

**IN MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

GATEWAY FOAM INSULATORS, INC.,)
)
Respondent,)
)
) Case No. ED 90186
) Twenty-Third Judicial Circuit
JOKERST PAVING &) (Case No. CV304-6740-CC-J2)
CONTRACTING, INC.,)
)
Appellant.)

**Appeal From The Circuit Court Of Jefferson County
Honorable Gary P. Kramer
Division II**

Brief of Appellant Jokerst Paving & Contracting, Inc.

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INDEX

TABLE OF AUTHORITY	Page 2
JURISDICTIONAL STATEMENT	Page 4
STATEMENT OF FACTS	Page 5
POINTS RELIED ON	Page 12
ARGUMENT	Page 16
CONCLUSION	Page 35
AFFIDAVIT OF SERVICE	Page 37
AFFIDAVIT OF COMPLIANCE	Page 38
APPENDIX	Page 39

TABLE OF AUTHORITIES

<u>Case</u>	<u>Location in Brief</u>
<u>Bridgeforth v. Proffitt</u> , 490 S.W.2d 416 (Mo. App. S.D. 1973)	15,33
<u>Coonis v. Rogers</u> , 429 S.W.2d 709 (Mo. 1968)	13,22
<u>Crank v. Firestone Tire & Rubber Co.</u> , 692 S.W.2d 397 (Mo. App. W.D. 1985)	12,18,20
<u>Davidson v. Chicago & A. Ry. Co.</u> , 71 S.W. 1069 (Mo. App. W.D. 1903)	12,15,16,18 27,33
<u>Gesellschaft Fur Geratebau v. GFG America Gas Detection, Ltd.</u> , 967 S.W.2d 144 (Mo. App. E.D. 1998)	13,22,23
<u>Gilwee v. Pabst Brewing Co.</u> , 193 S.W. 886 (Mo. App. W.D. 1917)	13,28
<u>Johnson v. Summers</u> , 608 S.W.2d 574 (Mo. App. S.D. 1980)	14,32
<u>Lewis v. Lawless Homes, Inc.</u> , 984 S.W.2d 583 (Mo. App. E.D. 1999)	12,14,16,17 27,28
<u>McFall v. Wells</u> , 27 S.W.2d 497 (Mo. App. E.D. 1930)	13,18
Missouri Revised Statute Section 490.680 (2000)	14,32
Missouri Revised Statute Section 509.200 (2000)	14,29
Missouri Supreme Court Rule 55.19 (2007)	14,29,31
<u>Murphy v. Carron</u> , 536 S.W.2d 30 (Mo. Banc 1976)	16,27

<u>Orr v. Williams</u> , 379 S.W. 2d 181 (Mo. App. W.D. 1964)	12,14,15,16, 17,18,27,28 33
<u>Shirley's Realty, Inc. v. Hunt</u> , 160 S.W.3d 804 (Mo. App. W.D. 2005)	14,29,31
<u>Stallman v. Hill</u> , 510 S.W.2d 796 (Mo. App. W.D. 1974)	13,18,19

JURISDICTIONAL STATEMENT

The underlying cause of action in this case is a petition for damages to personal property and for loss of use as a result of an automobile collision on November 26, 2002. The question before the court being the measure of damage to Respondent's personal property and the measure of Respondent's damage for loss of use of said personal property.

On the 30th day of July, 2007, a judgment in the sum of \$212,970.55 in favor of Respondent was entered by the Honorable Gary P. Kramer, Division II, in the Twenty-Third Judicial Circuit, Jefferson County, Missouri, said circuit being under the jurisdiction of the Eastern District of Missouri Court of Appeals.

Appellant appeals the issuance of the judgment on the basis of lack of substantial competent evidence and misapplication of the law.

Because this appeal does not involve the validity of a treaty or statute of the United States, or a statute or provision of the Constitution of the State of Missouri, or the construction of a revenue law, or the title to any state office, jurisdiction for this appeal is in the Missouri Court of Appeals, Eastern District. Mo. Const., Article V, Section 3.

STATEMENT OF FACTS

Respondent Gateway Foam Insulators, Inc. filed suit against Appellant Jokerst Paving & Contracting, Inc. for damages to a work truck and loss of use of the vehicle as a result of an automobile accident that occurred on the 26th day of November, 2002. (L.F. 7-8). Trial on the matter was had in Jefferson County before the Honorable Gary P. Kramer on Friday, July 27, 2007. (T. 4, l. 1-5; LF 6).

Respondent is a Missouri Corporation incorporated in 1995 which as part of its construction business installs a spray foam insulation. (T. 26, l. 14-16; T. 27, l. 11) On November 26, 2002, Respondent's owner, Ron Vunesky and employee Terry Richardson were driving north on Highway 67 in Jefferson County when passing through an intersection were struck by a vehicle belonging to Appellant. (T. 17, l. 20- T. 18, l. 10).

The vehicle driven by Terry Richardson was transported after the accident to Bill Abney Towing where it remained until being moved to property owned by Appellant. (T. 51, l. 8-9; T. 84, l. 4-10). No repairs were made to the vehicle and the vehicle remained on the property of Appellant until August of 2004 when Respondent had the truck moved to Pearson and Son Towing. (T. 104, l. 15-21). Ron Vunesky asserted that the title to the vehicle was signed over to Pearson for a credit of \$2500 to the storage bill. (T. 106, l. 11-T.107, l. 8)

Respondent's exhibit 3 allegedly sets forth the costs of the vehicle and the items thereon at the time Respondent purchased same. (T. 40, l. 15-19; T. 54, l. 12-22). Sue Vunesky, bookkeeper and an owner of Respondent, testified that the

items set forth in Exhibit 3 had been in use for two years prior to the accident. (T. 55, l. 1-4). Sue Vunesky did not testify as to the fair market value of the items on the date of the accident as Respondent had not provided that information to Appellant as requested by question 2 of Appellant's Interrogatories and, on Appellant's objection, Respondent's counsel withdrew the question. (T. 55, l. 11-23). Ms. Vunesky only testified to the new price for the miscellaneous items allegedly damaged in the accident at the cost of \$12,851.50. (T. 55, l. 7-10).

Larry Wilson, an employee of TBM division of Vance Holdings who is the industrial distributor of urethane foam spray equipment, testified for Respondent as an expert in the valuation of new and used foam equipment. (T. 110, l. 9-T. 112, l. 14). Mr. Wilson testified that he viewed the vehicle at Appellant's property after the accident. (T. 113, l. 7-13) Mr. Wilson testified that at the time of the accident the value of "a truck that was outfitted as that truck was, would be at that time, 75, maybe 80,000 dollars." (T. 116, l. 6-7). Mr. Wilson stated that when he inspected the vehicle the miscellaneous equipment that he viewed on the truck included only the remains of a spray hose, "the H2000 proportioner workbench, what was left of the cabinets", the generator and air compressor. (T. 113, l. 21-T. 114, l. 10). Mr. Wilson testified that he had no idea as to the condition of the items on Exhibit 3 that were not on the truck when he visited Appellant's property. (T. 120, l. 13-25).

Mr. Wilson further testified that it would take two and a half to three weeks to put a functioning vehicle in place. (T. 121, l. 7-15).

Ms. Vunesky testified that Respondent had been incorporated in 1995 and that it specialized in spray foam insulation for commercial, residential, industrial and farm buildings. (T. 26, l. 14-16; T. 55, l. 24-T. 56, l. 2). Ms. Vunesky as bookkeeper of Respondent alleged that she kept track of the records of Respondent including income and expense, material costs, and the cost of equipment. (T. 30, l. 12-T. 31, l. 16). Ms. Vunesky testified that sixty percent of Respondent's business is commercial buildings. (T. 56, l. 3-4). Ms. Vunesky testified as to Respondent's use of its vehicles that "we weren't busy enough to use two full-time, but we were busy enough and had large enough jobs that we could put both rigs on one job with the same crew...get done twice as fast." (T. 42, l. 2-7). At the time of the accident, Respondent was only using one truck. (T. 51, l. 23-24). On November 26, 2002, Respondent only had one truck in use as the older vehicle "was in the shop to get dismantled, just the equipment ... we wanted the equipment running well so that at some point we could just take the equipment out of that truck and put it in on a new truck." (T. 41, l. 12-17). According to Exhibit 6, the other truck was back in use after December 8, 2002. (Ex. 6). Ms. Vunesky testified that Exhibit 6 was the list of days missed by not having the vehicle damaged in the accident. (T. 58, l. 23-25).

Ms. Vunesky further alleged that the average day of gross income for Respondent would be \$2500, however it could be as low as \$1000 and a couple of times hit \$4000. (T. 63, l. 9-15). Ms. Vunesky testified that on Exhibit 9, Respondent's Sales from 1996 through 2006 the sub-category "insulation"

represented the sales of the company of the foam spray insulation and was the only category effected by the accident on November 26, 2002. (T. 67, l. 15-21). Ms. Vunesky testified as follows as to insulation sales for the period of 1996 to 2006: 1996 - \$84,239.55, 1997 - \$149,919.63, 1998 - \$226, 728.95, 1999 - \$351,972.60, 2000 - \$335,605.74, 2001 - \$528,037.70, 2002 – \$433,649.29, 2003 - \$448,051.50, 2004 – \$474,599.05, 2005 - \$423,096.80, 2006 - \$371,976.00. (T. 68, l. 7-T. 69, l. 16; T. 72, l. 18-T. 73, l. 17). Ms. Vunesky further testified from Exhibit 10 as to the net income and loss for the Respondent for the period of 1996 to 2004 as follows: 1996 – net income of \$7,681.00, 1997 – net loss of \$1,266.00, 1998 – net income of \$8,480.00, 2000 – net loss of \$39,692.00, 2001 – net income of \$11,149.00, 2002 – net income of \$5,133.41, 2003 – net loss of \$8,187.61, 2004 – net income of \$67,649.30, 2005 – net loss of \$23,830.11, 2006 – net income of \$6,175.63. (Ex. 10; T. 86, l. 18-T. 88, l. 23). Ms. Vunesky testified that after the accident, Respondent hired two new employees to assist with foam insulation. (T. 75, l. 23-25).

Cindy Burke, Respondent’s certified public accountant was retained by Respondent to testify as to projected lost profits from the accident of November 26, 2002. (T. 124, l. 19-T. 125, l.13). Ms. Burke asserted that Respondent lost at a minimum \$120,000. (T. 148, l. 20-25). Ms. Burke stated that she looked at business records of Respondent including Exhibits 9 and 10 in formulating her opinion as to lost profits. (T. 129, l. 13-21). Ms. Burke alleged that the sales in 2002 would be higher than 2001 if Respondent had not lost its truck at the end of

November as “they didn’t have income for the last six weeks of the year.” (T. 131, l. 13-21). Ms. Burke further asserted that net sales for Respondent went down because Respondent did not have the truck in service and was “kept from having the second truck able to be full-bore as they had intended before the accident.” (T. 133, l. 12-18).

Ms. Burke asserted that she considered the following as positive factors in determining a loss for Respondent: construction industry growth, advertising, reputation, second truck added. (T. 136, l. 21-24; T. 138, l. 3-23). Ms. Burke, stated, over the objection of Appellant, that she based her opinion of construction growth on data from the U.S. Census website. (T. 137, l. 2-21). Ms. Burke alleged that the asterisk on Exhibit 26 meant that all permit offices were reporting for the years 2003, 2004, and 2005. (T. 140, l. 15-1. 24). Ms. Burke stated that to formulate her opinion as to lost profit for Respondent she “took the information from the Census Bureau, took the increase between the years, that the Census Bureau did; took 2001 as their beginning year and increased based on the same percentage as the Census Bureau did.” (T. 141, l. 21-25). Ms. Burke asserted that the construction industry increased 18 percent from 2001 to 2002 and 6 percent in both 2002 to 2003 and 2003 to 2004. (T. 149, l. 12-16). Ms. Burke then took Respondent’s “best year, where they were hit in, and increased their sales by each of those amounts.” (T. 149, l. 16-17). Ms. Burke then subtracted out the actual revenues that Respondent had for those years to establish the total loss. (T. 149, l. 17-19).

The court took judicial notice of a default judgment rendered in St. Louis County against Respondent for what Respondent asserted was the hazardous cleanup of a spill of chemicals that was a result of the accident. (T. 5, l. 18-T. 7, l. 17). The invoice for the cleanup was admitted over the objection of Appellant for the lack of foundation as to the reasonableness and necessity of the expense and for said invoice not being a business record of Respondent. (T. 78, l. 1-25). Ms. Vunesky testified that Respondent did not pay the bill of \$12,746.72 nor did Respondent defend the suit filed against it in St. Louis County for collection. (T. 79, l. 2-21; T. 94, l. 24-T. 95, l. 18).

Ms. Vunesky attempted to testify at trial as to payments made on a loan obtained to replace the damaged vehicle. Appellant objected as beyond the pleadings and discovery responses and the court sustained said objection. (T. 82, l. 3-T. 83, l. 19). Exhibit 13 purporting to be the interest on a loan taken to obtain a replacement vehicle was admitted over the objection of Appellant as to relevance and being beyond the scope of the pleadings and beyond the discovery responses. (T. 150, l. 17-T. 154, l. 3).

On the 30th day of July, 2007, the court entered judgment against Respondent in the total sum of \$212,970.55 which was broken down by the court as \$68,500.00 for damage to the vehicle, \$11,723.83 as interest on the loan to replace the vehicle, \$12,746.72 as for the expense of cleanup, and \$120,000 for Respondent's lost profits. (LF 16).

Appellant filed its Notice of Appeal in this matter on the 23rd day of August, 2007. (LF 21).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN AWARDING RESPONDENT LOSS OF USE OF VEHICLE AND LOST PROFITS IN THAT THE JUDGMENT MISAPPLIED THE LAW BECAUSE LOSS OF USE IS ONLY AVAILABLE FOR RECOVERY FOR DAMAGE TO PERSONAL PROPERTY IF THE PROPERTY IS REPAIRED AND THE VEHICLE WAS REPLACED NOT REPAIRED.

Davidson v. Chicago & A. Ry. Co., 71 S.W. 1069 (Mo. App. W.D. 1903)

Lewis v. Lawless Homes, Inc., 984 S.W.2d 583 (Mo. App. E.D. 1999)

Orr v. Williams, 379 S.W.2d 181 (Mo. App. W.D. 1964)

II. THE TRIAL COURT ERRED IN AWARDING RESPONDENT \$120,000.00 AS AND FOR LOST PROFITS IN THAT DAMAGE FOR LOSS OF USE OF PERSONAL PROPERTY IS LIMITED TO THE TIME REASONABLY REQUIRED TO REPAIR THE PROPERTY BECAUSE THE VEHICLE COULD HAVE BEEN REPLACED IN TWO TO THREE WEEKS AND RESPONDENT DID NOT REPLACE FOR ALMOST TWO YEARS.

Crank v. Firestone Tire & Rubber Co., 692 S.W.2d 397 (Mo. App, W.D. 1985)

McFall v. Wells, 27 S.W.2d 497 (Mo. App. E.D. 1930)

Stallman v. Hill, 510 S.W.2d 796 (Mo. App. W.D. 1974)

III. THE TRIAL COURT ERRED IN AWARDING RESPONDENT LOST PROFITS IN THAT THERE WAS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THE AWARD BECAUSE THE TESTIMONY THAT RESPONDENT'S REVENUE WOULD INCREASE WAS MERE SPECULATION AND NOT COMPETENT PROOF AS TO ANTICIPATED PROFITS.

Coonis v. Rogers, 429 S.W.2d 709 (Mo. 1968)

Gesellschaft Fur Geratebau v. GFG America Gas Detection, Ltd.,

967 S.W.2d 144 (Mo. App. E.D. 1998)

IV. THE TRIAL COURT ERRED IN AWARDING RESPONDENT INTEREST ON A LOAN IN THE SUM OF \$11,723.83 INTEREST IN THAT SAID RULING MISAPPLIES THE LAW BECAUSE THE PROPER MEASURE OF DAMAGES TO PERSONAL PROPERTY IS DIMINUTION IN VALUE AND THE AWARD OF INTEREST ENCOMPASSES REPLACEMENT COSTS AND IS A DOUBLE RECOVERY FOR THE RESPONDENT.

Gilwee v. Pabst Brewing Co., 193 S.W. 886, 887 (Mo. App. W.D. 1917)

Lewis v. Lawless Homes, Inc., 984 S.W.2d 583 (Mo. App. E.D. 1999)

Orr v. Williams, 379 S.W.2d 181 (Mo. App. W.D. 1964)

V. THE TRIAL COURT ERRED IN AWARDING RESPONDENT INTEREST ON A LOAN FOR A REPLACEMENT VEHICLE IN THAT SAID RULING MISAPPLIES THE LAW BECAUSE REQUESTS FOR SPECIAL DAMAGES MUST BE SPECIFICALLY PLED.

Missouri Revised Statute Section 509.200 (2000)

Missouri Supreme Court Rule 55.19 (2007)

Shirley's Realty, Inc. v. Hunt, 160 S.W.3d 804 (Mo. App. W.D. 2005)

VI. THE TRIAL COURT ERRED IN AWARDING CLEANUP COSTS IN THAT THE JUDGMENT MISAPPLIED THE LAW BECAUSE THE COST OF CLEANUP IS A SPECIAL DAMAGE THAT WAS REQUIRED TO BE PLED AND PROVEN TO BE REASONABLE AND NECESSARY AND BECAUSE THE INVOICE OF ENVIRONMENTAL RESTORATION WAS NOT A BUSINESS RECORD OF RESPONDENT.

Johnson v. Summers, 608 S.W.2d 574 (Mo. App. S.D. 1980)

Missouri Revised Statute Section 490.680 (2000)

Shirley's Realty, Inc. v. Hunt, 160 S.W.3d 804 (Mo. App. W.D. 2005)

VII. THE TRIAL COURT ERRED IN AWARDING RESPONDENT \$68,500 IN THAT INSUFFICIENT EVIDENCE WAS PRESENTED AS TO THE DIMINUTION IN VALUE OF THE VEHICLE, EQUIPMENT,

SUPPLIES BECAUSE NO TESTIMONY WAS ADDUCED AS TO THE
FAIR MARKET VALUE OF THE PROPERTY PRIOR TO THE
ACCIDENT OR SUBSEQUENT TO THE ACCIDENT.

Bridgeforth v. Proffitt, 490 S.W.2d 416 (Mo. App. S.D. 1973).

Davidson v. Chicago & A. Ry. Co., 71 S.W. 1069 (Mo. App. W.D. 1903)

Orr v. Williams, 379 S.W.2d 181 (Mo. App. W.D. 1964)

ARGUMENT

I. THE TRIAL COURT ERRED IN AWARDING RESPONDENT LOSS OF USE OF VEHICLE AND LOST PROFITS IN THAT THE JUDGMENT MISAPPLIED THE LAW BECAUSE LOSS OF USE IS ONLY AVAILABLE FOR RECOVERY FOR DAMAGE TO PERSONAL PROPERTY IF THE PROPERTY IS REPAIRED AND THE VEHICLE WAS REPLACED NOT REPAIRED.

Review of this appeal is governed by the standard set forth in Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. Banc 1976), which requires the court to reverse the judgment of the trial court only if there is not substantial evidence to support it, the judgment is against the weight of the evidence, or it erroneously declares or applies the law. Lewis v. Lawless Homes, Inc., 984 S.W.2d 583, 586 (Mo. App. E.D. 1999).

This case is one for personal property damage to a business vehicle as a result of an automobile accident. (LF 8) The measure of damages for recovery for damage to personal property used in business depends on whether the personal property is rendered useless or whether the personal property is repaired. Orr v. Williams, 379 S.W. 2d 181, 189 (Mo. App. W.D. 1964); Davidson v. Chicago & A. Ry. Co., 71 S.W. 1069, 1070 (Mo. App. W.D. 1903). If the property is not repairable, the owner is limited to recovery of the fair market value of the property at the time just before the accident, less the fair market value after the accident but not for loss of use of same. Id. If the personal property is repairable, the owner

may recover loss of use for the period of time reasonably required to repair it. Id.; Lewis v. Lawless Homes, Inc., 984 S.W.2d at 586.

In the case at hand, Respondent's former employee, Terry Richardson, testified that after the accident the vehicle "was beat up. It wasn't usable at all." (T. 22, l. 3-8). Further, no repairs were made on the vehicle. Respondent's president, Ron Vunesky, testified that, after being in storage for almost two years, the vehicle was disposed of for \$2500 to Pearson and Sons Towing. Mr. Vunesky further testified that he did not pursue determining if the equipment on the vehicle was salvageable. (T. 107, l. 2-15). Respondent's expert, Larry Wilson, also testified that the vehicle was not serviceable after the accident. (T. 117, l. 15-16).

As Respondent's vehicle was not repaired, under well-established and longstanding case law, Respondent was not entitled to recover for loss of use of the vehicle, only for the diminution in value of the vehicle. As such the judgment of the trial court in awarding loss of use erroneously applied the law and must therefore be reversed.

II. THE TRIAL COURT ERRED IN AWARDING RESPONDENT

\$120,000.00 AS AND FOR LOST PROFITS IN THAT DAMAGE FOR LOSS OF USE OF PERSONAL PROPERTY IS LIMITED TO THE TIME REASONABLY REQUIRED TO REPAIR THE PROPERTY BECAUSE THE VEHICLE COULD HAVE BEEN REPLACED IN TWO TO THREE WEEKS AND RESPONDENT DID NOT REPLACE FOR ALMOST TWO YEARS.

Alternatively, if the Court determines that well-established case law does not state that loss of use is only available when the personal property is repaired, the trial court erred in awarding Respondent \$120,000.00 for loss of use in that Respondent failed to establish that the time it took Respondent to replace the vehicle was reasonable.

A claimant is only entitled to damages for loss of use “in a reasonable amount for the period reasonably required for repair” or “the time necessary in the exercise of due diligence to secure the repair”. Stallman v. Hill, 510 S.W.2d 796, 798 (Mo. App. W.D. 1974) and Crank v. Firestone Tire & Rubber Co., 692 S.W.2d 397, 403 (Mo. App. W.D. 1985); *see also* Orr v. Williams, 379 S.W. 2d 181, 189 (Mo. App. W.D. 1964); Davidson v. Chicago & A. Ry. Co., 71 S.W. 1069, 1070 (Mo. App. W.D. 1903); McFall v. Wells, 27 S.W.2d 497, 498 (Mo. App. E.D. 1930). The burden of proof is upon the claimant to establish the issue of reasonableness. Stallman v. Hill, 510 S.W.2d at 798 *citing* McFall v. Wells, 27 S.W.2d 497, 498 (Mo. App. E.D. 1930).

In Stallman v. Hill, plaintiff sought reimbursement for loss of use represented by the rental expenses incurred during the time of repair. 510 S.W.2d at 797. The collision occurred in April and remained at the dealership to which it had been towed for repairs until June. Id. at 798. The court found that there was insufficient evidence “that plaintiff exercised reasonable diligence to secure repair of his property.” Id. The evidence showed that the repair would have taken only one to two days as opposed to the six weeks plaintiff sought. Id. The court reversed the award of rental for six weeks and stated that “reasonable diligence imposes a duty upon the property owner to make repairs in order to reduce his damage as much as possible.” Id.

In the case at hand, the testimony of Respondent’s own witnesses established that Respondent could have replaced the vehicle within two to three weeks. (T. 108, l. 19-23; T. 121, l. 12-17). Although not clear from the transcript, if the court assumes that the bank loan statement of Exhibit 13 represents the date the vehicle was replaced, Respondent did not replace the vehicle until October of 2004, almost 2 years after the accident. (Ex. 13) Respondent attempted to argue that it did not have the funds to purchase another vehicle until that time. (T. 109, l. 1-14). No evidence was presented as to the basis that funds were not available. Also, the mere allegation of inability is not sufficient to warrant a variation from the requirement of making repairs within a reasonable time. Crank v. Firestone Tire & Rubber Co., 692 S.W.2d at 404. In fact, the evidence tended to establish that funds were available as the 2003 tax returns on Form 4562 showed that capital

assets totaling \$66,652 were placed into service in 2003 by Respondent. (Ex. C; T. 159, l. 12-24). Further, Ms. Vunesky stated that two new employees were hired in the time period and no employees were laid off. (T. 75, l. 23-25; T. 76, l. 4-5).

Further at the time of the accident, Respondent had only one vehicle in service as their other vehicle “was in the shop to get dismantled, just the equipment ... we wanted the equipment running well so that at some point we could just take the equipment out of that truck and put it in on a new truck.” (T. 41, l. 12-17). This testimony implies that it was the intent of Respondent not to have two trucks available for use. According to Exhibit 6, the other truck was back in use after December 8, 2002. (Ex. 6). Therefore the inference would be that once the second vehicle returned to service the loss of use to Respondent ended.

Also, no testimony was adduced as to one single client by name or contract lost by Respondent as a result of the accident although Ms. Vunesky asserted that jobs were missed or turned away. (T. 56, l. 16-T. 57, l. 17). Ms. Vunesky testified that Exhibit 6 was the list of days missed by not having the vehicle damaged in the accident. (T. 58, l. 23-25). However, Exhibit 6 does not set forth that any jobs were missed or turned away over the accident prior to the second vehicle being brought back into service but does so after the second vehicle came back into service, yet not by specific name or account. (Ex. 6) Exhibit 6 can be interpreted to mean that no jobs were missed in the time it took to bring the decommissioned vehicle back into service.

The burden was on the Respondent to establish a reasonable period for repair to determine loss of use. The evidence presented by Respondent was insufficient to establish that almost two years to replace the vehicle was reasonable. As such the judgment awarding Respondent \$120,000 was not based on a reasonable period for repair and the evidence supporting said judgment was insufficient and said judgment must be reversed.

III. THE TRIAL COURT ERRED IN AWARDING RESPONDENT LOST PROFITS IN THAT THERE WAS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THE AWARD BECAUSE THE TESTIMONY THAT RESPONDENT'S REVENUE WOULD INCREASE WAS MERE SPECULATION AND NOT COMPETENT PROOF AS TO ANTICIPATED PROFITS.

Alternatively, if the Court determines that well-established case law does not state that loss of use is only available when the personal property is repaired and that almost two years after the accident is a reasonable period for repair or replacement, the trial court erred in awarding Respondent \$120,000.00 for loss of use in that Respondent failed to establish competent and non speculative proof of the amount of anticipated profits.

The general rule regarding the recovery of lost profits of a commercial business is that profits “are too remote, speculative and too dependent upon changing circumstances to warrant a judgment for their recovery.” Gesellschaft Fur Geratebau v. GFG America Gas Detection, Ltd., 967 S.W.2d 144, 147 (Mo. App. E.D. 1998) *citing* Coonis v. Rogers, 429 S.W.2d 709, 714 (Mo. 1968). The only exception is for established businesses when claimants can make the anticipated profits “reasonably certain by competent proof of the amount of profits.” Id. The facts necessary to establish lost profits must include “income and expenses of the business for a reasonable time anterior to its interruption, with a subsequent establishment of net profits during the previous period.” Id. Missouri

case law holds the awarding of lost profits to “stringent requirements, refusing to permit speculation as to probable or expected profits, and requiring a substantial basis for such award.” Id.

The evidence submitted by Respondent as to its lost profits is based on nothing but speculation and therefore must be reversed. Respondent’s expert, its certified public accountant, Cindy Burke, stated that she based her figures that Respondent’s business would have grown entirely on the Census data that she collected over the internet. (T. 136, l. 25-T. 21; T. 141, l. 21-25) Ms. Burke further stated that she only looked at the Census data for the years 2001 through 2006. (T. 137, l. 24-25). Over the objection of Appellant on the basis of hearsay and not the best evidence, Ms. Burke asserted that she pulled the housing permits for the St. Louis metropolitan area for each year along with the payroll records of commercial jobs for each year. (T. 137, l. 1-25). Ms. Burke’s exhibit 26 was admitted over the objection of Appellant to allegedly prove that the number of housing permits was increasing over the time period of 1996 through 2006. (T. 139, l. 8-13; T. 154, l. 7-18).

However, Ms. Burke’s testimony as to a growth in the construction industry is flawed and contradictory. Ms. Burke testified that the asterisk on Exhibit 26 indicated that all permit offices in the St. Louis region had reported in those years which were 2003, 2004, and 2005. (T. 140, l. 15-21). It can therefore be assumed that in 2001 and 2002 not all offices reported and therefore the percentage of growth alleged by Ms. Burke between 2001 and 2003 is inaccurate. Further, Ms.

Burke did not testify, nor did anyone else, as to any correlation between any growth in the construction industry and the same growth in the use of spray foam insulation in construction. By Ms. Vunesky's own testimony when Respondent began in 1995, spray foam insulation was new to the area. (T. 27, l. 4-5). There was no evidence presented as to the popularity of the product in the construction industry and its use as compared to standard insulation.

Ms. Burke stated that she assumed that the damaged vehicle was responsible for 50 percent of the variable expense in 2001. (T. 148, l. 1-11). However, no testimony was ever elicited from any witness as to whether each truck was used equally or as to whether the expenses for each vehicle were the same. In fact, Ms. Vunesky testified that Respondent was not busy enough to use both vehicles full-time. (T. 42, l. 2-3).

Further, Ms. Burke did not use the income and expenses and net profit for a reasonable period anterior to the accident. Ms. Burke stated that to determine increased revenue that she took Respondent's gross revenue for 2001 and increased it by eighteen percent (what she stated the Census indicated as construction growth) to determine what the revenue for 2002 would have been if not for the accident. (T. 149, l. 16-17). In essence that would mean that the gross revenue for 2002 if not for the accident would have been eighteen percent more than Respondent's 2001 gross revenue of \$528, 037.70 which would be \$623,084.48. Keeping in mind that the accident occurred at the end of November and assuming that Respondent had no revenue in December of 2002, in order to

meet Ms. Burke's hypothesis, Respondent would have needed to earn \$189,435.19 from November 27, 2002 to December 31, 2002. Ms. Vunesky testified that the most revenue generated by Respondent in one day was \$4,000 and that Respondent had done that a couple of times but that average gross revenue for the day was \$2500. (T. 63, l. 6-15). Even in Respondent's best case scenario, if it operated 7 days a week and grossed \$4000 a day, Respondent at a minimum would not have revenue of \$189,435.19 for 47.3 days or January 8, 2003. Yet Ms. Burke testified that if not for the accident Respondent would have grossed 18 percent more in 2002 than in 2001. (T. 149, l. 12-19).

Ms. Burke then states that construction industry increased again in 2003 by six percent over 2002 and in 2004 by six percent over 2003. (T. 149, l. 16-17). Ms. Burke assumed that Respondent would grow at the same rate and increased Respondent's revenues by same percentage. (T. 149, l. 16-17). Ms. Burke did this despite the fact that in the past no equal growth was established between Respondent and the construction industry for any year.

As the testimony of Ms. Burke of increasing sales of Respondent was based on the mere speculation that the company would grow at the same rate as the construction industry allegedly did and the mere speculation as to the growth of the construction industry without any consideration of the ebb and flow of Respondent in the years prior to the accident, the judgment for lost profits must be reversed as lacking any substantial competent evidence of loss.

IV. THE TRIAL COURT ERRED IN AWARDING RESPONDENT INTEREST ON A LOAN IN THE SUM OF \$11,723.83 INTEREST IN THAT SAID RULING MISAPPLIES THE LAW BECAUSE THE PROPER MEASURE OF DAMAGES TO PERSONAL PROPERTY IS DIMUNITION IN VALUE AND THE AWARD OF INTEREST ENCOMPASSES REPLACEMENT COSTS AND IS A DOUBLE RECOVERY FOR THE RESPONDENT.

Review of this appeal is governed by the standard set forth in Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. Banc 1976), which requires the court to reverse the judgment of the trial court only if there is not substantial evidence to support it, the judgment is against the weight of the evidence, or it erroneously declares or applies the law. Lewis v. Lawless Homes, Inc., 984 S.W.2d 583, 586 (Mo. App. E.D. 1999).

This case is one for personal property damage to a business vehicle as a result of an automobile accident. (LF 8) The measure of damages for recovery for damage to personal property used in business depends on whether the personal property is rendered useless or whether the personal property is repaired. Orr v. Williams, 379 S.W. 2d 181, 189 (Mo. App. W.D. 1964); Davidson v. Chicago & A. Ry. Co., 71 S.W. 1069, 1070 (Mo. App. W.D. 1903). If the property is not repairable, the owner is limited to recovery of the fair market value of the property at the time just before the accident, less the fair market value after the accident but not for loss of use of same. Id. If the personal property is repairable, the owner

may loss of use for the period of time reasonably required to repair it. Id.; Lewis v. Lawless Homes, Inc., 984 S.W.2d at 586.

In the case at hand the judgment for interest on the bank loan obtained to replace the vehicle damaged goes beyond the proper measure of damages in that it is awarding part of the costs of replacement. (LF. 16). As Respondent was awarded a sum for the diminution in value of the vehicle in the sum of \$68,500, the award of interest in addition to the diminution of value of the vehicle is a double recovery. Said award is contrary to the rule that a claimant cannot be compensated twice for the same loss. Gilwee v. Pabst Brewing Co., 193 S.W. 886, 887 (Mo. App. W.D. 1917).

As interest on loan for replacement vehicle is not a proper measure of damage in an automobile property damage case and is in essence a double recovery, the judgment for interest must be reversed.

V. THE TRIAL COURT ERRED IN AWARDING RESPONDENT INTEREST ON A LOAN FOR A REPLACEMENT VEHICLE IN THAT SAID RULING MISAPPLIES THE LAW BECAUSE REQUESTS FOR SPECIAL DAMAGES MUST BE SPECIFICALLY PLED.

Alternatively, if the court determines that interest on a loan to replace the vehicle is a recoverable damage, the judgment of the court must still be reversed as Respondent did not request the award of same in its pleadings and the court should have sustained Appellant's objection to the entry of evidence regarding interest paid.

Missouri Supreme Court Rule 55.19 (2007) and Missouri Revised Statute Section 509.200 (2000) require that "when items of special damage are claimed, they shall be specifically stated." Respondent made no pleading for any special damages other than loss of use of the vehicle. (LF 8) "Special damages are the natural but not necessary result of the wrongful act...and result from the act by reason of the special circumstances of the case." Shirley's Realty, Inc. v. Hunt, 160 S.W.3d 804, 809 (Mo. App. W.D. 2005). Interest on a loan to purchase a replacement vehicle is not the necessary result of an automobile accident and only arose due to the alleged financial condition of the Respondent. As such, the claim for interest should have been specifically pled.

Further, Appellant objected both times Respondent sought to illicit testimony as to the interest. The court sustained Appellant's objection to the testimony of Ms. Vunesky on the subject of the payment of interest. (T. 82, l. 7-T.

83, l. 19). However, the court allowed Ms. Burke to testify as to interest paid over the objection of Appellant as being beyond the scope of the pleadings. (T. 150, l. 17-T. 154, l. 3). The court erred in not sustaining Appellant's objection.

Because the interest was not pled and Appellant appropriately objected to testimony and exhibits regarding same, the court erred in awarding interest and the judgment for same must be reversed.

VI. THE TRIAL COURT ERRED IN AWARDING CLEANUP COSTS IN THAT THE JUDGMENT MISAPPLIED THE LAW BECAUSE THE COST OF CLEANUP IS A SPECIAL DAMAGE THAT WAS REQUIRED TO BE PLED AND PROVEN TO BE REASONABLE AND NECESSARY AND BECAUSE THE INVOICE OF ENVIRONMENTAL RESTORATION WAS NOT A BUSINESS RECORD OF RESPONDENT.

Missouri Supreme Court Rule 55.19 (2007) and Missouri Revised Statute Section 509.200 (2000) require that “when items of special damage are claimed, they shall be specifically stated.” Respondent made no pleading for any special damages other than loss of use of the vehicle. (LF 8) “Special damages are the natural but not necessary result of the wrongful act...and result from the act by reason of the special circumstances of the case.” Shirley’s Realty, Inc. v. Hunt, 160 S.W.3d 804, 809 (Mo. App. W.D. 2005). An environmental hazardous spill cleanup is not the natural occurrence of an automobile accident and only arose because of the special circumstances of the type of business conducted by Respondent. As such the claim for environmental cleanup costs should have been pled.

Further, Respondent presented no evidence as to the reasonableness and necessity of the cleanup and costs. Mo. S.C. Rule 55.19. Caleb Tuft, employee of Environmental Restoration who would have allegedly testified as to the cleanup costs, was not allowed to testify as Respondent had not updated discovery responses. (T. 24, l. 1-T. 25, l. 25). Further no offer of proof was made. The

invoice of Environmental Restoration was entered into evidence as a business record of Respondent over the objection of Appellant. (T. 78, l. 3-25).

Appellant's objection should have been sustained as Ms. Vunesky did not testify as to the mode of the invoice's preparation as required to be considered competent evidence. Section 490.680 RSMo (2000).

Also, Ms. Vunesky could not establish the reasonableness of the bill as Respondent had not paid the bill. A court may consider payment of the bill to be evidence of its reasonableness. Johnson v. Summers, 608 S.W.2d 574, 575 (Mo. App. S.D. 1980).

As the court should have sustained the objection of Appellant as to the admittance of the invoice of Environmental Restoration and that there was no evidence as to the reasonableness of the bill presented and the clean up costs were not pled as special damages, the judgment of the court for the clean up costs must be reversed.

VII. THE TRIAL COURT ERRED IN AWARDING RESPONDENT \$68,500 IN THAT INSUFFICIENT EVIDENCE WAS PRESENTED AS TO THE DIMINUTION IN VALUE OF THE VEHICLE, EQUIPMENT, SUPPLIES BECAUSE NO TESTIMONY WAS ADDUCED AS TO THE FAIR MARKET VALUE OF THE PROPERTY PRIOR TO THE ACCIDENT OR SUBSEQUENT TO THE ACCIDENT.

This case is one for personal property damage to a business vehicle as a result of an automobile accident. (LF 8) The measure of damages for recovery for damage to personal property is the diminution in value of the property. Orr v. Williams, 379 S.W. 2d 181, 189 (Mo. App. W.D. 1964); Davidson v. Chicago & A. Ry. Co., 71 S.W. 1069, 1070 (Mo. App. W.D. 1903). The owner is limited to recovery of the fair market value of the property at the time just before the accident, less the fair market value after the accident. Id. For the purposes of determining damage to personal property, “fair market value” is the amount of money the personal property “will bring when it is offered for sale by an owner who is willing but under no compulsion to sell and is bought by a buyer who is willing or desires to purchase but is not compelled to do so.” Bridgeforth v. Proffitt, 490 S.W.2d 416, 425 (Mo. App. S.D. 1973).

Respondent presented no evidence as to the fair market value of any of the items that it alleged were damaged in the accident either prior to the accident or immediately subsequent to accident. Ms. Vunesky testified only that the costs

listed in Exhibit 3 were either the purchase price paid or the new cost and not the fair market value. (T. 40, l. 7-19; T. 55, l. 7-25). Mr. Vunesky only testified as to what he believed he could obtain for the generator and air compressor today and not what their fair market value was the day prior to or right after the accident. (T. 107, l. 9-23). Further Mr. Vunesky testified that at least two years after the accident he obtained \$2500.00 for the vehicle. (T. 105, l. 25-T. 106, l. 4; T. 107, l. 7-8). He gave no testimony as to the fair market value of any item prior to the accident or subsequent to the accident. (T. 103, l. 16-T. 109, l. 25). Further, Respondent's expert, Larry Wilson, only testified that a used vehicle outfitted such as Respondent's vehicle allegedly was would have had a value of \$75,000 to \$80,000. (T. 116, l. 3-7). Mr. Wilson gave no testimony that he was familiar with that particular vehicle prior to the accident or the value of vehicle in the condition that it was in just prior to the accident based on the testimony of any person with knowledge. (T. 110, l. 1-T. 124, l. 10).

As no witness testified as to the fair market value of the particular items of Respondent prior to the accident or after the accident, the court lacked substantial evidence on which to base an award for actual damages and as such the judgment of the court for the award of \$68,500 must be reversed.

CONCLUSION

Well-established Missouri case law states that loss of use is only available when the personal property is repaired, and here the personal property was not. Further, almost two years after the accident is not a reasonable period for repair or replacement. Also Respondent failed to establish competent proof of the amount of anticipated profits and merely speculated as to Respondent's net profits with no basis on past performance and history of the company. As such the judgment for \$120,000 for loss of use must be reversed.

As interest for replacement vehicle is not a proper measure of damage in an automobile property damage case and is in essence a double recovery, the judgment for interest must be reversed. Further, the judgment for interest must be reversed as Respondent did not request the award of same in its pleadings and the court should have sustained Appellant's objection to the entry of evidence regarding interest paid.

As the court should have sustained the objection of Appellant as to the admittance of the invoice of Environmental Restoration and that there was no evidence as to the reasonableness of the bill presented and the clean up costs were not pled as special damages, the judgment of the court for the clean up costs must be reversed.

As no witness testified as to the fair market value of the particular items of Respondent prior to the accident or after the accident, the court did lacked

substantial evidence on which to base an award for actual damages and as such the judgment of the court for the award of \$68,500 must be reversed.

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AFFIDAVIT OF SERVICE OF APPELLANT'S BRIEF

STATE OF MISSOURI)
) SS.
COUNTY OF JEFFERSON)

 BIANCA L. EDEN, being first duly sworn, does state that on the 14th day of March, 2008, two (2) copies on paper and one (1) copy on disk of the foregoing Appellant's Brief were mailed by United States mail, postage prepaid to:

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 Subscribed and sworn to before me this ____ day of _____,
2008.

Notary Public

AFFIDAVIT OF COMPLIANCE

STATE OF MISSOURI)
) SS.
COUNTY OF JEFFERSON)

BIANCA L. EDEN, being first duly sworn, does state as follows:

1. That Appellant’s Brief complies with the limitations set forth in Missouri Supreme Court Rule 84.06(a) and Eastern District Rule 360;
2. That the number of words in Appellant’s Brief is 7155;
3. That the disk of the Appellant’s Brief has been scanned for viruses and is virus-free.

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Subscribed and sworn to before me this ____ day of _____,
2008.

Notary Public

APPENDIX INDEX

Judgment of Court	Page 1A
Missouri Revised Statute Section 490.680 (2000)	Page 4A
Missouri Revised Statute Section 509.200 (2000)	Page 5A
Missouri Supreme Court Rule 55.19 (2007)	Page 6A