IN THE SUPREME COURT OF MISSOURI

No. SC88637

UNION ELECTRIC COMPANY, d/b/a AMEREN UE,

Plaintiff/Respondent,

vs.

METROPOLITAN ST. LOUIS SEWER DISTRICT,

Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
THE HONORABLE PHILIP D. HEAGNEY, JUDGE

SUBSTITUTE BRIEF OF RESPONDENT UNION ELECTRIC COMPANY d/b/a AMEREN UE

ARMSTRONG TEASDALE LLP
James J. Virtel #21744
Karen A. Baudendistel #37735
Cynthia A. Petracek #43247
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102-2740
(314) 621-5070
(314) 621-5065 (facsimile)

ATTORNEYS FOR RESPONDENT

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STATEMENT OF FACTS

Union Electric Company, d/b/a AmerenUE ("Ameren") brought this action against the Metropolitan Sewer District ("MSD"), seeking contribution under the Missouri Overhead Power Line Safety Act for damages that Ameren paid to settle a personal injury lawsuit filed by Anthony and Donna Page. L.F. 82, 86. Mr. Page worked for Mulligan Construction Company, and was a labor foreman on an MSD construction project to construct a drainage ditch and install a sanitary sewer line. L.F. 56-57. He sustained severe electric shock injuries when the boom of a crane delivering concrete to the drainage ditch where he was working came into contact with an energized, high-voltage overhead power line. Tr. 53, 56.

Mr. and Mrs. Page sued Ameren; FMC Corporation, the crane's manufacturer; MSD; and two of MSD's inspector supervisors who were on site the day of the accident, Robert Dillman and Joseph Campisi. Tr. 93. Ameren, in turn, filed contribution claims against MSD, Mr. Dillman, and Mr. Campisi. L.F. 82. The Pages voluntarily dismissed FMC after settling their claim against it for $3 million. L.F. 51. Ameren settled the Pages' claims for $7.5 million and received $1.5 million of that amount back from Mr. Page's employer, for a net payment and loss subject to contribution of $6 million. L.F. 86; Tr. 94. The Pages also reached an agreement with Ameren that if Ameren chose to pursue its contribution claims and recovered damages, the Pages would receive a portion of Ameren's recovery. Tr. 95. The Pages then dismissed Ameren shortly after they filed their third amended petition. L.F. 18, 20, 22. Eventually, the Pages also settled with MSD, Mr. Campisi and Mr. Dillman for $6 million. Tr. 95.

Ameren pursued its contribution claims against the MSD defendants. The claims were tried to a jury, which assessed fault to both Ameren and MSD for the damages Ameren paid to settle the claims. L.F. 266. MSD appeals the trial court's entry of judgment on that verdict. L.F. 343.

Mr. Page's Injuries.

The incident that caused Mr. Page's injuries occurred on December 27, 1999, a cold, rainy day. Tr. 44, 51. MSD had contracted with Mr. Page's employer, Mulligan Construction, to construct a drainage ditch and replace a sewer line, under MSD's general supervision, in a St. Louis County subdivision. Tr. 80, 112, 123-24. On the day of the incident, Mr. Page and several co-workers were pouring the concrete floor of the drainage ditch. Tr. 47-48.

The concrete was brought to the ditch by a crane equipped with a large metal bucket attached to a metal cable that extended from the crane's boom. Tr. 48-49, 475. Concrete trucks delivered concrete to the worksite, the bucket would be filled, and the crane would then swing the bucket into the ditch. Tr. 48, 475. Mr. Page would catch the bucket, place it where he wanted the concrete dispersed, and release the concrete by pulling a lever that opened the bottom of the bucket. Tr. 49. The crane was positioned on the south side of the ditch, and south of several energized, high voltage overhead power lines owned by Ameren. Tr. 64. In order to transport the concrete to the pour site, the crane operator would boom up when filling his bucket, boom down when swinging under the power lines, and then boom up to deliver the concrete to Mr. Page. Tr. 48-49, 83, 272-73, 475. The workers, and two MSD representatives present at the site were

aware of the power lines and knew that the lines were energized. Tr. 64, 112, 159-60. In fact, as is discussed more fully below, shortly before the accident, the MSD inspector, Joseph Campisi, informed Robert Dillman, his supervisor and MSD's manager of construction, that the crane was coming too close to the lines, creating a very dangerous, potentially fatal situation. Tr. 159-60, 163. Neither Campisi nor Dillman made any effort to halt the work. Tr. 166, 316.

Shortly after 3:00 p.m., as Mr. Page was catching the bucket, the crane came into contact with a 34,000 volt energized overhead power line. Tr. 53. Electricity transferred from the power line to the crane, ran down the cable that extended to the metal bucket, and energized the bucket. Tr. 53. Mr. Page saw a bright flash and heard a loud boom, and then blacked out. Tr. 53. He later realized that he had sustained a severe electric shock. Tr. 53. Before the incident, no one warned Mr. Page that the crane's boom was getting too close to the power lines. Tr. 53.

Mr. Page sustained severe burns to his extremities and his torso, resulting in the amputation of both of Mr. Page's hands approximately four inches below the elbows, and the amputation of his left leg above the knee. Tr. 56. Mr. Page also lost dorsiflexion in his right foot, requiring the use of a special brace with springs that lift his foot so he can walk. Tr. 58. At the time of the accident, Mr. Page was thirty-four years old and recently married. Tr. 40-41.

The Construction Contract Between MSD and Mulligan.

In 1998, the trustees of Antoinette Hills Subdivision granted MSD an easement to construct and maintain a drainage ditch and sewer system in the subdivision's common

ground. Tr. 121; Ex. 2. The subdivision trustees also granted MSD a temporary construction license for the work. Tr. 124. Mulligan and MSD entered into the contract to perform the construction work in 1999. Ex. 1.

The contract between MSD and Mulligan incorporated a "black book" of standard construction specifications for sewers and drainage facilities. Tr. 119; Ex. 1a. Mr. Dillman testified that he was unaware of any provision of the black book that was not part of the contract. Tr. 119.

The contract required all work to be done in the presence of an MSD district inspector unless otherwise specifically authorized. Tr. 149-50; Ex. 1a at 8. The work was to be performed at the locations and in the order of precedence as MSD's director – its president – required. Tr. 144, 151; Ex. 1a at 9. MSD's director and inspectors were "authorized to enforce compliance with [the project's] plans and specifications, to determine the acceptability of materials and workmanship, and to prepare and process progress and final payment estimates." Tr. 147; Ex. 1a at 6.

The contract required Mulligan's authorized representative in charge of the work to be present at the site at all times while work was in progress. Ex. 1a at 13. The authorized representative would receive orders and communications from MSD. Ex. 1a at 13. Mulligan was required to perform "all work contemplated and described in these specifications . . . in accordance with the detailed drawings and all directives" given by MSD during the progress of the work. Ex. 1a at 4.

With respect to the means and methods of performing the work, the contract required Mulligan to use equipment that would assure performance of the work in

accordance with the contract's specifications. Tr. 149; Ex. 1a at 7. Mulligan's president, Jerry Kloeppel, testified that he believed Mulligan chose the means and methods of how to do the job. Tr. 494. Mr. Dillman testified that Mulligan was generally responsible for selecting the means and methods of performing work. Tr. 157. However, he acknowledged that MSD had, on occasion, exercised the right to change the equipment:

> MR. VIRTEL: …Whether it's bid work or force account work, you have a right to tell the contractor to change his equipment if you don't think it's getting the job done safely and consistently with the specifications, correct?
>
> A. In general, the means and methods are those that the contractor selects.
>
> Q. (By Mr. Virtel): I understand that. But if you disagree, if you think that what they're using is not letting them deliver the work that you've asked for, perform up to the specifications or otherwise are operating inconsistent with the terms of that black book, you have a right to tell them to change the equipment?
>
> A. I don't know –
>
> Q. And you have –
>
> A. -- where it says that.
>
> Q. And you've done that, haven't you?
>
> A. Yes, we have.

Tr. 157.

The contract obligated Mulligan to retain only competent superintendents, foremen, mechanics and laborers. Tr. 155; Ex. 1a at 13. Any person employed on the job who, in MSD's opinion, was intemperate, incompetent, troublesome, or otherwise undesirable and who failed or refused to perform the work in the manner specified in the contract was to be immediately discharged, and could not be re-employed on the project without MSD's consent. Tr. 155; Ex. 1a at 13.

Section D of the contract, titled "Control of Work," discussed the authority of MSD's district representative. Tr. 277-78, Ex. 1a at 5-6. It gave the district representative authority to suspend work in the event of a disagreement between Mulligan and MSD, and ultimate authority to resolve the dispute: "In the event of a dispute between the Contractor and the inspection representative, the latter is authorized to reject materials or to suspend work until the question at issue can be referred to and decided by the Director." Tr. 278, 147; Ex. 1a at 6. Mr. Campisi claimed that, despite this contract language, "As far as I know, I was told – I mean I did not have the authority to shut a job down for any reason." Tr. 326. He admitted that he made a conscious choice not to stop the dangerous work at the site:

> Q. And so in this case, even though; I understand your interpretation, but even though in this case you can suspend work, you made a conscious choice not to talk to Mr. Kloeppel who you knew was in charge down there, not to call it to his attention, not to call it to the crane operator's attention, not to call it to the attention of the guys in the ditch, all the people directly involved. And you

made a decision to tell your boss [Mr. Dillman], look out and then leave the job site, right? That was a decision you made that day?

A. Yes.

The contract required Mulligan to be fully informed of and comply with all federal, state, and municipal laws, ordinances, and regulations that affected the safety of the public and those employed on the project. Tr. 152-54; Ex. 1a at 12. One such state law is the Missouri Overhead Power Line Safety Act (OPLSA), which prohibits the operation of construction machinery within ten feet of energized overhead power lines:

> Unless danger against contact with high voltage overhead lines has been guarded against as provided by section 319.083, no person, individually or through an agent or employee, shall store, operate, erect, maintain, move or transport any tools, machinery, equipment, supplies or materials or any other device that conducts electricity, within ten feet of any high voltage overhead line, or perform or require any other person to perform any function or activity upon any land, building, highway or other premises, if at any time during the performance thereof it could reasonably be expected that the person performing the function or activity could move or be placed within ten feet of any high voltage overhead line.

§ 319.080 RSMo. As noted above, the contract provided that "the director and his inspection representatives are authorized to enforce compliance with plans and specifications." Tr. 147. Mr. Dillman, MSD's manager of construction at the project, testified that he was "a designee of the director in these plans and specifications," and

could "act as the director, when appropriate, in these plans and specifications." Tr. 112, 144-45. He testified that the MSD inspectors' job was "to see that the contractor followed the contract and the plans and specifications." Tr. 137-38. He testified that Mulligan's failure to comply with the OPLSA would be conduct contrary to the contract's specifications. Tr. 154-55.

The meaning of the contract was a main topic of MSD's opening statement at trial. MSD's comments about the contract included the following statements:

> The contract between MSD and Mulligan set forth the rights and obligations and understanding of who was gonna do what. Under the contract, it says that the control of the work shall be – be the contractor's for the entire project. It says under the responsibilities of the contract that the contractor, Mulligan Contracting Company, Tony Page's employer, must keep – keep informed of all safety laws and observe them. And Mulligan Contracting Company under the contract must give adequate notice in writing to all owners or occupants of the property including utilities. It also says, if the method of operation for the construction of the sewers or this channel that they were building requires the removal and replacement or protection of any overhead wires or poles, the contractor, Mulligan Construction Company, shall make satisfactory arrangements for such work with the owner of such wires and poles, AmerenUE. There was no misunderstanding out there on December 27th, 1999, as to whose job it was to contact AmerenUE to

cover or disable or de-energize these high power overhead lines, if Mulligan felt that needed to be done. (Tr. 32-33).

***

There was no misunderstanding that the means and methods of how Mulligan chose to do their job, to lay this sewer channel, was up to them. The only function MSD had in sending inspectors out to the scene was not to advise on safety practices, not to tell Mulligan and their employees how to lay the concrete but simply to ensure that Mulligan was performing under the contract; building this sewer channel to the correct plans and specifications of the contract. (Tr. 33)

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Not to tell them what type of equipment to use, not to tell them how their safety practices should be; not to tell them how to notify utility companies if, in fact, that needed to be done in Mulligan's estimation. (Tr. 33-34)

***

[Mr. Campisi] noticed that it looked like the crane was getting kind of close to those wires. He has no obligation or nor can he under the contract, go down; tell the contractor stop. It's the contractor's job. He's been given a contract. Mulligan was given a contract. Tony Page and his employer were given this contract to do the job. It's up to them

to see how they do the job so long as it meets the plans and specifications. (Tr. 34-35).

Ameren made two references to the contract in its opening statement. It stated that the contract required an MSD inspector on site while Mulligan performed its work (Tr. 26), and "we believe the contract will demonstrate" it was Mr. Dillman's job to do something when he became aware of the dangerous work practice. Tr. 29.

Ameren called Mr. Dillman to testify in its case in chief. During Ameren's direct examination, several contract provisions relating to MSD's authority at the job site were displayed to the jury. Tr. 142-54. In MSD's cross-examination, Mr. Dillman testified that MSD would only have the right to direct a change in equipment in a "force account" contract – a contract done on a time and material basis – and "not under bid work." Tr. 171. He testified that the contractor could use whatever method, labor and equipment he chose, as long as the end product met the plans and specifications. Tr. 173. He testified that the contract placed responsibility for job safety on Mulligan. Tr. 176-177, 180.

In Ameren's redirect, Mr. Dillman admitted that MSD's authority to enforce Mulligan's compliance with the contract's specifications included the contract's provisions requiring compliance with all Missouri safety requirements. Tr. 183. He stated that it would be "absurd" to suggest that MSD would not have the right to interfere if Mulligan was engaging in a practice that could hurt its workers. Tr. 185. Alfred Brooks, MSD's inspector supervisor at the time of the accident, similarly testified that he relied on MSD's onsite inspectors to make sure a job site was safe, and that the inspector had the right to stop the work if he felt it was unsafe. Tr. 191-92. When asked whether

he had "the authority as an inspector supervisor to stop a job if you didn't think it was safe?", Mr. Brooks stated, "I guess I did." Tr. 191.

The Power Lines at the Project Site.

Ameren uses high voltage overhead power lines to transmit large quantities of electricity from power plants to substations, and then to customers. Tr. 353. The lines are placed overhead by attaching them to towers. Tr. 356-57. The power lines on the right side of the tower are transmission wires, and carry 138,000 volts of electricity. Tr. 354, 360. Those on the left side (the ditch side), the sub-transmission wires, carry 34,000 volts. Tr. 354, 357-58, 360. The sub-transmission wires deliver electricity to a substation, which steps down the voltage, and then to poles with transformers that further reduce the voltage for use in homes. Tr. 361.

Voltage is the force that pushes electrical current through the wire. Tr. 355. When someone is injured by shock from electrical current, the voltage is the force that pushes the current into the body. Tr. 355. When the crane's boom hit the 34,000-volt overhead wire, the voltage driving the electricity to the bucket was 19,900 volts. Tr. 359-60.

Air acts as an insulator of electricity, not a conductor; electricity does not "jump" through the air. Tr. 369. If someone held a copper rod several feet, or even a few inches, from an energized, 34,000 volt sub-transmission line, the electricity in that line would not jump from the line to the copper rod. Tr. 368. Electricity might travel from the sub-transmission line to the copper rod only if the rod were placed a fraction of an inch from the line. Tr. 368. The fact that air is an insulator allows electric companies to run bare

overhead power lines. Tr. 369. Jeffrey Hartenberger, Ameren's managing supervisor of line design, testified at trial that it would be technically impossible to cover all overhead power lines with additional insulation, because insulation would make the lines too heavy. Tr. 369. This is why every utility in the United States has bare overhead systems. Tr. 370.

The National Electrical Safety Code required Ameren to place its 34,000-volt line at least fourteen and a half feet from the ground. Tr. 387. Ameren placed the line forty-two feet above the ground, almost triple the Code's clearance requirement. Tr. 387.

Testimony conflicted as to whether Ameren was asked to de-energize or cover the overhead power lines before the work began. Ameren denied that any such request was ever made. Mr. Hartenberger testified that he spoke with Mulligan's president, Jerry Kloeppel, about removing a utility pole west of the accident site in the path of the proposed sewer installation, but that Mr. Kloeppel never asked him to de-energize or cover any overhead lines. Tr. 371-73, 334-36. Mr. Kloeppel's concern in his conversation was that if the poles were not moved quickly enough, it would slow down his construction. Tr. 372-73. Had Mr. Hartenberger received a call to cover the lines, he would have informed Mr. Kloeppel that it was the operating department's decision, not his, and that Mr. Kloeppel had to call Ameren's call center with information on the location of the line. Tr. 373. Mr. Hartenberger also testified that he checked the records from Ameren's call center, and did not find a record of any call allegedly requesting a cover on the lines. Tr. 389-90, 394-95. However, Mr. Hartenberger acknowledged the

possibility that Mr. Kloeppel might have called Ameren and spoken to someone about de-energizing the lines, but the call was never recorded. Tr. 395.

Michael Toennies was an energy services consultant at Ameren in December, 1999. Tr. 333. He testified that in November of 1999, he was asked to get involved in a project to move a pole, and was given a note to call Mr. Kloeppel. Tr. 333-34. He called Mr. Kloeppel, the men discussed relocating a utility pole west of the accident site, and they met on the property where the pole was located. Tr. 333, 337. Ameren relocated the pole sometime before December 14. Tr. 339. Mr. Toennies testified that Mr. Kloeppel never asked him to de-energize or cover the lines at the work site. Tr. 340.

Jerry Kloeppel testified that he was aware of the OPLSA. Tr. 502. He testified that he made four calls to Ameren – two on November 16 and two on November 17 – and talked to someone about de-energizing or covering the lines. Tr. 480-81, 484-85, 488, 502. Mr. Kloeppel testified that it might have taken all four calls to reach the right person, and it was "quite possible" that he made additional calls from a different phone, "but I don't know." Tr. 489-90. The two calls on November 16 were to phone numbers 992-9711 and 992-9712. Tr. 484. When asked if he knew whose phone numbers these were, Mr. Kloeppel stated, "Other than that being Union Electric's phone number, I don't know." Tr. 484. The two calls on November 17 were to phone number 992-9722. Tr. 485. Mr. Kloeppel does not recall who he spoke to at that number, or whether it was a man or a woman, or what the person said. Tr. 486. In fact, 992-9722 was Mr. Toennies' phone number, and as noted above, Mr. Toennies testified that Mr. Kloeppel never asked him to cover or de-energize the lines. Tr. 340, 346.

Mr. Kloeppel testified that Ameren refused his request to cover or de-energize the lines. Tr. 501. He testified that he was "upset" by Ameren's response, and told everyone working on the project, including an MSD inspector, how upset he was. Tr. 490, 501.

Although Mr. Kloeppel testified that he called Ameren about the overhead lines, he admitted that he never told Ameren that the crane needed to come within ten feet of those lines:

> Q. Okay. When you called Ameren/UE on the 16th and 17th about line covers, did you tell them why you wanted the lines covered?
>
> A. Yes.
>
> Q. What did you tell them?
>
> A. Construction, MSD project under the wires, working with crane and so forth in the vicinity of their wires.
>
> Q. Well, did you tell them that you were going to get the work, the work necessitated you bringing that crane within 10 feet of the power lines?
>
> A. No.
>
> Q. Did you tell them your work would have necessitated bringing the crane within 15 feet of the power lines?
>
> A. No.
>
> Q. Did you tell Union Electric, when you talked to them, that you couldn't do the job safely unless they covered the lines?

A. No.

Tr. 501. In fact, there was no question that the job could be done safely without coming within ten feet of the lines. Mr. Kloeppel admitted that the crane could deliver the concrete without coming within even fifteen feet of the lines. Tr. 499-500, 502. He tested the crane before the concrete delivery, saw there was at least a fifteen foot clearance, and was satisfied that there was no danger. Tr. 476-77. Mr. Kloeppel never considered placing a "spotter" under the lines while the work was being performed to make sure the crane did not get within ten feet of the lines. Tr. 501. He "assumed the operator and Tony could handle it" because they had safely performed other jobs near power lines. Tr. 501. Mr. Kloeppel was so sure that the crane could safely deliver the concrete that, after the accident, he "went ahead and finished the last two loads in exactly the same manner," with a crane. Tr. 496-97. In addition, the evidence established that a crane was not the only means to deliver concrete to the ditch. Mulligan's employee, Robert Smith, and MSD's inspector supervisor, Alfred Brooks, both testified that the concrete could have been safely placed in the ditch with a pumper truck instead of a crane. Tr. 106, 192.

Ameren has the right to deny a request to de-energize or cover lines. Tr. 507. Mr. Hartenberger testified that the placement of the crane should not have presented any problem as long as Mulligan maintained the required ten-foot clearance. Tr. 391. The day after the accident, Ameren de-energized the overhead power line. Tr. 395-96. Mr. Hartenberger testified that as a result of the accident, "we knew that we had a situation out there." Tr. 396.

MSD's Presence at the Site on the Accident Date.

On December 27, Mr. Campisi was acting as the MSD inspector at the project site. Tr. 305-06. He learned that morning that Mulligan would be pouring and placing concrete in the ditch, and he knew that overhead power lines ran directly above the area. Tr. 307-08. At one point as the concrete was being placed, Alvin Harmon, an employee of Mulligan's subcontractor, noticed that the crane's boom was getting "pretty close to the wires." Tr. 83. He could see this from a thousand feet away. Tr. 83. One of Mulligan's employees, Robert Smith, also noticed that the crane was coming too close to the wires; he testified that it was within "a very few feet" of them. Tr. 103. One of the men told Mr. Campisi about the situation. Tr. 309-10. Mr. Campisi did not stop the work or speak with Jerry Kloeppel about the problem. Tr. 316. Instead, he approached a worker running the high lift, the "dirt man," and told him "it looks like they're getting pretty close to those lines." Tr. 316. Mr. Campisi knew that the dirt man was not in charge of the work. Tr. 316. The dirt man responded, "I think they know what they're doing." Tr. 330.

Robert Dillman arrived at the job site shortly before 3:00 p.m. Tr. 319. Upon Mr. Dillman's arrival, Mr. Campisi told him to be careful if he went near the ditch because there were live overhead wires close to the crane, and it was "dangerous down there." Tr. 159-60. Mr. Dillman, who considers himself an expert in the construction of drainage ditches and sewer systems, knew that if the crane's boom made contact with the overhead power line, the power line could release energy that would travel to the bucket and kill or

injure anyone who touched it. Tr. 111, 163. He knew the situation was potentially dangerous for the workers in the ditch. Tr. 163.

Mr. Dillman approached the area, did not observe the boom close to a wire at that moment, and therefore did nothing. Tr. 166. He did not investigate any further. Tr. 166. He believed that Mulligan was responsible for safety practices, and that if Mr. Page or his co-workers were facing a life-threatening situation, it was not his job to fix the problem:

> Q. All right. Now it's my understanding that it's your position that if there was something dangerous going on and Tony Page or its fellow workers were being exposed to death or serious injury, that wasn't your job or your problem. That was Mulligan's problem, correct?
>
> A. As far as the safety of that job site, it is Mulligan's job.

Tr. 160. Mr. Dillman left the area and walked away to inspect a manhole. Tr. 168. Mr. Page sustained his electric shock injuries approximately fifteen to twenty minutes after Mr. Dillman was informed of the crane's dangerous proximity to the lines. Tr. 168.

Testimony of Douglas Gransberg.

Ameren offered the testimony of Douglas Drake Gransberg, a civil engineer and professor at the University of Oklahoma. Tr. 219. Before becoming a professor, Dr. Gransberg was an officer in the Army Corps of Engineers from 1974 until he retired as a lieutenant colonel in 1994. Tr. 219-20, 236. He holds a bachelor's degree in civil engineering; a master's degree with dual majors, construction engineering management and transportation engineering; and a Ph.D. in civil engineering with a concentration in

construction engineering management. Tr. 218. During his twenty years of military service, he managed construction projects for the federal government in a number of states as well as internationally, including projects in Minnesota and North Dakota that were very similar to the MSD project. Tr. 216, 220-21, 223, 236. Dr. Gransberg served in positions of project engineer; resident engineer, where he supervised a number of project engineers; and area engineer, where he managed an entire project. Tr. 236-37. He served as construction manager on government projects in "either eleven or twelve" states "from the west coast to the east coast," and served as construction manager on projects in Germany, Saudi Arabia, Turkey, Greece, Kahzakstan, and the former Soviet Union. Tr. 239. In Saudi Arabia, he was the director of public works for nine military communities, where he was involved in the construction of buildings, roads, sewer systems, water lines, and power lines. Tr. 239. Since leaving the army, he had also done consulting work for departments of transportation and power companies. Tr. 222. He taught construction scheduling for a semester at Washington University, during which the class scheduled a Missouri construction project. Tr. 226.

Dr. Gransberg testified that the Corps of Engineers would sometimes use its own employees for the whole project, but that most work was done through contracting with civil construction companies. Tr. 237. He had served as the government's representative in the preparation of and bid specifications for construction contracts, in negotiating contracts, and in supervising contractors as they did work for the government. Tr. 238. Dr. Gransberg testified that custom and practice in the construction industry are generally national in scope. Tr. 221-22. Construction contracts have a uniformity about them

because the professional societies have done a good job of creating "the skeleton, if you will . . . of a model contract." Tr. 224.

Dr. Gransberg was retained to offer expert opinion evidence on custom and practice in the industry, including the standard construction specifications in the "black book." Tr. 222-23, 227-28. After MSD employees Alfred Brooks and Robert Dillman testified about what they believed the contract authorized, Dr. Gransberg gave the following opinions.

Dr. Gransberg testified that the contract between MSD and Mulligan was a fairly standard public works contract, with language and specifications very similar to standard public work contracts at the federal, state and local levels. Tr. 221-22, 258. Through the specifications, MSD reserved to itself the right to resolve any conflicts with utilities. Tr. 259-60. This opinion was based on contract language stating that utilities with facilities located within the project's right-of-way would have to complete installation, relocation, repair or replacement before the contractor commenced work. Tr. 260. Consistent with this language, before the work started, MSD sent project plans and specifications to utilities that might be impacted by the construction. Tr. 34, 133-35, 260-61. In addition, deposition testimony from Mr. Dillman established that MSD had paid for the relocation of Ameren utility poles that conflicted with the sewer's location. Tr. 261-62. The fact that MSD, rather than the contractor, paid for this relocation indicated that MSD had reserved a right to coordinate and resolve utility conflicts at its own expense and direction. Tr. 262.

Dr. Gransberg expressed the opinion that MSD retained a right to direct the contractor's means and methods of construction. Tr. 262. The "means and methods" include the tools and equipment that the contractor chooses to complete the work, such as the choice between using a crane or a pumper truck to deliver concrete. Tr. 263. Dr. Gransberg's opinion was based on the "very common" contract language directing that all work would be done in accordance with the detailed drawings and with all directives given by MSD during the work's progress. Tr. 264. His opinion was also based on the contract language stating that all work would be completed at such locations and order of precedence as MSD required; that all work had to be performed in the presence of an MSD inspector; and that Mulligan's authorized representative had to be present at the site to receive directives from MSD. Tr. 265-67, 268-69. In addition, Dr. Gransberg relied on MSD inspection reports showing that an MSD inspector had directed Mulligan as to the means and methods of collaring a pipe junction, and an MSD inspector had suspended work on a manhole until an issue could be resolved. Tr. 271.

Finally, Dr. Gransberg testified that MSD's inspector had the right to stop work if he observed a dangerous work practice. Tr. 273-74. His opinion was based on several provisions of the contract, including terms requiring MSD's presence while work was being performed; giving MSD the authority to suspend work and reject materials in the event of a dispute with the contractor; authorizing MSD to issue directives as to the work; requiring the contractor's compliance with safety laws and regulations; and authorizing MSD to enforce compliance with all specifications. Tr. 274, 276, 278. Based on these provisions, Dr. Gransberg would have expected the MSD inspector, upon learning of the

dangerous situation at the ditch, to direct Mulligan's authorized representative to cease work until Mulligan could comply with the OPLSA. Tr. 279. If Mulligan's representative had responded that he needed to continue the activity and get within ten feet of the overhead line, MSD's inspector had authority to suspend the work, and even dismiss Mulligan's representative. Tr. 279-80. Dr. Gransberg testified that the authority to dismiss supervisors or laborers at the site is custom and practice in the industry, and that he had exercised that authority on several occasions to remove supervisors who refused to follow directions. Tr. 281.

Proceedings in Court.

The OPLSA provides that if a violation of its provisions results in physical or electrical contact with any high voltage overhead power line, "such violation shall be a rebuttable presumption of negligence on the part of the violator in the event such violation shall cause injury, loss or damage." § 319.085, RSMo. The statute gives the public utility, Ameren, the right of contribution against the violator, "notwithstanding any other law to the contrary." *Id.* Ameren's cross claim for contribution was originally based on both the common law and the statutory right to contribution conferred by the OPLSA. L.F. 82, 86. Before trial, Ameren dismissed its common law claim, and proceeded solely on its OPLSA claim. L.F. 108, Tr. 533.

At the close of evidence, the trial court granted the motions for directed verdict filed by defendants Dillman and Campisi. Tr. 532-33, L.F. 267. Ameren's claim against MSD was submitted through an instruction that directed the jury to render a verdict for Ameren if it believed that the crane's operation could bring the boom within ten feet of

the lines; MSD knew or could have known of this operation; MSD failed to use ordinary care to stop the crane's operation; the crane's boom contacted the overhead line and Anthony Page was injured; and Ameren's settlement of the Pages' claims was reasonable. L.F. 258. The jury also was instructed to assess a percentage of fault against Ameren if it believed that Ameren maintained the lines; failed to use the highest degree of care to isolate or insulate the lines from reasonably foreseeable contact; and that this failure directly caused or contributed to cause damage to Anthony Page. L.F. 260.

When asked whether MSD had any objection to the instruction, its counsel stated, "Other than to the submissibility of the claim which it purports to send to the jury, I have one objection. And that is, I don't think it comports with the Overhead Power Line Safety Act in that it does not require a finding that MSD is a person within the definition of the Act. And I would propose that without the first element that would read, MSD contracted to perform any function or activity on land or activity to an overhead line, that is does not comply with the Overhead Power Line Safety Act." Tr. 521. The trial court overruled the objection and submitted Ameren's verdict director. Tr. 522.

The jury returned a verdict assessing Ameren twenty-five percent at fault and MSD seventy-five percent at fault for the damages Ameren paid in settlement. L.F. 266. The trial court entered judgment on the verdict, ordering that Ameren recover $4,500,000 from MSD. L.F. 274. The court subsequently denied MSD's post-trial motions to reduce the amount of the verdict, for judgment notwithstanding the verdict, and for a new trial. L.F. 34, 338. MSD appealed.

The court of appeals reversed the judgment. The court of appeals held that the trial court committed "gross evidentiary error" in admitting Dr. Gransberg's testimony. *Union Elec. Co. v. Metro. St. Louis Sewer Dist.*, __ S.W.3d __, 2007 WL 1341820 at *4 (Mo. App. E.D. May 9, 2007). The court of appeals also reversed the judgment on instructional grounds, even though MSD did not raise any instructional error on appeal. The court held that Ameren was required to submit and the trial court was required to give an instruction submitting MSD's duty to notify Ameren of work to be performed within ten feet of energized overhead lines, and to pay for safety precautions. *Id.* at *4. The court held that Ameren was required to give an agency instruction based on M.A.I. 13.06, as well as a verdict director based on M.A.I. 32.05 submitting, in the first paragraph, MSD's control over the work. *Id.* at *4-5. Finally, the court held that Ameren's loss subject to contribution was $4.5 million, rather than $6 million, and that on retrial $4.5 million should be submitted as Ameren's loss. *Id.* at *5. The court was apparently under the mistaken belief that Ameren had settled with Mr. Page for $6 million and received $1.5 million back from Mulligan. The court, however, denied Ameren's request to modify its opinion to accurately reflect the loss to be submitted on retrial.

This Court granted Ameren's application for transfer on August 21, 2007.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED MSD'S MOTION FOR JNOV BASED ON MSD'S ARGUMENT THAT IT IS NOT A "PERSON" UNDER THE OPLSA, BECAUSE IN HOLDING THAT MSD WAS AN ENTITY THAT "PERFORMS OR CONTRACTS TO PERFORM" AN ACTIVITY IN PROXIMITY TO AN OVERHEAD LINE, THE COURT FOLLOWED SETTLED RULES OF STATUTORY CONSTRUCTION BY GIVING MEANING TO EACH WORD USED, AND THE COURT APPLIED THIS MEANING TO THE FACTS.

The trial court correctly determined that MSD falls within the OPLSA's definition of a "person." This Court should reject MSD's argument that it was not subject to the statute.

A. Standard of Review.

Judgment notwithstanding the verdict should only be granted when all the evidence and the reasonable inferences to be drawn from it "are so strong against the prevailing party that there is no room for reasonable minds to differ." *Martin v. Missouri Highway and Transp. Dept.*, 981 S.W.2d 577, 579 (Mo. App. 1998). Where the trial court's ruling on a motion for JNOV is based on an issue of law, such as the construction of a statute, the court's conclusions are reviewed de novo. *Id.*; *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279-80 (Mo. banc 2007)

B. MSD is a "Person" Under Missouri's OPLSA.

The OPLSA defines a "person" as an individual or entity, including a governmental unit, "which *performs or contracts to perform* any function or activity

upon any land, building, highway or other premises in proximity to an overhead line." § 319.078 RSMo. (emphasis added). MSD argues that it does not satisfy this definition because it did not "perform" and did not "contract to perform" the sewer construction project. According to MSD, a landowner who contracts with a third party to have work performed does not "fall within either of these categories because such an entity neither 'performs' nor 'contracts *to perform*' that function or activity." App. Br. at 40. It argues that (1) Mulligan, not MSD, was the entity that actually "performed" the work, and (2) Mulligan, not MSD, was the entity that "contracted to perform" the work, because the term "contracts to perform" can only refer to an entity that actually performs the work pursuant to a contract. App. Br. at 47.

The trial court considered and rejected these same arguments. L.F. 333. The court found that MSD's interpretation of the statute was not only too restrictive, but also overlooked the fact that MSD had "substantial rights to control the step-by-step performance of the construction and that MSD had inspectors on the scene at the time Anthony Page was electrocuted." L.F. 333. The trial court was correct. MSD satisfied the statute's definition.

MSD's proposed interpretation assumes that the legislature inserted superfluous language in the statute. If, as MSD argues, a person who "contracts to perform" work under a power line can only refer to the person who actually performs the work, then the statute's definition of a "person" as an individual or entity that "performs or contracts to perform" the work contains an obvious redundancy: both terms refer to the person who actually does the work. The rules of statutory construction prohibit this interpretation.

When interpreting a statute, the Court presumes "that the legislature did not insert idle verbiage or superfluous language in a statute." *Civil Serv. Comm'n of St. Louis v. Members of the Board of Aldermen of St. Louis*, 92 S.W.3d 785, 788 (Mo. banc 2003). The Court does not favor "any interpretation rendering statutory language superfluous." *Schoemehl v. Treasurer of Missouri*, 217 S.W.3d 900, 902 (Mo. banc 2007). Where the legislature uses two different terms in the same statute, this Court presumes that it intended the terms to be given different meanings and effect. *City of Wellston v. SBC Communications, Inc.*, 203 S.W.3d 189, 196 (Mo. banc 2006). Thus, the terms "performs" and "contracts to perform" in the OPLSA are presumed to have different meanings and effect. This presumption makes the meaning of "person" clear: a "person" can be an entity that performs the work or an entity that contracts to have the work performed by someone else. The trial court's decision to apply the rules of statutory construction and ascribe meaning to the term "or contracts to perform" was absolutely proper. *See* L.F. 332-33.

Arizona's overhead power line statute, on which MSD heavily relies, contains language different from the OPLSA and does not compel a different conclusion. The Arizona statute does not define a "person" as someone who "performs or contracts to perform"; it defines "persons" as "those parties who contract to perform" an activity or function within six feet of a power line. *See* Ariz. Rev. Stat. § 40-360.43. Arizona's legislature might have decided to place safety responsibility on the entities that perform the work, as the court in *Arizona Public Service Co. v. Shea*, held. 742 P.2d 851, 854 (Ariz. Ct. App. 1987); *see also* App. Br. at 43-44. But the Arizona court's interpretation

of an Arizona statute that uses language distinct from the language in Missouri's OPLSA, and the court's application of this statute to a different fact situation (discussed below), has no bearing on MSD's liability and certainly is not binding on this Court. The language of Missouri's OPLSA is broader than Arizona's. It plainly applies to persons who perform the work and those who contract with others to perform the work.

Furthermore, MSD is not in the same position as the defendant ranch owner in *Shea.* The Arizona Court of Appeals noted that the ranch owner was "not a 'person' who contracted to perform within the meaning of" the Arizona statute. *Shea*, 742 P.2d at 854. "Rather, [the ranch owner] simply contracted to have [the hay company] deliver hay to his property." *Shea*, 742 P.2d at 854. The court was reluctant to impose liability on the ranch owner for this activity, reasoning that this would not serve the legislative intent of promoting safety because a homeowner is generally not familiar with the contractor's work procedures, and "is not likely to be able to control the conduct of the employee who is working near the overhead line." *Id.* at 855. Also, because the homeowner generally is unfamiliar with the employer's regular course of activity, he "cannot be said to have 'required' the employee" to come within the space limitation. *Id.* As MSD points out in its brief, however, the Arizona court did believe that the statute was intended to impose liability on those who were in a position to prevent a statutory violation. It stated that the performing party would have knowledge of its employees' work habits and equipment, would be able to assess the danger of violating the statutory prohibition, would have control over the employee who is in close proximity to the line, "and *can order that employee not to violate the statutory prohibition.*" *Id.* at 855 (emphasis added); App. Br.

at 45. The court believed that the statutory prohibition was intended to encourage those persons with control to "establish routine safety procedures that will minimize the risk of accidental contact." *Id.*

MSD was clearly in a position to prevent a statutory violation. Unlike the ranch owner in *Shea*, MSD contracted for the performance of work that is part of MSD's daily operation – the construction of a drainage ditch. In fact, Mr. Dillman testified that he considers himself an "expert in the construction of drainage ditches and sewer systems." Tr. 111. There is no suggestion in *Shea* that the ranch owner contractually reserved to himself authority to direct the hay company's work procedures. MSD, on the other hand, required Mulligan to perform its work in the presence of MSD's inspectors, and required Mulligan to have an authorized representative on-site to take directives from MSD. Ex. 1a at 8, 13; Tr. 149-50. MSD reserved the right to enforce its project specifications, and to stop the work if those specifications – including applicable safety statutes – were violated. Ex. 1a at 6. MSD had actual knowledge that OPLSA was being violated at the site, and knew that this created a potentially life threatening situation, but made a conscious decision to walk away and not exercise its authority to prevent the violation. If the Arizona court had confronted this fact situation in *Shea*, it is quite possible the court would have imposed liability.

MSD also attempts to support its argument with a three-page string cite of overhead power line safety statutes from other states. App. Br. at 46-48. A review of the parentheticals following each citation shows that *none* of these statutes contains language identical Missouri's OPLSA. MSD claims that "these statutes overwhelmingly apply

only to those directly responsible for performing the work personally or through their employees or agents." App. Br. at 46. Whether this is correct in the context of the fact situation presented here is anybody's guess; MSD does not cite any case applying any of these statutes to a fact situation where an entity with expertise in the work had authority to stop the unsafe conduct and chose not to do so. *See, e.g. Green v. Moreland*, 407 S.E.2d 119, 122 (Ga. App. 1991), cited at page 49 of appellant's brief (the county had no liability as the owner or occupier of land, because it had relinquished possession and control of the work site to its independent contractor). However, it is evident from the language of every one of these statutes that the purpose of overhead power line safety statutes is *safety*; to prevent injury or death from contact with overhead lines, and to impose liability on those entities who are in a position to control the activity and prevent the violation. MSD was in a position to control the activity and prevent the violation.

Furthermore, even if the OPLSA's definition of "person" was limited to an entity that "performs" work in proximity to an overhead line, MSD's argument would fail. As the trial court found, MSD reserved to itself a substantial amount of authority over the project, including the authority enforce safety regulations, suspend work, resolve disputes, fire and rehire workers, direct the sequence of work, and reject materials. L.F. 333; Tr. 144, 147, 151, 154-55, 271, 278; Ex. 1a at 6, 8, 9, 13. MSD was "performing" the work as surely as Mulligan was performing it.

MSD would have this Court hold that, under the OPLSA, an entity "performs" work only if its employees do the heavy lifting, and that directing and controlling the work has nothing to do with its "performance." But the trial court correctly found that

this interpretation is contrary to the statute's safety purpose and too restrictive. MSD was subject to the OPLSA.

C. <u>The trial court's interpretation advances the OPLSA's purpose.</u>

Because the OPLSA's purpose is to promote safety and protect life and property, it must be liberally construed. *Eastern Missouri Laborers' Dist. Council v. City of St. Louis*, 5 S.W.3d 600, 602 (Mo. App. 1999). A liberal (and literal) construction of the OPLSA advances the statute's purpose by placing responsibility for public safety on *both* those who perform the work and those who enter into contracts to have the work performed.

MSD argues that this construction of the OPLSA is actually detrimental to the statute's safety purpose because it "shift[s] the Act's focus from those actually performing the work to those hiring others to do the work"; "creates confusion" as to who is responsible for safety; and "shifts responsibility" from those knowledgeable about safety to those less knowledgeable. App. Br. 50. MSD makes no effort to explain how placing responsibility for safety on those who "perform or contract to perform" work – in accordance with the statute's plain language – "shifts" the Act's focus. MSD also offers no explanation as to why shared safety responsibility is "confusing" or tantamount to a "shift" in responsibility. MSD's arguments also do not fit the facts of this case. MSD certainly was not "less knowledgeable" than Mulligan about the work. MSD was an expert in the work. MSD was not "confused" about responsibility for safety. It admittedly had authority to enforce the contract's safety specifications, including the

OPLSA, it knew that the crane was not operating safely, and it knew the crane's operation could grievously injure or kill the workers in the ditch.

Clearly, Mulligan had primary responsibility for project safety. But when MSD had *actual knowledge* that Mulligan was directing work in a manner in direct violation of OPLSA and putting employees in harm's way, MSD, through Dillman, had an affirmative duty to act to protect Anthony Page, and not affirmatively to walk away.

MSD again relies on *Arizona Public Service Company v. Shea, supra*. App. Br. at 57-58. As discussed above, *Shea* is neither binding nor on point. MSD's argument that the OPLSA imposed no obligation on MSD to ensure Mulligan's safe performance of the work, or even to inform Mr. Page that his life was in danger, urges a construction of the statute directly at odds with its purpose.

D. MSD was not entitled to JNOV based on an instructional issue that MSD never raised at trial or on appeal, and the failure to submit an issue that the OPLSA does not require.

Relying on the Court of Appeals' opinion, MSD argues that Ameren should have submitted its case on a respondeat superior theory of vicarious liability. App. Br. at 54. MSD apparently agrees with the Court's determination that the trial court erred in failing to given an agency instruction under MAI 13.06. App. Br. at 54. To the extent that MSD now attempts to raise a new instructional issue in its appeal, its argument should be rejected. Rule 83.08 prohibits an appellant from raising new claims of error in this Court: "The substitute brief . . . shall not alter the basis of any claim that was raised in the court of appeals brief." MSD never raised a claim at trial or in the court of appeals that

Ameren was required to submit a respondeat superior theory under MAI 13.06, and it cannot do so now.

Furthermore, the Court of Appeals was wrong. There is no language in the OPLSA that required Ameren to prove MSD's control over Mulligan or the work, or to submit an OPLSA contribution claim under an agency theory. The court of appeals does not point to any such language in its opinion. Also, Ameren did not argue that an entity's general control over a contractor will, in every case, give rise to a right of contribution under OPLSA. Ameren's contribution claim was based on the facts of this case – an entity who reserved authority to issue directives and enforce safety laws and regulations had actual knowledge that a life threatening safety violation was occurring, and admittedly chose not to stop the violation.

Ameren submitted its claim based on the statute's plain language stating that "notwithstanding any other law to the contrary," Ameren has a right of contribution against any "person" who violates any of the statute's provisions. For the reasons discussed above, MSD is a "person" who violated the statute, resulting in damages to Ameren. Ameren therefore had a statutory right of contribution.

The trial court properly applied the OPLSA to MSD. The trial court's judgment should be affirmed.

II. THE TRIAL COURT PROPERLY DENIED MSD'S MOTION FOR JNOV BASED ON MSD'S ARGUMENT THAT AMEREN'S CLAIM WAS GOVERNED BY COMMON LAW CONTRIBUTION PRINCIPLES. IN ACCORDANCE WITH THE LANGUAGE OF THE OPLSA AND CASE LAW CONSTRUING IT, THE COURT CORRECTLY DETERMINED THAT THE STATUTE CREATED A SEPARATE STATUTORY DUTY RUNNING FROM MSD TO AMEREN AND GRANTED AMEREN A RIGHT OF CONTRIBUTION "NOTWITHSTANDING ANY OTHER LAW TO THE CONTRARY."

The Court should deny MSD's Point II. MSD's arguments are based on common law principles not applicable here. The trial court properly applied the OPLSA's plain language granting Ameren a right to contribution "notwithstanding any other law to the contrary."

A. <u>The OPLSA created a duty running from MSD to Ameren.</u>

The OPLSA, not common law, created and governed Ameren's contribution claim. The OPLSA imposes a duty to either refrain from bringing equipment within ten feet of a utility's energized overhead line, or to notify the utility when work must be performed within that space limitation and make arrangements to cover or de-energize the lines. §§ 319.080, 319.083 RSMo. The statute therefore establishes a separate, "independent statutory duty" from the "person" *to the utility* to satisfy the statute's requirements. *See State ex rel. Safety Roofing Sys., Inc. v. Crawford*, 86 S.W.3d 488, 493-94 (Mo. App. 2002). A violation of this duty resulting in physical or electrical contact with any high voltage overhead line "shall be a rebuttable presumption of

negligence on the part of the violator in the event such violation shall cause injury, loss or damage." § 319.085 RSMo. The statute creates a duty running from "persons" to the utility, and permits a utility to recover damages paid to injured third parties resulting from the violator's breach of the duty to the utility: "notwithstanding any other law to the contrary, the public utility shall have the right of contribution against any such violator." § 319.085 RSMo; *Crawford*, 86 S.W.3d at 493-94.

In *Crawford, supra*, the Court of Appeals confronted the issue of whether the utility's statutory right of contribution could be limited by other laws. The plaintiff in that case, an employee of Safety Roofing Systems, received workers' compensation benefits for injuries he sustained when a piece of metal trim he was handling contacted an overhead line owned by the City of Carthage. *Crawford*, 86 S.W.3d at 490. After settling his workers' compensation claim, the employee sued the city. *Id.* The city filed a third party claim against Safety Roofing seeking contribution under the OPLSA. *Id.*

Similarly to MSD here, Safety Roofing argued that its payment of benefits pursuant to the Workers' Compensation Law (WCL) extinguished its liability, and that the WCL's exclusivity provisions therefore barred the City's contribution claim. *Crawford*, 86 S.W.3d at 493. The Court of Appeals rejected this argument. The Court properly presumed that the legislature was aware of the Act's exclusivity provisions when it made the OPLSA applicable to "any entity" and "any party" that violated its provisions. *Id.* at 493. The legislature "mandated contribution as a penalty for violation of the OPLSA *notwithstanding any law to the contrary.*" *Id.* (emphasis in original). In view of the legislature's clear mandate, the Court of Appeals held that "the OPLSA

allowed City to seek contribution from Employer based on City's allegation that Employer violated its independent statutory duty to notify City that its employees would be working within ten feet or less of City's line." *Id.* at 493-94 (emphasis added).

The Court in *Crawford* relied in part on *McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co.*, a case in which this Court recognized an exception to the exclusivity provision of the Workers' Compensation Law (WCL). 323 S.W.2d 788 (Mo. 1959). In *McDonnell*, a non-employer defendant was permitted to bring an indemnity action against the employer, based on the employer's breach of a contractual duty. *Id.* at 795-96. This Court held that the WCL released the employer from all liability for personal injury or death of the employee, but did not release the employer "for breach of an independent duty or obligation owed to a third party by an employer whose liability for injury to his employee is under the compensation act." *Id.* at 796 (emphasis added). The Court of Appeals in *Crawford*, applying this reasoning to the OPLSA, held that the OPLSA, like the contract in *McDonnell*, imposed an independent duty running from the defendant to the utility. *Crawford*, 86 S.W.3d at 493. Consequently, an action under the OPLSA is "comparable to the contractual indemnity actions that the Supreme Court of Missouri has recognized as an exception to the exclusivity provisions of the WCL." *Id.* The Court of Appeals thus held that the WCL limits an employer's tort liability to its employee, but it does not immunize or limit the liability of an employer that breaches its statutory duty to the utility.

Similar reasoning applies here. MSD's payment to the Pages did not extinguish its liability to Ameren, because its liability stemmed from the breach of its duty to Ameren under the OPLSA.

B. Ameren's contribution claim was not limited by other statutes or common law.

Throughout its Point II, MSD ignores the fact that the OPLSA creates an independent statutory duty. MSD argues that Ameren's contribution right was limited by common law principles and statutes that are not part of the OPLSA, despite the OPLSA's grant of that right "notwithstanding any other law to the contrary." Common law principles and statutes that might limit or eliminate Ameren's contribution rights under the OPLSA are laws contrary to that right. *See Crawford,* 86 S.W.3d at 493.

As support for its arguments, MSD cites *Ozark Wholesale Beverage Company v. Supervisor of Liquor Control*, 80 S.W.3d 491 (Mo. App. 2002) and *White v. American Republic Ins. Co.*, 799 S.W.2d 183 (Mo. App. 1990). Neither case has anything to do with the duty created by the OPLSA, and to the extent they apply at all, they aid Ameren.

Ozark Wholesale involved the interpretation of several statutes in Chapter 311 governing the sale of alcohol. Section 311.200.2 permitted the sale of malt liquor with an alcohol content of up to five percent; section 311.290, which set forth a time limitation for liquor sales, prohibited the sale of liquor between 1:30 a.m. Sunday and 6:00 a.m. Monday; and section 311.293.1 permitted liquor sales on Sundays. *Ozark Wholesale*, 80 S.W.3d at 498. The defendant retailer argued that the Sunday sales statute permitted the sale of all liquor on Sunday, regardless of alcohol content, because it began with the words "Notwithstanding the provisions of section 311.290 or any other law to the

contrary." *Id.* at 498. The Court of Appeals disagreed, noting that the statute explicitly referred to the time limitation in section 311.290: "Thus, reading § 311.293.1 in conjunction with § 311.290, as we must, given the express language of § 311.293.1 directing us to § 311.290, it is clear and unambiguous that the legislature only intended for the provisions of § 311.293.1 to affect 'when' intoxicating liquor that was licensed under § 311.200 could be sold, not 'what' intoxicating liquor could be sold." *Id.* at 498. The court reasoned that its interpretation was in "complete harmony" with the provisions of Chapter 311 limiting the issuance of Sunday sales licenses to those possessing the qualifications and meeting the requirements of the chapter. The court correctly concluded that these statutes simply permitted Sunday sales of whatever type of alcohol a vendor was licensed to sell. *Id.*

In *White*, the court of appeals was asked to determine what misrepresentations on an insurance policy would permit rescission. The plaintiff in that case was over-insured; he had numerous accident and health policies that he failed to disclose to defendant American Republic when he obtained policies from them. *White*, 799 S.W.2d at 186. Two statutes relating to misrepresentations were at issue. Section 376.783.3 provided that a false statement in an insurance application would not bar recovery under the policy "unless such false statement materially affected either the acceptance of the risk or the hazard assumed by the insurer." *Id.* at 187. The later-enacted section 376.800 stated, "Anything in the law to the contrary notwithstanding," a misrepresentation made in obtaining an insurance policy would not "render the policy void, or constitute a defense to a claim thereunder," unless the matter misrepresented actually contributed to the event

on which the claim would be payable. *Id.* American Republic argued that section 376.800 applied to misrepresentations about health conditions, while section 376.783.3 applied to misrepresentations like those made by the plaintiff. *Id.* at 189. The court rejected this argument: "Section 376.800 is the current expression of the legislature on the subject. To the extent § 376.783.3 conflicts with that view, enactment of § 376.800 has repealed § 376.783.3. The words 'anything in the law to the contrary notwithstanding . . .' found in § 376.800 confirms this court in that view." *Id.*

In contrast to the liquor laws discussed in *Ozark Wholesale*, the OPLSA does not reference any statute restricting Ameren's right to contribution. Instead, it permits the right notwithstanding any contrary law. Furthermore, consistent with the reasoning in *White*, the words "notwithstanding any law to the contrary" demonstrates that any law inconsistent with Ameren's right to obtain contribution for its loss is effectively repealed in an OPLSA claim.

In fact, the reasoning in *White* is consistent with this Court's reasoning in a very recent case, *State ex rel. City of Jennings v. Riley*, ____ S.W.3d ____, 2007 WL 3147313 (Mo. banc, October 30, 2007). In *Riley*, two venue statutes facially applied to the action, section 508.010.4, the general venue statute for tort cases, and section 508.050, which governs venue in cases against municipal corporations. *Riley*, 2007 WL 3147313 at *1. In contrast to section 508.050, however, section 508.010.4 expressly applies "notwithstanding any other provision of the law." *Id.* Based on this prefatory language, this Court held that venue against the City of Jennings was properly lodged in the City of St. Louis, where the alleged injury occurred. *Id.* at *2. The Court reasoned that "to say a

statute applies 'notwithstanding any other provision of the law' is to say that no other provisions of law can be held in conflict with it. Indeed, the 'Notwithstanding' clause does not create a conflict, but eliminates the conflict that would have occurred in the absence of the clause." *Id.* The Court also rejected the relator's argument that applying the tort venue statute effected an implied repeal of section 508.050: "But neither the circuit court nor this Court hold that section 508.050 has been repealed by implication because that section is still applicable in all actions against a municipality other than actions in tort." *Id.*

As in *White* and *Riley*, no provision of the law can be held in conflict with Ameren's contribution rights under the OPLSA. While those laws are applicable in other types of cases, they are not applicable to a utility's claim under OPLSA. Ameren was entitled to seek contribution of its entire $6 million net settlement.

Citing *Fetick v. American Cyanamid Co.*, 38 S.W.3d 415 (Mo. banc 2001), MSD argues that the "settlor-barred" doctrine required Ameren to "discharge MSD's liability when it settled with the Pages" in order to pursue its contribution claim. App. Br. at 59. *Fetick*, however, is readily distinguishable; it dealt with common law contribution. *Fetick* did not involve the unique situation presented here – a right of contribution based on a defendant's violation of a statutory duty to the party seeking contribution. Nothing in the OPLSA required Ameren to extinguish MSD's liability to the Pages before seeking contribution from MSD for MSD's breach of its duty to Ameren.

MSD's argument that Ameren had to plead and prove the parties' "common liability" to the Pages is also misguided. App. Br. at 60. This argument is again based on

the common law rule that "non-contractual indemnity presupposes actionable negligence of both parties toward a third party," and therefore the party seeking contribution must assert its own liability. *See Stephenson v. McClure*, 606 S.W.2d 208, 213 (Mo. App. 1980); App. Br. at 60. Ameren's contribution claim was not grounded in the common law notion of a shared duty to the plaintiff. It was grounded in a statute that (1) imposed a duty running from MSD to Ameren, and (2) contained no provision requiring Ameren to assert its own liability. The issue raised by Ameren's pleading was not whether Ameren paid more than its pro-rata share of the Pages' total damages, but whether some portion of Ameren's settlement damages was attributable to MSD's breach of its statutory duty to Ameren. The jury determined that Ameren – who was neither present at the project site nor informed that the work might bring the crane within ten feet of the line – was only twenty-five percent at fault for its damages.

MSD claims that under section 537.060, its settlement with the Pages either discharged it from any liability for contribution, or required a set-off of Ameren's damages in the amount of MSD's settlement with the Pages. App. Br. at 60-61. MSD is wrong. Section 537.060 calls for a reduction in the amount of the *plaintiff's* claim based on the *plaintiff's* partial compensation for breach of a shared duty to the plaintiff. It provides that when a release is given to a joint tortfeasor, "such agreement shall not discharge any of the other tortfeasors for the damage unless the terms of the agreement so provide; however such agreement shall reduce *the claim* by the stipulated amount of the agreement." § 537.060 RSMo. (emphasis added). The statute also bars a contribution claim against a settling joint tortfeasor: "The agreement shall discharge the tortfeasor to

whom it is given from all liability for contribution or noncontractual indemnity to any other tortfeasor." *Id.*

Section 537.060 does not apply to bar Ameren's claim because "the claim" in Ameren's case was based on the damages resulting from MSD's breach of its statutory duty to Ameren; Ameren was not in the position of a plaintiff who had received partial compensation, through settlement, with one of several joint tortfeasors, and therefore was subject to a set-off of those settlement amounts. *See Crawford*, 86 S.W.3d at 493-94. Section 537.060 also does not apply to give MSD a set-off for its own settlement with the Pages, because that settlement only extinguished MSD's liability to the Pages for MSD's breach of its common law duty to them. MSD's settlement did not extinguish its liability to Ameren for the breach of its statutory duty.

MSD argues that Section 537.060 is not a law that is truly contrary to the OPLSA. It states that Ameren could still have preserved its right of contribution, either by first extinguishing MSD's liability in Ameren's settlement with the Pages and then proceeding to seek contribution, or by pursuing its claim and having its damages reduced by the other settlements that the Pages received. App. Br. at 60. These arguments merely reiterate MSD's arguments discussed above, and again ignore the separate duty imposed by the OPLSA. MSD's claim that Ameren attempted to "circumvent § 537.060 by agreeing to pay the Pages 17% of any recovery obtained from MSD" is similarly groundless. App. Br. at 61. Ameren has not attempted to "circumvent" an inapplicable statute, and MSD offers no explanation of how Ameren's agreement with the Pages "circumvents" the statute.

The trial court correctly concluded that the OPLSA "establishes a separate cause of action between UE and MSD and . . . this cause of action is distinct from the underlying cause of action which arises out of Anthony Page's injuries at the jobsite." L.F. 333. The court correctly concluded that applying section 537.060 to bar Ameren's claim would be "contrary" to the OPLSA's grant of that right "notwithstanding any other law to the contrary." L.F. 333-34; *see also Crawford*, 86 S.W.3d at 493-94. This Court should deny MSD's Point II.

III. THE TRIAL COURT PROPERLY DENIED MSD'S MOTION TO REDUCE THE AMOUNT OF THE JUDGMENT PURSUANT TO THE DAMAGES CAP IN SECTION 537.610, BECAUSE GRANTING MSD THE BENEFIT OF THE DAMAGE CAP WOULD CONTRAVENE THE OPLSA'S LANGUAGE GRANTING AMEREN A RIGHT OF CONTRIBUTION AGAINST GOVERNMENTAL ENTITIES "NOTWITHSTANDING ANY OTHER LAW TO THE CONTRARY."

MSD argues that regardless of whether sovereign immunity was waived under the dangerous condition section in § 537.600(2), or whether the OPLSA overrides sovereign immunity, its damages are limited to $100,000 under the statutory damage cap set forth in section 537.610. MSD is wrong. Because the OPLSA overrides sovereign immunity, section 537.610 does not apply.

The fact that MSD waived sovereign immunity is settled. In the trial court, MSD alleged that it was "entitled to sovereign immunity pursuant to R.S.Mo. 537.600 et seq." L.F. 100. The trial court found that MSD did not have sovereign immunity from Ameren's claim under the OPLSA. L.F. 333-35. MSD has made no claim on appeal that it was entitled to judgment notwithstanding the verdict based on sovereign immunity under section 537.600; it claims only that its waiver of sovereign immunity is limited by the damage cap in section 537.610. The trial court's judgment that MSD was not entitled to sovereign immunity from Ameren's OPLSA claim therefore is final. *Flooring Sys., Inc. v. Staat Constr. Co.*, 100 S.W.3d 835, 838-39 (Mo. App. 2003).

MSD is not entitled to the damage cap for the same reason that it is not entitled to sovereign immunity; because the OPLSA explicitly permits Ameren to seek its damages from MSD. The damage cap in section 537.610 limits "the liability of the state and its public entities *on claims within the scope of sections 537.600 to 537.650*," to three hundred thousand dollars per person and $2 million per accident. § 537.610.2 RSMo (1999).[1] Section 537.600 codifies sovereign immunity "as it existed in this state prior to September 12, 1977," and expressly waives it in tort claims for (1) injuries resulting from the negligent acts or omissions of public employees arising from the operation of motor vehicles, and (2) injuries caused by the dangerous condition of a public entity's property. § 537.600.1 RSMo. Section 537.610, as noted above, relates to insurance for tort claims against the state and the cap on damages. The remaining sections, sections 537.615

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[1] MSD states that the damage caps established in 1999 would apply here. Resp. Br. at 65. This is incorrect. "[T]he date from which a court should determine the limitation on liability under Section 537.610 is the date of judgment." *Robinson v. St. Louis Bd. of Police Commissioners*, 212 S.W.3d 165, 166 (Mo. App. 2006). The judgment was entered in 2006. L.F. 285. If MSD were entitled to the caps in section 537.610, the current damage caps would apply. Furthermore, as Ameren noted in the trial court, before the occurrence, MSD apparently knew that its potential liability would not be restricted to the limits in section 537.610; it purchased insurance that exceeded the combined amount that MSD agreed to pay the Pages and the amount of the jury's verdict. L.F. 309-10.

through 537.650, relate to the timing of the act's provisions increasing the state's liability, and the creation of entities to provide insurance to the state. MSD's sovereign immunity was not waived through any of these statutes. Its immunity was waived through the OPLSA.

As discussed in Point I, the OPLSA defines a "person" as a "municipality, or governmental unit which performs or contracts to perform any function or activity upon any land, building, highway or other premises in proximity to an overhead line." § 319.078. The OPLSA creates a statutory duty running from the governmental unit to the utility. *State ex rel. Safety Roofing Sys., Inc. v. Crawford*, 86 S.W.3d 488, 493-94 (Mo. App. 2002). The OPLSA gives the utility a right of contribution against any governmental unit that violates the statutory duty, "notwithstanding any other law to the contrary." *Id.*, § 319.085 RSMo. The OPLSA's creation of a duty running from the government to the utility, and its language authorizing the utility to seek contribution from the government "notwithstanding any law to the contrary," constitutes a statutory waiver of sovereign immunity for MSD for claims covered by the OPLSA. The OPLSA therefore treats MSD the same as it treats every other person who violates its provisions. *See Bachtel v. Miller County Nursing Home Dist.*, 110 S.W.3d 799, 804 (Mo. banc 2003) (because the Omnibus Nursing Home Act expressly applies to nursing home districts, the act waives the district's sovereign immunity; "any other reading of the statute would treat nursing home districts differently from private nursing homes, contrary to the express intent of the legislature that the Act should be fully applicable to nursing home districts"); *H.S. v. Bd. of Regents, Southeast Mo. State Univ.*, 967 S.W.2d 665, 673 (Mo. App. 1998)

(the legislature made the Missouri Human Rights Act applicable to the state and its political subdivisions, and thereby waived the state university's sovereign immunity for claims made under the Act; the MHRA "treats the state and its subdivisions the same as it treats other employers"). Because any sovereign immunity that MSD might have enjoyed was waived pursuant to the OPLSA, section 537.610, by its terms, does not apply.

Furthermore, the OPLSA was enacted after, and therefore prevails over, section 537.610. As the trial court discussed in its judgment, *State ex rel. Safety Roofing Systems, Inc. v. Crawford*, 86 S.W.3d 488 (Mo. App. 2002) addressed a "parallel" question. L.F. 334. As noted in Point II, *Crawford* involved the apparent conflict between the OPLSA and the exclusivity provision of the Workers' Compensation Law which, like the damage cap, limits an employer's liability. *Id.* at 492. The Court of Appeals reconciled the conflict by applying settled rules of statutory construction. *Id.* The Court reasoned that when statutes conflict, "a chronologically later statute, which functions in a particular way will prevail over an earlier statute of a more general nature, and the latter statute will be regarded as an exception to or qualification of the earlier general statute." *Id.* Because "the OPLSA (which functions in a more particular manner) is the later enactment," it prevails over "the more general, earlier WCL enactment." *Id.* The Court held that "any different construction would require this court to presume the legislature, when enacting the OPLSA, gave no consideration to the existing law. This we will not do, nor will we presume that the legislature enacts meaningless provisions." *Id.* It held that the OPLSA allowed the utility to seek contribution for the employer's

violation, notwithstanding the immunity and limitation on liability granted by the Workers' Compensation Law. *Id.* at 493-94.

The OPLSA was enacted in 1991, more than a decade after Section 537.610 was enacted in 1978. The legislature presumably was aware of section 537.610 when it granted the utility contribution rights against governmental entities that violate the OPLSA, and granted those rights "notwithstanding any other law to the contrary." *Crawford*, 86 S.W.3d at 493. The OPLSA, which permits contribution claims for breach of the specific duties outlined in the statute, prevails over the general limitation on liability enacted many years earlier in section 537.610. The trial court properly applied the reasoning in *Crawford* to this case.

MSD argues that "the damages cap *does not* directly conflict with § 319.085's general right of contribution because it does not eliminate that right, but merely limits the total amount of damages recoverable pursuant thereto." App. Br. at 64. According to MSD, applying a cap that would eliminate almost all of Ameren's recovery would not offend the OPLSA. This is nonsense.

The OPLSA is remedial – a statute enacted for the protection of life and property. A remedial statute must be construed liberally to effect its purpose and advance the remedy. *See Eastern Missouri Laborer's Dist. Council v. City of St. Louis*, 5 S.W.3d 600, 602 (Mo. App. 1999). To further the OPLSA's aim to promote safety and prevent dangerous work practices, the legislature endowed utilities with a right of contribution against the state's political subdivisions *notwithstanding any other law to the contrary*. Granting MSD the benefit of a damage cap would allow MSD to escape almost all of its

adjudged liability for violating the statute and prevent Ameren from recovering almost all of its damages. This result would clearly be contrary to the OPLSA's purpose and plain language. Applying the damage cap also would be contrary to Missouri's statutory policy by engrafting a limitation onto a remedial statute that the legislature clearly did not impose. *See, e.g.*, *Schmidt v. City of Gladstone*, 913 S.W.2d 937, 940 (Mo. App. 1996) (policy provisions attempting to restrict or limit an insurer's UM liability are invalid, because Missouri's mandatory uninsured motorist statute is remedial and contains no allowance for restrictions or limitations on the insurer's liability).

The trial court correctly concluded that "sovereign immunity, common law contribution rules, and set-off and credit rules do not apply to UE's action against MSD." L.F. 335. MSD is not entitled to the damage cap in section 537.610. The court's judgment should be affirmed.

IV. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE TESTIMONY OF DR. GRANSBERG, BECAUSE DR. GRANSBERG WAS QUALIFIED TO GIVE HIS OPINIONS, HIS TESTIMONY WAS RELEVANT AND ADMISSIBLE, AND THE ADMISSION OF HIS TESTIMONY WAS NOT UNFAIRLY PREJUDICIAL TO MSD.

A. Standard of Review.

The admissibility of evidence lies within the trial court's sound discretion and the court's ruling will not be disturbed absent abuse of discretion. *Nelson v. Waxman*, 9 S.W.3d 601, 603-04 (Mo. banc 2000). "The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." *Id.* at 604.

B. The Trial Court Properly Admitted Dr. Gransberg's Testimony.

MSD asserts in its Point Relied On that Dr. Gransberg's opinions could not be admitted "to alter the contract's clear and unambiguous allocation of responsibility for compliance with all safety laws to Mulligan," or to contradict "MSD's and Mulligan's uniform construction of their contract as placing responsibility for OPLSA compliance on Mulligan." App. Br. at 67. It argues that MSD and Mulligan "both construed the contract" as placing responsibility for safety on Mulligan, and that MSD and Mulligan "uniformly" acknowledged that Mulligan bore sole responsibility for selecting means and methods, ensuring safety, complying with the OPLSA, and notifying Ameren about the

overhead wires. App. Br. at 75. These arguments ignore the record. The testimony by MSD and Mulligan was not remotely "uniform."

It is true that MSD claimed that it bore no responsibility for any conduct that caused Mr. Page's injuries and Ameren's damages. MSD's counsel told the jury in opening statement that the "control of the work" was the contractor's "for the entire project"; the "means and methods" were up to Mulligan; the MSD inspectors' "only function" was "simply to ensure that Mulligan was performing under the contract"; MSD was not at the site to advise on safety practices; and MSD's inspector "has no obligation *nor can he*" tell the contractor to stop work. Tr. 32-34. Mr. Dillman testified that MSD could only direct an equipment change in a "force account" contract, not a bid contract, and that job safety was Mulligan's responsibility. Tr. 171, 176-77, 180. Mr. Campisi testified that "as far as I know . . . I did not have the authority to shut down a job for any reason." Tr. 326. Jerry Kloeppel testified that there was "no question" in his mind that the contractor chose the means and methods. Tr. 494.

However, MSD's witnesses also testified that they had responsibility for safety and means and methods at the job site. When Ameren asked Alfred Brooks, MSD's inspector supervisor, whether he had "the authority as an inspector supervisor to stop a job if you didn't think it was safe?", Mr. Brooks stated, "I guess I did," and testified that he relied on his inspectors to make sure a job was safe. Tr. 191-92. He then said, "I don't know as an inspector if – if it was my job to do so. But if I thought it was unsafe, I would at least mention it to the contractor." Tr. 192. When Ameren asked Mr. Dillman whether, under a bid contract, MSD could direct a change in equipment if the job was not

being performed safely, Mr. Dillman stated, "I don't know . . . where it says that," but acknowledged that MSD had done so on occasion. Tr. 157. Mr. Dillman stated that MSD's job was to enforce the contract's specifications, and admitted that Mulligan's failure to comply with OPLSA would be contrary to the contract's specifications. Tr. 154-55. Mr. Dillman also admitted that it would be "absurd" to suggest that MSD could not interfere with an unsafe work practice. Tr. 185.

The record plainly does not demonstrate a "uniform" construction of the contract. To the contrary, MSD's witnesses said that MSD had no authority to stop unsafe work, but maybe it did; that MSD had no authority to choose a safer means of performing work, but maybe it did; and that MSD had no authority for enforcing the OPLSA and all safety regulations, but maybe it did. MSD tried to tell the jury that regardless of the contract language, it either had no authority or minimal authority at the site.

All of this testimony was given without objection and, as noted above, was elicited after MSD gave an opening statement that had as its central theme the meaning of and MSD's obligations under the contract. The trial court's admission of Dr. Gransberg's testimony after MSD placed this argument and evidence before the jury was absolutely proper.

A party can open the door to testimony on a subject by broaching the subject in opening statement. *Turnbo by Capra v. City of St. Charles,* 932 S.W.2d 851, 857 (Mo. App. 1996). This is true even where the evidence would be otherwise irrelevant and inadmissible. *State v. Skillicorn*, 944 S.W.2d 877, 892 (Mo. banc 1997). A party who opens a subject "is held either to be estopped from objecting to its further development or

to have waived his right to its further development." *Turnbo*, 932 S.W.2d at 857; *Mische v. Burns*, 821 S.W.2d 117, 119 (Mo. App. 1991).

A party can also open the door to a subject by permitting testimony on the subject without objection. *Schisler v. Rotex Punch Co., Inc.*, 746 S.W.2d 592, 594 (Mo. App. 1988) (plaintiff's claim of error in the admission of evidence on his contributory negligence "must fail because that evidence was either admitted throughout the trial from many witnesses without objection, or was the subject of plaintiff's own examination." For example, in *Park Lane Med. Ctr. of Kansas City, Inc. v. Blue Cross/Blue Shield of Kansas City*, 809 S.W.2d 721 (Mo. App. 1991), the plaintiff hospital complained on appeal that extrinsic evidence of its intent in entering into a settlement was improperly admitted. *Park Lane*, 809 S.W.2d at 725. The Court of Appeals rejected this argument, noting that the hospital not only failed to object to extrinsic evidence of intent, but was the first to offer such evidence. *Id.* The court held that the hospital could not "complain on appeal that allowing extrinsic or parol evidence is error after introducing such evidence at trial." *Id.*

Furthermore, while extrinsic evidence may not be admitted to vary the terms of a contract or create obligations that the contract does not impose, "attendant extrinsic facts may be used to aid in the interpretation of an unambiguous contract." *J.S. DeWeese Co. v. Hughes-Treitler Mfg. Corp.*, 881 S.W.2d 638, 644 (Mo. App. 1994); *Monsanto Co. v. Sygenta Seeds, Inc.*, 226 S.W.3d 227, 232-33 (Mo. App. 2007) (where the contract as a whole is unambiguous, "some extrinsic evidence may be used to interpret rather than to construe a contract term"). Such evidence might be particularly helpful in interpreting a

standard contract with terms that have a generally accepted meaning in the industry. *See Oldaker v. Peters*, 869 S.W.2d 94, 100-01 n.4 (Mo. App. 1993) (expert testimony that lighting was justified at the location in question based on the MHTC design manual and guidelines was admissible); *Structural Sys., Inc. v. Hereford*, 564 S.W.2d 62, 66 (Mo. App. 1978) (the court, in determining construction contract obligations, noted that "Exhibit 2 contains general provisions and must be construed with provisions in other instruments, and in determining the meaning we must consider the generally accepted practice in the industry as testified to by appellant's expert witness").

MSD opened the door to Dr. Gransberg's testimony by extensively discussing the contract's meaning in opening statement. It opened the door to his testimony by permitting evidence of the contract's meaning to be introduced without objection, and by eliciting testimony on the contract's meaning through its own employees. On cross-examination, MSD asked Mr. Dillman whether Mulligan could use whatever method, labor and equipment it wanted; whether the contract only obligated MSD to inspect for compliance with plans and specifications; whether the contract made job safety Mulligan's responsibility; whether the contract obligated the contractor to notify Ameren if the work would come too close to the wires; and whether he acted in accordance with the "black book" of standard specifications. Tr. 175-78, 180. As noted above, MSD's employees gave inherently conflicting testimony regarding their obligations under the contract; after claiming that they had no responsibility for safety or selecting means and methods of performing the work, then acknowledged that they did have responsibility.

Dr. Gransberg, a civil engineer with over twenty years' experience in construction

management, was able to give testimony about custom and practice in the construction industry under contracts very similar to the one at issue. His testimony was admissible not only to clarify contract terms that MSD had attempted to muddy, but to develop a subject that MSD broached at the outset of the case. Clearly, the trial court's decision to admit the testimony was neither against the logic of the circumstances, nor "so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." *See Nelson*, 9 S.W.3d at 604. The court and jury were entitled to consider Dr. Gransberg's opinions in determining whether MSD violated the OPLSA.

MSD cites *Burns v. Black & Veach Architects, Inc.*, and *Marx & Co., Inc. v. Diners' Club, Inc.* as support for its argument that Dr. Gransberg's testimony was inadmissible. App. Br. at 70-71. These cases do not aid MSD at all.

In *Burns*, the plaintiff, who was injured when a trench wall collapsed, challenged the trial court's entry of summary judgment in favor of the defendant architect. 854 S.W.2d 450, 452-53 (Mo. App. 1993). The plaintiff argued that the architect was responsible for means and methods of trench work. *Id.* The contract language, however, explicitly stated that the architect "shall not have control over" the means and methods unless specified by the architect for the performance of the work, and that the contractor would be "solely" responsible for the means and methods. *Id.* at 453. The plaintiff's expert witness was not an expert in the subject he testified about. He had no education beyond high school and admitted that "he does not consider himself an expert in the field of architecture or structural engineering." *Id.* at 454. The expert nevertheless opined that

the architect "should have provided means and methods," even though he admitted that the contract did not require the architect to perform that function. *Id.* at 454. Contrary to his own opinion, the expert then testified that custom in the industry "is that architects . . . do not provide trench shoring plans," and that "it is not a generally accepted practice in the construction industry for an architect to tell a contractor how to make an excavation." *Id.* Not surprisingly, the Court of Appeals rejected the plaintiff's claim that the architect owed a contractual duty to protect him from the trench collapse. *Id.* at 454-55. Notably, there is nothing in the opinion indicating that the defendants contested the admissibility of the expert's testimony, and the Court of Appeals never held that the expert's testimony was inadmissible.

Marx & Co., Inc. v. Diners' Club, Inc., is similarly unavailing. *See* App. Br. at 73. The expert in *Marx* was qualified as an expert in securities regulation, and therefore was competent to explain the steps necessary to process a stock registration statement through the SEC. 550 F.2d 505, 508-09 (2nd Cir. 1977). However, the New York district court permitted the expert to testify regarding the legal meaning of language used in the parties' contract, which was "testimony concerning matters outside his area of expertise." *Id.* at 509-10. The expert was allowed to testify that certain facts surrounding the defendant's conduct would not be a "legal excuse" for non-performance, and that the parties' exploration of alternatives was not a "legal waiver" of defendant's obligations. *Id.* at 510. The expert conceded that his opinions were based in part on his "experience and use of the English language." *Id.* The Court of Appeals for the Second Circuit held that the expert's testimony was, in the circumstances, inadmissible, because his

"testimony construed the contract, as a matter of law, and includes his opinion that the defenses of Diners were unacceptable as a matter of law." *Id.* at 508.

Unlike the expert in *Burns*, Dr. Gransberg was clearly qualified to give his opinions, and MSD makes no argument to the contrary. Unlike the expert in *Marx*, Dr. Gransberg did not give legal conclusions as to the merit of MSD's defenses. Dr. Gransberg discussed the relationship created by standard construction contract language, used in an industry in which he had two decades of experience.

MSD argues that, assuming the contract was ambiguous, the parties' own interpretation was conclusive. App. Br. at 75. According to MSD, MSD's and Mulligan's testimony that Mulligan was responsible for selecting means and methods and that Mulligan was responsible for safety settled the issue. App. Br. at 75-76. This argument again ignores the fact that MSD acknowledged that it could enforce the contract's safety provisions, could stop unsafe work, and had exercised its right to change the means and methods of performing the work. Tr. 154-55, 157, 183, 191. Given MSD's admissions and the contract's language, the trial court clearly was not bound by MSD's self-serving testimony that Mulligan was solely responsible for ensuring compliance with the OPLSA. Like the other cases MSD cites, *MLPGA, Inc. v. Weems*, 838 S.W.2d 7 (Mo. App. 1992) is inapplicable. The court in that case was not confronted with inherently contradictory testimony like that given by MSD's employees here.

In effect, MSD argues that its counsel and its witnesses could tell the jury what the contract meant, and Ameren would be bound by MSD's self-serving argument and evidence, with no right to rebut it. MSD argues that the trial court had no discretion to

admit evidence showing how standard contract language is commonly understood in the industry, even if MSD's purported interpretation of the contract did not accord with the contract's language or the grudging admissions of MSD's employees at trial. This argument is contrary to settled law granting the trial court broad discretion to evaluate the admissibility of evidence in the circumstances of the case before it.

Furthermore, MSD was not unfairly prejudiced by Dr. Gransberg's testimony. His testimony was not "the only evidence" adduced to contradict MSD's and Mulligan's purported "uniform testimony" that Mulligan bore sole responsibility for selecting means, methods and equipment, ensuring job site safety, complying with the OPLSA, and notifying Ameren about overhead wires. App. Br. at 76. In fact, the opposite is true.

Dr. Gransberg's opinion that MSD had authority to stop unsafe work at the site accorded with testimony of MSD witnesses Alfred Brooks and Robert Dillman. Mr. Brooks testified that as an MSD inspector, he had authority to stop work at a job site if he thought it was unsafe. Tr. 191-92. He testified that he relied on his inspectors to make sure the site was safe. Tr. 191-92. Mr. Dillman likewise testified that MSD had authority to enforce the contract's terms requiring Mulligan to comply with all safety laws and regulations. Tr. 155. Mr. Dillman testified that it would be "absurd" to suggest that MSD would not have the right to interfere with an unsafe work practice. Tr. 185.

Dr. Gransberg's opinion that MSD could direct the means and methods of the work accorded with Mr. Dillman's testimony that MSD had, in fact, exercised such authority. Dr. Gransberg's opinion was based on several contract provisions, including those authorizing MSD to enforce the contract's specifications, to give directives and

determine the work's "order of precedence", very common contract language requiring all work to be performed in MSD's presence, and contract language requiring Mulligan to have an authorized representative on-site to take directives from MSD's inspectors. Tr. 263-68. Similarly to Dr. Gransberg, Mr. Dillman testified that his job as an on-site inspector was to make sure that the contractor followed the plans and specifications. Tr. 137-38. He testified that MSD had, on occasion, exercised its authority to tell the contractor to change the equipment. Tr. 157.

Dr. Gransberg's testimony that MSD had the right to coordinate with the utilities accorded with Mr. Dillman's testimony that he had, in fact, coordinated the construction activities with Ameren. Dr. Gransberg's opinion was based on contract language stating that utility owners and public agencies responsible for facilities located in the project's right of way would have to complete installation, repair, or relocation before the contractor started work. Tr. 260. He stated that, consistent with this language, before the work began MSD would have sent plans to utilities that might be impacted by the construction. Tr. 260. Mr. Dillman similarly testified that early in the project, there were a "whole series" of poles that had to be moved to accommodate the construction, and "I provided them [Ameren] electronic drawings or digitized drawings of our improvements so that they knew where to move the poles." Tr. 134.

A complaining party cannot be prejudiced by the admission of allegedly inadmissible evidence where that party offers evidence to the same effect as the challenged evidence, or if the challenged evidence is merely cumulative to other admitted

evidence of like tenor. *Dunn v. St. Louis-San Francisco Ry.*, 621 S.W.2d 245, 252 (Mo. banc 1981). Dr. Gransberg's testimony did not prejudice MSD.

The Court of Appeals wrongly held that the introduction of Dr. Gransberg's testimony was a "blatant attempt [by Ameren] to mislead the jury." *Union Elec. Co. v. Metropolitan St. Louis Sewer Dist.*, 2007 WL 1341820 at *4 (Mo. App. E.D., May 9, 2007). Ameren's introduction of Dr. Gransberg's testimony was intended to demonstrate how the contract's standard terms are understood in the industry. Tr. 227-28. There was no intent to mislead, and the Court of Appeals does not hint at how the evidence might have misled the jury.

The Court of Appeals also wrongly held that the admission of Dr. Gransberg's testimony was "gross evidentiary error." Early in the trial, the court denied MSD's motion that Dr. Gransberg be prohibited from testifying, stating that "in making my ruling, I'm relying on Section 490.065 of the Revised Statutes of Missouri and my understanding as to the guidelines that trial courts are go follow with regard to expert witness testimony in a civil case." Tr. 3. Later in the trial, the court evaluated, at length, the foundation for the admission of Dr. Gransberg's testimony. Tr. 216-17. The court heard testimony about Dr. Gransberg's qualifications outside the jury's presence, and concluded that Dr. Gransberg was qualified to express his opinions. Tr. 210-26. When MSD objected to Dr. Gransberg's testimony, Ameren's counsel pointed out that MSD and its witnesses had discussed the contractor's duty extensively: "We've been talking about duty here for a couple of days. And I think that . . . the issue has clearly been

opened and . . . testimony has been rendered on that by both Mr. Buckley and his witnesses and by ours." Tr. 256.

The admission of Dr. Gransberg's testimony was not only well within the trial court's discretion, but it was absolutely proper. The Court of Appeals' contrary conclusion overlooks the record and misapplies the law. The trial court's judgment should be affirmed.

CONCLUSION

The trial court correctly concluded that the OPLSA applied to MSD, that Ameren's OPLSA claim was not governed by common law principles or subject to the damage cap in § 537.060, and that Dr. Gransberg's testimony was relevant and admissible. The Court of Appeals erroneously reversed the trial court's judgment. For all of the reasons discussed in this brief, the trial court's judgment should be affirmed.

Respectfully submitted,

ARMSTRONG TEASDALE LLP

James J. Virtel, #21744
Karen A. Baudendistel #37735
Cynthia A. Petracek #43247
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102-2740
(314) 621-5070
(314) 621-5065 (fax)

CERTIFICATE OF SERVICE

A copy of this Substitute Brief of Respondent, and a disk containing the brief, were mailed on November 6, 2007, to the following:

Adrian P. Sulser
Thomas M. Buckley
BUCKLEY & BUCKLEY, L.L.C.
1139 Olive St., Suite 800
St. Louis, MO 63101-1928

Edward M. Kay
Melinda S. Kollross
CLAUSEN MILLER P.C.
10 South LaSalle St., Suite 1600
Chicago, IL 60603

_____

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Substitute Brief of Respondent includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 16,938, exclusive of the cover, signature block, and certificates of service and compliance.

The undersigned further certifies that the disks filed with the Substitute Brief of Respondent and served on appellant were scanned for viruses and found virus-free through the Symantec anti-virus program.

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