v. Central Missouri Elec. Co-op, 966 S.W.2d 15, 16-17 (Mo. App. W.D. 1997)

Senu-Oke v. Modern Moving Systems, Inc., 978 S.W.2d 426 (Mo. App. E.D. 1998)

II. THE TRIAL COURT ERRED AND THIS CASE MUST BE REMANDED BACK TO THE TRIAL COURT FOR A NEW TRIAL ON ALL ISSUES FOR LACK OF APPELLATE COURT JURISDICTION BECAUSE WHEN THE TRIAL COURT ENTERED ITS ORDER AND AMENDED JUDGMENT OF MAY 31, 2001 OVERRULING DEFENDANT'S MOTION FOR A NEW TRIAL AND ENTERING JUDGMENT IN THE REMITTED AMOUNT OF \$2,760,000 IT DID SO AFTER PLAINTIFF HAD FAILED TO TIMELY FILE HIS ACCEPTANCE OF REMITTITUR RESULTING IN A NEW TRIAL BEING ORDERED AND THE TRIAL COURT RETAINING JURISDICTION OF THIS CASE.

Cotter v. Miller, 54 S.W.3d 691 (Mo. App. W.D. 2001)

Local Rules of the Circuit Court of Jackson County, Missouri

Rule 43.02(c), Mo.RulesCiv.Pro. (App. A25-30)

III. THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S OBJECTION TO PLAINTIFF'S EXHIBIT 46, A VIDEOTAPE OF THE ACCIDENT SCENE MADE ONE DAY AFTER PLAINTIFF'S ACCIDENT, BECAUSE THIS WAS PREJUDICIAL EVIDENCE OF POST-ACCIDENT REMEDIAL MEASURES IN THAT PLAINTIFF WAS IMPROPERLY PERMITTED TO USE AND SHOW TO THE JURY A VIDEOTAPE DEPICTING POST-ACCIDENT REMEDIAL MEASURES AS EVIDENCE THAT DEFENDANT WAS NEGLIGENT IN FAILING TO WARN OTHER WORKERS IN THE AREA OF THE DISLODGED GRATING.

Stinson v. E.I. DuPont de Nemours and Co., 904 S.W.2d 428

(Mo.App. W.D. 1995)

Wingate v. Lester E. Cox Medical Center, 853 S.W.2d 912 (Mo. banc 1993)

Brooks v. Elders, Inc., 896 S.W.2d 744 (Mo. App. E.D. 1995)

Nash v. Stanley Magic Door, Inc., 863 S.W.2d 677 (Mo. App. E.D. 1993)

IV. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL AND IN REFUSING TO ENTER FURTHER REMITTITUR OF COMPENSATORY DAMAGES BECAUSE THE JUDGMENT, EVEN AS

REMITTED, IS GROSSLY EXCESSIVE, SHOCKS THE CONSCIENCE OF THE COURT, DEMONSTRATES BIAS, PASSION AND PREJUDICE ON THE PART OF THE JURY AND EXCEEDS FAIR AND REASONABLE COMPENSATION FOR PLAINTIFF'S INJURIES IN THAT THE RESULTING COMPENSATORY DAMAGES AWARD IS UNSUPPORTED BY THE EVIDENCE AND BEARS NO RELATION TO THE DAMAGES PROVEN AT TRIAL.

Bishop v. Cummines, 870 S.W.2d 922 (Mo. App. W.D. 1994)

Barnett v. La Societe Anonyme Turbomeca, 963 S.W.2d 639

(Mo. App. W.D. 1997)

Larabee v. Washington, 793 S.W.2d 357 (Mo. App. W.D. 1990)

Fust v. Francois, 913 S.W.2d 38 (Mo. App. E.D. 1995)

V. THE TRIAL COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF PLAINTIFF'S EVIDENCE AND AT THE CLOSE OF ALL OF THE EVIDENCE BECAUSE THE EVIDENCE DID NOT SUPPORT A FINDING OF DEFENDANT'S NEGLIGENCE AND PLAINTIFF DID NOT MAKE A SUBMISSIBLE CASE IN THAT HE FAILED TO PROVE NEGLIGENCE AND CAUSATION ON THE PART OF THE DEFENDANT.

Martin v. City of Washington, 848 S.W.2d 487 (Mo. banc 1993)

Pierce v. Platte-Clay Electric Co-op., Inc., 769 S.W.2d 769 (Mo. banc 1989)

Mino v. Porter Roofing Co., Inc., 785 S.W.2d 558 (Mo. App. W.D. 1990)

Loehring v. Westlake Const. Co., 94 S.W. 747 (Mo. 1906)

I. THE TRIAL COURT COMMITTED PLAIN ERROR AFFECTING SUBSTANTIAL RIGHTS OF THE DEFENDANT AND RESULTING IN MANIFEST INJUSTICE AND A MISCARRIAGE OF JUSTICE IN SUBMITTING INSTRUCTION NO. 7, PATTERNED ON M.A.I. 31.02(3), RES IPSA LOQUITUR, THAT PREJUDICED THE DEFENDANT REQUIRING REVERSAL OF THE TRIAL COURT'S JUDGMENT IN A NEW TRIAL BECAUSE THE PLEADINGS AND PROOF IN THIS CASE CLEARLY DEMONSTRATE THAT PLAINTIFF'S CASE WAS PLED AND TRIED ON A THEORY OF SPECIFIC NEGLIGENCE ONLY AND THE DOCTRINE OF RES IPSA LOQUITUR WAS UNAVAILABLE TO PLAINTIFF UNDER MISSOURI LAW AND THE INSTRUCTION FAILED TO HYPOTHESIZE THE REQUIRED ELEMENTS OF RES IPSA LOQUITUR AND THE EVIDENCE DID NOT SUPPORT THE GIVING OF THIS INSTRUCTION IN THAT:

(A) IT ASSUMED NEGLIGENCE AND RELIEVED PLAINTIFF OF HIS DUTY OF PROVING AN ESSENTIAL ELEMENT OF HIS CASE;

(B) IT DID NOT HYPOTHESIZE THAT DEFENDANT CONTROLLED THE AREA WHERE THE ACCIDENT OCCURRED AT THE TIME OF PLAINTIFF'S FALL;

(C) THERE WAS NO EVIDENCE SUPPORTING A SUBMISSION OF PLAINTIFF'S CASE

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THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE REQUISITE PROOF ELEMENTS OF PLAINTIFF'S CLAIM OF SPECIFIC NEGLIGENCE AND THE INSTRUCTION THAT WAS SUBMITTED BY THE COURT WAS EVIDENT, OBVIOUS AND CLEAR ERROR DEPRIVING DEFENDANT OF HIS CIVIL DUE PROCESS RIGHTS BY RELIEVING PLAINTIFF OF THE BURDEN OF PROVING EACH ELEMENT OF HIS CAUSE OF ACTION AND, THEREFORE, BECAUSE THE TRIAL COURT COMMITTED PLAIN ERROR AFFECTING THE SUBSTANTIAL DUE PROCESS RIGHTS OF DEFENDANT A MANIFEST INJUSTICE AND MISCARRIAGE OF JUSTICE HAS RESULTED THEREFROM.

A.
STANDARD OF REVIEW

The standard of review for plain error of an unpreserved claim of error by the trial court is when, in the appellate's court discretion, it finds that manifest injustice or miscarriage of justice has resulted therefrom. Rule 84.13(c), Mo.R.Civ.Pro. Pursuant to Rule 70.03, to

preserve an instructional error for appellate review in a civil case, the appellant must object to the instruction prior to the jury's retiring to consider its verdict and, in addition, must raise the objection in a motion for new trial, in accordance with Rule 78.07. To the extent that appellant challenges the giving of Instruction No. 7, neither objected to nor preserved for appellate review, unpreserved claims of error may still be reviewed, in the Supreme Court's discretion, for plain error, even when not raised or preserved, when the Court finds manifest injustice or a miscarriage of justice has resulted. Rule 84.13(c); *Guess v. Escobar*, 26 S.W.3d 235 (Mo. App. W.D. 2000); *Roy v. Missouri Pacific Railroad Company*, 43 S.W.2d 351 (Mo. App. W.D. 2001).

B.
ARGUMENT

Plaintiff's verdict-directing Instruction No. 7 (L.F. 023) submitted plaintiff's claim for negligence against defendant CDI. Instruction No. 7, which the trial court referred to as being "patterned on M.A.I. 31.02(3)," (Tr. 424) attempted to state the general verdict directing instruction for res ipsa loquitur and read as follows:

"In your verdict you must assess a percentage of fault to defendant, whether or not plaintiff was partly at fault, if you believe:

First, the floor grate was dislodged from its supports by employees of the defendant, and

Second, the floor grate fell while plaintiff was standing on it or as he approached it, and

Third, the collapse of the floor grate and plaintiff's fall were directly caused by defendant's negligence, and

Fourth, as a direct result of such negligence, plaintiff sustained damage." (L.F. 023 (App. A5))

This instruction was faulty and the trial court plainly erred in submitting this instruction because it failed to hypothesize the required elements of *res ipsa loquitur* and the evidence did not support the giving of this instruction in that it did not hypothesize that CDI controlled the area where the accident occurred or had the right to control or the management of the floor grate at the time of the plaintiff's fall and there was no evidence supporting such a finding. Likewise, because the pleadings, evidence and closing argument clearly demonstrate that plaintiff's case was pled and tried solely on a theory of specific negligence, the doctrine of *res ipsa loquitur* was not available to plaintiff. Accordingly, plaintiff could not submit his case on *res ipsa loquitur* when he pleaded specific negligence only and attempted to prove the real and precise cause of his injuries. *City of Kennett v. Akers*, 564 S.W.2d 41, 48-49 (Mo. banc 1978).

Defendant concedes that it did not object or preserve this issue for appellate review but asks that plain error review be given under Rule 84.13(c). Rule 84.13(c) provides:

Plain errors affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.

Defendant also recognizes that the plain error rule should be used sparingly and does not justify a review of every trial error that has not been properly preserved for appellate review. *Messina v. Prather*, 42 S.W.3d 753, 763 (Mo. App. W.D. 2001). In determining whether to exercise its discretion to provide plain error review, the Supreme Court must look to determine whether on the face of appellant's claim substantial grounds exist for believing that the trial court committed a "plain" error, which resulted in manifest injustice or a miscarriage of justice. *Bedwell v. Bedwell*, 51 S.W.3d 39, 43 (Mo. App. W.D. 2001). "Plain" error for purposes of Rule 84.13(c) is error that is evident, obvious and clear. *Bedwell v. Bedwell*, 51 S.W.3d at 43, and a determination of whether plain error exists must be based on a consideration of the facts and circumstances of each case. *State v. Cline*, 808 S.W.2d 822, 824 (Mo. banc 1991). However, this unpreserved claim of error by the trial court may still be reviewed in the appellate court's discretion for plain error. *Roy v. Missouri Pacific Railroad Company*, 43 S.W.3d 351 (Mo. App. W.D. 2001).

When this court chooses to exercise its discretion to conduct plain error review, the process involves two steps. First, this court must determine whether the trial court committed error, affecting substantial rights, that was evident, obvious and clear. *State v. Hibler*, 21 S.W.3d 87, 96 (Mo. App. W.D. 2000). As in the case of regular error, not every evident, obvious and clear error requires reversal. In the case of regular error, to be reversible, the error must have prejudiced the appellant. *Coats v. Hickman*, 11 S.W.3d 798, 807 (Mo. App. W.D. 1999). Similarly, in the case of obvious error, the error must have prejudiced the

appellant, except that such prejudice must rise to the level of manifest injustice or a miscarriages of justice. *Slankard v. Thomas*, 912 S.W.2d 619, 628 (Mo. App. S.D. 1995).

Although in the context of a criminal case, the Missouri Court of Appeals has previously stated, with respect to plain error and review of instructional error:

Plain error for purposes of instructional error ‘results when the trial court has so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury’s verdict.’ Applying this standard, we would be more likely to reverse where the erroneous instruction ‘did not merely allow a wrong word or some other ambiguity to exist, [but] excused the State from its burden of proof on [a] contested element of the crime.’ Our appellate courts have found plain error where a verdict director effectively omits an essential element of the offense and the evidence fails to establish the omitted element beyond serious dispute.

State v. Harney, 51 S.W.3d 519, 535-36 (Mo. App. W.D. 2001). Accordingly, there is no logical reason for not applying this same standard in a civil case such as the one now before this Court. In light of this standard, it is proper for this Court to choose to exercise its discretion and review for plain error inasmuch as it is clear in this case that on the face of appellant’s claim that substantial grounds exist here to believe that the trial court committed obvious instructional error affecting its civil due process rights in submitting Gomez’ case to

the jury, which resulted in manifest injustice and a miscarriage of justice to appellant in that the jury verdict director submitted relieved Gomez of proving an essential element of his case.

In *Cremeens v. Kree Institute of Electrolysis*, 689 S.W.2d 839, 842 (Mo. App. E.D. 1985), the Court of Appeals held:

The doctrine of *res ipsa loquitur* applies only when (a) the instrumentality involved was under the management and control of the defendant; (b) the defendant possesses a superior knowledge or means of information as to the cause of the occurrence; and (c) the occurrence resulting in injury was such as does not ordinary happen if those in charge use due care.

Plaintiff's evidence, as previously noted herein, was lacking in all three of these elements (in addition to his failure to make a submissible case under either specific negligence or *res ipsa loquitur* theories) and by ignoring the mandatory requirements of M.A.I. 31.02(3) which are also in serious dispute in this appeal. Clearly, Instruction No. 7 failed to inform the jury of the elements necessary for a finding of negligence and there was no evidence presented at trial to support this submission.

As to that instruction at the instruction conference, the trial court stated: "Next we have Instruction No. 7, patterned on M.A.I. 31.02(3). This is the verdict director instruction from plaintiff" (T.R. 424). M.A.I. 31.02(3) [1997 revision] is the mandatory pattern instruction for submitting cases on "*res ipsa loquitur* - general." It reads:

Your verdict must be for plaintiff if you believe:

First, defendant (*here describe defendant's control, right to control, or management of the instrumentality involved*), and

Second, (*here describe the occurrence, event or incident, which is alleged to be the type that does not ordinarily happen when those in charge use due care*), and

Third, from the fact of such occurrence and the reasonable inferences therefrom, such occurrence was directly caused by defendant's negligence, and

Fourth, as a direct result of such negligence, plaintiff sustained damage.

For the reasons discussed, *infra*, it was plain error for the trial court to submit on the doctrine of *res ipsa loquitur*, rather than specific negligence.

The doctrine of *res ipsa loquitur*:

is a rule of evidence that allows, but does not compel, a jury to infer from circumstantial evidence that the plaintiff's injury resulted from some negligent act of the defendant without requiring the plaintiff to prove specific negligence.

The doctrine aids an injured party who is uncertain as to the exact cause of his or her injury. [T]he doctrine relieves a plaintiff of proving specific negligence and creates a rebuttable inference of general negligence which gets the plaintiff to the jury where the defendant may rebut the inference.

Guffey v. Integrated Health Servs., 1 S.W.3d 509, 514 (Mo. App. W.D. 1999) (citations omitted). As noted in ***Guffey v. Integrated Health Servs.***, 1 S.W.3d at 514, for the doctrine of *res ipsa loquitur* to apply, the plaintiff must show:

(1) the incident causing the injury is of the kind that does not ordinarily occur in the absence of negligence; (2) the instrumentality causing the injury is under the control of the defendant; and (3) the defendant has superior knowledge as to the cause of the injury.

More importantly, “[r]es ipsa loquitur is incompatible with proof of specific negligence.” *Hale v. American Family Mut. Ins. Co.*, 927 S.W.2d 522, 525 (Mo. App. W.D. 1996) (citing *Bonnot v. City of Jefferson City*, 791 S.W.2d 766, 769 (Mo. App. W.D. 1990)). A plaintiff may not submit under *res ipsa loquitur* if the plaintiff either: (1) pleads specific negligence only; or (2) pleads general negligence (*res ipsa loquitur*) only or in the alternative to specific negligence, and proves the real and precise cause of the injury. *City of Kennett v. Akers*, 564 S.W.2d 41, 48-49 (Mo. banc 1978); see also *Guffey*, 1 S.W.3d at 514 n.2 (noting that in some cases the rule has been incorrectly stated as prohibiting the pleading of *res ipsa loquitur* and specific negligence in the alternative). A review of respondent’s pleadings and proof presented at trial reveal that Gomez’ case was pled on specific negligence only and that his proof at trial was, if sufficient to satisfy submissibility (which is also being challenged in this appeal), in conformity therewith such that it should have been obvious to the trial court that it was error to submit respondent’s case on *res ipsa loquitur*. *Bond v. California Compensation & Fire Co.*, 963 S.W.2d 692, 698-99 (Mo. App. W.D. 1998); *Guffey*, 1 S.W.3d at 514.

Gomez’ petition for damages alleged specific acts of negligence on the part of CDI, including a failure to inspect the grating, a failure to properly secure the grating during the

removal of the heat exchanger, and a failure to give timely warnings of the dislodged grating (L.F. 001-005). The petition made no mention of *res ipsa loquitur*, nor did it allege facts which, if true, would invoke the doctrine, which requires that: (1) the incident resulting in injury is the kind which ordinarily does not occur without someone's negligence; (2) the incident is caused by an instrumentality under the control of the defendant; and (3) the defendant has superior knowledge about the cause of the incident. ***Roebuck v. Valentine-Radford, Inc.***, 956 S.W.2d 329, 334 (Mo. App. W.D. 1997). The mere fact that plaintiff fell and was injured is not sufficient to bring the *res ipsa loquitur* doctrine into action. ***Shafer v. Southwestern Bell Telephone Company***, 295 S.W.2d 109 (Mo. 1956).

As to his proof at trial, Gomez attempted to elicit testimony in support of his allegations of specific negligence. In this regard, Glen Frost, Gomez' TMS supervisor on the ADM job, testified in plaintiff's portion, of the case over objection, that the CDI workers did not advise him in advance of how they were going to remove the heat exchanger, and that, if they had, he would have removed his workers from harm's way, if necessary (Tr. 59-60). In addition, on cross-examination in CDI's portion of the case, Gomez' counsel elicited testimony from CDI employees which tried to point to an alleged failure on CDI's part to determine if the floor grating was secure before lifting the heat exchanger as the specific act of negligence responsible for Gomez' injury (Tr. 344 and 357-360). Again, in defendant's portion of the case, both Hamilton and McDowell acknowledged under cross-examination that

they did not examine the grating before lifting the heat exchanger and McDowell agreed that someone should have checked the grate to see if it was secured (Tr. 344 and 360).

Gomez' closing argument was further indication that the case was tried on a theory of specific negligence. In closing argument, Gomez' counsel pointed to a number of specific omissions on the part of CDI employees and multiple claims of real and precise causes for plaintiff's injury which he urged constituted negligence on the part of CDI (Tr. 431-435). The omissions argued by Gomez' counsel included not only the fact that, before the heat exchanger was lifted, neither McDowell nor Hamilton checked the grating to see if it was secured, but also that they did not inform other nearby workers of their plans, and that, when the grate was dislodged, neither of them immediately shouted a warning to the other workers in the area (Tr. 433).

Simply stated, in the pleadings, evidence and closing arguments Gomez attempted to present a case based upon evidence of multiple and specific negligent acts on the part of defendant as causes of his injuries. Pursuant to *Akers*, if Gomez made a submissible case and proved the real and precise causes of his injuries then the trial court is bound by the pronouncements of the Missouri Supreme Court and he cannot submit under *res ipsa loquitur*. Because Gomez' pleadings, evidence and closing arguments clearly demonstrate that the case was pled and tried solely on a theory of specific negligence, the doctrine of *res ipsa loquitur* was unavailable to him. *Balke v. Central Missouri Elec. Co-op*, 966 S.W.2d 15, 26-27 (Mo. App. W.D. 1997). Thus, it was evident, obvious and clear error for the trial court to submit a

res ipsa loquitur instruction (notwithstanding the fact that this instruction was also prejudicially erroneous) and that relief under Rule 84.13(c) is warranted in this case.

Furthermore, in instructing Gomez' case on *res ipsa loquitur*, the jury was never asked to deliberate on whether CDI's alleged acts of negligence were, in fact, negligent. The only reference to negligence in instruction no. 7 was in the third paragraph which instructs the jury to assess a percentage of fault to the defendant if they believe that "the collapse of the floor grate and plaintiff's fall were directly caused by defendant's negligence." This paragraph assumes negligence and simply asked the jury to determine whether the assumed negligence was a direct and proximate cause of the plaintiff's alleged injuries and damages. Thus, in instructing the jury under the doctrine of *res ipsa loquitur*, the trial court relieved Gomez of his duty of proving an essential element of his case, which was that the alleged acts or omissions of CDI were negligent. In that regard, it should be noted that the omitted element goes to the very heart and essence of Gomez' action against CDI, as it would in any negligence action; namely, whether CDI was negligent and, therefore, liable to Gomez in damages for his injuries.

A plaintiff's verdict directing instruction must require the jury to find all elements necessary to the plaintiff's case except, those unmistakably conceded by both parties. *Karnes v. Ray*, 809 S.W.2d 738, 741(Mo. App. S.D. 1991). The trial court's failure to instruct the jury in this case on the requisite proof elements of Gomez' claim of specific negligence, specifically on the issue of whether the alleged acts or omissions of CDI were negligent, was clear and obvious error that resulted in Gomez being relieved of proving an essential element

of his claim, which was in serious dispute at trial. Due process required Gomez to prove each element of his cause of action by a preponderance of the evidence, and relieving him of that due process requirement constituted manifest injustice and a miscarriage of justice. *State v. Crenshaw*, 59 S.W.3d 45, 49 (Mo. App. E.D. 2001). A verdict director which fails to require the jury to find the necessary elements in order to return a verdict for the plaintiff constitutes plain error. *Haynam v. Laclede Elec. Co-op., Inc.*, 827 S.W.2d 200, 204 N.2 (Mo. banc 1992). Moreover, Instruction No. 7 allowed the jury to return a damage award against defendant without hypothesizing the essential elements of *res ipsa loquitur* which provides further reasons for requiring a review of this point for plain error. It is clear that the trial court's error in submitting this instruction without the necessary elements required by M.A.I. 31.02(3) allowed the jury to return a verdict for the plaintiff that constituted manifest injustice or a miscarriage of justice that constitutes plain error *Senu-Oke v. Modern Moving Systems, Inc.*, 978 S.W.2d 426 (Mo.App. E.D. 1998); *State v. Roe*, 6 S.W.3d 411, 415 (Mo.App. E.D. 1999).

Thus, it is clear, evident and obvious error for the trial court to submit Instruction No. 7, *res ipsa loquitur*, and that relief under Rule 84.13(c) is warranted. Defendant was entitled to a jury verdict director that required the jury to find all of the necessary elements of a negligence submission in order to return a verdict for the plaintiff. That right was denied to defendant by plaintiff's Instruction No. 7. To affirm a judgment based upon a verdict directing instruction which is so patently defective and devoid of any grounds for recovery of a verdict

would be a manifest injustice or miscarriage of justice *Nelson v. Martin*, 760 S.W.2d 182 (Mo.App. E.D. 1988).

Accordingly, in instructing the jury under the doctrine of *res ipsa loquitur*, the trial court allowed plaintiff to submit his case on a theory of negligence that was unavailable to him. This error was further compounded by submitting an instruction that also failed to hypothesize the required elements of *res ipsa loquitur* or any other theory of negligence. This obvious error on the part of the trial court in failing to require the jury to find the necessary elements in order to return a verdict for plaintiff constituted plain error. Because of the obvious error in the verdict directing instruction resulting in manifest injustice and a miscarriage of justice to CDI, this Court must reverse the judgment of the trial court and remand this cause for a new trial.

II. THE TRIAL COURT ERRED AND THIS CASE MUST BE REMANDED BACK TO THE TRIAL COURT FOR A NEW TRIAL ON ALL ISSUES FOR LACK OF APPELLATE COURT JURISDICTION BECAUSE WHEN THE TRIAL COURT ENTERED ITS ORDER AND AMENDED JUDGMENT OF MAY 31, 2001 OVERRULING DEFENDANT'S MOTION FOR A NEW TRIAL AND ENTERING JUDGMENT IN THE REMITTED AMOUNT OF \$2,760,000 IT DID SO AFTER PLAINTIFF HAD FAILED TO TIMELY FILE HIS ACCEPTANCE OF REMITTITUR RESULTING IN A NEW TRIAL BEING ORDERED AND THE TRIAL COURT RETAINING JURISDICTION OF THIS CASE

A.
STANDARD OF REVIEW

The standard of review of the Court as to its own jurisdiction is the “right, power and authority of the Court to act.” *Transit Casualty Company in Receivership v. Certain Underwriters at Lloyd’s of London*, 995 S.W.2d 32 (Mo. App. W.D. 1999). The right to appeal from a circuit court judgment is purely statutory. *Mo. Const. Art. V, Section V; Committee for Educ. Equality v. State of Missouri*, 878 S.W.2d 446 (Mo.banc 1994). The Supreme Court of Missouri lacks jurisdiction to hear an appeal if it is not authorized by statute. *Abmeyer v. State Tax Commission*, 959 S.W.2d 800, 801 (Mo. banc 1998). This point raises the issue of the jurisdiction of this Court to hear this appeal. Before this Court can consider the merits of an appeal, its first duty must be to determine its own jurisdiction. Moreover, to the extent that defendant challenges the timeliness of this appeal, in the absence of a timely

filed notice of appeal, there is no appellate jurisdiction and if there is no appellate jurisdiction then the appeal must be dismissed. *Cotter v. Miller*, 54 S.W.3d 691 (Mo.App. W.D. 2001).

B.
ARGUMENT

As shown by the record here, the trial court erred when it entered its Order and Amended Judgment of May 31, 2001 (L.F. 053, App. A4) and, therefore, this Court lacks jurisdiction of this appeal and this case must be returned to the trial court for the conduct of a new trial on all issues because:

- (1) The Trial Court's Amended Order of May 24, 2001 (L.F. 050-051, App. A1-2), sustained defendant CDI's Motion for New Trial or in the Alternative for Remittitur (L.F. 033-038) and was conditioned upon the filing by plaintiff (Gomez) by 4:30 p.m. on or before May 25, 2001 of a written acceptance of a new judgment in the amount of \$2,760,000.00 for compensatory damages or a new trial would be ordered;
- (2) Plaintiff (Gomez) did not file his written acceptance of a new judgment in the amount of \$2,760,000.00 with the Court until May 31, 2001, (L.F. 052, App. A3); and
- (3) Plaintiff (Gomez') failure to timely file his written acceptance of the remitted amount of the new judgment has thereby resulted in a new trial being ordered and the trial court retaining jurisdiction of this case.

FACTUAL BACKGROUND

This is an appeal of a personal injury action arising out of a fall by Gomez at a construction site. CDI was a subcontractor at the construction project site and Gomez was an employee of another subcontractor at the same construction site. The jury returned a verdict finding defendant CDI 100% at fault and awarded Gomez damages of \$3,760,000.00 (L.F. 0300). Thereafter, the trial court, by Amended Order (L.F. 050-051, App. A1-2), granted defendant CDI's Motion for New Trial or in the Alternative for Remittitur conditioned upon Gomez not accepting in writing and filing the Court's proposed remittitur by 4:30 p.m. on Friday, May 25, 2001 to file a written acceptance of the remitted amount of \$2,760,000.00, otherwise, a new trial would be granted.

On May 25, 2001 plaintiff faxed to both the trial court and defendant's counsel Plaintiff's Acceptance of Remittitur (App. A31-32). This facsimile transmission, a copy of which is attached hereto as Addendum A and incorporated herein by this reference, indicated that "[t]he original will follow in the mail." Missouri Rule 43.02(c)(App. A25-30) states that pleadings may be filed by facsimile transmission if "filing by facsimile transmission is authorized by local rule." The Local Rules of the Circuit Court of Jackson County, Missouri, did not and do not authorize the filing by facsimile transmission of this type pleading and only authorize the filing by facsimile transmissions of (1) petitions and other necessary pleadings in adult abuse and child protection cases, (2) applications for continuance and (3) in certain probate matters (Rules 4.8, 34.4 and 72.3, respectively, Local Rules of the Circuit Court of Jackson County, Missouri, App. A25-30). Under these Local Rules, the facsimile transmission of Plaintiff's Acceptance of Remittitur (which by certificate of service was

mailed by plaintiff for filing to the Clerk of the Circuit Court, Division 3 on May 25, 2001) could not be filed by the Court and, therefore, was not filed by the Clerk of Division 3 until it was apparently received by mail on May 31, 2001 (L.F. 052) and was null and void *ab initio*.

Simply stated, the faxed filing was without legal effect, plaintiff did not timely file his written acceptance of the remitted amount by 4:30 p.m. May 25, 2001 and the trial court's Order and Amended Judgment (L.F. 053) incorrectly recites that he did. As a result of plaintiff's failure to comply with the Court's Amended Order (L.F. 050-051, App. A1-2) under both the undisputed facts and the law, (1) the trial court's May 24 Order, conditionally granting a new trial, became by default the final judgment of the Court which the Court was powerless to amend and from which no timely appeal was filed; (2) the trial court erred when it entered its Order and Amended Judgment (L.F. 053, App. A4); and (3) plaintiff failed to file a timely notice of appeal from the Court's Amended Order of May 24, 2001, and therefore this Court has been deprived of any jurisdiction over both this appeal and the cross-appeal, except to dismiss and remand for new trial on all issues in accordance with this Court's Amended Order of May 24, 2001.

As recently noted in *Cotter v. Miller*, 54 S.W.3d 691 (Mo.App. W.D. 2001) the first duty of an appellate court is to determine its own jurisdiction. "The timely filing of a notice of appeal is a jurisdictional requirement" and "[i]n the absence of a timely filed notice of appeal there is no appellate jurisdiction." *Cotter at 693*. Therefore, as a preliminary matter of this appeal, this Court must decide whether it has jurisdiction of these appeals and then determine whether the Notice of Appeal by respondent-appellant was timely filed. In

reviewing the Legal File in this case, it is clear that plaintiff was required to file his acceptance of remittitur by 4:30 p.m. on May 25, 2001 (L.F. 050-051, App. A1-2).

The facsimile transmission by Gomez of Plaintiff's Acceptance of Remittitur was not legally permitted under the Local Rules of the Circuit Court of Jackson County and, since this pleading was transmitted by facsimile, it could not be filed by the Clerk of Division 3 on May 25, 2001. The court and clerk were required under Rule 43.02(c) (App. A25-30) of the Missouri Rules of Court and the Local Rules of the Circuit Court of Jackson County, Missouri to wait until receipt by mail of plaintiff's original pleading (May 31, 2001) before it could be filed with the court. CDI, as the appellant, without the benefit of a filed-stamped copy of this pleading, proceeded with this appeal under the incorrect assumption that Gomez had filed his acceptance of remittitur on May 25, 2001 as recited in the Court's Order and Amended Judgment entered May 31, 2001 (L.F. 053, App. A4). Obviously, this appeal and cross-appeal were undertaken with the same mistaken understanding that the trial court had when it entered its May 31, 2001 Order and Amended Judgment.

It was not until the Legal File was officially prepared for this appeal that these undisputed facts and the record of this untimely filing became known and confirmed. This is because only the Circuit Court file contained the file-stamped original of Plaintiff's Acceptance of Remittitur. Clearly, under the facts and record, Gomez did not timely file his acceptance of remittitur and the trial court's Order and Amended Judgment entered in the remitted amount of \$2,760,000 plus costs on May 31, 2001 was in error when it recited that acceptance of the remittitur had been filed by plaintiff. Accordingly, the Amended Order of

May 24, 2001 became the only judgment in the case and from which Gomez was required to appeal within ten (10) days of its entry. Gomez' failure to file his written acceptance of remittitur by 4:30 p.m. on May 25, 2001 and the trial court's incorrect recital that it had been filed in its May 31, 2001 Amended Order and Judgment leads without doubt to one clear and undisputable conclusion, to wit: the trial court erred when it entered its Order and Amended Judgment (L.F. 053, App. A4) and this appellate court lacks subject matter jurisdiction of this appeal.

Finally, the trial court's Amended Order and Judgment (L.F. 050-051, App. A1-2) ruling Gomez had until 4:30 p.m. on May 25, 2001 to file a written Acceptance of Remittitur means that this order became appealable upon expiration of the period granted Gomez to make his choice as to remittitur (May 25, 2001). *Wicker v. Knox Glass Assoc.*, 242 S.W.2d 366 (Mo. 1951). The failure of Gomez to file his Acceptance of Remittitur gave him only ten (10) days from May 25, 2001 or until June 4, 2001 to file an appeal. Gomez did not file an appeal within this ten day time period. However, CDI as the appellant did timely file its appeal on June 7, 2001, under the mistaken belief that Gomez had, in fact, timely filed his Acceptance of Remittitur on May 25, 2001. Obviously, Gomez' cross-appeal of the Order and Amended Judgment of remittitur filed June 25, 2001, was also too late and not timely filed. Rule 81.04(a), Missouri Rules of Court.

For these very cogent reasons, it was error for the trial court to enter its Order and Amended Judgment on May 31, 2001. The effect of this error was to deprive this Court of any

jurisdiction over this appeal and cross-appeal. Accordingly, this Court has no alternative here but to remand this case back to the trial court for the conduct of a new trial on all issues.

III. THE TRIAL COURT ERRED IN OVERRULING DEFENDANT’S OBJECTION TO PLAINTIFF’S EXHIBIT 46, A VIDEOTAPE OF THE ACCIDENT SCENE MADE ONE DAY AFTER PLAINTIFF’S ACCIDENT, BECAUSE THIS WAS PREJUDICIAL AND ERRONEOUS EVIDENCE OF POST-ACCIDENT REMEDIAL MEASURES IN THAT PLAINTIFF WAS IMPROPERLY PERMITTED TO USE AND SHOW TO THE JURY A VIDEOTAPE DEPICTING POST-ACCIDENT REMEDIAL MEASURES AS EVIDENCE THAT DEFENDANT WAS NEGLIGENT IN FAILING TO TIMELY WARN OTHER WORKERS IN THE AREA OF THE DISLODGED GRATING.

A.
STANDARD OF REVIEW

This Court’s standard of review when considering whether the trial court erred in admitting evidence of post-accident remedial measures is governed by the trial court’s determination of the relevancy of such evidence and its ruling on the admission or exclusion of such evidence rests in the sound discretion of the trial court. Reversible error occurs when the trial court abuses its discretion in admitting such evidence. *Brown v. Hamid*, 856 S.W.2d 51, 56 (Mo.banc 1993); *Stinson v. E.I. DuPont de Nemours and Co.*, 904 S.W.2d 428, 432 (Mo. App. W.D. 1995). This point raises the issue of the trial court’s abuse of discretion in overruling defendant’s objections and admitting into evidence plaintiff’s Exhibit 46, a video tape of the accident scene made one day after plaintiff’s accident, which depicted prejudicial evidence of post-accident remedial measures.

B.
ARGUMENT

At trial, in plaintiff's portion of the case, he displayed to the jury a videotape, Plaintiff's Exhibit 46, depicting the accident scene. The videotape contained approximately four (4) minutes of color footage and was admitted over defendant CDI's objections that were made both before trial by Motion in Limine (L.F. 015-017) and at trial (Tr. 53-56). This videotape exhibit was offered, according to plaintiff's counsel, for the express purpose of showing to the jury (1) the accident scene where plaintiff and his employer subcontractor TMS, Inc. and defendant were working; (2) the equipment being used; and (3) the grating that became dislodged.

The videotape had been made the day after the accident (Tr. 52) and contained approximately two minutes of footage showing a bright yellow "CAUTION" tape (familiar to the general public (and jury) as a warning for a dangerous condition) that can be clearly seen and pictured surrounding and wrapped around the area of the grating where Gomez fell. Everything portrayed on and contained in this videotape was testified about by witnesses at trial. The videotape did not in any way purport to reflect the condition of the accident scene or the grate flooring when Gomez fell. Simply stated, it was prejudicial, cumulative and was used only for the purpose of showing that someone was negligent and at fault for this accident.

Missouri follows the Federal Rules of Evidence, Rule 407, which provides that:

When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.

See *Stinson v. E.I. DuPont de Nemours and Co.*, 904 S.W.2d 428, 432 (Mo. App. W.D. 1995); *Pollard v. Ashby*, 793 S.W.2d 394, 401 (Mo. App. E.D. 1990); *Hewitt v. Empiregas, Inc. of Sikeston*, 831 S.W.2d 744, 748 (Mo. App. S.D. 1992).

There are two reasons for prohibiting the admission of subsequent remedial measures to show negligence. First, if precautions taken could be used as evidence of previous improper conditions, no one after an accident would make improvements. Secondly, subsequent changes are not relevant as to what the previous condition was. *Stinson*, 904 S.W.2d at 432. Hence, in cases involving claims of negligence, the courts have consistently held that evidence of subsequent remedial measures is not admissible to prove antecedent negligence. *Wingate v. Lester E. Cox Medical Center*, 853 S.W.2d 912, 917 (Mo. banc1993); *Hewitt v. Empiregas*, 831 S.W.2d at 747-748.

Gomez' petition for damages alleges specific acts of negligence on the part of CDI, including, (1) a failure to inspect the grating; (2) in loosening and not securing the floor grating during removal of the heat exchanger; (3) making the floor grating unsafe and in a dangerous condition; and (4) breaching a duty to warn of the dislodged grating (L.F. 001-005). The petition made no mention of *res ipsa loquitur* nor did it allege facts which, if true, would

invoke this doctrine. Nonetheless, the trial submitted CDI's negligence to the jury based upon a theory of *res ipsa loquitur* (Tr. 424, L.F. 023, App. A5). Plaintiff's Exhibit 46 was clearly used by Gomez to further his argument that somehow CDI breached its duty to warn and was at fault as demonstrated by the post-accident bright yellow tape of "CAUTION" surrounding the accident scene. Likewise, since the bright yellow "CAUTION" tape demonstrated an improper condition, the undeniable inference to be drawn by the jury from this videotape was obviously that it could and should have been put in place around the area prior to Gomez' fall. The substantial prejudice generated by the showing of this exhibit to the jury with the repeated and continual introduction of the bright yellow "CAUTION" tape on the videotape clearly identified measures taken after the accident which, if taken previously, would have made the event less likely to occur. That is exactly what the prohibition of Rule 407 is designed to prevent.

The condition of the accident scene at the time of the accident was not in dispute. Witnesses for both parties described the ADM project and their respective functions at the site as subcontractors. There was ample evidence of the physical condition of the accident scene without this inflammatory and prejudicial videotape. Accordingly, the only relevancy of this videotape would be to establish the culpable conduct of CDI.

These facts are very similar to the facts involved in *Brooks v. Elders, Inc.*, 896 S.W.2d 744 (Mo. App. E.D. 1995). The condition of the accident site at the time of the accident involved in that case was not in dispute. Plaintiff did not see a step while exiting a restaurant and fell. The step was subsequently painted with a yellow stripe and plaintiff sought to

introduce a photograph of the painted step as a depiction of the accident scene. The trial court properly excluded and prohibited this evidence because the prejudicial effect to defendant outweighed the probative benefit of admitting the evidence and the Court of Appeals agreed. It is a well known and universally accepted principle of law that public policy encourages that improvements be made to improper and dangerous conditions, since use of those improvements as evidence of negligence or comparable conduct would inhibit or even halt such progress.

The admissibility of such videotapes depends on whether it is “practical, instructive and calculated to assist the jury in understanding the case.” *Nash v. Stanley Magic Door Company*, 863 S.W.2d 677, 681 (Mo. App. E.D. 1993). There can be no doubt that the videotape of the accident scene area in this case with a bright yellow “CAUTION” tape surrounding the area where Gomez fell was erroneously admitted into evidence to the prejudice of CDI defendant. The videotape was not instructive on any issue in the case, it was not material or relevant to any issue in controversy, and it was cumulative in nature.³

Even assuming, arguendo, that the videotape was relevant to some material issue, this evidence should have been excluded because its prejudicial effect outweighed its probative value. As stated by the court in *Conley v. Kaney*, 250 S.W.2d 350, 353 (Mo. 1952), “the sole

³In fact, witnesses for Gomez were shown Plaintiff’s Exhibit 48, a still photo taken from the video showing the accident scene without the bright yellow “CAUTION” tape. (Tr 58 and 80).

fact that evidence is logically relevant does not require its admission.” Logically relevant evidence may be excluded if it causes prejudice disproportional to its usefulness.

In summary, the prejudicial nature of this videotape was evident and the jury’s verdict reeks of passion and prejudice and the videotape obviously contributed to that attitude. Accordingly, the judgment must fall and a new trial is required because of the huge unsupportable verdict attributable to the poison interjected into the case by plaintiff’s erroneously admitted Exhibit 46.

IV. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDG
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A.
STANDARD OF REVIEW

To the extent that this defendant challenges the excessiveness of the verdict and the trial court's order of remittitur, the standard of review for this Court requires that it must consider the evidence and verdict in light of the following factors: (1) loss of income, present and future; (2) medical expenses; (3) plaintiff's age; (4) the nature and extent of the injuries; (5) economic factors; (6) awards given and approved in comparable cases; and (7) the superior opportunity for the jury and the trial court to appraise plaintiff's injuries and other damages. *Larabee v. Washington*, 793 S.W.2d 357 (Mo.App. W.D. 1990). The appellate court will interfere with an order of remittitur only upon a finding that both the jury's verdict and trial court's ruling constituted an arbitrary abuse of discretion. The trial court will be deemed to have abused its discretion where the remitted judgment is still so excessive as to shock the conscience of the Court. *Barnett v. LaSociete Anonyme Turbomeca*, 963 S.W.2d 639 (Mo.App. W.D. 1997).

B.
ARGUMENT

Plaintiff Gomez was a 39 year old unskilled laborer with low average intelligence at the time of his accident on May 2, 1994 (Plaintiff's Ex. 61, Dr. Blasi). There was no evidence of his life expectancy, lost earnings (past, future or present value thereof), or reasonable and necessary medical expenses. Dr. John Bopp, a vocational analyst and psychologist, and other experts testified that Gomez was totally vocationally disabled as a result of his accident. Dr. Bopp testified, over objection of defendant, without any qualification as an economic expert,

that in his opinion Gomez had an earning capacity of \$15,586.07 per year (Tr. 226-228). Dr. Bopp also testified that he never verified his wages at the time of the accident and agreed that his work for TMS, Inc. at the ADM Plant was not continued employment (Tr. 283). There was no evidence of lost wages other than this testimony.

With regard to medical bills, Gomez testified that he thought that he had “pretty close to 40 some thousand dollars in back medical” (Tr. 315). The only evidence of future medical expenses came from Dr. Ronald Geir, a dentist, (Plaintiff’s Ex. 62) who testified that he thought there was possibly a need for future surgery which was estimated to be \$10,000-\$20,000 and additional treatment of approximately \$315.00 with \$60.00 per year follow-up care for the rest of his life (Plaintiff’s Ex. 62).

Gomez testified about his current medical and physical problems, including complaints of pain in various parts of his body, as a result of his accident (Tr. 306-310). He also testified that he currently did not take pain medication, either prescription or over the counter (Tr. 316), and that he was under no ongoing active medical treatment except for follow-up care with his family physician every four months (Tr. 316). It should also be pointed out that because Gomez and other witnesses injected his financial condition as a reason for not currently seeking medical care, CDI was able to present testimony and evidence through Gomez that he had received a lump sum payment for his injuries from this accident of over \$110,000 (Tr. 327-328).

Assuming, arguendo, that there was any admissible evidence of economic loss presented in this case, which there was not, the jury’s award of \$3,760,000 compensable

damages was over 20 times greater than any amount that could be inferred from the evidence as economic loss. Even as remitted by the trial judge, the \$2,760,000 is over 16 times greater than any inferred loss.⁴

Since a remittitur under § 537.068 R.S.Mo. is designed to rectify a verdict that exceeds fair and reasonable compensation for plaintiff's injuries and damages based upon the evidence presented at trial, the issue presented here is whether the trial court's remittitur cured the problem that obviously plagued the jury's verdict. The purpose of remittitur is to bring jury verdicts in line with prevailing awards and to avoid the delays and expenses of a trial. *Bishop v. Cummines*, 870 S.W.2d 922 (Mo.App. 1994). Under § 537.068 remittitur is proper only where, "after reviewing the evidence in support of the jury's verdict, the Court finds that the jury's verdict ... exceeds fair and reasonable compensation for plaintiff's injuries and damages" *Barnett v. La Societe Anonyme Turbomeca*, 963 S.W.2d 639, 656 (Mo. App. W.D. 1997). The trial court will be deemed to have abused its discretion where the remitted judgment is still so excessive as to shock the conscience of the appellate court. *Fust v. Francois*, 913 S.W.2d 38, 49 (Mo. App. E.D. 1995). CDI submits that after reviewing the evidence it is obvious that the remitted judgment so far transcends the bounds of

⁴There is nothing in the record to indicate how Judge Wells picked the \$2,760,000 as the remitted damages figure. At argument on post trial motions, though, Judge Wells acknowledged that the verdict was excessive and gave some indication to what economic loss he would be considering in reducing the verdict (Tr. 510).

reasonableness that a new trial is required or, at least, an additional substantial remittitur should be imposed by this Court.

It is understood that there is no exact formula to determine whether a verdict for compensatory damages is excessive and that each case must be considered on its own merits. *La Societe Anonyme Turbomeca*, 963 S.W.2d at 657. In evaluating the excessiveness of a damage award in a personal injury case, this Court must consider the evidence in the case and verdict in light of the following factors: (1) loss of income, present and future; (2) medical expenses; (3) plaintiff's age; (4) the nature and extent of the injuries; (5) economic factors; (6) awards given and approved in comparable cases; and (7) the superior opportunity for the jury and the trial court to appraise plaintiff's injuries and other damages. *Larabee v. Washington*, 793 S.W.2d 357 (Mo. App. W.D. 1990).

In light of these general principles of law, a review of the evidence in this case clearly reveals that, by any measure, the awards of \$3,760,000 remitted to \$2,760,000 are extraordinarily excessive. Gomez' proof of economic loss for injuries and damages from this accident and "possible" future medical expenses totaled less than \$200,000. Gomez offered no admissible evidence of his reasonable and necessary medical expenses and did not put on any other economic evidence of damages. Gomez' closing argument did not even suggest any compensatory damages but, instead, merely argued as to defendant that "They did it, they should pay for it and They should pay a lot" (Tr. 426-427). There were no requests for any specific dollar amount of damages in either closing argument.

No one can seriously contend that either the jury verdict or remitted judgment remotely approximates the evidence in this case. The key *Larabee* factors in determining the reasonableness of a damage award are loss of income, medical expenses, plaintiff's age, and plaintiff's nature and extent of injuries. Another important *Larabee* factor in determining the reasonableness of a damage award is the comparison to awards given and approved in comparable cases. *Fowler v. Park Corporation*, 673 S.W.2d 749 (Mo.banc 1984). However, without a comparison of damages evidence available here and because there was no proof of damages, the disparity between the proof and verdict and remittitur becomes even more apparent. As pointed out in *Fowler v. Park Corporation*, 673 S.W.2d at 758:

There may be cases in which the award is so far out of line when compared to the tangible damages shown, that the appellate court would be impelled to take corrective action.

This is one of those cases. Considering these factors, it is clear from what proof was presented and what proof was omitted at trial that both the verdict and remitted judgment were grossly excessive and were the product of reversible trial court error that demonstrates bias, passion and prejudice of the jury.

At bottom, the jury's action here is explainable only as a product of bias, passion and prejudice. Right from the beginning, counsel set out to prejudice the jury with a videotape depiction of the accident scene made after the accident that clearly displayed for almost one-half the time of the tape a bright yellow "CAUTION" tape around the entire area of the

accident scene. This videotape of the accident scene was erroneously admitted into evidence, over objection, to the prejudice of CDI. The videotape was not instructive on any issue on the case, it was not material or relevant to any issue in controversy and it was cumulative in nature. The jury verdict obviously reeks of passion and prejudice and the videotape clearly contributed to that attitude.

Likewise, claims of injuries and the inability to work without any proof of economic loss or direction to the jury as to the claimed loss and damages in this case by Gomez allowed the jury to spin the proverbial “wheel of fortune” for him and to reach an outrageous verdict without any supporting proof or guidance to assist them. Although bias and prejudice are usually difficult to identify and trace, there is no such mystery in this case. Clearly, the fires of passion and prejudice were ignited in this jury that produced a verdict that is so inexplicable in any other terms given the evidence and proof presented.

Moreover, other than Dr. Bopp’s speculative testimony of potential earning capacity there was no evidence presented as far as Gomez’ life expectancy, no evidence of the present value of his past or future wage loss, limited testimony of medical expenses and possible future medical expenses, no proof as to reasonableness or necessity of medical expenses and the admission by Gomez himself that he had already received over \$110,000 in payments for his injuries. Without disputing proof, for the purposes of this appeal, of the nature and extent of plaintiff’s injuries or his pain and suffering as presented at trial, there still can be no rational basis or justification for compensation of this magnitude. Gomez is not on any pain medication, he is not taking physical therapy, he has no surgeries planned, he doesn’t require

assistance as far as day-to-day living, he reads, he drives a car, he does errands, he is able to feed and clothe himself, he has fathered a child since this accident, he was awarded legal custody of the child, and it was recommended that he need only visit his family doctor every four months for follow-up care (Tr. 293-327).

The ultimate test here is what fairly and reasonably compensates Mr. Gomez for the injuries sustained. *Barnett v. La Societe Anonyme Turbomeca*, 963 S.W.2d at 656. Recognizing that the trial court had broad discretion in ordering remittitur because the ruling is based upon the weight of the evidence, it is clear from this record that there was no evidence to support this verdict or remitted amount. This result leads to no other conclusion but that the jury's verdict and trial court's rulings constituted an arbitrary abuse of discretion requiring a new trial.

The outrageous verdict in this case, viewed in the light most favorable to Gomez, was glaringly unwarranted not only as a result of the trial court's error and resulting prejudice to defendant by allowing Exhibit 46 to be shown to the jury with the bright yellow "CAUTION" tape but, also, by the Court's submission to the jury of a negligence theory that failed to instruct the jury on the requisite proof elements of his claim and that was not supported by evidence either as to causation or damages. The jury's calculation of damages was obviously distorted by the improper introduction of a videotape depiction of the accident scene and no evidence of wage loss or damages which, in turn, allowed the jury to assume negligence and speculate on the issues of control, duty and warning that were totally absent from the evidence presented at trial and in the verdict directing instruction (L.F. 023). The introduction and

showing of the videotape, over defendant's objection, lack of any specific proof or evidence of economic or non-economic loss, the trial court's error in submitting to the jury a case and instruction without sufficient proof of negligence, causation and damages, and a closing argument that made no damage request other than that CDI "should pay for it" and "pay a lot," standing alone or together obviously compounded the sympathy and emotion produced and ignited the fires of passion and prejudice that resulted in a verdict that is unexplainable in any other term.

A new trial is obviously required here because of this outrageously large and unsupportable verdict that was attributable to the passion injected by the trial court's errors in admitting plaintiff's Exhibit 46, by the submission of the case for verdict without sufficient evidence and proper instruction, and the complete and total failure on the part of Gomez to produce any specific damages for the jury's consideration. The result is apparent here - a verdict based upon bias, passion and prejudice - an award so out of line that this Court is impelled to take corrective action by reversing the judgment of the trial court and remanding this cause for a new trial. Accordingly, this Court should at the very least, enter an additional substantial remittitur to eliminate the excessiveness of the judgment and to bring it in line with other judgments that have been upheld in this state.

V. THE TRIAL COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF PLAINTIFF'S EVIDENCE AND AT THE CLOSE OF ALL OF THE EVIDENCE BECAUSE THE EVIDENCE DID NOT SUPPORT A FINDING OF DEFENDANT'S NEGLIGENCE AND PLAINTIFF DID NOT MAKE A SUBMISSIBLE CASE IN THAT HE FAILED TO PROVE NEGLIGENCE AND CAUSATION ON THE PART OF THE DEFENDANT.

A.
STANDARD OF REVIEW

The standard of review for this Court when determining whether plaintiff failed to make a submissible case and whether judgment notwithstanding the verdict, or, in the alternative, a new trial should have been granted by the trial court is that substantial evidence is required for every fact essential to liability. *Edison v. Reproductive Health Services*, 863 S.W.2d 621 (Mo. App. E.D. 1993). The questions of whether evidence in a case is substantial and whether the inferences drawn are reasonable are questions of law. Accordingly, in

determining whether plaintiff has made a submissible case, the Court must view the evidence in the light most favorable to plaintiff, presume plaintiff's evidence to be true, and give plaintiff the benefit of all reasonable and favorable inferences to be drawn from the evidence. However, this Court cannot supply missing evidence or give the plaintiff the benefit of unreasonable, speculative, or forced inferences. The evidence and inferences must establish every element and not leave any issue to speculation. *Stewart v. Goetz*, 945 S.W.2d 520 (Mo. App. E.D. 1997).

B.
ARGUMENT

In any action for negligence the plaintiff must establish that (1) the defendant had a duty to the plaintiff; (2) defendant failed to perform that duty; and (3) defendant's breach was the proximate cause of the plaintiff's injury. *Martin v. City of Washington*, 848 S.W.2d 487 (Mo.banc 1993). To make a submissible case of negligence, a plaintiff must prove, *inter alia*, that the defendant breached a duty of care and a duty is a requirement to conform to a standard of conduct for the protection of others against unreasonable risks. *Pierce v. Platte-Clay Electric Co-op., Inc.*, 769 S.W.2d 769 (Mo.banc 1989). For the reasons that follow, Gomez did not prove the elements necessary to overcome CDI's Motion for Directed Verdict both at the close of plaintiff's evidence and at the close of all of the evidence.

There is no dispute that Gomez' employer, TMS, Inc., and CDI were both subcontractors on the ADM job site at the time of Gomez' accident. However, Gomez presented no evidence

at trial to prove that CDI unlatched or unfastened the grating causing it to move as the heat exchanger was being lifted by its employees prior to Gomez' accident (Tr. 344, 348 and 352). Gomez also failed to offer any testimony or evidence in his portion of the case by CDI or any of its employees. Instead, Gomez chose to rely upon the testimony of TMS, Inc. co-workers Frye and Frost and himself. All of whom had no knowledge about CDI or its responsibilities for the work it was performing on this project and at this jobsite.

Gomez' first witness, Glenn Frost, a foreman on the jobsite for TMS, Inc., described the accident scene (Tr. 53-56) and testified that he had no contact with CDI and wasn't even aware that it was on the project (Tr. 59). Frost further testified that he had no conversations with CDI or any of its employees about what it was doing on the day of the accident but did describe his understanding of how the accident happened (Tr. 59-65). The next fact witness, Wayne Frye, another TMS, Inc. fellow employee of plaintiff, testified about Gomez' job duties on the site (Tr. 78-79) and stated that he also had never had any contact with CDI prior to the accident (Tr. 82). Frye described the grate flooring (Tr. 85) and testified that he was working on the scaffold at the time of the accident with his back turned and did not know where Gomez was or that the flooring had been moved (Tr. 90-92). Gomez, the only other so-called fact witness as to the accident and accident scene, described his fall (Tr. 297) stating that it happened too quick to remember (Tr. 303-304) and that he didn't remember who he was working for on the day of the accident but was told that it was TMS, Inc. (Tr. 320). This testimony constituted the entirety of the evidence and proof in Gomez' portion of his case as to CDI's alleged negligence.

In CDI's portion of the case, two of its employees, Kevin McDowell and Paul Hamilton, provided testimony regarding the accident and accident scene. McDowell testified on cross-examination that the grating should have been locked down and that "someone should have checked" (Tr. 344). No evidence was presented with regard to who, if anyone, had this responsibility for the grate flooring. McDowell testified that as soon as the grate moved (about 3 inches) he and Hamilton stopped their work lifting the exchanger (Tr. 348-349), that McDowell moved over to cover the hole with his body and that he did the same thing on the other side (Tr. 349, 359). McDowell further testified that immediately after the grate moved and they went to cover the hole, Gomez came through the area from behind McDowell and Hamilton (Tr. 353, 359), stepped on the grate and slid through the hole to the floor below. Hamilton testified that his first knowledge that the grate flooring was unsecured was when it moved. Hamilton also stated that after the grate flooring moved he immediately stopped his work but there wasn't any time to clear the area before Gomez came through and fell (Tr. 361). Hamilton did not see Gomez until he stepped through the grating and fell (Tr. 362-363). The above-referenced testimony presented in CDI's case, together with the testimony of McDowell, Frye and Gomez represented the entire evidence presented in the case in support of Gomez' allegations as to specific negligence and causation on the part of CDI.

Under Missouri law, a subcontractor is liable to workers not employed by him if he is in control of and is in charge of the work being performed and a dangerous condition is attributed to the wrongful and negligent actions of his employees while the work is in progress. *Mino v. Porter Roofing Co., Inc.*, 785 S.W.2d 558 (Mo.App. W.D. 1990). Furthermore, if the

instrumentality causing the harm is under the control of the defendant contractor and plaintiff is injured while in a work area common to all employees, the defendant owes a duty of care to avoid causing such injury. *Mino v. Porter Roofing*, 785 S.W.2d at 561. Finally, a contractor who supplies equipment or devices which are to be used by employees of others on the construction site owes the duty to make the device safe for its intended use. *Loehring v. Westlake Const. Co.*, 94 S.W. 747 (Mo. 1906).

Gomez offered absolutely no evidence in his portion of the case that the area where CDI's employees were working was under the control of CDI or that CDI had control of the instrumentality causing Gomez' injury. Gomez' only fact witnesses to the accident in his portion of the case testified that they had no idea who was working in the area or what the defendant was doing. Gomez could hardly remember anything except falling. There was simply no evidence in Gomez' case offered as to CDI's responsibility, if any, for the situation created by the grate flooring or that CDI had control, right of control or management of the grate flooring involved. The failure of this proof by Gomez continued in CDI's portion of the case.

A duty exists when a general type of event or harm is foreseeable and foreseeability is established when a defendant is shown to have knowledge, actual or constructive, that there is some probability of injury sufficiently serious that an ordinary person would take precautions to avoid it. *Pierce v. Platte-Clay Electric*, 769 S.W.2d at 776. The record in this case provides no evidence of any kind from which a jury could conclude any duty on the part of CDI

to Gomez. There was no evidence of foreseeability nor proof of any kind that CDI had time to warn or remedy the situation before Gomez fell. CDI, therefore, was not chargeable with negligence on account of its conduct and, in this case, under the evidence presented, it owed no duty to Gomez because it had no proven responsibility for or control over or management of the area of the grate flooring where Gomez was injured. *Mino v. Porter Roofing*, 785 S.W.2d at 561.

Accordingly, under the evidence presented at trial, Gomez clearly failed to make a submissible case. The undisputed facts that CDI had no responsibility, duty, control or management of the area involved are fatal to Gomez' cause against CDI and, therefore, required the granting of a directed verdict in its favor by the trial court.

CONCLUSION

For the reasons stated, the judgment of the Circuit Court of Jackson County should be reversed and the case remanded with directions to enter judgment for defendant or to conduct a new trial on all issues.

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March 21, 2003

RULE 84.06(c) CERTIFICATION

I hereby certify in accordance with Rule 84.06(c) that this brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b) and includes 16,959 words in its entirety.

CERTIFICATE OF VIRUS FREE DISK

I hereby certify that the disk filed with this Brief required by Rule 84.06(g) has been scanned for viruses and that it is virus free.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was hand-delivered this 21st day of March 2003, to Ms. Candis L. Young, Esq., HURSH & YOUNG, L.C., 405 West 89th Street Kansas City, MO 64112, (816) 822-1400, (816) 822-2444 (Fax), Attorneys for Plaintiff; and John M. Graham, Jr., Esq., LAW OFFICES OF STEPHANIE WARMUND, 9200 Ward Parkway, Suite 300, Kansas City, MO 64114, (816) 361-7979, (816) 523-8682 (Fax), Attorneys for Construction Design, Inc.
