

Case No. SC85889

IN THE
MISSOURI SUPREME COURT

AMERISTAR JET CHARTER, INC. and
SIERRA AMERICAN CORPORATION,
Appellants and
Respondents/Cross-Appellants,

v.

DODSON INTERNATIONAL PARTS, INC.,
Appellant and Respondent, and
HOUSTON CASUALTY COMPANY,
Respondent

Appeal from the Circuit Court of
Jackson County, Missouri at Kansas City

**APPELLANTS' AND CROSS-APPELLANTS', AMERISTAR JET CHARTER, INC. AND
SIERRA AMERICAN CORPORATION, SUBSTITUTE BRIEF IN RESPONSE TO THE
SUBSTITUTE BRIEF OF CROSS-APPELLANT DODSON INTERNATIONAL PARTS, INC.**

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 6

STATEMENT OF JURISDICTION..... 10

STATEMENT OF FACTS 11

POINTS RELIED ON 25

I. Ameristar Had Standing to Bring Claims Against Dodson because the Proof of Loss Did not Assign the Entirety of the Plaintiffs’ Claims to Houston Casualty. 25

II. Ameristar’s Lost Profits Were Established With Reasonable Certainty. Fixed Expenses Are Not Required to Be Subtracted From the Lost Profits Calculation Because the Loss of Use of the Aircraft Did Not Change These Expenses...... 25

III. The Trial Court Properly Refused to Give a Contributory Negligence Instruction Because Ameristar’s Losses Include Property Damage...... 26

IV. The Court’s Instructions to the Jury Were Proper. If the “tail” was Error, it was Harmless. Furthermore, Dodson Waived Any Objection to the Verdict Director on Negligence. 26

V. Dodson’s Motion for Directed Verdict Was Properly Denied...... 27

A. Dodson’s handling of the aircraft failed to follow FAA regulations;..... 27

B. Dodson handling of the aircraft caused the fuselage to be bent as it sat on the flatbed trailer; 27

C.	<u>The fact that the fuselage was bent caused HCC to declare the aircraft a constructive total loss;</u>	27
D.	<u>The loss of the aircraft damaged Ameristar in an amount equal to the uninsured portion (\$300,000) plus lost profits;</u>	27
E.	<u>Ameristar had no duty to purchase the aircraft from HCC as “salvage”;</u>	27
F.	<u>Ameristar had no duty to purchase the aircraft from Dodson.</u>	27
VI.	<u>The Trial Court Properly Excluded Exhibit 85 Because it was Hearsay and Properly Refused to Take Judicial Notice of the Definition of “Maintenance” in the Federal Aviation Regulations. In the Alternative, the Failure to Take Judicial Notice of the Federal Aviation Regulations was Harmless.</u>	27
VII.	<u>Any Error by Ameristar in its Closing Argument was Waived by Dodson’s Failure to Object And The Jury was not Prejudiced.</u>	28
VIII.	<u>The Trial Court Properly Denied Dodson’s Motion for New Trial and Request for Remitter Because the Verdict is Support by Substantial Evidence and the Amount of the Verdict is in Line with the Damages Evidence Presented to the Jury.</u>	28
	<u>ARGUMENTS AND AUTHORITIES</u>	29
I.	<u>Ameristar Had Standing to Bring Claims Against Dodson.</u>	29
A.	<u>Standard of Review.</u>	29
B.	<u>Argument</u>	29
II.	<u>Ameristar’s Lost Profits Were Established With Reasonable Certainty. Fixed</u>	

	<u>Expenses (Overhead) Are Not Required To Be Subtracted. Data From an Anterior Period is Also Not Required.</u>	39
A.	<u>Standard of Review.</u>	40
B.	<u>Argument.</u>	40
III.	<u>The Trial Court Properly Refused to Give a Contributory Negligence Instruction Because Ameristar’s Losses Include Property Damage.</u>	50
A.	<u>Standard of Review.</u>	50
B.	<u>Argument.</u>	50
IV.	<u>The Court’s Instructions to the Jury Were Proper. If the “Tail” was Error, it was Harmless. Furthermore, Dodson Waived Any Objection to the Verdict Director on Negligence.</u>	52
A.	<u>Standard of Review.</u>	52
B.	<u>Argument.</u>	53
V.	<u>Dodson’s Motion for Directed Verdict Was Properly Denied.</u>	55
A.	<u>Standard of Review.</u>	55
B.	<u>Argument.</u>	56
VI.	<u>The Trial Court Properly Excluded Exhibit 85 Because it was Hearsay and Properly Refused to Take Judicial Notice of the Definition of “Maintenance” in the Federal Aviation Regulations. In the Alternative, the Failure to Take Judicial Notice of the Federal Aviation Regulations was Harmless.</u>	58
A.	<u>Standard of Review.</u>	58

B. <u>Argument</u>	58
<u>VII. Any Error by Ameristar in its Closing Argument was Waived by Dodson’s Failure to Object And The Jury was not Prejudiced</u>	59
A. <u>Standard of Review</u>	59
B. <u>Argument</u>	60
<u>VIII. The Trial Court Properly Denied Dodson’s Motion for New Trial and Request for Remitter Because the Verdict is Support by Substantial Evidence and the Amount of the Verdict is in Line with the Damages Evidence Presented to the Jury</u>	60
A. <u>Standard of Review</u>	60
B. <u>Argument</u>	61
<u>CONCLUSION</u>	63
<u>CERTIFICATE OF SERVICE</u>	64
<u>RULE 84.06(c) AND RULE 84.06(g) CERTIFICATION</u>	65

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Con Agra, Inc. v. Inland River Towing Co.</i> , 252 F.3d 979 8th Cir. 2001).....	25, 44-45
<i>Peter Kiewit Sons' Co. v. Summit Constr. Co.</i> , 422 F.2d 242 (8th Cir. 1969).....	41
<i>Productive Automated Sys. Corp. v. CPI Sys. Inc.</i> , 61 F.3d 620 (8th Cir. 1995).....	41
<i>Resolute Ins. Co. v. Percy Jones Inc.</i> , 198 F.2d 309 (10th Cir. 1952).....	41
<i>Vitex Manuf. Corp. v. Caribtex Corp.</i> , 377 F.2d 795 (3rd Cir. 1967).....	41

STATE CASES

<i>All Star Amusement v. Jones</i> , 727 S.W.2d 930 (Mo. App. 1987).....	43
<i>Ashland Oil, Inc. v. Tucker</i> , 768 S.W.2d 595 (Ct. App. Mo. 1989).....	30
<i>Barnette v. La Societe Anonyme Turbomeca France</i> , 963 S.W.2d 639 (Mo. Ct. App. 1997).....	27-28, 60
<i>Burton v. Bistate Dev. Agency</i> , 468 S.W.2d 4 (Mo. 1971).....	25, 53
<i>Citizens Bank of Appleton City v. Schapeler</i> , 869 S.W.2d 120 (Mo. Ct. App. 1993).....	25, 51
<i>Coast Indus., Inc. v. Noonan</i> , 231 A.2d 663 (Conn. App. Ct. 1966).....	41

<i>Connecticut Energy Dev. Corp. v. Triton Energy Corp.</i> , 22 S.W.3d 691 (Mo. Ct. App.1999).....	28
<i>Coon v. Dryden</i> , 46 S.W.3d 81 (Mo. Ct. App. 2001).....	25, 28, 49, 55
<i>Coonis v. Rogers</i> , 429 S.W.2d 709 (Mo. 1968).....	42-43
<i>Cormier v. Highway Trucking Co.</i> , 312 S.W.2d 406 (Tex. Civ. App. - San Antonio 1958, n.w.h.)	34
<i>Disabled Veterans Trust v. Porterfield Const. Co.</i> , 996 S.W.2d 548 (Mo. Ct. App. 1999).....	37
<i>E.F. Minyard v. Culotta</i> , 128 So. 2d 797 (La. Ct. App. 1961).....	41
<i>Edwards v. Lacey</i> , 412 S.W.2d 419 (Mo. 1967).....	27, 59
<i>Franklin v. Demico</i> , 347 S.E.2d 718 (Ga. Ct. App. 1986).....	41
<i>Ft. Worth & Denver Ry. Co. v. Ferguson</i> , 261 S.W.2d 874 (Tex. Civ. App. - Ft. Worth 1953, writ <i>dism'd</i>).....	24, 33
<i>Gasser v. John Know Village</i> , 761 S.W.2d 728 (Mo. Ct. App. 1988).....	40, 46
<i>Giddens v. Kan. City S. Ry. Co.</i> , 29 S.W.3d 813 (Mo. Banc. 2000), <i>cert. denied</i> , 532 U.S. 990, 121 S. Ct. 1644, 149 L. Ed.2d 502 (2001).....	27, 59
<i>Hein v. Oriental Gardens, Inc.</i> , 988 S.W.2d 632 (Mo. Ct. App. 1999).....	25, 51
<i>Highlife Sales Co. v. Brown-Foreman Corp.</i> , 823 S.W.2d 493 (Mo. 1992).....	24, 40-41

<i>Hocker Oil Co. v. Barker-Phillips-Jackson, Inc.</i> , 997 S.W.2d 510 (Mo. Ct. App. 1999).....	38
<i>Holt v. Myers</i> , 494 S.W.2d 430 (Mo. Ct. App. 1973).....	24, 35
<i>Hoskins v. Business Men's Assurance</i> , WD 61744, 2003 Mo. Ct. App. LEXIS	27, 59
<i>Jack L. Baker Co. v. Pasley Mfg. & Distrib. Co.</i> , 413 S.W.2d 268 (Mo. 1967).....	39
<i>Jessup & Moore Paper Co. v. Bryant Paper Co.</i> , 147 A. 519 (Penn. 1929).....	41
<i>Joel Bianco Kawasaki Plus v. Meramec Valley Bank</i> , 81 S.W.3d 528 (Mo. Banc. 2002).....	26, 54-55
<i>Keisker v. Farmer</i> , 90 S.W.3d 71 (Mo. Banc 2002).....	35
<i>King Features Syndicate v. Courier</i> , 43 N.W.2d 718 (Iowa 1950).....	41
<i>Krobach v. Mayflower Ins. Co., Ltd.</i> , 827 S.W.2d 208 (Mo.1992).....	28
<i>Lakewood Pipe of Tex. Inc. v. Conveying Techniques Inc.</i> , 814 S.W.2d 553 (Tex. App. 1991).....	41
<i>Lay v. P&G Healthcare, Inc.</i> , 37 S.W.3d 310 (Mo. Ct. App. 2000).....	25, 27-28, 51, 60
<i>Meridian Enterprises Corp. v. KCBS, Inc.</i> , 910 S.W.2d 329 (Mo. Ct. App. 1995).....	39

<i>Morrow-Smith Co. v. Cleveland Traction Co.</i> , 145 A. 915 (Penn. 1929).....	41
<i>Nemani v. St. Louis Univ.</i> , 33 S.W.3d 184 (Mo. Banc. 2000).....	26, 54, 55
<i>Oakland Cal. Towel Co., Inc. v. Sivils</i> , 126 P.2d 651 (Cal. Ct. App. 1942).....	41
<i>Price v. Couch</i> , 462 S.W.2d 556 (Tex. 1970).....	24, 34
<i>Ranch Hand Foods v. Polar Pak Foods, Inc.</i> , 690 S.W.2d 437 (Mo. Ct. App. 1985).....	24, 40
<i>Rosbottom v. The Office Lounge Inc. v.</i> , 654 So. 2d 377 (La. Ct. App. 1995).....	41
<i>Roy v. Mo. Pac. R.R. Co.</i> , 43 S.W.3d 351 (Mo. Ct. App. 2001).....	27, 51
<i>S.A. Breeding v. Champlain Marine & Realty Co. Inc.</i> , 172 A. 625 (Vt. 1934).....	41
<i>Scullen Steel Co. v. Paccar</i> , 708 S.W.2d 756 (Mo. Ct. App. 1986).....	42
<i>State Farm Fire & Cas. Co. v. Reed</i> , 873 S.W.2d 698 (Tex. 1993).....	32
<i>Traders Gen. Ins. Co. v. Richardson</i> , 387 S.W.2d 478 (Tex. Civ. App. - Beaumont 1965, writ ref'd).....	24, 34-35
<i>Whitman's Candies, Inc. v. Pet Inc.</i> , 974 S.W.2d 519 (Mo. Ct. App. W.D. 1998).....	29, 39, 44, 47

STATEMENT OF JURISDICTION

These consolidated appeals arise out of two judgments from the same underlying lawsuit: (1) Ameristar Jet Charter, Inc. and Sierra American Corporation (collectively, “Ameristar” or the “Plaintiffs”) appeal the Order entered by the Honorable John R. O’Malley, Circuit Judge of the Circuit Court of Jackson County, Missouri on September 14, 2000, granting summary judgment against Ameristar and in favor of Houston Casualty Company (“HCC”) based on a release; and (2) Ameristar’s cross-appeal (in response to the appeal of Dodson International Parts, Inc. (“Dodson”)) of the post-trial judgment for Ameristar and against Dodson entered by the Circuit Court of Jackson County, the Honorable Lee E. Wells on June 14, 2002, which disposed of all remaining claims in the lawsuit. The summary judgment and post-trial judgment are thus final and appealable judgments pursuant to Missouri Rules of Civil Procedure 74.01 and 81.05. Following an appeal to the Missouri Court of Appeals, Western District, an opinion was issued on January 20, 2004 and a denial of rehearing on March 2, 2004. On April 27, 2004, pursuant to Rule 83.04, this Court ordered the case transferred to the Missouri Supreme Court.

STATEMENT OF FACTS

Brief Summary of Facts.

This case arises out of the intersection of two unfortunate events: Dodson's mishandling of Ameristar's Falcon 20 Aircraft (the "Aircraft") after it made an off-airport landing and HCC's poor handling of Ameristar's insurance claim. Dodson was hired by HCC to move the Aircraft to the downtown Kansas City Airport. In performing its services, Dodson failed to follow the manufacturer's maintenance manual, failed to use the correct tools to secure the fuselage, violated FAA regulations, and ultimately caused the fuselage to be bent as it sat on the flatbed trailer that was used to transport it.

As a result of the fuselage being bent, HCC determined that the Aircraft had major structural damage and that the cost to repair the Aircraft would be prohibitively high. Ameristar "begged" HCC to send the Aircraft to a repair facility in Wisconsin to see if the Aircraft could be fixed, but HCC refused. HCC informed Ameristar that it had the right to "total" the Aircraft and that it had made up its mind to do so. HCC declared the Aircraft a constructive total loss and paid Ameristar \$1.5 million. Ameristar lost a \$1.8 million aircraft, as well as the profits it would have generated until it could be replaced.

After the Aircraft was "totaled," Dodson purchased the salvage and repaired the Aircraft for approximately \$100,000.00.

The Off-Airport Landing.

On April 9, 1998, the Aircraft made an off airport landing on a levy near the downtown Kansas City Airport. Tr. 167:1-9. Other than one flat tire and a bend on the nose gear door, there was no other damage. Tr. 173:15-17. The hard landing indicators were not deformed in any way, indicating that the Aircraft did not have a hard landing. Tr. 178:1-9. The ruts formed when the wheels touched the ground were uniform, indicating that the landing gear did not flair under the pressure of the landing and that the Aircraft did not have a hard landing. Tr. 179:6-180:4. The chief pilot who inspected the Aircraft did not observe anything that would lead him to conclude the Aircraft was so badly damaged that it would need to be totaled. Tr. 180:5-10.

Dodson is in the salvage business.

HCC hired Dodson to retrieve and transport the Aircraft to the downtown airport. Tr. 386:26 - 387:4. Dodson is one of largest aircraft salvage businesses in the country. Tr. 598: 19-24. Ninety percent (90%) of the Dodson assignments are of aircraft that are not going to fly again; they will be sold for parts (rather than recoveries where the aircraft will be repaired). Tr 606:19-25.

Dodson's person in charge, Jonathan Harnden, was inexperienced.

The person put in charge of this recovery for Dodson was Jonathan Harnden. Tr. 194:21-195:2, 546:16-24. Harnden had never dismantled a Falcon 20 before. Tr. 195:11-13. Harnden had never participated in any type of formal training program to learn how to dismantle or disassemble a Falcon 20. Tr. 195:14-17. Of the hundreds of

aircraft Harnden had recovered, 90% were aircraft that were going to be dismantled and cannibalized. Tr. 260:8-11. Of the remaining 10%, none was a Falcon 20. Tr. 260:24-261:1.

Harnden admits that it is important to consult the manufacturer's maintenance manual when disassembling an aircraft. Tr. 196:1-13; 196:21-25. In this case however, Harnden did not consult the maintenance manual before disassembling the Aircraft. Tr. 197:1-4. Nor did Harnden take the manufacturer's maintenance manual to the landing site to be used in working on the Aircraft. Tr. 197:5-8. However, Harnden told his boss, J. R. Dodson, that he *did* take the maintenance manual with him. Tr. 634:25 - 637:12.

Harnden, who was not designated as an expert on the interpretation or application of the Federal Aviation Regulations, testified that Dodson's handling of the Aircraft during recovery did not constitute "maintenance" for purposes of the Federal Aviation Regulations (Tr. 239:15-240:5). However, Harnden admits he did not ask to consult anyone at the FAA about his opinion, it was just his personal opinion. Tr. 254:1-8.

The standard of care --- the manufacturer's maintenance manual.

Allen King was with the FAA 28 years. Tr. 274:15-19. King is familiar with the FAA rules and regulations and had occasion to apply them to the maintenance of aircraft. Tr. 274:22-275:15. King's experience included being an aviation inspector. Tr. 274:5-6; 275:19. The FAA rules and regulations require that Dodson observe a certain standard of care. That standard of care is the manufacturer's maintenance manual. Tr. 276:12-20. King opined that the tasks performed by Dodson constitute "maintenance" for purposes

of the FAA rules and regulations. Tr. 278:4-16. King recited the definition of “maintenance” into the record from the Federal Aviation Regulations. Tr. 302:16-303:21. King opined that Dodson was required to comply with the manufacturer’s maintenance manual, even when the plane was located in a field. Tr. 277:8-20. Picking up the Aircraft and dismantling it is “maintenance.” Tr. 306:5-9. There is no exemption in the regulations that says Dodson does not have to comply. Tr. 316:13-15.

J. R. Dodson disputed Mr. King’s testimony about the Federal Aviation Regulations (“FARS”). However, J. R. Dodson was not listed as an expert on the interpretation and application of FAA rules and regulations. Tr. 601:3-24. J. R. Dodson does not hold any licenses or certificates as a mechanic. Tr. 512:22-25. J. R. Dodson has never been employed by the FAA. Tr. 605:10-11. J. R. Dodson is not an A&P (“airframe and power plant”) mechanic. Tr. 605:12-13. Dodson hired an expert named Vincent Sipes to testify about the interpretation and application of FAA rules and regulations. Tr. 601:25-602:18. J.R. Dodson was unaware that the expert Dodson hired considered recovery of the Aircraft to be covered within the definition of maintenance under the FARs, just like Allen King. Tr. 603:23-604:10. J. R. Dodson was unaware that his expert agreed with Allen King that Dodson’s conduct violated Section 43.13 of the FARs. Tr. 604:16-605:13.

Dodson breached the standard of care when it failed to follow the maintenance manual.

When Harnden got to the Aircraft, it did not appear to be badly damaged. Tr. 195:3-5. In fact, Harnden told J. R. Dodson that the Aircraft looked pretty good when he first saw it. Tr. 195:6-10. The maintenance manual requires one to remove the engines before disassembling the Aircraft. Tr. 198:5-11. Dodson did not do so. *Id.* When removing the wings, the maintenance manual requires the wing bolts to be removed in a particular order so that there is no undue amount of stress on any particular bolt. Tr. 201:1-5. Harnden did not consult the maintenance manual to make certain that the bolts were taken out in the order required by the maintenance manual. Tr. 201:9-12. Harnden did not ask that the bolts be removed in any particular order. Tr. 201: 6-8. In fact, Harnden did not know at the time that the maintenance manual required the wing bolts to be removed in any particular order. Tr. 201:13-16. Some of the wing bolts were scored. Tr. 289:24-290:7.

The maintenance manual requires that the fuselage be supported by an apparatus that matches the curvature of the fuselage in order to distribute the weight of the fuselage evenly. Tr. 286:15-22; 287: 8-21. Plaintiffs' Exhibit 121. Dodson moved the Aircraft without the use of such an apparatus. Tr. 215:19-22. Instead, the Aircraft was sitting on wooden blocks that did not have any curvature to match the fuselage. Tr. 199:15-19. Dodson could have built an apparatus to match the curvature of the fuselage to support the fuselage evenly, but it would have taken a couple of days. Tr. 199:20-200:10.

Dodson would have preferred to have a center section fixture (which matches the curvature of the fuselage); J. R. Dodson called three companies to try to get one because he would have preferred to have one. Tr. 608:16-609. Dodson recognized that there was a risk the fuselage would bend when it failed to use a center section fixture. That's why Dodson called around to try and find one. Tr. 610:6-18. Dodson was hired to move the Aircraft; it didn't have the tools, it tried to find the tools, it couldn't find the tools, and it assumed the risk when it moved the aircraft anyway. Tr. 610:23-611:3.

The maintenance manual also requires hydraulic lines to be capped in order to avoid foreign contaminants. Dodson did not do so. Tr. 216:17-25.

The place on the fuselage where the maintenance manual requires the Aircraft to be lifted is not where Dodson supported the aircraft with the blocks. Tr. 200:13-20.

From these facts, King concluded that Dodson breached the standard of care. Tr. 279:14-23. Dodson did not follow the manufacturer's maintenance manual in dismantling the Aircraft. Tr. 279:14-23. Dodson failed to use an apparatus that matched the curvature of the fuselage, Tr. 286:16-18, the wings were not supported in the manner recommended by the manufacturer's maintenance manual, Tr. 287:20-22, there was evidence that the bolt-holes were scored and corroded, Tr. 288:19-22, the hydraulic lines were not capped and the hydraulic system was not flushed as required by the manufacturer's maintenance manual. Tr. 288:23 - 289:5. Use of an alternative procedure requires getting advance permission from the FAA, which Dodson did not do. Tr. 280:17 - 281:12.

Jim Sparks is the manager for technical information support services for Dassault Falcon Jet, the manufacturer of the Aircraft. Plaintiffs' Exhibit 149 at 13:14:14-13:21:48.¹ Before that, and at the time of this incident, he was a field representative for Dassault. *Id.* He has an FAA "A&P" (airframe and power plant) license. *Id.* He has worked on Falcon aircraft for over 23 years. *Id.* He has taught how to perform maintenance on Falcon aircraft for 15 years. *Id.*

Mr. Sparks observed the fuselage as it sat on the trailer on April 18, 1998. At that time, he observed that the fuselage was bent. Plaintiffs' Exhibit 149 at 13:55:27-13:55:56, 16:29:43-16:30:20. Mr. Sparks noticed that the lower panels were "distorted" or "buckled". Plaintiffs' Exhibit 149 at 13:38:13-13:43:48. He photographed the deformation, which occurred in the "center box section." Plaintiffs' Exhibit 104. The center box section is where the wing joins the fuselage and is probably considered the strongest part of the aircraft. Plaintiffs' Exhibit 149 at 13:43:40-13:43:58. Sparks tried to open the cockpit door but it would not open; it was binding because the fuselage was bowed. Plaintiffs' Exhibit 149 at 13:49:24-13:50:11, 13:53:01-13:54:54.

Sparks was not impressed with the way the Aircraft had been moved. Plaintiffs' Exhibit 149 at 14:11:07-14:11:13. The failure to leave the junction plate attached to the

¹ The original videotape deposition of Jim Sparks was misplaced. At the Court of Appeals a substitute edited copy of the deposition and pages from the deposition that corresponded to the testimony admitted at trial were submitted to the Court of Appeals by agreement of the parties.

fuselage and the use of the wooden blocks caused the deformation. Plaintiffs' Exhibit 149 at 13:41:24-13:43:13, 14:12:35-14:13:15, 15:05:03-15:06:53. The Aircraft was not disassembled and transported in conformance with the procedures recommended by Dassault. Plaintiffs' Exhibit 149 at 14:22:22-14:23:20. Dassault has specific recommendations for disassembly and transportation of the Aircraft that require the Aircraft to be stabilized in specific places in a specific way in order to avoid any torsional or twisting loads. Plaintiffs' Exhibit 149 at 14:23:38-14:24:23. Sparks identified how Dodson failed to follow Dassault's procedures and explained how those deficiencies allowed the fuselage to bend. Plaintiffs' Exhibit 149 at 14:26:25-14:38:26. The fact that the junction plates were not bent, but that the fuselage was bent, established that the distortion *had* to occur after the plane was disassembled, during transportation by Dodson. Deposition of James Sparks p. 137, ll. 9-18.

Dodson's own expert, Raymond Gaillard, admitted that as the fuselage sat on the trailer, it was "deformed" Tr. 836:10-12.

HCC declared the Aircraft a total constructive loss because it was bent as it sat on the trailer.

James Hyberg is a senior vice-president at HCC who oversees aviation claims. Deposition of James D. Hyberg (hereinafter referred to as "Hyberg Deposition) at p. 7, ll. 6-19.² Hyberg was the person at HCC who made the decision to declare the Aircraft a

² The videotape deposition of James D. Hyberg was misplaced. By agreement, the

total constructive loss. Hyberg Deposition at p. 13, l. 14-p. 17, l. 6; p. 34, ll. 7-10. He decided to declare the Aircraft a total constructive loss because he thought the Aircraft had a bent fuselage and he thought it was going to be very expensive to repair. Hyberg Deposition at p. 48, l. 5-p. 49, l. 10; p. 59, ll. 10-20.

HCC did not give Ameristar a choice.

Lindon Frazer requested that the Aircraft be taken off the trailer to see if the deflection was temporary or permanent, but HCC refused. Tr. 401:17-2, 402:12-18. In fact, Lindon Frazer testified that he “begged” Keith Brown, the in-house adjuster for HCC, to send the Aircraft to Appleton, Wisconsin for further evaluation. Tr. 681:5-12. Brown refused and directed Howe & Associates to “put the Proof of Loss before Ameristar.” Tr. 920:1-4. By putting the Proof of Loss before Ameristar, HCC was stating its intention to total the aircraft. Tr. 919:21- 920:1.

HCC told Frazer that the Aircraft was going to be “totaled” and did not give Ameristar (Lindon Frazer) a choice. Tr. 681:24-682:1. HCC had made up its mind that it was going to total the Aircraft. Tr. 682:7-9. Tom Wachendorfer consulted Larry Galizi, the HCC agent who sold him the policy, and was told that if the insurance company wanted to total the Aircraft, it had the absolute right to do so. Tr. 426:8-9; 432:11-16. As a result, there was no sense in taking the Aircraft off the trailer and spending money to have it evaluated. Tr. 692:22 - 694:14; 694:15-20.

Parties submitted to the Court of Appeals excerpts from the deposition transcript that corresponded to the portions of the deposition admitted at trial.

There was never a time when Ameristar decided it would rather have the insurance money than have the plane repaired. Tr. 928:19-22. There was never a time when Ameristar said “to heck with it, we would rather have the money.” Tr. 929:15-17. Ameristar wanted the plane, not the money. Tr. 929:21-23. But the insurance company ended up “sending a check.” Tr. 930:15-25. HCC paid Ameristar \$1.5 million (Tr. 397:15-20) and Ameristar signed the Proof of Loss. Defendant’s Exhibit 1.

Dodson buys the Aircraft and tries to re-sell it to Ameristar for exactly the same amount as the insurance payment.

Dodson purchased the Aircraft from HCC, “as is, where is,” for \$750,000, with waiver of retrieval and rental charges of about \$15,000. Tr. 438:1-10 - 552:14-7, 553:2-8. When Dodson removed the Aircraft from the trailer, the fuselage popped back into shape. Tr. 834:6-13, 834:18-23. Dodson reassembled the Aircraft and offered to sell it to Ameristar for \$1.5 million. Tr. 81:4-18.

Neither Dodson International Parts, nor Dodson Aviation are certified by the FAA to work on Falcon 20 aircraft. Tr. 658:13-20. Ameristar obtained copies of Dodson’s records for the work it performed and did not feel confident that the plane was airworthy. Tr. 364:12-20. Ameristar had Lindon Frazer and Richard Brown, a mechanic out of Dallas, visually inspect the plane and review the work orders prepared by Dodson. Tr. 464:4-16. Ameristar knew that Dodson had not moved the Aircraft in accordance with the maintenance manual; Ameristar reviewed Dodson’s records and formed an opinion that Dodson had also not reassembled the Aircraft in accordance with the maintenance

manual. Tr. 479:6-12. Ameristar did not know if the Aircraft would ever fly again. Tr. 463:10-11. It did not have confidence that Dodson reassembled the plane properly. Tr. 463, 10-18; 464:1-3. Ameristar didn't purchase the Aircraft for \$1.5 million because Tom Wachendorfer did not have confidence that the Aircraft was airworthy. Tr. 364:2-11. Ameristar offered \$950,000 for the plane because it knew Dodson did not handle the plane correctly, Dodson's paperwork for the work performed wasn't correct, and Ameristar thought it would have to spend a lot of money to make it right. Tr. 365:5-21. Ameristar estimated that it would have to spend hundreds of thousands of dollars to make certain that everything on the Aircraft was done properly. Tr. 486:15-22.

Dodson sells the Aircraft to Smith Air but misrepresents and fails to disclose material facts.

Dodson sold the aircraft to Smith Air. Smith Air hired Ev Mastin to inspect the Aircraft. The inspection Mastin did for Smith Air was not really a "pre-purchase inspection" as that term is used in the industry. Tr. 904:2-10. Someone from Dodson told Mastin that a wooden cradle had been used to support the Aircraft on the trailer. Tr. 905:5-10. He did not learn that Dodson had been untruthful until he saw the photographs of the Aircraft sitting on the trailer during this litigation. Tr. 905:11-18. Mastin also did not know that Dodson had failed to cap the hydraulic lines. Tr. 905:19-21. If he had known, he would have ordered some hydraulic analysis be performed. Tr. 905:22-24.

Ameristar's damages.

Ameristar owns more Falcon 20 aircraft than anyone in the industry. Tom Wachendorfer is an expert on the value of Falcon 20 aircraft. Tr. 329:16-21. Ameristar's Aircraft was unique because it was configured for cargo. Tr. 328:4-8. It cost between \$365,000 and \$450,000 to have a cargo door installed. Tr. 328:9-19. The Aircraft was worth \$1.8 million as it sat on the viaduct. Tr. 327:22-25.

Availability of Falcon 20's is limited. There are about 50 aircraft, with 90 percent of those 50 being owned by three or four operators. Tr. 333:23-334:2. Ameristar purchased a replacement aircraft in France for \$1.732 million. Tr. 334:24-335:11. Ameristar had to get a cargo door installed in the aircraft. It cost \$365,000 to have the cargo door installed. Tr. 335:12-25. The replacement aircraft went into service in August of 1999. Tr. 334:22-23.

Ameristar's business is seasonal. Tr. 340:25-341:1. The April through June time period is busy for Ameristar because the auto manufacturers are busy. Tr. 341:4-23. Tom Wachendorfer calculated the revenue that the Aircraft would have earned less the expenses it would have incurred in rendering the service. Tr. 342:8-11; also see Plaintiffs' Exhibit 134 which is a summary of data that Ameristar maintains as part of the regular and ordinary course of its business. Tr. 343:3-8.

Tom Wachendorfer calculated that Ameristar suffered over \$2.5 million in net lost profits. Tr. 341:24-342:3. In order to give Dodson credit for the amount of time, three weeks, it should have taken to make repairs and get the plane back in the air, Ameristar

calculated its lost profits beginning April 30, 1998 even though plane landed on April 9, 1998, Tr. 350:12-24. The \$2.5 million lost profit number assumes average utilization of the Aircraft. Tr. 362:15-363:12. Ameristar's lost profits were calculated from objective data about Ameristar's actual fleet utilization during the time period in question. Tr. 344:6-363:12, Plaintiff's Exhibits 134-138. Ameristar calculated the average number of hours the Aircraft would have flown, the average revenue to be realized per flight hour, and the hourly expense for each hour the Aircraft would have flown. *Id.* Ameristar even went so far as to determine the average leg-time for each flight so that fuel consumption and therefore, expense could be calculated accurately. Tr. 357:16-360:19. As a result, Ameristar calculated the net profits the Aircraft would have generated.

Tom Wachendorfer was vigorously cross-examined on the accuracy of his methodology, including additional variable expenses that Dodson asserted should have been deducted, including insurance and interest on debt. Tr. 466:15-468:4.

The case for Ameristar and Sierra was submitted jointly by agreement.

Dodson agreed to submit the case to the jury with the Plaintiffs being referred to in the aggregate as "Ameristar". Tr. 957:19-959:7.

The jury returned a verdict for Ameristar.

The jury returned a verdict for the Plaintiffs, finding total damages of \$2.1 million and finding Plaintiffs 30% at fault and Defendants 70% at fault. Tr. 688. On August 21, 2002, the trial court overruled Dodson's post-trial motions and entered judgment on the verdict against Dodson in the amount of \$1,420,000 deducting the amount of Howe's

\$50,000 settlement payment to Plaintiffs after subtracting the \$630,000 attributable to Plaintiff's fault. L.F. 915-916. This appeal followed.

POINTS RELIED ON

I. AMERISTAR HAD STANDING TO BRING CLAIMS AGAINST DODSON BECAUSE THE PROOF OF LOSS DID NOT ASSIGN THE ENTIRETY OF THE PLAINTIFFS' CLAIMS TO HOUSTON CASUALTY.

- *Ft. Worth & Denver Ry. Co. v. Ferguson*, 261 S.W.2d 874 (Tex. Civ. App. - Ft. Worth 1953, writ *dism'd*)
- *Holt v. Myers*, 494 S.W.2d 430 (Mo. Ct. App. 1973)
- *Price v. Couch*, 462 S.W.2d 556, 558 (Tex. 1970)
- *Traders Gen. Ins. Co. v. Richardson*, 387 S.W.2d 478 (Tex. Civ. App. - Beaumont 1965, writ *ref'd*)

II. AMERISTAR'S LOST PROFITS WERE ESTABLISHED WITH REASONABLE CERTAINTY. FIXED EXPENSES ARE NOT REQUIRED TO BE SUBTRACTED FROM THE LOST PROFITS CALCULATION BECAUSE THE LOSS OF USE OF THE AIRCRAFT DID NOT CHANGE THESE EXPENSES.

- *Whitman's Candies, Inc. v. Pet Inc.*, 974 S.W.2d 519 (Mo. Ct. App. W.D. 1998)
- *Ranch Hand Foods v. Polar Pak Foods, Inc.*, 690 S.W.2d 437 (Mo. Ct. App. 1985)
- *Highlife Sales Co. v. Brown-Foreman Corp.*, 823 S.W.2d 493 (Mo. 1992)

- *Con Agra, Inc. v. Inland River Towing Co.*, 252 F.3d 979 (8th Cir. 2001)

III. THE TRIAL COURT PROPERLY REFUSED TO GIVE A CONTRIBUTORY NEGLIGENCE INSTRUCTION BECAUSE AMERISTAR'S LOSSES INCLUDE PROPERTY DAMAGE.

- *Coon v. Dryden*, 46 S.W.3d 81 (Mo. Ct. App. 2001)

IV. THE COURT'S INSTRUCTIONS TO THE JURY WERE PROPER. IF THE "TAIL" WAS ERROR, IT WAS HARMLESS. FURTHERMORE, DODSON WAIVED ANY OBJECTION TO THE VERDICT DIRECTOR ON NEGLIGENCE.

- *Hein v. Oriental Gardens, Inc.*, 988 S.W.2d 632 (Mo. Ct. App. 1999)
- *Lay v. P&G Healthcare, Inc.*, 37 S.W.3d 310 (Mo. Ct. App. 2000)
- *Citizens Bank of Appleton City v. Schapeler*, 869 S.W.2d 120 (Mo. Ct. App. 1993)
- *Burton v. Bistate Dev. Agency*, 468 S.W.2d 4 (Mo. 1971)

V. DODSON’S MOTION FOR DIRECTED VERDICT WAS PROPERLY DENIED.

A. DODSON’S HANDLING OF THE AIRCRAFT FAILED TO FOLLOW FAA REGULATIONS;

B. DODSON HANDLING OF THE AIRCRAFT CAUSED THE FUSELAGE TO BE BENT AS IT SAT ON THE FLATBED TRAILER;

C. THE FACT THAT THE FUSELAGE WAS BENT CAUSED HCC TO DECLARE THE AIRCRAFT A CONSTRUCTIVE TOTAL LOSS;

D. THE LOSS OF THE AIRCRAFT DAMAGED AMERISTAR IN AN AMOUNT EQUAL TO THE UNINSURED PORTION (\$300,000) PLUS LOST PROFITS;

E. AMERISTAR HAD NO DUTY TO PURCHASE THE AIRCRAFT FROM HCC AS “SALVAGE”;

F. AMERISTAR HAD NO DUTY TO PURCHASE THE AIRCRAFT FROM DODSON.

- *Joel Bianco Kawasaki Plus v. Meramec Valley Bank*, 81 S.W.3d 528 (Mo. Banc. 2002)

- *Nemani v. St. Louis Univ.*, 33 S.W.3d 184 (Mo. Banc. 2000)

VI. THE TRIAL COURT PROPERLY EXCLUDED EXHIBIT 85 BECAUSE IT WAS HEARSAY AND PROPERLY REFUSED TO TAKE JUDICIAL NOTICE OF THE DEFINITION OF “MAINTENANCE” IN THE FEDERAL AVIATION REGULATIONS. IN THE ALTERNATIVE, THE

FAILURE TO TAKE JUDICIAL NOTICE OF THE FEDERAL AVIATION REGULATIONS WAS HARMLESS.

- *Lay v. P&G Healthcare, Inc.*, 37 S.W.3d 310 (Mo. Ct. App. 2000)
- *Giddens v. Kan. City S. Ry. Co.*, 29 S.W.3d 813 (Mo. Banc. 2000), cert. denied, 532 U.S. 990, 121 S. Ct. 1644, 149 L. Ed.2d 502 (2001)

VII. ANY ERROR BY AMERISTAR IN ITS CLOSING ARGUMENT WAS WAIVED BY DODSON'S FAILURE TO OBJECT AND THE JURY WAS NOT PREJUDICED.

- *Edwards v. Lacey*, 412 S.W.2d 419 (Mo. 1967)
- *Hoskins v. Business Men's Assurance*, WD 61744, 2003 Mo. Ct. App. LEXIS (Mo. Ct. App. June 30, 2003)
- *Roy v. Mo. Pac. R.R. Co.*, 43 S.W.3d 351, 363-64 (Mo. Ct. App. 2001)

VIII. THE TRIAL COURT PROPERLY DENIED DODSON'S MOTION FOR NEW TRIAL AND REQUEST FOR REMITTER BECAUSE THE VERDICT IS SUPPORT BY SUBSTANTIAL EVIDENCE AND THE AMOUNT OF THE VERDICT IS IN LINE WITH THE DAMAGES EVIDENCE PRESENTED TO THE JURY.

- *Barnette v. La Societe Anonyme Turbomeca France*, 963

S.W.2d 639 (Mo. Ct. App. 1997)

- *Lay v. P&G Healthcare, Inc.*, 37 S.W.2d 301(Mo. Ct. App. 2000)

ARGUMENTS AND AUTHORITIES

I. AMERISTAR HAD STANDING TO BRING CLAIMS AGAINST DODSON.

A. STANDARD OF REVIEW.

Motions for directed verdict and judgment notwithstanding the verdict challenge the submissibility of the plaintiff's case. *Coon v. Dryden*, 46 S.W.3d 81, 88 (Mo. Ct. App. 2001); *Connecticut Energy Dev. Corp. v. Triton Energy Corp.*, 22 S.W.3d 691, 697 (Mo. Ct. App.1999). To determine whether the plaintiff has made a submissible case, the appellate court views the evidence and all reasonable inferences therefrom in the light most favorable to the plaintiff. *Id.*

B. ARGUMENT

The issue presented is whether the Proof of Loss assigned to HCC the entirety of Ameristar's claims so that Ameristar did not have any claim left to bring against Dodson. The answer is that it did not. The analysis appears below.

1. Texas law applies to the Proof of Loss.

The negligence claim in this matter is governed by Missouri law but any law dealing with the Proof of Loss is governed by Texas law. The Proof of Loss is an agreement between a Texas insured and its Texas insurer. Missouri has adopted the most

significant relationship test of Section 188 of the Restatement 2nd of Conflicts when resolving contract choice of law questions.

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties, the contacts to be taken into account in applying the principle of § 6 to determine the law applicable to an issue include:

- (a) the place of the contracting;
- (b) the place of negotiation of the contract;
- (c) the place of performance;
- (d) the location of the subject matter of the contract,
and
- (e) the domicile, residence, nationality, place of incorporation and place of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law [**12] of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

Ashland Oil, Inc. v. Tucker, 768 S.W.2d 595, 599 (Ct. App. Mo. 1989) quoting RESTATEMENT (SECOND) OF CONFLICTS § 188. Applying these factors to the POL establishes beyond question that the POL must be interpreted pursuant to Texas law. The POL was negotiated (to the extent any negotiation occurred) in Texas, executed in Texas, between two Texas companies. Texas law should apply.

The trial Court previously, and correctly, held that the interpretation of the agreement is governed by Texas Law. L.F. 564. It would be preposterous to apply Missouri law to the Proof of Loss when deciding Dodson's issues and then apply Texas law to the Proof of Loss when deciding HCC's issues. As a result, the Missouri cases cited by Dodson on the differences between an assignment of a claim and subrogation of a claim are of little help.

a. The Proof of loss did not assign Ameristar's claims for uninsured losses.

The issue is whether the Proof of Loss assigned Ameristar's claim for uninsured losses to HCC. The answer is that it did not. The Proof of Loss states in pertinent part:

RELEASE, SUBROGATION AND AUTHORIZATION TO PAY

(To be filled in and executed in every case)

In full settlement and satisfaction for all loss and damage set forth in the foregoing proof of loss, _____ is hereby requested, authorized and empowered to pay, as follows:

To Ameristar Jet Charter, Inc, Tom Wachendorfer Aviation, Inc., Tom Wachendorfer, Jr., Sierra American Corporation and Compass Bank of Dallas, Texas, the sum of \$1,500,000.00 (One Million Five Hundred Thousand and 00/100) Dollars.

In consideration of such payment, said Company is hereby discharged and forever released from any and all further claim, demand, or liability whatsoever for said loss and damage, under the Policy herein referred to, repairs and/or replacements having been made to my entire satisfaction.

Now, therefore, in consideration of the aforesaid payment, I/we hereby assign, transfer and subrogate to the said Insurance Company, all right, interest, or things in action against any person or corporation, who may be liable or hereafter adjudged liable for *this loss*, and I/we empower the said Insurance Company to sue, compromise or settle in my/our name(s), *to the extent of the money aforesaid*.

Defendant's Exhibit 1 (Emphasis added).

The Court should note that the title of the document does not mention "assignment" at all. Ameristar respectfully suggests that this is nothing more than HCC's

standard, boilerplate, subrogation clause. In any event, interpretation of the scope of the assignment requires one to determine the meaning of the following phrases in the Proof of Loss:

- “...this loss;” and
- “...to the extent of the money aforesaid.”

Any ambiguity in these phrases must be resolved in favor of the insured, Ameristar. *State Farm Fire & Cas. Co. v. Reed*, 873 S.W.2d 698, 699 (Tex. 1993).

- b. “This loss” refers to the off-airport landing on April 9, 1998.**

Ameristar agrees with HCC that “this loss” refers to the damage caused by the off-airport landing that occurred on April 9, 1998. It does not refer to Dodson’s subsequent handling of the Aircraft. Dodson completely ignores the limitation of the Proof of Loss to “this loss.” Dodson fails to mention it in any way.

- c. “To the extent of the money aforesaid” limits the release to the amount of money paid by HCC, that is, to the *insured loss*.**

Even if the assignment did include claims arising from Dodson’s handling of the aircraft, the assignment still did not assign all of Ameristar’s interest in those claims because the assignment is limited to, “the extent of the money aforesaid.” The phrase, “...to the extent of” clearly limits the scope of the release or subrogation; if the parties intended for the scope to be unlimited, there would be no need for the phrase, “to the

extent of... .” Likewise, the phrase, “money aforesaid,” clearly refers to the \$1.5 million HCC paid to Ameristar. The logical reading of the Proof of Loss is that it gives HCC the right to recover its \$1.5 million from the person who caused the loss. However, it does not limit or restrict Ameristar’s right to pursue claims against the person who caused the loss *for uninsured losses*.

d. Under Texas law, Ameristar was authorized to sue Dodson for uninsured losses.

Texas law supports this common sense interpretation. *In Fort Worth & Denver Ry. Co. v. Ferguson*, 261 S.W.2d 874 (Tex. Civ. App. -- Ft. Worth 1953, writ dismissed), the Court explained the various options available to an insurer and its insured where the insured has “subrogated and assigned” his interest in and to his claim and cause of action for damages against the defendant “to the extent of said payment”:

In Texas, the plaintiff may, with the authority and consent of the subrogee-assignee, sue upon a cause of action which he has totally transferred, where he sues for the use and benefit of such transferee. In such a case the subrogee-assignee may sue for his own use and benefit, but in the name of the plaintiff. *The plaintiff could bring the suit likewise where he had only transferred a part of the cause of action.* In such a case, he would be bringing it for his own use and benefit in so far as his non-transferred interest still subsisted

and for the use and benefit of his transferee in so far as the interest in the cause of action had been transferred. The subrogee-assignee could, with the authority and consent of the plaintiff similarly, sue in the name of the plaintiff, with like contemplation as to the use and benefits to be derived from the act. Or, the plaintiff could sue for his own use and benefit as his interest might appear, with the subrogee-assignee suing in its own name for its own use and benefit as its interest might appear, both prosecuting their separate claims (though founded on the same cause of action) in the same suit.

Id. at 880.

This does not mean that the cause of action can be split and tried in two separate actions. Rather, when the insured initiates an action against the Defendant to pursue a claim for uninsured losses, the insurer who receives notice of the lawsuit has a duty to intervene in the lawsuit to protect its interest. *Price v. Couch*, 462 S.W.2d 556, 558 (Tex. 1970) (citing and discussing *Cormier v. Highway Trucking Co.*, 312 S.W.2d 406 (Tex. Civ. App. - San Antonio 1958, n.w.h.) and *Traders & Gen. Ins. Co. v. Richardson*, 387 S.W.2d 478 (Tex. Civ App. - Beaumont 1965, writ ref'd)). This way, the cause of action is tried once, with the interest of each owner of the cause of action being protected. If the insurer fails to intervene when it has notice of the lawsuit initiated by the insured against

the defendant, then the insurer will be barred from bringing its subrogation claim against the defendant in a separate action. *Traders & Gen. Ins. Co. v. Richardson*, 387 S.W.2d 478, 479-80 (Tex. Civ. App.--Beaumont 1965, writ ref'd).

2. Ameristar also had standing under Missouri law.

a. Subrogation and assignments are mutually exclusive in Missouri.

As acknowledged by Dodson, under Missouri law, “there is a distinct difference between the assignment of a claim and the subrogation to a claim.” *Holt v. Myers*, 494 S.W.2d 430, 437 (Mo. Ct. App. 1973); *Keisker v. Farmer*, 90 S.W.3d 71, 74 (Mo. Banc 2002). In fact, by definition, an assignment and a subrogation cannot coexist in the same contractual provision. An assignment is defined as:

a complete divestment of all rights from the assignor and a vesting of those same rights in the assignee.

Holt, 494 S.W.3d at 437. While in a subrogation:

only an equitable right passes to the subrogee and the legal right to the claim is *never removed from the subrogor and remains with him throughout*.

Id. If a claim is assigned there is nothing left to subrogate. Therefore, there are two issues under Missouri law: (1) does the disputed language constitute a subrogation or an assignment; and, (2) if an assignment, is the assignment only partial (being limited to the insured's loss). The issue presented under Missouri law is whether the Proof of Loss is:

a (1) complete assignment of Ameristar's claims and, (2) a partial assignment to HCC. The answer, though ignored by Dodson, is contained in the title of the contractual provision: RELEASE, *SUBROGATION* AND AUTHORIZATION TO PAY. Defendant's Exhibit 1 (Emphasis added). The contractual provision at issue in this dispute states the following:

Now, therefore, in consideration of the aforesaid payment, I/we hereby *assign, transfer and subrogate* to the said Insurance Company, all right, interest, or things in action against any person or corporation, who may be liable or hereafter adjudged liable for this loss, and I/we empower the said Insurance Company to sue, compromise or settle in my/our name(s), *to the extent of the money aforesaid.*

Defendant's Exhibit 1 (Emphasis added).

In its Brief, Dodson repeatedly argues that the inclusion of the word 'assign' in the Proof of Loss makes the provision an assignment. Dodson's Brief, pp. 45-53. However, Dodson chooses to ignore two things that indicate a subrogation was intended. First, Dodson wholly disregards the fact that the title of the contract provision includes the word "SUBROGATION," *not* assignment. In fact, the title of the provision identifies three purposes: "RELEASE, SUBROGATION, AND AUTHORIZATION TO PAY." Following this title, there are three paragraphs: the first authorizing payment; the second a release; and the third the subrogation.

As further evidence that subrogation was intended, Ameristar directs the Court to the phrase “I/we empower the said Insurance Company to sue, compromise or settle in *my/our name(s)*, to the extent of the money aforesaid.” If an assignment were intended, HCC would sue in its own name as the owner of the claim, not Ameristar’s.

Dodson ignores the fact that the provision contains the words “assign, transfer and *subrogate*.” As discussed above, subrogation and assignment are mutually exclusive under Missouri law. If Ameristar assigned all of its claims to HCC, then there was no claim left for HCC to have a subrogation interest in. Therefore, the inclusion of both words (assignment and subrogation) creates an ambiguity---an ambiguity that must be resolved in Ameristar’s favor.

b. The Proof of Loss contains a subrogation, not an assignment.

If a written instrument is unambiguous then the intent of the parties should be determined from the contract alone. *Disabled Veterans Trust v. Porterfield Const. Co.*, 996 S.W.2d 548, 552 (Mo. Ct. App. 1999). In this case, the intent of the parties is clear that the provision was intended to be a subrogation provision, not an assignment--the title of the provision is “SUBROGATION.” Defendant’s Exhibit 1. Alternatively, if the provision is ambiguous, the rules of contract interpretation require that the provision be interpreted as a subrogation provision.

An ambiguous contract provision must be interpreted against the drafter of the provision. *Hocker Oil Co. v. Barker-Phillips-Jackson, Inc.*, 997 S.W.2d 510, 514 (Mo.

Ct. App. 1999). This is especially true in the insurance context. *Krobach v. Mayflower Ins. Co., Ltd.*, 827 S.W.2d 208, 211 (Mo.1992) (en banc). In this case, the Proof of Loss was prepared by HCC, not Ameristar. The rules of contract construction require that the Proof of Loss be construed against HCC and in favor of Ameristar. In this case there are two possible interpretations: assignment or subrogation. Clearly an assignment of *all* claims from Ameristar would be a greater benefit to HCC than a subrogation of Ameristar's claim. Therefore, the contract must be construed as a subrogation--in favor of Ameristar.

- c. If the Proof of Loss includes an assignment, the assignment is only partial; it is limited to claims for insured losses only.**

If the disputed language constitutes an assignment, the Missouri Court of Appeals was correct that it is a partial assignment. *Op.* p. 20. In the instant case, the phrase "to the extent of the money aforesaid" is set off by a comma; therefore, it refers not only to the word subrogate, but also to the words "assign and transfer," thereby limiting the insurance company's rights and suggesting that the parties did not intend a complete assignment. *Op.* p. 20. The assignment, if any, was limited to a recovery of the proceeds paid under the policy and did not include uninsured losses.

II. AMERISTAR'S LOST PROFITS WERE ESTABLISHED WITH REASONABLE CERTAINTY. FIXED EXPENSES (OVERHEAD) ARE

NOT REQUIRED TO BE SUBTRACTED. DATA FROM AN ANTERIOR PERIOD IS ALSO NOT REQUIRED.

A. STANDARD OF REVIEW.

The trial court should not sustain a Defendant's motion for directed verdict or judgment notwithstanding the verdict unless the facts in evidence and the reasonable inferences to be drawn therefrom are so strongly against the plaintiff as to leave no room for reasonable minds to differ. *Meridian Enterprises Corp. v. KCBS, Inc.*, 910 S.W.2d 329, 331 (Mo. Ct. App. 1995).

B. ARGUMENT.

To obtain a damage award for lost profits, a plaintiff must produce evidence that provides an adequate basis for estimating lost profits with reasonable certainty. *Meridian Enterprises Corp. v. KCBS, Inc.*, 910 S.W.2d 329, 331 (Mo. Ct. App. 1995); *Jack L. Baker Co. v. Pasley Mfg. & Distrib. Co.*, 413 S.W.2d 268, 270 (Mo. 1967). Missouri law regarding lost profits has delineated a distinction between evidence establishing the fact of damage and evidence establishing the amount of damage. *Whitman's Candies, Inc. v. Pet Inc.*, 974 S.W.2d 519, 525-526 (Mo. Ct. App. 1998). It is the fact of damages that must be proven with reasonable certainty. *Id.*

Where the damages are in the nature of lost profits, all that can be required [of the plaintiff] is to produce all the relevant facts tending to show the extent of the damages and one is not

excused for a breach of contract resulting in damages simply because those damages may not be established with certainty.

Id. citing *Gasser v. John Know Village*, 761 S.W.2d 728, 731 (Mo. Ct. App. 1988).

Another Missouri court held:

In some cases the evidence weighed in common experience demonstrates that a substantial pecuniary loss has occurred, but at the same time, it is apparent that the loss is of a character which defies exact proof. In that situation, it is reasonable to require a lesser degree of certainty as to the amount of loss, leaving a greater degree of discretion to the court or jury. This principle is applicable in the case of proof of lost profits.

Ranch Hand Foods v. Polar Pak Foods, Inc., 690 S.W.2d 437, 444-45 (Mo. Ct. App. 1985).

1. Fixed expenses are not required to be deducted.

Dodson complains that Ameristar failed to subtract fixed costs from its calculations, such as overhead, rent, depreciation, advertising, and telephone expenses. Dodson Brief p. 61-63; 67-74. However, fixed expenses are not required to be subtracted from the lost profits calculations since the loss of use of the Aircraft did not change these expenses. Tr. 354:20-356:6. For example, in *Highlife Sales Co. v. Brown-Foreman Corporation*, the Missouri Supreme Court held that where there was evidence that

operating expenses did not change as a result of the loss, they were not required to be deducted from a lost profits calculation. *Highlife Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 503 (Mo. 1992). This view is in accord with a number of other jurisdictions and the UCC.³

³ See *Vitex Manuf. Corp. v. Caribtex Corp.*, 377 F.2d 795, 798-800 (3rd Cir. 1967); *Resolute Ins. Co. v. Percy Jones Inc.*, 198 F.2d 309, 312-13 (10th Cir. 1952); *Peter Kiewit Sons' Co. v. Summit Constr. Co.*, 422 F.2d 242, 264-65 (8th Cir. 1969); *Oakland Cal. Towel Co., Inc. v. Sivils*, 126 P.2d 651, 651 (Cal. Ct. App. 1942); *Coast Indus., Inc. v. Noonan*, 231 A.2d 663, 665-66 (Conn. App. Ct. 1966); *Franklin v. Demico*, 347 S.E.2d 718, 720 (Ga. Ct. App. 1986); *King Features Syndicate v. Courier*, 43 N.W.2d 718, 726 (Iowa 1950); *E.F. Minyard v. Culotta*, 128 So.2d 797, 798 (La. Ct. App. 1961); *Rosbottom v. The Office Lounge Inc.* 654 So.2d 377,379 (La. Ct. App. 1995); *Jessup & Moore Paper Co. v. Bryant Paper Co.*, 147 A. 519, 524 (Penn. 1929); *Morrow-Smith Co. v. Cleveland Traction Co.*, 145 A. 915, 916 (Penn. 1929); *Lakewood Pipe of Tex. Inc. v. Conveying Techniques Inc.*, 814 S.W.2d 553, 556 (Tex. App. 1991); *S.A. Breeding v. Champlain Marine & Realty Co. Inc.*, 172 A. 625, 628 (Vt. 1934). The position that fixed costs should not be deducted in cases involving lost profits is also the view of the U.C.C., which has been adopted by the Eighth Circuit and Missouri. See *Productive Automated Sys. Corp. v. CPI Sys. Inc.*, 61 F.3d 620, 623 (8th Cir. 1995); *Scullen Steel Co. v. Paccar*, 708 S.W.2d 756, 761-62 (Mo. Ct. App. 1986).

In *Highlife Sales Co.*, the plaintiff only deducted those expenses directly associated and affected by the loss. Here, Mr. Wachendorfer did the same thing; he only subtracted the variable expenses that would have been incurred to operate the Aircraft. Tr. 357:16-362:10. The fixed expenses did not change and there was no cost savings realized from the loss of the Aircraft. Where there was no cost savings, there was no reason to deduct the fixed expenses. In addition, the *Highlife* court held that the jury was entitled to determine what expenses to deduct in awarding damages.

The Court of Appeals' analysis of overhead was exactly correct. Op. p. 34-37. "When overhead is fixed and the lost business produces no savings in overhead expenses, the lost business only costs Plaintiff its direct expenses associated with such business, and no deduction from profits for fixed overhead should result. Therefore, the law should be that fixed overhead need not be deducted in lost profits damages calculation." Op. at p. 36 citing H. Kent Munson, *Fixed Overhead Expenses; The Gremlins of Lost Profits Damages*, 56 J.Mo.B. 104, 107 (March – April 2000).

2. Profits of the business for a reasonable anterior period are not required.

Relying on *Coonis v. Rogers*, 429 S.W.2d 709 (Mo. 1968), Dodson argues that proof of income and expenses of the business for a reasonable time before its interruption are "indispensable." Dodson's Brief p. 61-62; 74-79. Contrary to Dodson's assertion, however, it was not necessary for Ameristar to introduce evidence of profits from anterior periods because Ameristar introduced evidence of net profits. In *Coonis*, it was

necessary for the Plaintiff to introduce evidence from anterior periods because he had only introduced gross figures, not net figures. On this topic, the Missouri Court of Appeals stated:

Seller next argues that it is indispensable for proof of anticipated profits that a plaintiff include the income and expenses of the business for a reasonable anterior period, with a consequent establishing of the net profits. ***However, it is evidence of net profits, not proof of income and expenses, that is essential to a claim of lost profits.*** As this court held in *All Star Amusement v. Jones*, 727 S.W.2d 930, 932 (Mo. App. 1987), “insofar as *All Star’s* evidence failed to establish anticipated net profits, the damage award cannot stand.” In *All Star*, the evidence only established the amount of average gross revenues. (citation omitted). Seller argues that in making a claim for lost profits, *Coonis v. Rogers*, 429 S.W.2d 709, 714 (Mo. 1968), requires of proof of income and expenses of the business for a reasonable time anterior to its interruption. (Citation omitted.) However, the Court in *Coonis* held that, “it is the *net* loss, not the gross, that must be established.” In *Coonis*, the only proof of damages was a gross, rather than net, figure. The evidence of income and

expenses serves as a means by which to establish the net profits. In the present case, *Buyer's president testified as to the gross sales and the net profits. There was no need for Buyer to introduce other evidence of income and expenses to corroborate his net profit figure. Defense counsel was free to dispute the validity of Ward's testimony* that Buyer makes \$1.79 net profit per box of chocolate. Given the appropriate standard of review and the clear establishment of a substantial pecuniary loss to Buyer, there was sufficient evidence of net profits from which a jury could determine the Buyer's lost profits.

Whitman's Candies, Inc., 974 S.W.2d at 527. (Emphasis added.)

Just as in *Whitman's Candies*, there was no need for Ameristar to introduce other evidence to corroborate its net profit figure. Defense counsel was free to dispute, and did dispute, the validity of Ameristar's calculations. Ameristar introduced "evidence of income and expenses as a means by which to establish the net profits," just as the law requires.

Furthermore, an almost identical methodology was approved in an admiralty action arising from damages to barges and cargo in *ConAgra, Inc. v. Inland River Towing Co.*, 252 F.3d 979 (8th Cir. 2001). The court required that the lost profits be "proven

with reasonable certainty.” *Id.* at 983. The court applied the same standard applicable to this case:

We have generally stated that to prevail on a claim for loss-of-use in an admiralty case, the plaintiff must present proof sufficient to bring the issue outside the realm of conjecture, speculation, or opinion unfounded on definite facts. As an element of recoverable damages, the sufficiency of the evidence of lost profits is dependent upon whether the financial information contained in the record is such that a just or reasonable estimate can be drawn.

Id. (citing *Cargill, Inc. v. Taylor Towing Serv., Inc.*, 642 F.2d 239, 241 (8th Cir. 1981)).

The methodology used by the plaintiff to establish lost profits in *ConAgra* was the “average fleet-wide net barge earnings per day.” *Id.* The Court approved the methodology stating, “no more is required” of a district court than to adopt a methodology that permits it to arrive at a damage amount “with reasonable certainty.” Ameristar’s methodology permitted the jury to arrive at a lost profit figure with reasonable certainty. Ameristar used actual, objective data for the relevant time period to determine the average fleet-wide utilization. Then, Ameristar determined how much revenue its aircraft realized per flight hour and subtracted the expenses incurred to operate the Aircraft each hour, resulting in a net-profit-per-hour calculation. Ameristar then multiplied the net-profit-per-hour calculation times the average aircraft utilization

times the numbers of days that the Aircraft was unavailable to arrive at a net-lost-profits figure. Tr. 344:6-363:12; Plaintiff's Exhibits 134-138.

The Court of Appeals correctly noted that Ameristar's evidence and methodology for calculating lost profit is even more compelling where, as here, only one aircraft out of an entire fleet was lost. Op. pgs. 33-34. Ameristar was able to demonstrate with actual historical, objective data how the entire fleet of aircraft performed during the time period in question. Ameristar was able to use the actual, average performance of the remainder of the fleet to demonstrate how the missing aircraft would likely have performed and to project the amount of profit lost by its absence. As a result, the jury was able to determine lost profits without resort to speculation and with a reasonable degree of certainty. The opinion of the Court of Appeals should be affirmed.

3. Dodson's "best evidence" argument is without merit.

Dodson also complains because Ameristar did not present the "actual business records from which the profits calculation was generated." Dodson's Brief pp. 64-66; 79-83. It was unnecessary for Ameristar to introduce all of the voluminous business records from which Exhibits 134 through 138 were prepared. Indeed, Missouri law specifically provides for the use of summaries in order to relieve the court of the burden from having to admit voluminous business records. *Gasser v. John Knox Village*, 761 S.W.2d 728, 733 (Mo. Ct. App. 1988). Furthermore, no objection was made to use of the summaries at trial.

Similarly, Dodson attacks Mr. Wachendorfer for testifying about the expenses based on his personal knowledge without introducing the documents upon which his opinions are based. Dodson's Brief p. 82-83. This same argument was confronted by the court in *Whitman's Candies*:

 Seller further argues that Ward's testimony regarding net profits is not the best evidence in that Buyer must provide documentary evidence to support its lost profits claim. However, the best evidence rule does not exclude evidence based on personal knowledge even if the documents would have provided the same information.

Whitman's Candies, Inc., 974 S.W.2d at 527.

Where, as here, the president's testimony is based on his personal knowledge of the business operations, the testimonial evidence is sufficient to provide the jury with a rational basis for estimating lost profits, and the jury will determine the weight to be accorded such testimony. *Id.*

4. Ameristar produced substantial evidence to provide an adequate basis for estimating lost profits with reasonable certainty.

Ameristar relied on actual data from the relevant time period to estimate its lost profits. Ameristar introduced summaries of data taken from its business records. Exhibits 134, 135, 136, 137, and 138. The data included the following information for each Falcon 20 in Ameristar's fleet of aircraft: gross revenue, number of miles flown,

number of legs, leg length, leg time, and hourly rate. Ameristar determined the average number of hours per month each aircraft flew and then used the average figure to determine how much the subject Aircraft would have flown. By multiplying the average hourly rate times the average hourly utilization per month, Ameristar was able to calculate the amount of lost gross revenue. Ameristar divided the estimated gross revenue by the total number of hours the Aircraft would have flown based on average utilization. The resulting figure is the gross revenue per hour. Ameristar subtracted from the gross revenue per hour the variable expenses which would have been incurred to operate the Aircraft. The variable expenses were broken down to an hourly rate so that they could be subtracted from the hourly revenue, thus allowing Ameristar to estimate the net profit-per-hour. In calculating the hourly expenses, Ameristar went so far as to determine the average leg time (the average amount of time that the Aircraft spends between take off and landing) so that Ameristar could accurately estimate the amount of fuel burned on an average trip. Obviously, the aircraft burns more fuel on takeoff and landing than when they are cruising at a level speed (just like an automobile is more efficient when it is on cruise control than when it is accelerating from a stop light or braking for a stop sign.) Ameristar provided a substantial amount of factual data from which the jury was able to estimate lost profits.

Dodson's efforts to find errors in Ameristar's business records and flaws in its lost profits calculation are too little too late. Dodson's points should have been made on cross-examination and are not properly raised for the first time on appeal. The fact that

profit increased in 1999 without the Aircraft is evidence that business increased and that the Aircraft was sorely needed. Ameristar's fleet was flying more and, therefore, the business became even more profitable. Tom Wachendorfer testified that business was very good. Tr. 383:19. There is no question that the absence of the disputed Aircraft cost Ameristar profit.

III. THE TRIAL COURT PROPERLY REFUSED TO GIVE A CONTRIBUTORY NEGLIGENCE INSTRUCTION BECAUSE AMERISTAR'S LOSSES INCLUDE PROPERTY DAMAGE.

A. STANDARD OF REVIEW.

Motions for directed verdict and judgment notwithstanding the verdict challenge the submissibility of the plaintiff's case. *Coon*, 46 S.W.3d at 88 (Mo. Ct. App. 2001). To determine whether the plaintiff has made a submissible case, the appellate court views the evidence and all reasonable inferences therefrom in the light most favorable to the plaintiff. *Id.* A case will not be withdrawn from the jury unless there is no room for reasonable minds to differ. *Id.*

B. ARGUMENT.

Dodson's argument is premised on a false assumption, specifically, that this case involved *purely* economic losses. Dodson's Brief pp. 85-89. This case did not involve only economic losses, it also involved property damage. As a result, the trial court did not err in submitting the case on comparative fault.

Dodson's mishandling of the Aircraft caused the fuselage to be bent as it sat on the trailer. Plaintiffs' Exhibit 149 at 13:55:27-13:55:56, 16:29:43-16:30:20. Dodson repeatedly mischaracterizes the evidence when it argues that the aircraft "appeared" to have distortion in the fuselage (Dodson's Brief, pp. 85; 88), that people "thought" they observed a deflection in the wing box (Dodson's Brief, p. 15), and that there was "apparent" deflection (Dodson's Brief p. 16-17). The testimony was clear and undisputed that the fuselage was, in fact, bent as it sat on the trailer. Plaintiffs' Exhibit 149 at 13:55:27-13:55:56, 16:29:43-16:30:20. The "deformation" was photographed and measured. Plaintiffs' Exhibit 149 at 13:55:27-13:55:56; 16:29:43-16:30:20, Plaintiffs' Exhibit 104. There was also evidence that wing bolt holes were scored. Tr. 288:19-22.

Furthermore, there was substantial evidence that the reason the fuselage was bent was because of the improper handling procedures used by Dodson. Plaintiffs' Exhibit 149 at 13:41:24-13:43:13, 14:12:35-14:13:15, 15:05:03-15:06:53. As a result, there was substantial evidence that Dodson caused damage to the Aircraft. Because the case involves property damage, not just purely economic losses, the Court did not err when it refused to give a contributory negligence instruction.

IV. THE COURT’S INSTRUCTIONS TO THE JURY WERE PROPER. IF THE “TAIL” WAS ERROR, IT WAS HARMLESS. FURTHERMORE, DODSON WAIVED ANY OBJECTION TO THE VERDICT DIRECTOR ON NEGLIGENCE.

A. STANDARD OF REVIEW.

When reviewing a claim of instructional error resulting from an alleged deviation from Missouri Approved Instructions (“MAI”) , the Court applies a four-step analysis: (1) if MAI prescribes a particular form of instruction, its submission is mandatory because if the MAI instruction is not given, prejudicial error is presumed; (2) the submitting party has the burden of demonstrating that the instruction did not create a prejudicial effect; (3) the court must determine if the instruction created such a prejudicial effect, and (4) in order to be grounds for reversal, the error must materially affect the merits of the case. The appellate court no longer automatically reverses instructional errors unless the record indicates that the error substantially prejudiced a party. To show prejudice, the party claiming instructional error must show that the instruction, as submitted, misdirected, misled, or confused the jury. *Hein v. Oriental Gardens, Inc.*, 988 S.W.2d 632, 634 (Mo. Ct. App. 1999). *Accord, Lay v. P&G Healthcare, Inc.*, 37 S.W.3d 310, 329 (Mo. Ct. App. 2000); *Citizens Bank of Appleton City v. Schapeler*, 869 S.W.2d 120, 128 (Mo. Ct. App. 1993).

B. ARGUMENT.

1. Instructions No. 8 and 9 did not deviate from the MAI form.

Instruction No. 8 was the comparative fault instruction. The instruction was used as required. Dodson's objection is to the description of the conduct that formed the basis for Ameristar's alleged percentage of fault, specifically, "failure to remove the Aircraft from the trailer in order to determine if the distortion was permanent or temporary," and "failure to have the Aircraft undergo an inspection in order to determine the Aircraft's condition." However, Ameristar had no duty to perform either of these tasks *unless* it reasonably should have done so. Otherwise, failure to remove the Aircraft from the trailer and failure to have the Aircraft undergo an inspection are not required because there was no independent duty. Likewise, Instruction No. 9 followed MAI 32.29. The instruction requires the court to "insert act sufficient to constitute failure to mitigate." Dodson objects to the description of the acts that were inserted into the instruction, not to any failure to follow the required instruction. Failure to purchase the Aircraft from Dodson for \$1.5 million could not have been the basis for mitigation *unless* Ameristar reasonably should have done so. Ameristar had no duty to purchase the Aircraft salvage from HCC, and certainly there would have been no failure to mitigate *unless* Ameristar reasonably should have done so. In short, the "tail" ("... if plaintiff reasonably should have done so") in Instruction Nos. 8 and 9 was not error because the identified acts could not have been the basis for comparative fault or mitigation *unless* Ameristar reasonably should have performed those tasks.

Furthermore, the authority relied upon by Dodson is inapposite. The fatal deviation in *Burton v. Bistate Dev. Agency*, 468 S.W.2d 4 (Mo. 1971) was not the addition of a “tail” on reasonableness; it was the *failure* to give a required instruction on “adequate and timely warning.” *Id.* at 6-7. In the instant case, the trial court did not fail to include a required element.

2. If the instructions did deviate from the MAI form, they did not create a prejudicial effect and did not materially affect the merits of the case.

If the “tail” was error, it was harmless. Dodson admits that the “tail” was simply a repetition of a requirement already contained in the second element of each instruction. Dodson’s Brief p. 91 (The instruction is “redundant.”). As a result, the instructions did not cause the jury to fail to consider a required element. Nor did the instructions cause the jury to consider a fact or element that they should not have considered. At most, the jury considered the “reasonableness” of Ameristar’s actions twice. There is no reason to believe that the error, if any, substantially prejudiced Dodson.

Dodson’s argument is not strengthened by the omission of “parallel language” from the defendant’s negligence Instruction No. 7. L.F. 680 (Dodson’s Brief p. 93). Dodson did not request parallel language in its instruction and, as a result, should not now be heard to complain about a lack of “symmetry” in the instructions.

Finally, the jury found Ameristar 30 percent at fault based upon the instructions about which Dodson complained. Where the jury found Ameristar 30 percent at fault,

there is no basis to find that the alleged errors in the instructions substantially prejudiced Dodson. The jury does not appear to have been misdirected, misled, or confused by the instruction. Thus, the instruction neither caused a prejudicial effect, nor affected the merits of the case.

V. DODSON’S MOTION FOR DIRECTED VERDICT WAS PROPERLY DENIED.

The trial Court properly denied Dodson’s Motion for directed verdict as to Ameristar’s negligence claim for the following reasons:

- Dodson failed to follow FAA regulations;
- Dodson’s handling of the Aircraft caused the fuselage to be bent as it sat on the flatbed trailer;
- The fact that the fuselage was bent caused HCC to declare the Aircraft a constructive total loss;
- Ameristar had no duty to purchase the Aircraft from HCC as “salvage”;
- Ameristar had no duty to purchase the Aircraft from Dodson.

A. STANDARD OF REVIEW.

When reviewing a jury verdict, the appellate court considers the evidence in the light most favorable to the verdict, giving the prevailing party all reasonable inferences from the verdict and disregarding the unfavorable evidence. *Joel Bianco Kawasaki Plus v. Meramec Valley Bank*, 81 S.W.3d 528, 537 (Mo. Banc. 2002); *Nemani v. St. Louis*

Univ., 33 S.W.3d 184, 185 (Mo. Banc. 2000). The jury's verdict shall not be overturned unless there is a complete absence of prohibitive facts to support it. *Joel Bianco Kawasaki Plus*, 81 S.W.3d at 537; *Coon v. Dryden*, 46 S.W.3d 81, 88 (Mo. Ct. App. 2001).

B. ARGUMENT.

1. Dodson failed to follow FAA regulations.

The standard of care and Dodson's breach of that standard were established by Allen King. King testified that the standard of care is established by the FAA, and that the FAA required Dodson to follow the manufacturer's maintenance manual in the retrieval of the aircraft. Tr. 276: 12-20; 277: 8-20. King also testified that Dodson failed to follow the manufacturer's maintenance manual. Tr. 279: 14-23. King testified that Dodson violated the FAA regulations. Tr. 279: 21-23. Dodson's own expert, Vincent Sipes, agreed with King that Dodson violated the FAA regulations. Tr. 604: 16-605:13.

2. Dodson's handling of the Aircraft caused the fuselage to be bent as it sat on the flatbed trailer.

James Sparks testified that the deformation of the fuselage was caused by the failure to leave the junction plate attached to the fuselage and the use of the wooden blocks to support the fuselage (failure to use a center section fixture which matched the curvature of the fuselage). Plaintiffs' Exhibit 149 at 13:41:24-13:43:13, 14:12:35-14:13:15, 15:05:03-15:06:53.

3. The fact that the fuselage was bent caused HCC to declare the Aircraft a constructive total loss.

James Hyberg testified that he “totaled” the Aircraft because the fuselage was bent and he thought it would cost a lot to repair. Hyberg Deposition at p. 48, l. 5-p. 49, l. 10; p. 59, ll. 10-20.

4. Ameristar had no duty to purchase the Aircraft from HCC as “salvage.”

Dodson’s argument that Ameristar’s decision not to purchase the Aircraft somehow completely cut off the damages is misplaced. Ameristar had no legal obligation to purchase the “salvage” from HCC. Furthermore, HCC decided to sell the Aircraft to Dodson *concurrently* with the decision to declare it a total loss. Deposition of Keith Brown (hereinafter referred to as “Brown Deposition”) at p. 182, l. 14 - 183, l. 24; Defendant’s Exhibit 88.

5. Ameristar had no duty to purchase the Aircraft from Dodson.

When Dodson offered the Aircraft to Ameristar, the repairs had not been completed. Tr. 578:17-21 (offered to Ameristar in May); Tr. 578:1-2 (Repairs completed in July). In addition, Tom Wachendorfer did not trust Dodson to have performed the work competently in view of the way Dodson handled the retrieval. Tr. 463:10-18, 464:1-3. The jury was able to consider all of these facts and, apparently did so, reducing Ameristar’s recovery by 30%.

VI. THE TRIAL COURT PROPERLY EXCLUDED EXHIBIT 85 BECAUSE IT WAS HEARSAY AND PROPERLY REFUSED TO TAKE JUDICIAL NOTICE OF THE DEFINITION OF “MAINTENANCE” IN THE FEDERAL AVIATION REGULATIONS. IN THE ALTERNATIVE, THE FAILURE TO TAKE JUDICIAL NOTICE OF THE FEDERAL AVIATION REGULATIONS WAS HARMLESS.

A. STANDARD OF REVIEW.

Ameristar agrees that the exclusion of evidence is reviewed on an abuse of discretion standard. *Lay v. P&G Healthcare, Inc.*, 37 S.W.3d 310, 331 (Mo. Ct. App. 2000). The trial court’s ruling is presumed correct, and the party claiming error has the burden of showing that the trial court abused its discretion and that he has been prejudiced. “Judicial discretion is abused when the trial court’s ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” *Giddens v. Kan. City S. Ry. Co.*, 29 S.W.3d 813, 819 (Mo. Banc. 2000), cert. denied, 532 U.S. 990, 121 S. Ct. 1644, 149 L. Ed.2d 502 (2001). Failure to admit evidence does not mandate reversal of a judgment unless the error materially affected the merits of the action and is so prejudicial as to deny a fair trial. *Id.*

B. ARGUMENT.

The trial court’s exclusion of Exhibit 83 was not an abuse of discretion. It was not so unreasonable as to “shock the sense of justice” and, in no event affected the merits of

the action since Allen King recited the definition of “maintenance” for the jury from the federal aviation regulations (Tr. 302: 16 - 303:21) and there is no claim that King’s recitation was inaccurate. As a result, the jury was not deceived or deprived from considering the language of the regulation.

Defendant’s Exhibit 85 was an unofficial reprint of the regulations and, as such, was hearsay. The Court properly sustained Ameristar’s objection.

Furthermore, it is disingenuous for Dodson to argue that the tasks it performed did not constitute “maintenance” under the federal aviation regulations when it designated an expert, Vincent Sipes, who was deposed and who *agreed* with Allen King that Dodson’s conduct *did* constitute maintenance for purposes of the federal aviation regulations and that Dodson *did* violate the federal aviation regulations. (Tr. 601:25 - 602:18, 603:23 - 604:10, 604:16 - 605:13)

VII. ANY ERROR BY AMERISTAR IN ITS CLOSING ARGUMENT WAS WAIVED BY DODSON’S FAILURE TO OBJECT AND THE JURY WAS NOT PREJUDICED.

A. STANDARD OF REVIEW.

Where the Defendant does not object to improper jury argument, request a reprimand on instruction to the jury to disregard the argument, nor request a mistrial at the time of the argument, the Court must determine, in its discretion, whether plain error existed. *Roy v. Mo. Pac. R.R. Co.*, 43 S.W.3d 351, 363-64 (Mo. Ct. App. 2001).

B. ARGUMENT.

Dodson admits that it did not object to the closing argument. Dodson's Brief, pp. 107. It did not request that the Court reprimand Plaintiff's counsel or that the Court issue a curative instruction. The impropriety could have been cured by reprimand or admonition of counsel, or by proper instruction to the jury, (*Edwards v. Lacey*, 412 S.W.2d 419, 421 (Mo. 1967)), but Dodson did not ask for any such relief. By failing to object to the closing argument, Dodson waived any complaints about it. *Hoskins v. Business Men's Assurance*, WD 61744, 2003 Mo. Ct. App. LEXIS, at *49-50 (Mo. Ct. App. June 30, 2003).

Furthermore, the closing argument did not prejudice the jury. The jury found Ameristar 30% responsible for the loss and awarded Ameristar \$700,000 less than it was seeking (before any offset for Ameristar's fault).

VIII. THE TRIAL COURT PROPERLY DENIED DODSON'S MOTION FOR NEW TRIAL AND REQUEST FOR REMITTER BECAUSE THE VERDICT IS SUPPORT BY SUBSTANTIAL EVIDENCE AND THE AMOUNT OF THE VERDICT IS IN LINE WITH THE DAMAGES EVIDENCE PRESENTED TO THE JURY.

A. STANDARD OF REVIEW.

The trial court's ruling on a motion for new trial or for remittitur is reviewed for an abuse of discretion. The trial court has broad discretion in ordering remittitur because the ruling is based upon the weight of the evidence, and the trial court is in the best

position to weigh the evidence. *Barnette v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 656-657 (Mo. Ct. App. 1997).

The issue of damages is primarily for the jury to decide. *Lay v. P&G Healthcare, Inc.*, 37 S.W.2d 301, 332 (Mo. Ct. App. 2000). The trial court is given broad discretion in deciding whether to accept the verdict or to set it aside because it is excessive. *Id.* The appellate court “will interfere only when the verdict is so excessive it shocks the conscience of the court and convinces the appellate court that both the jury and the trial court abused its discretion.” *Id.* The size of the verdict alone is not sufficient to show bias, passion, prejudice, or sympathy, and in order for the appellate court to grant a new trial, “the complaining party must show that the verdict, viewed in the light most favorable to the prevailing party, was glaringly unwarranted and that some trial error or misconduct of the prevailing party was responsible for prejudicing the jury. *Id.*

B. ARGUMENT.

1. The verdict was not excessive — it is supported by the evidence.

The verdict is not excessive. It is based on objective data of Ameristar’s income and expenses from Ameristar’s business records and Tom Wachendorfer’s personal knowledge. In fact, the verdict is \$700,000 *lower* than the amount requested by Ameristar. The cost of the replacement aircraft and the cargo door modification, alone, nearly equal the amount of the verdict.

2. No bias, passion, or prejudice.

Ameristar presented substantial evidence that the Aircraft's fuselage was mishandled by Dodson, that Dodson's carelessness caused the fuselage to bend, and that the bent fuselage was the reason HCC declared the Aircraft a constructive total loss. Ameristar presented evidence to support the value of the Aircraft at \$1.8 million and lost profits of \$2.5 million. Ameristar sought damages of \$2.8 million, but the jury only rendered a verdict for \$2.1 million, \$700,000 less than that requested. Furthermore, the jury attributed 30% of the loss to Ameristar. It is remarkable that Dodson suggests the jury was inflamed when the jury verdict was 25% less than Ameristar sought and the jury apportioned 30% of the fault to Ameristar. Under the circumstances, the verdict was not excessive.

CONCLUSION

The judgment entered by the trial court in favor of Ameristar against Dodson and affirmed by the Court of Appeals is supported by substantial evidence and should be AFFIRMED.

WHEREFORE, PREMISES CONSIDERED, for the foregoing reasons, Ameristar and Sierra respectfully request that the Court affirm the judgment against Dodson, and for such other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing, with an electronic version on a 3.5 floppy disk in Word format, was delivered to all counsel of record as shown below:

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Christopher S. Shank

RULE 84.06(c) AND RULE 84.06(g) CERTIFICATION

I certify that this Brief contains 12,008 words and 1,412 lines. I rely on the Word Count in the word processing software, which was Microsoft® Word 2002, used to create this Brief.

In addition, I certify that the disk has been scanned and is virus-free.

Dated this _____ day of July, 2004.

Christopher S. Shank