In the
Missouri Court of Appeals
Western District

CHILDREN'S WISH FOUNDATION INTERNATIONAL, INC.,	)	
	)	**WD70616**
Appellant,	)	
	)	**OPINION FILED:**
v.	)	**April 27, 2010**
	)	
MAYER HOFFMAN McCANN PC, ET AL.,	)	
	)	
Respondents.	)	

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Robert M. Schieber, Judge

Before Division Four: Thomas H. Newton, Chief Judge, Presiding, James M. Smart, Jr., Judge and Cynthia L. Martin, Judge

This case arises out of a claim for professional negligence asserted by Children's Wish Foundation, International, Inc. ("CWF") against Mayer Hoffman McCann, P.C. ("Mayer Hoffman") and CBIZ Accounting, Tax & Advisory of Kansas City, Inc. ("CBIZ") relating to Mayer Hoffman's audit of CWF's financial statements and CBIZ's preparation of CWF's tax returns. Following a jury trial, verdicts were returned in favor of Mayer Hoffman and CBIZ. CWF appeals claiming instructional error. CWF contends

the trial court erred in submitting a contributory negligence instruction because such an instruction is not an appropriate defense in a professional negligence action involving only economic loss. CWF suggests that, at most, a comparative fault instruction should have been submitted pursuant to the authority of *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. banc 1983). Finally, CWF contends that if contributory negligence remains an appropriate defense in economic loss negligence cases, Missouri should adopt the "audit interference rule" to limit contributory negligence submissions to scenarios where the client's negligence prevents the auditor from performing its duties. We affirm.

Factual and Procedural Background

CWF is a charitable organization. CWF grants wishes to terminally or seriously ill children. CWF is managed by a husband and wife team, Arthur Stein and Linda Dozoretz. Stein is the President of CWF. Dozoretz is the executive director.

Charitable organizations are evaluated on the amount of their fundraising expenses expressed as a charity's "cost to raise a dollar." In March 1998, a new accounting rule known as Statement of Position 98-2 was issued. CWF was advised this new rule would require CWF to record certain expenses as fundraising costs instead of program services, negatively impacting its publicly reported cost to raise a dollar. In response to the impending rule change, Stein and Dozoretz expanded CWF's gifts in kind program.

A gift in kind is a donation to a charitable organization in the form of property. CWF pays an administrative fee to clearinghouses for surplus goods, books, or toys. CWF then distributes these items to hospitals and Ronald McDonald Houses. The

administrative fee paid by CWF to obtain the items is markedly lower than the value of the goods CWF can report as a charitable contribution. The intended effect of expanding the gifts in kind program was to reduce CWF's cost to raise a dollar.

During the fiscal year ending June 30, 1999, CWF's gifts in kind increased by more than tenfold from approximately $500,000.00 to $5,500,000.00. Gift in kind orders, receipts, and shipments were all managed and recorded by CWF employees. The record reflects some question as to whether CWF's employees were adequately skilled and/or trained to manage the challenging inventory and record keeping requirements for gifts in kind, particularly given the substantial increase in volume over a short period of time.

Mayer Hoffman was retained by CWF in 1991 or 1992 to provide various accounting services, including the preparation of annual financial statement audits. Mayer Hoffman provided these services to CWF through the preparation of a financial statement audit for the fiscal year ending June 30, 1999.

In connection with the audit for fiscal year ending June 30, 1999, CWF signed an audit engagement letter with Mayer Hoffman. The audit engagement letter stated that the objective of the audit was to permit Mayer Hoffman to express an opinion about whether CWF's financial statements are fairly presented, in all material respects, in conformity with generally accepted accounting principles ("GAAP"). The engagement letter indicated that the audit would involve tests of CWF's accounting records and other procedures as Mayer Hoffman considered necessary to enable it to express such an

opinion, including "tests of documentary evidence supporting the transactions recorded in the accounts, tests of physical existence of inventories, and direct confirmation of receivables and certain other assets and liabilities by correspondence with selected customers, creditors, and banks." The engagement letter advised that Mayer Hoffman would "plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatements, whether caused by error or fraud." However, the engagement letter warned that:

> Our audit is designed to provide reasonable rather than absolute assurance of detecting misstatements that, in our judgment, could have a material effect on the financial statements taken as a whole; therefore, a material misstatement may remain undetected. Consequently, our audit will not necessarily detect misstatements less than this materiality level that might exist due to error, fraudulent financial reporting, or misappropriation of assets.

The engagement letter notified CWF that it was responsible for making all financial records and related information available, and for the accuracy and completeness of its records.

Auditors from Mayer Hoffman's Kansas City office arrived at CWF's Atlanta, Georgia headquarters to perform field audit work in August 1999. A spreadsheet of the fiscal year 1999 gift in kind transactions prepared by CWF employees was provided to Mayer Hoffman for its audit work. The spreadsheet summarized, among other things, a beginning number of pallets for each gift in kind item, the quantity of items contributed to either a hospital or a Ronald McDonald House, the fair market value of the gifts in kind, and the number of pallets of each gift in kind remaining in inventory. Mayer

Hoffman's representative's testified that they believed the beginning number of pallets for each gift in kind item shown on CWF's spreadsheet represented the number of pallets of that item actually ***received*** by CWF from the clearinghouses.

In the course of its audit, Mayer Hoffman discovered an error in the fair market value assigned by CWF to each unit of a particular gift in kind item that remained in CWF's inventory. Mayer Hoffman made a downward adjustment in the total value of this item remaining in inventory. Mayer Hoffman did not make a downward adjustment in the total value of the same item contributed by CWF during the year.

Because of the significant increase in gifts in kind, and because of the valuation error Mayer Hoffman discovered, Mayer Hoffman attempted to confirm from outside sources the fair market value of the gifts in kind. First, Mayer Hoffman contacted the clearinghouses from whom the gifts in kind had been obtained to see if the clearinghouses would provide the fair market values attributed to the items by the original contributors of the items. The clearinghouses could not reveal this information. Thus, Mayer Hoffman secured a written confirmation from the two clearinghouses from which CWF had obtained most of its gifts in kind. The gift in kind spreadsheets CWF had prepared were provided to the two clearinghouses. Both clearinghouses signed and returned a confirmation letter that had been prepared by Mayer Hoffman. The letter said that "as to the question of the merchandise ***received*** from [clearinghouse], our records do not appear to contradict the information that you have supplied." (Emphasis added.) Mayer Hoffman thus concluded that the fair market values attributed by CWF to the gift

in kind items shown as contributed on CWF's spreadsheet were materially accurate. The fair market value for contributed gifts in kind reflected on CWF's spreadsheet was thus reflected in its financial statements. These financial statements were provided by Mayer Hoffman to CBIZ, a tax preparation entity that is related in some manner to Mayer Hoffman. CBIZ then prepared CWF's 1999 tax return, including its IRS Form 990.

The engagement letter had advised CWF that at the conclusion of its audit, Mayer Hoffman would "require certain written representations from [CWF] about the financial statements and related matters." Mayer Hoffman secured this management representation letter from Stein and Dozoretz on August 24, 1999. In the management representation letter, Stein and Dozoretz indicated they had made available to Mayer Hoffman all financial records and related data for CWF. With respect to the gift in kind values that had been furnished to Mayer Hoffman and included in CWF's financial statements, Stein and Dozoretz represented "we have reviewed the nature of the in-kind contributions and the valuation methods used for these contributions. We believe the in-kind contributions have been fairly presented in the financial statements."

On August 24, 1999, Mayer Hoffman issued its Independent Auditor's Report, which was attached to CWF's audited financial statements for the periods ending June 30, 1998, and June 30, 1999. The Report noted "[t]hese financial statements are the responsibility of the Organization's management. Our responsibility is to express an opinion on these financial statements based on our audits." The Report described the method of conducting the audit as follows:

> We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

The Report concludes with this opinion from Mayer Hoffman about CWF's financial statements:

> In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of Children's Wish Foundation International, Inc. as of June 30, 1999 and 1998 and its change in net assets and its cash flows for the years then ended in conformity with generally accepted accounting principles.

In fact, CWF's financial statements were not accurate. The financial statements did not accurately reflect the value of gift in kind items contributed during the fiscal year ending June 30, 1999.

The quantity of each gift in kind item ***contributed*** by CWF was calculated by simply subtracting the number of pallets of the item remaining in CWF's inventory from the beginning number of pallets shown on the spreadsheet. Though Mayer Hoffman believed the beginning number of each gift in kind item shown on the spreadsheet was the quantity of the item ***received*** by CWF, in fact the beginning number of each gift in kind item shown on the spreadsheet was the quantity of the item ***ordered***. Occasionally, CWF ***received*** fewer pallets of an item than it had ***ordered***. CWF apparently did not have a process in place to record these discrepancies. There was testimony at trial about

waybills, which would accompany shipments of gifts in kind. The waybills apparently indicated what the shipper showed had been ***shipped***. A CWF employee would "check in" an order and sign off on the waybills. The employee who checked in merchandise said she would note on the waybill if what came in differed from what the waybill reflected. This employee also testified, however, that she did "not believe any of the counts came out wrong. Whatever they said was delivered pallet wise was delivered." CWF's copies of the waybills were not provided to Mayer Hoffman for review during the audit. However, it is not clear whether the waybills would have revealed the discrepancy between the quantity of a gift in kind item ***ordered*** versus the quantity actually shipped and ***received***.

The mistaken use of the quantity of each gift in kind ***ordered*** versus ***received*** as the "starting point" for calculating the quantity of each gift in kind ***contributed*** had the obvious effect of overstating the value of gift in kind contributions on CWF's financial statements for the period ending June 30, 1999, and on CWF's 1999 tax return. The overstatement was in the approximate amount of $1,310,000.00.

In October 2000, the Commonwealth of Pennsylvania filed an Order to Show Cause against CWF. The Order to Show Cause related, in part, to the overstated value of the gift in kind contributions shown on CWF's 1999 tax return. To respond to the Order to Show Cause, CWF hired a forensic accountant, Ricardo Zayas, to examine CWF's gift in kind records. Zayas concluded that the overstatement in the value of the gifts in kind CWF had actually received and contributed essentially cancelled each other out, so that

the net effect on the tax return was a write down of only $26,699.00. CWF then hired a successor auditor to file an amended tax return for 1999. That successor auditor concluded that the "write down" calculated by Zayas was not "material" as to require a restatement of CWF's financial statements according to GAAP standards of materiality. Notwithstanding, the Pennsylvania hearing examiner ruled against CWF.

CWF then filed this action against Mayer Hoffman and CBIZ asserting professional negligence. CWF sought damages for the cost of defending itself in the Pennsylvania proceeding and for damage to its reputation. CWF alleged that Mayer Hoffman should have detected the mistake in the quantity of each gift in kind item actually received, which mistake led to the overstated value of gifts in kind on CWF's financial statements and tax return. As CBIZ and Mayer Hoffman are related entities, CWF alleged CBIZ prepared an erroneous tax return based on Mayer Hoffman's erroneously audited financial statements. Mayer Hoffman and CBIZ filed answers asserting the affirmative defenses of contributory negligence and comparative fault.

At trial, Mayer Hoffman and CBIZ tendered a contributory negligence instruction. Mayer Hoffman and CBIZ contended that CWF was contributorily negligent for providing Mayer Hoffman and CBIZ with erroneous records. CWF objected to the contributory negligence instruction during the instruction conference. The trial court overruled the objection. The jury returned verdicts in favor of Mayer Hoffman and CBIZ. This appeal follows.

Standard of Review

"This [c]ourt reviews *de novo*, as a question of law, whether a jury was properly instructed." *Harvey v. Washington,* 95 S.W.3d 93, 97 (Mo. banc 2003); *See also*, *Kopp v. Home Furnishing Ctr., LLC,* 210 S.W.3d 319, 328 (Mo. App. W.D. 2006). "A faulty instruction is grounds for reversal if the defendant has been prejudiced." *State v. Carson,* 941 S.W.2d 518, 523 (Mo. banc 1997) (citing *State v. Betts*, 646 S.W.2d 94, 99 (Mo. banc 1983)). "'In order to preserve claims of instructional error for review, counsel is required to make specific objections to the instruction at trial and again raise the error in the motion for new trial.'" *State v. Martin,* 211 S.W.3d 648, 652 (Mo. App. W.D. 2007) (quoting *Hatch v. V.P. Fair Found., Inc.*, 990 S.W.2d 126, 140 (Mo. App. E.D. 1999)).

Analysis

On appeal, CWF asks us to answer an unresolved question regarding the propriety of submitting contributory negligence as an affirmative defense in professional negligence actions involving only economic damages given the abrogation of contributory negligence in lieu of pure comparative fault in *Gustafson v. Benda,* 661 S.W.2d 11 (Mo. banc 1983). Should we determine that contributory negligence remains an available defense in economic loss negligence cases, CWF asks us to limit the availability of the contributory negligence defense to circumstances where a client's negligence interferes with an auditor's ability to perform its duties--the audit interference rule. We must first evaluate whether CWF has preserved these issues for appellate review.

Preservation of Claimed Instructional Error

At trial, CWF tendered Instructions No. 9 and No. 10, the proposed verdict directors against Mayer Hoffman and CBIZ, respectively. Both verdict directors were modified at the request of Mayer Hoffman and CBIZ, and without objection from CWF, to add affirmative defense tails.

The verdict directing instructions read as follows:

INSTRUCTION NO. 9

> Your verdict must be for plaintiff Children's Wish Foundation International, Inc. if you believe:
>
> First, defendant Mayer Hoffman McCann, P.C., either:
>
> a) Proposed and made inaccurate entries on Plaintiff's books and records leading to Defendant Mayer Hoffman McCann, P.C.'s preparation of Plaintiff's financial statements which contained material misstatements, or
>
> b) In its audit of Plaintiff's financial statements failed to adhere to generally accepted auditing standards and, as a result, failed to detect material misstatements, or
>
> c) Failed to obtain sufficient evidential matter to support the amount of gifts made to Ronald McDonald Houses and, as a result, Plaintiff's schedule of gifts to Ronald McDonald Houses was overstated, and
>
> Second, Defendant Mayer Hoffman McCann, P.C., in any one or more of the respects submitted in paragraph First, was thereby negligent, and
>
> Third, as a direct result of such negligence Plaintiff Children's Wish Foundation International sustained damage,
>
> unless you believe plaintiff is not entitled to recover by reason of Instruction Number 11.

INSTRUCTION NO. 10

Your verdict must be for plaintiff Children's Wish Foundation International, Inc., and against defendant CBIZ Accounting, Tax & Advisory of Kansas City, Inc., if you believe:

First, defendant CBIZ Accounting, Tax & Advisory of Kansas City, Inc., prepared Plaintiff's IRS Form 990 with an inaccurate schedule of gifts to Ronald McDonald Houses, and

Second, defendant CBIZ Accounting, Tax & Advisory of Kansas City, Inc. was thereby negligent, and

Third, as a direct result of such negligence Plaintiff Children's Wish Foundation International, Inc. sustained damage,

unless you believe plaintiff is not entitled to recover by reason of Instruction Number 11.

Instruction No. 11 was submitted by Mayer Hoffman and CBIZ as a contributory negligence instruction. The contributory negligence instruction read as follows:

INSTRUCTION NO. 11

You must find plaintiff contributorily negligent if you believe:

First,

plaintiff erroneously stated to defendant Mayer Hoffman McCann, P.C. that its accounting records reflected the gifts-in-kind plaintiff had received, or

plaintiff provided to defendants Mayer Hoffman McCann, P.C. and CBIZ Accounting, Tax & Advisory of Kansas City, Inc. erroneous shipping records to Ronald McDonald House, and

Second, plaintiff, in one or more of the respects submitted in Paragraph First, was thereby negligent, and

Third, such negligence of plaintiff directly contributed to cause its injury.

The term "negligent" or "negligence" as used in this instruction means the failure to use that degree of care that an ordinarily careful person would use under the same or similar circumstances.

Instruction No. 11 noted as its source: "MAI No. 32.07(B) (1996) modified; MAI 11.02 *Blackstock v. Kohn*, 994 S.W.2d 947, 952 *n.* 2 (Mo. banc 1999)."

CWF objected to Instruction No. 11 during the instruction conference. The exchange with the trial court was as follows:

THE COURT: All right. The contributory negligence instruction will be Instruction No. 11.

And now, Mr. Benson, you wanted to make an argument with regard to that?

MR. BENSON: Yes. We object to the submission of Instruction No. 11 because contributory negligence should not be submitted in an economic damages only negligence case, and this is more properly a converse which is improper under the circumstances.

MS. CARLSON: And, Your Honor, we believe that Missouri case law does support submission of a contributory negligence affirmative defense instruction in cases of economic damages.

THE COURT: That's it?

MS. CARLSON: I lost my train of thought.

THE COURT: As we discussed yesterday,[1] I'm going to go ahead and give the jury this instruction. I will note it being over your objection, Mr. Benson. That would be Instruction 11 taken from MAI 32.07, modified MAI 11.02.

[1]The prior day's discussion referenced by the trial court during the instruction conference is not a part of the record.

In CWF's motion for new trial, CWF claimed it was error to give Instruction No. 11, and that:

> Instructions 11 and 15[2] and, to the extent that they alerted the jury to consideration of Instruction 11, Instructions 9 and 10, improperly allowed the jury to consider whether Plaintiff was contributorily negligent in this professional negligence case that sought only economic damages.

CWF's motion for new trial further contended that:

> The submission of contributory negligence or comparative fault in a professional negligence case in which only economic loss is sustained has never been approved in Missouri. Plaintiff asserts that if any instruction was permissible, it would have been an instruction on comparative fault.

In a footnote, however, CWF suggested that:

> Under the facts of this professional negligence claim, where the defendant auditors know of the alleged fault or negligence of the plaintiff, accepted the challenges of the audit under that circumstance, and proceeded to conduct the audit, neither contributory negligence or comparative fault should be submitted by an instruction.

On appeal, CWF's first point relied on claims the trial court erred in giving a contributory negligence instruction in that contributory negligence is not a proper defense to a claim of professional negligence and is contrary to Missouri law. Within the argument portion of the brief, CWF suggests that comparative fault, and not contributory negligence, applies to professional negligence cases involving economic damages in light of *Gustafson*. CWF's second point relied on claims the trial court erred in giving a contributory negligence instruction because Missouri should adopt the audit inference

[2]Instruction No. 15 was a verdict director included in a second package of instructions relating to an unrelated claim of negligence by CWF against Mayer Hoffman involving audit of a contract with Reese Brothers. That verdict is not the subject of this appeal.

rule, which limits use of the contributory negligence defense in auditor negligence cases to situations where the client has prevented the auditor from performing his duties.

Rule 70.03 addresses the standard for preserving claims of instructional error for appellate review. Rule 70.03 provides:

> Counsel shall make specific objections to instructions considered erroneous. No party may assign as error the giving or failure to give instructions unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Counsel need not repeat objections already made on the record prior to delivery of the instructions. The objections must also be raised in the motion for new trial in accordance with Rule 78.07.

"Proper preservation of error requires that objections be made at the instruction conference and renewed in a motion for new trial." *Syn, Inc. v. Beebe*, 200 S.W.3d 122, 135 (Mo. App. W.D. 2006) (citing *Hatch*, 990 S.W.2d at 140). As noted in Rule 70.03, objections must be specific; general objections are not sufficient to preserve error. "'The rationale behind making objections is to avert error and allow the trial court to make an intelligent ruling.'" *Gill Constr., Inc. v. 18th & Vine Auth.*, 157 S.W.3d 699, 718 (Mo. App. W.D. 2004) (quoting *Gamble v. Bost*, 901 S.W.2d 182, 188 (Mo. App. W.D. 1995)). "'Further, a point on appeal must be based upon the theory voiced in the objection at trial and a defendant cannot expand or change on appeal the objection as made.'" *Id.* (quoting *Zakibe v. Ahrens & McCarron, Inc.*, 28 S.W.3d 373, 387 (Mo. App. E.D. 2000)).

Mayer Hoffman and CBIZ argue that CWF's claim raised in point one that it was error to submit contributory negligence in a professional negligence case involving only

economic loss is a general objection that does not comply with Rule 70.03. We disagree. CWF consistently claimed at the instruction conference, in the motion for new trial, and on appeal that a contributory negligence affirmative defense is not proper in a negligence case involving only economic loss. This claim raised a pure question of law that was adequately presented to the trial court for its consideration.[3] Thus, CWF's claim in point one that contributory negligence is no longer available as an affirmative defense in an economic loss case has been preserved for appellate review.

Mayer Hoffman and CBIZ next argue that CWF's claim raised in point one that comparative fault should have been submitted in lieu of contributory negligence has not been preserved pursuant to Rule 70.03 because, though raised in the motion for new trial and in the argument portion of the brief under CWF's first point relied on,[4] this argument was not raised by CWF during the instruction conference. It is true CWF did not suggest an alternative submission of comparative fault to the trial court during the instruction conference. However, CWF was not required to suggest submission of comparative fault in order to preserve its objection that contributory negligence is not, as a matter of law, a proper defense in a professional negligence action involving only economic loss. Mayer Hoffman and CBIZ pled both contributory negligence and comparative fault as

[3]Though CWF's objection to the contributory negligence instruction has, from time to time, referenced "economic loss" and/or "professional negligence involving economic loss," we do not view these contentions as materially different for purposes of evaluating whether CWF preserved its objection to the contributory negligence instruction for appellate review. Though not all economic loss negligence cases involve professional negligence, and not all professional negligence cases involve only economic loss, CWF's objection was sufficiently specific to afford the trial court an opportunity to "avert error."

[4]We note that CWF's point relied does not mention comparative fault. Normally, this would preclude any discussion of comparative fault pursuant to Rule 84.04(e). However, we perceive CWF's discussion of comparative fault in the argument portion of its brief as nothing more than the natural and inescapable corollary of discussing the effect of *Gustafson* on the contributory negligence defense in economic loss cases.

affirmative defenses in their respective answers to CWF's Petition. Their election to submit only contributory negligence and not comparative fault to the jury was a trial strategy that does not presuppose the propriety of submitting either contributory negligence or comparative fault as a matter of law, or based on the particular facts of this case. Rule 70.03 does not require CWF to propose an alternative theory for assessing fault to itself in order to preserve an objection that the only such theory tendered by Mayer Hoffman and CBIZ--contributory negligence--was barred by applicable law. If contributory negligence was not an appropriate submission in this case, then it was Mayer Hoffman's and/or CBIZ's obligation to raise the alternative of submitting comparative fault, not CWF's.[5] We will, therefore, address the propriety of submitting a comparative fault instruction in a professional negligence case involving only economic loss as a natural and necessary corollary to our discussion of the continued viability of contributory negligence as an affirmative defense in such cases following *Gustafson*.

Finally, Mayer Hoffman and CBIZ argue that CWF's second point relied on, which requests adoption of the audit interference rule as a constraint on the permissible submission of contributory negligence when auditor negligence is alleged, was not preserved for appellate review because the subject was never raised with the trial court.[6] We agree. Unlike comparative fault, the audit interference rule is not a theory of

[5]In fact, treatises on the subject warn that "[t]he question [of the continued availability of contributory negligence as a defense in negligence cases involving only economic loss] thus remains undecided, and careful counsel will take steps to preserve the issue by pleading affirmatively for apportionment of fault and offering appropriate instructions." 34 ROBERT H. DIERKER, JR. & RICHARD J. MEHAN, MISSOURI PRACTICE SERIES Section 3:2 at 57 (2009 ed.).

[6]CWF did assert in a footnote in its Motion for New Trial that neither contributory negligence nor comparative fault would have been appropriate submissions because Mayer Hoffman knew of alleged errors made by CWF in maintaining its financial records and nonetheless accepted the challenge of the audit.

assessing fault to CWF. Rather, it is a theory which limits the availability of contributory negligence in auditor negligence cases to circumstances where a client's negligence has interfered with the auditor's ability to perform its duties. The audit interference rule is a species of the broader concept of limiting the contributory negligence defense in professional negligence cases to avoid a client being charged with negligent conduct that is subsumed within the very duties undertaken by the professional to the client. CWF is essentially arguing that contributory negligence should not have been submitted because the fact that CWF had mistakes in its records did not affirmatively prevent Mayer Hoffman from conducting its audit in accordance with the applicable standard of care as to discover CWF's mistakes.

CWF was obligated by Rule 70.03 to raise this issue with the trial court. Because CWF did not raise this issue with the trial court, it is not preserved for appellate review unless we elect to exercise our discretion to afford plain error review. "Points not preserved on appeal may be reviewed for plain error at the court's discretion." *Syn*, 200 S.W.3d at 135 (citing *Smith v. White*, 114 S.W.3d 407, 412 (Mo. App. W.D. 2003)). We will address in our subsequent discussion of point two whether the circumstances of this case warrant the exercise of our discretion to conduct plain error review of the conceptual issue raised by CWF in point two.

Point I

Two questions are raised in CWF's first point on appeal: (1) whether contributory negligence remains an affirmative defense in a professional negligence action involving

only economic damages following *Gustafson*; and (2) whether comparative fault is an available affirmative defense in a professional negligence action involving only economic damages as a result of *Gustafson.* To answer these questions, we must survey those cases in Missouri which have addressed the submission of contributory negligence or comparative fault in negligence cases involving economic loss following *Gustafson*.

Contributory Negligence as a Defense in Economic Loss Cases Pre-Gustafson

It is first necessary to assure that contributory negligence was available as an affirmative defense in economic loss cases before the adoption of comparative fault in *Gustafson*. This discussion presents a bit of a misnomer. Even today, many claims involving solely economic loss are simply not actionable pursuant to the economic loss doctrine.[7] Notwithstanding the economic loss doctrine, however, there are cognizable "economic loss" cases, including negligent misrepresentation claims[8] and claims of professional negligence.

We have reviewed economic loss negligence cases pre-dating *Gustafson* where an affirmative defense labeled as, or sounding in, contributory negligence has been discussed.[9] These cases uniformly suggest that contributory negligence was recognized as an available affirmative defense in economic loss cases prior to *Gustafson*.

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[7]*Collegiate Enters., Inc. v. Otis Elevator Co.*, 650 F.Supp. 116, 118 (E.D. Mo. 1986) ("Under Missouri law, a plaintiff cannot recover damages for economic loss on a negligence theory."); *Wilbur Waggoner Equip. & Excavating Co. v. Clark Equip. Co.*, 668 S.W.2d 601, 603 (Mo. App. E.D. 1984) ("It is the law in Missouri, however, that recovery in tort for purely economic damage is limited to those cases where there is personal injury, damage to property other than that sold, or destruction of the property sold due to some violent occurrence.")

[8]Negligent misrepresentation was first recognized in Missouri in *Ligon Specialized Hauler, Inc. v. Inland Container Corp.*, 581 S.W.2d 906 (Mo.App.1979).

[9]There are very few such cases, surprisingly, involving professional negligence. We exclude from this discussion, of course, medical negligence cases, which routinely involve personal injuries and are not, therefore, economic loss cases.

In *Benton v. Craig*, 2 Mo. 198 (1830), an attorney was entitled to a jury instruction relieving him of liability if the client was found to have failed to inform the attorney of information necessary to permit the attorney to defend the client in an action of assumpsit. In *Carr's Executrix. v. Glover*, 70 Mo. App. 242 (1897), the court noted that though a client's acquiescence in an attorney's conduct would not ordinarily bar recovery in negligence for the client, where the client was himself a skilled attorney, the client's action to recover for his attorney's negligence would be barred. In *Ligon Specialized*, the first case in Missouri to recognize the tort of negligent misrepresentation, contributory negligence was submitted as an affirmative defense. 581 S.W.2d at 907. The Eastern District reversed the trial court's entry of judgment in accordance with defendant's motion for directed verdict. *Id*. at 910. The jury had resolved the issue of contributory negligence in the plaintiff's favor, and the Eastern District expressed its view that the evidence supported the jury's verdict. *Id.* The Eastern District expressed no reservation with the use of contributory negligence as an affirmative defense in negligent misrepresentation cases.

It thus appears that, prior to *Gustafson*, contributory negligence was an available affirmative defense in economic loss negligence cases asserting a cognizable claim. The question is what remained of the defense in such cases following *Gustafson*.

The Abrogation of Contributory Negligence

In *Gustafson*, the Missouri Supreme Court "supplant[ed] the doctrines of contributory negligence, last clear chance, and humanitarian negligence with a

comprehensive system of comparative fault." *Gustafson*, 661 S.W.2d at 16. In so doing, the Supreme Court noted that "[i]nsofar as possible this and future cases shall apply the doctrine of pure comparative fault in accordance with the Uniform Comparative Fault Act Sections 1-6, 12 U.L.A. Supp. 35-45 (1983)." *Gustafson*, 661 S.W.2d at 15. A copy of the Uniform Comparative Fault Act ("UCFA") was attached to the opinion as an appendix.

Gustafson's abrogation of contributory negligence was thereafter loosely declared by our courts as applicable to ***all negligence cases***. *See Gramex Corp. v. Green Supply, Inc.*, 89 S.W.3d 432, 439 (Mo. banc 2002) ("Until 1983, a plaintiff's recovery in a negligence action was subject to the doctrine of contributory negligence."); *Lippard v. Houdaille Indus., Inc.*, 715 S.W.2d 491, 492 (Mo. banc 1986) ("This opinion [referring to *Gustafson*] abolished contributory negligence as a bar to the plaintiff's recovery in negligence cases . . . .") However, it is unclear whether *Gustafson* truly abrogated contributory negligence in its entirety, or only supplanted contributory negligence in those negligence cases where comparative fault would be thereafter applied, leaving the common law principle of contributory negligence in place for negligence actions where comparative fault would not be applied.

The UCFA suggests the latter intention. The UCFA provides that:

> In an action based on fault ***seeking to recover damages for injury or death to person or harm to property***, any contributory fault chargeable to the claimant diminishes proportionally the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This ***rule applies whether or not under prior law***

> ***the claimant's contributory fault constituted a defense*** or was disregarded under applicable legal doctrines, such as last clear chance.

UCFA Section 1(a), 12 U.L.A. Master Ed. 125 (2008) (emphasis added). The UCFA thus suggests that the abrogation of contributory negligence extends only so far as the reach of comparative fault. The UCFA recommends that comparative fault extend ***only*** to negligence actions "seeking to recover damages for injury or death to person or harm to property." UCFA Section 1(a), 12 U.L.A. Master Ed. 125 (2008). Comparative fault is ***not*** recommended to extend to:

> [M]atters like economic loss resulting from a tort such as negligent misrepresentation, or interference with contractual relations or egregious falsehood, or harm to reputation resulting from defamation. But failure to include these harms specifically in the Act is not intended to preclude application of the general principle to them if a Court determines that the common law of the state would make the application.

UCFA Section 1 Cmt., 12 U.L.A. Master Ed. 125 (2008).

Read collectively, therefore, the UCFA recommends: (i) the abrogation of contributory negligence in favor of comparative fault in ***all matters*** involving damages for injury or death to a person or harm to property; (ii) the application of comparative fault in ***all matters*** involving such damages even where contributory negligence was not previously recognized as an affirmative defense; and (iii) not applying comparative fault, and thus an unchanged state of the law, in "economic loss" negligence cases, subject to a court's right to apply comparative fault principles if permitted by the common law of the state.

Though these are the recommendations of the UCFA, we cannot conclude that these recommendations have been adopted, wholesale, in Missouri by virtue of *Gustafson*. In fact, though the UCFA recommends that comparative fault should be permitted as an affirmative defense even where contributory fault was not previously available as a defense, our Supreme Court has concluded to the contrary. In *Lippard,* the Supreme Court held that comparative fault is not an available defense in products liability cases ***because*** contributory negligence was never a defense in such cases - the antithesis of the UCFA's recommendation. 715 S.W.2d at 492-93.[10] *Lippard* noted:

> It was not the purpose of *Gustafson* to enact that model act [referring to the UCFA] as a virtual statute of the state of Missouri, to establish substantive principles controlling cases not then before the Court. ***Much less was there any purpose of giving special authority to the annotations and commissioners' comments***.

Lippard, 715 S.W.2d at 492-93 (emphasis added). As a result of *Lippard*, the intended reach of *Gustafson's* adoption of pure comparative fault and the corollary abrogation of contributory negligence has remained subject to a case by case determination.

Because *Gustafson* cannot be read to adopt the entirety of the UCFA, the following questions remained unanswered after *Gustafson* and remain unanswered today: (i) did *Gustafson* abrogate contributory negligence in ***all*** negligence cases, including economic loss negligence cases, or does contributory negligence remain a defense in those cases; and (ii) will Missouri courts extend the availability of comparative fault as a defense to economic loss negligence cases. Though several Missouri cases have

[10]Following *Lippard*, the Missouri legislature enacted section 537.765 effective July 1, 1987, which specifically authorizes fault apportionment in products liability cases.

addressed these open questions following *Gustafson*, no case is viewed as having dispositively resolved the questions.

Contributory Negligence in Economic Loss Cases Post-Gustafson

In *Murphy v. City of Springfield*, 738 S.W.2d 521 (Mo. App. S.D. 1987) ("*Murphy I*"), the Southern District considered a subcontractor's claim of misrepresentation based on inaccurate plan documents where only economic loss was claimed. *Id.* at 525. The case was submitted to the jury on a *comparative fault* theory. *Id.* at 529. The jury awarded a judgment in plaintiff's favor, but assessed fault to both the plaintiff and the defendant. *Id.* "After considering after trial motions, the trial court determined that comparative fault principles were inapplicable and entered judgment for the total damages found by the jury." *Id.* The trial court ***did not*** apply contributory negligence in entering its modified judgment. On appeal, the defendant claimed error as the trial court's modified judgment apportioned no fault to the plaintiff. *Id.* The defendant contended that "because contributory negligence was an affirmative defense in negligent misrepresentation cases before *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. banc 1983)," it was error not to apportion fault. *Id.* The Southern District, noting the UCFA does not recommend extending comparative fault to negligence actions involving only economic loss, concluded "***we doubt that Missouri will apply comparative fault any broader than the Act.***" *Murphy*, 738 S.W.3d at 529-30 (emphasis added). The Southern District did not, however, address the corollary question. It did not address whether *Gustafson* abrogated contributory negligence in ***all*** negligence cases, including economic loss

negligence cases. However, the Southern District's opinion can only be harmonized if read to intend that, following *Gustafson*, ***neither*** contributory negligence nor comparative fault are available affirmative defenses in negligence cases involving only economic loss.

Murphy has, in fact, been relied on for this very proposition. In *Garnac Grain Co. v. Blackley*, the Eighth Circuit concluded that:

> [O]ne might argue that, in cases not covered by the Act, Missouri courts would continue to apply the common law, under which a claimant's fault, large or small, was a complete defense. That was not the course taken, however, in *Murphy*, and we conclude that *Murphy*, which the opinion of the District Court did not discuss, is our best guide of what the Missouri Supreme Court would do.

932 F.2d 1563, 1570 (8th Cir. 1991). *Garnac* was modified by a supplemental opinion, issued July 30, 1991, which observed that a subsequent opinion styled *Murphy v. City of Springfield*, 794 S.W.2d 275 (Mo. App. S.D. 1990) (*Murphy II*) created a question about the principal opinion's reading of *Murphy I*. As a result, the Court said;

> [W]e are left in a state of uncertainty and believe that the prudent course is to withdraw the remark about the defense of contributory negligence that we made in the original opinion . . . . Accordingly, our discussion of contributory negligence as a complete defense is withdrawn. We intimate no view as to the proper answer to this question.

Id. at 1571.

Notwithstanding this retreat, in *Ehrhardt v. Penn Mutual Life Insurance. Co.*, 21 F.3d 266 (8th Cir. 1994), a contributory negligence instruction in an action against an insurer alleging failure to provide adequate guidance in filling out change of beneficiary forms was deemed erroneous. The court concluded "[c]ontributory negligence does not apply in Missouri to a negligence action involving only economic loss." *Id*. at 270. The

court cited *Garnac*, curiously ignoring the supplemental opinion withdrawing this finding which had been published as a part of the principal opinion. *Id.; Garnac*, 932 F.2d at 1571.

In *Bross v. Denny*, 791 S.W.2d 416 (Mo.App. W.D. 1990), this court reversed that portion of a judgment against an attorney in a malpractice action assessing twenty-five percent fault to the client because there was insufficient evidence to suggest that the client had acted negligently. *Id.* at 423. No party claimed error in submission of the comparative fault defense. This court thus did not discuss, but appeared simply to presume, that comparative fault was an appropriate defense.

Similarly, in *Layton v. Pendleton*, 864 S.W.2d 937 (Mo. App. W.D. 1993), this court again considered an attorney malpractice action where comparative fault was submitted. The judgment assessing fault to the client was reversed due to an absence of substantial evidence to support the comparative fault instruction. *Id.* at 942-43. Again, neither party claimed error in submitting the comparative fault defense. This court thus did not address whether comparative fault was an appropriate defense.

In *London v. Weitzman*, 884 S.W.2d 674 (Mo. App. E.D. 1994), also a legal malpractice action, the plaintiff claimed the trial court erred in submitting a comparative fault instruction based on sufficiency of the evidence. *Id.* at 678. The Eastern District noted that the plaintiff *had not preserved* the general issue of the propriety of submitting comparative fault in a case of this nature. *Id.* Thus, the Eastern District noted that its "concern focuses on the submissability of the issue of comparative fault and whether any

one of the defendant's theories was supported by the evidence and was sufficient in law to warrant the assessment of a percentage of fault against plaintiff." *Id.* Though the practical effect of *London* was to permit the comparative fault instruction, the Eastern District made it clear that the over-arching issue of the propriety of such an instruction in a legal malpractice action had not been properly preserved and was thus not being addressed. Though unstated in either opinion, the same caveat is likely applicable to our decisions in both *Bross* and *Layton*.

In *Chicago Title Insurance Co. v. Mertens*, 878 S.W.2d 899 (Mo. App. E.D. 1994), the maker on a promissory note counterclaimed in an action asserted by a title insurer who had taken assignment of the note from its insured. *Id.* at 901. The counterclaim alleged negligence by the title insurer in performing a title search for the property securing the note. *Id.* The losses suffered by the plaintiff were purely economic. *Id.* The trial court submitted a comparative fault instruction on the counterclaim. *Id.* The jury found the plaintiff to be partially at fault. *Id.* On appeal, plaintiff contended "that the trial court erred in submitting a comparative fault instruction on appellant's counterclaim in that comparative fault is not applicable to situations involving economic loss only, and in any event, the evidence did not support the submission." *Id.* at 902. Citing section 1(a) of the UCFA, and the Commissioners' Comments following that section, the Eastern District noted that ***the UCFA is not intended to apply to negligence actions involving economic loss***. *Id.* The Eastern District cited *Murphy I*, noting that the Southern District had also "held that comparative

fault does not apply to cases involving economic loss resulting from a tort such as negligent misrepresentation." *Chicago Title*, 878 S.W.2d at 902. As a result, the Eastern District concluded that:

> Nothing in the UCFA indicates that comparative fault should apply in a case involving only economic damages. As a result, the trial court erred in submitting the instruction to the jury regarding appellant's counterclaim. Therefore, the judgment on the counterclaim is reversed and ***remanded for proceedings consistent with this opinion.***

Id. (emphasis added). Importantly, though the Eastern District remanded the case, it offered no guidance about whether contributory negligence could be submitted as an affirmative defense on remand. In fact, the opinion makes no mention of contributory negligence at all. *Id*. Given *Chicago Title's* favorable reliance on *Murphy I*, one might assume that *Chicago Title* could be read to reject ***both*** comparative fault and contributory negligence in economic loss negligence cases.

This assumption, however, was disavowed in *Miller v. Ernst & Young*, 892 S.W.2d 387 (Mo. App. E.D. 1995) (*Miller I*),[11] an action against an accounting firm for professional negligence. In *Miller I* the Eastern District held that "**[i]*n this case involving only economic damages, contributory negligence remains an absolute defense***." *Id*. at 391 n.1 (citing *Chicago Title*, 878 S.W.2d at 902) (emphasis added). The Eastern District's attribution of such an important holding to *Chicago Title* is curious given *Chicago Title's* omission of ***any*** discussion of contributory negligence. It appears the Eastern District, without discussion or analysis, treated as self-evident the continuing

[11]We hereinafter refer to this case as *Miller I*, as a subsequent decision from the Eastern District arising out of the same underlying facts and bearing the same case name was decided by the Eastern District in 1997 and is discussed later in this opinion.

availability of contributory negligence as a defense in negligence cases where comparative fault is determined not to be available. Though this conclusion is consistent with the recommendations of the UCFA, it is diametrically opposed to the holding attributed to the Southern District in *Murphy I*.

In *Roskowske v. Iron Mountain Forge Corp.*, 897 S.W.2d 67 (Mo. App. E.D. 1995), the Eastern District addressed the acceptance doctrine which may result in an owner becoming "100% liable in accepting work for which the contractor would have similar liability before acceptance." *Id.* at 73. The Eastern District declined "*Roskowske's* invitation to abandon the acceptance doctrine because it is inconsistent with comparative fault." *Id.* The Eastern District noted that "comparative fault has never been applied uniformly in Missouri law. It was adopted only 'insofar as possible.'" *Id.* (quoting *Gustafson*, 661 S.W.2d at 16). The Eastern District concluded that "[c]omparative fault does not apply to a case involving purely economic damages." *Roskowske*, 897 S.W.2d at 73 (citing *Chicago Title Ins. Co.*, 878 S.W.2d at 902). In support of its conclusion that the acceptance doctrine is not supplanted as an exculpatory defense in economic loss negligence cases notwithstanding the adoption of comparative fault, the court pointed to other surviving "exceptions" to comparative fault involving exculpatory defenses.[12] *Id.* Though the court was not required to address contributory negligence, one could reasonably construe *Roskowske* as authorizing the continued use of

[12]"Assumption of risk is still a complete defense for injuries incurred in an athletic contest. *Martin v. Buzan*, 857 S.W.2d 366, 368-69 (Mo. App. E.D. 1993). Only certain types of actions can be considered as comparative negligence in a products liability case. Section 537.765 RSMo Cum.Supp.1993. "A party who has already settled with the plaintiff is not included in the apportionment of fault, *Schiles v. Schaefer*, 710 S.W.2d 254, 275-76 (Mo. App. 1986), although the recovery is credited to defendants who refuse to settle." *Roskowske*, 897 S.W.2d at 73.

"absolute defenses," including contributory negligence, in economic loss negligence cases post-*Gustafson*.

In *Williams v. Preman*, 911 S.W.2d 288 (Mo. App. W.D. 1995),[13] plaintiff alleged negligent completion of bankruptcy schedules and the preparation of a false affidavit by his attorney. *Id.* at 293. Plaintiff alleged the trial court erred in submitting a contributory negligence instruction. *Id.* at 303. We noted that the contributory negligence instruction:

> Presents the plaintiff's alleged negligent actions as a complete bar to recovery. Dr. Williams asserts that the instruction was erroneous in that comparative fault, not contributory negligence, applies in legal malpractice actions. Alternatively, Dr. Williams advances the theory that ***neither comparative fault nor contributory negligence applies because an attorney should not be able to reduce his liability due to the alleged negligence of his client***. We need to address the intriguing issue of whether the adoption of comparative fault in *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. banc. 1983), included only cases involving bodily injury and excluded cases of purely economic damage.

Williams, 911 S.W.2d at 303 (emphasis added).[14] Before broaching this "intriguing question," this court expressed an overriding concern with the use of either contributory negligence ***or*** comparative fault in the case before it, observing that:

> Logic . . . dictates that the allegation of Williams' failure to correct the schedules is not a proper submission for either contributory negligence or comparative fault. Mr. Preman was hired for the purpose, *inter alia*, of filling out the forms. He brought to the forms his professional knowledge and skill as to how such forms are to be completed. There was no testimony presented which would show that it was the duty of Dr. Williams to know what assets must be disclosed. No evidence was presented that the forms and schedules filed in connection with the bankruptcy petition were

[13]*Williams* was overruled by *Klemme v. Best*, 941 S.W.2d 493 (Mo. banc 1997), on grounds unrelated to our discussion.

[14]The emphasized text raises the policy concern involved when a professional's duties are permitted to be shifted back to the client through use of an affirmative defense. This is the subject of our discussion of CWF's point two on appeal, *infra*.

> the kinds of forms and schedules with which Williams was familiar. Thus, we find no evidence to support the notion that Dr. Williams should have known that he had a duty to supervise Mr. Preman's completion of the forms.

Id. at 304. This court continued:

> The normal assumption is that people hire lawyers to complete such forms because the clients are not familiar with how to do so. ***It would be the exception, and not the rule, where clients may be considered at fault for failing to properly supervise the very person they have hired as their expert. Such a notion, to be submissible, must be supported in the evidence***.

Id. (citing *Annotation, Contributory Negligence or Assumption of Risk as Defense in Action Against Physician or Surgeon for Malpractice*, 50 A.L.R. 2d 1043 (emphasis added). *Williams* cited *Carr,* the 1897 Missouri appellate decision discussed, *supra*, for its expression of a similar concern. "As a rule a client not only acquiesces in pleadings prepared and filed by his attorney, but he implicitly relies upon him in that regard." *Carr*, 70 Mo. App. at 250.

Williams ultimately concluded that the contributory negligence instruction was erroneous "because the submission suggesting that plaintiff had a duty to supervise the lawyer's completion of the forms was not supported by the evidence." *Williams,* 911 S.W.2d at 304. As a result, *Williams* did not reach the "intriguing issue" of whether contributory negligence or comparative fault is ever an available defense in professional negligence cases involving economic loss.

In *Blackstock v. Kohn*, 994 S.W.2d 947 (Mo. banc 1999), the plaintiff filed an action against its tax attorneys for professional negligence. The trial court submitted a

verdict director with an affirmative defense tail stating "[u]nless you believe plaintiffs are not entitled to recovery by reason of Instruction No. 11." *Id.* at 951. Instruction No. 11 was characterized by the parties as a contributory negligence instruction. It read:

> Your verdict must be for Defendants Michael Kohn, Joseph Mooney if you believe:
>
> First, Plaintiff John Blackstock represented to Defendants that Plaintiffs had an agreement to purchase the docks prior to the flood, and
>
> Second, Plaintiffs were thereby negligent, and
>
> Third, such negligence of Plaintiffs directly caused any damage Plaintiffs may have sustained.

Id.

On appeal, the plaintiff claimed that following adoption of comparative fault in *Gustafson*, the defense of contributory negligence had been eliminated in professional negligence cases, thus requiring the court to submit a comparative fault instruction. *Id.* The Supreme Court did not resolve this question. Instead, it "re-characterized" Instruction No. 11 as an inartfully drafted affirmative converse instruction and not a contributory negligence instruction at all. *Id.* at 951-52. The Supreme Court reasoned that the instruction was an affirmative converse because it presented a "hypothetical ultimate issue which, if true, renders it impossible for the jury to find the defendant negligent as a matter of law." *Id.* at 951 (citing *Hiers v. Lemley*, 834 S.W.2d 729, 734 (Mo. banc 1992)). The court thus concluded that "[b]ecause the instruction submitted was not a contributory negligence instruction, this Court does not reach the issue of

whether the trial court should have submitted a comparative fault instruction rather than a contributory negligence instruction." *Id.* at 952.

Though we acknowledge *Blackstock*, we note our reservation with the Supreme Court's "re-characterization" of the subject instruction as an affirmative converse. The subject instruction mirrored in every respect MAI 32.01(1) 1978 (New), the required MAI instruction for submitting contributory negligence pre-*Gustafson*. Post-*Gustafson* versions of MAI do not include a contributory negligence instruction except for MAI 32.07(B), the contributory negligence instruction for use in F.E.L.A. cases. *Blackstock* actually referenced the F.E.L.A. contributory negligence instruction as an exemplar for the "proper" way to instruct contributory negligence because of the instruction's initial passage: "[y]ou must find ***plaintiff contributorily negligent*** if you believe." *Blackstock*, 994 S.W.2d at 952 n.2 (emphasis added). However, *Blackstock* does not mention that MAI 32.01(1), the pre-*Gustafson* MAI approved contributory negligence instruction of general applicability, ***did not use*** this prefatory phrase, and instead began: "[y]our verdict must be for defendant if you believe." Further, *Blackstock* did not mention that though MAI 32.07(B) is called a contributory negligence instruction, the law in F.E.L.A. cases is unusual as the damage instruction required in such cases apportions fault in a manner consistent with the concept of comparative fault. *See* MAI 8.01 and 8.02.

The confusion occasioned by *Blackstock* is reflected in the case before us. Instruction No. 11 is in every material respect identical to Instruction No. 11 at issue in *Blackstock* ***except*** for the fact Mayer Hoffman and CBIZ modified the introductory

passage of the Instruction to read "[y]ou must find plaintiff contributorily negligent if you believe" in the very manner suggested by *Blackstock.*[15] In fact, Instruction No. 11 notes as its source MAI 32.07(B) and *Blackstock*. CWF's objection to Instruction No. 11 during the instruction conference also bears witness to the confusing message of *Blackstock.* CWF objected not only to the propriety of submission of contributory negligence generally, but also to the instruction as "a converse which is improper under the circumstances."

Though not subject to citation as precedent because supplanted by *Blackstock,* the underlying court of appeals' decision in *Blackstock v. Kohn*, No. 73101, 1998 WL 726263 (Mo. App. E.D. Oct. 20, 1998), discussed extensively the applicability of contributory negligence and/or comparative fault in cases involving economic loss. For purposes of our analysis, the opinion is informative. The Eastern District noted that:

> Since *Gustafson*, Missouri appellate courts have uniformly held that the comparative fault doctrine does not apply to cases involving only economic loss. *See Murphy v. City of Springfield*, 738 S.W.2d 521, 530 (Mo. App. 1987); *Chicago Title Ins. Co. v. Mertens*, 878 S.W.2d 899, 902 (Mo. App. 1994); *Roskowske v. Iron Mountain Forge Corp.*, 897 S.W.2d 67, 73 (Mo. App. 1995). ***None of these cases, however, specifically hold that contributory negligence remains in effect in economic loss actions.*** Thereafter, this court took the next logical step and held that contributory negligence remains an absolute defense in cases involving only economic damages.

[15]As a result of Mayer Hoffman's and CBIZ's modification of the prefatory phrase at the beginning of Instruction No. 11 in the manner suggested by *Blackstock,* we are unable to re-characterize the instruction as an affirmative converse as we did in *Wagner v. Mortgage Information Services, Inc.*, 261 S.W.3d 625, 635-36 (Mo. App. W.D. 2008). We must, therefore, squarely tackle whether submitting contributory negligence remains a defense in economic loss negligence cases following *Gustafson*.

Blackstock, 1998 WL 726263, at *2 (citing *Miller I*, 892 S.W.2d at 388 n.1) (emphasis added). The court concluded "[w]e follow this court's precedent and hold that contributory negligence is a defense in cases involving economic loss." *Id.* The Eastern District thus signaled its continuing inclination to permit contributory negligence, but not comparative fault, as an affirmative defense in economic loss negligence cases.

Subsequently, in an opinion whose binding precedential value was also negated by subsequent transfer to the Supreme Court, this court concluded in *Ameristar Jet Charter, Inc. v. Dodson International Parts, Inc.*, Nos. WD61655, WD61800, WD62141, 2004 WL 76342 (Mo. App. W.D. Jan. 20, 2004),[16] that "contributory negligence remains an absolute defense in a case involving purely economic damages." *Id.* at *14 (citing *Miller I*, 892 S.W.2d at 388 n.1). Notwithstanding the early Western District decisions post-*Gustafson* which permitted comparative fault without discussion,[17] the Western District in *Ameristar Jet* signaled an inclination to follow the Eastern District's lead, thus permitting contributory negligence, but not comparative fault, as an affirmative defense in negligence cases involving economic loss.

This chronological summary reveals initial uncertainty but, in the end, a persuasive emerging trend. Missouri appellate courts appear unwilling to extend comparative fault to economic loss negligence cases. Missouri appellate courts appear inclined to view *Gustafson's* abrogation of contributory negligence as extending only so

[16]*Ameristar* was transferred to the Supreme Court. *Ameristar Jet Charter, Inc. v. Dodson International Parts, Inc.*, 155 S.W.3d 50 (Mo. banc 2005). The Supreme Court disposed of the case on grounds other than the instructional error issue, which led to this court's discussion of the submissability of contributory negligence in a case involving purely economic damages.

[17]*Bross*, 791 S.W.2d 416; *Layton*, 864 S.W.2d 937.

far as the reach of comparative fault, leaving contributory negligence intact as a defense in economic loss negligence cases.[18]

Contributory Negligence as a Continuing Defense in Economic Loss Cases

This emerging trend is, of course, consistent with the recommendations of the UCFA. That alone, however, is not dispositive of the direction Missouri should take in resolving the intriguing debate over the continued application of contributory negligence in economic los negligence cases. We must independently assess whether the UCFA's recommendations on this subject are sound and grounded in logical legal principles. We believe that they are.

The UCFA's recommendation discouraging the use of comparative fault in economic loss negligence cases arises out of the distinguishable underpinning of such cases. Economic loss negligence cases generally arise out of a relationship that is contractual or quasi-contractual in nature.[19]

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[18]As we will discuss under point two, however, the willingness to permit the affirmative defense of contributory negligence in professional negligence cases remains subject to the concern that care must be taken to avoid submitting the defense when the effect would be to impose a duty on the client to perform duties undertaken by the professional.

[19]The source of the tort of negligent misrepresentation is the Restatement (Second) of Torts Section 552 (1977), which describes the theory as involving a situation where "[o]ne who, in the course of his business, profession or employment, or in any transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions." *See B.L. Jet Sales, Inc. v. Alton Packaging Corp.*, 724 S.W.2d 669, 671-72 (Mo. App. E.D. 1987). Courts in Missouri permit recovery in tort when a client "sues for breach of a duty recognized by the law as arising from the relationship or status the parties have created by their agreement." *Bus. Men's Assurance Co. of Am. v. Graham*, 891 S.W.2d 438, 453 (Mo. App. W.D. 1994) (citing *Am. Mortgage Inv. Co. v. Hardin-Stockton*, 671 S.W.2d 283, 293 (Mo. App. W.D. 1984)). Even where the economic loss is suffered by a third party, courts are inclined to find liability in tort where the conduct of one was "with the very end and aim of shaping the conduct of another," tantamount to the contractual theory of third party beneficiary. *Glanzer v. Shepard*, 135 N.E. 275, 277 (N.Y. 1922) (weighers under contract to seller of beans misrepresented weight of beans and were held liable to ultimate buyer of beans who paid too much). Certainly, professional negligence actions routinely arise from a contractual or quasi-contractual relationship where the client has retained the professional for a particular purpose.

> [T]he Act does not cover suits to recover purely economic loss, such as actions that are fully contractual in their gravamen, in which the plaintiff is suing solely because the plaintiff did not recover what the plaintiff contracted to receive, or suits for negligent misrepresentation, interference with contractual relations, injurious falsehood, or defamation.

3 RICHARD E. KAYE, COMPARATIVE NEGLIGENCE, Section 19.10[3], at 19-12 (2004). "Excluding economic damages cases from the Act's coverage is based on a belief that parties in contract negotiations can bargain and allocate risks and duties among themselves." *Id.; See also,* W. Dudley McCarter, Economic Loss Doctrine: Is Privity Required?, 53 J. MO. BAR 23, 23 (Jan.-Feb. 1997) ("Historically, economic losses have been associated with contract law under the theory that the parties to a contract can allocate the risks between them.")

The contractual or quasi-contractual overtones in economic loss negligence cases are in conflict with the sweeping concept of "fault" subsumed within comparative fault. "***[A]ny . . . fault*** chargeable to the claimant" is to be compared when comparative fault is submitted. UCFA Section 1(a), 12 U.L.A. Master Ed. 125 (2008) (emphasis added). The UCFA views "fault" broadly to accomplish the objective of simplicity, even requiring fault to be compared "whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance." UCFA Section 1(a), 12 U.L.A. Master Ed. 125 (2008). In keeping with this intent, the UCFA defines "fault" as:

> [A]cts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse

> of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages.

UCFA Section 1(b), 12 U.L.A. Master Ed. 125 (2008) (emphasis added).

Missouri has adopted the UCFA's definition of "fault" in comparative fault cases. *Love v. Park Lane Med. Ctr.*, 737 S.W.2d 720, 724 (Mo. banc 1987) ("Negligence is but one type of fault; fault also includes avoidable consequences, including mitigation of damages.") Thus, the comparative fault defense in Missouri permits ***fault of every kind*** to be evaluated by a jury, including evidence of fault which would not have been admissible using a contributory negligence defense. *See, e.g.*, *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 106-07 (Mo. banc 1996) (court adopted evidentiary standard permitting admission of evidence of a party's alcohol use without requiring evidence of related erratic behavior, noting the old evidentiary standard made "more sense under a system of contributory negligence . . . . A comparative fault system can better accommodate alcohol evidence than a contributory negligence system.") The broad sweep of "fault" for comparative fault is based on principles of fairness, such that "a jury should be as fully informed as possible in order to determine the relative fault of the parties." *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS Section 67, at 470 (5th ed. 1984)).

At first blush, one might assume the broad sweep of "fault" subsumed within comparative fault would mitigate toward permitting use of that defense, instead of contributory negligence, in negligence actions involving only economic loss. In fact, permitting comparative fault in economic loss negligence actions given the broad sweep

of "fault" could result in a jury weighing fault without regard to the manner in which the parties' negotiations or discussions have allocated risks and duties among them, and without regard to differing standards of care, inconsistent with the historical relationship between economic loss cases and underlying principles of contract law.

This risk is particularly apparent in economic loss professional negligence cases. In professional negligence cases, the professional is held to a standard of care as "a member of a learned and skilled profession [and will have] a duty to exercise the ordinary and reasonable technical skill that is usually exercised by one in that profession." *Bus. Men's Assurance*, 891 S.W.2d at 453. The client's duty is defined by the lower standard of an ordinarily careful person.[20] The comparison of fault in cases involving two different standards of care is problematic as comparative fault principles blur, if not ignore, differences in standards of care, opting instead for the simplicity of proportional reduction of damages by "***any . . . fault*** chargeable to the claimant." UCFA Section 1(a), 12 U.L.A. Master Ed. 125 (2008) (emphasis added). In fact, implicit in the broad sweep of "fault" subsumed within comparative fault is the presumed fairness of charging the plaintiff and the defendant with commensurate duties to use reasonable care to avoid harm to oneself or injury to another. The Restatement (Third) of Torts confirms this underlying presumption. "Plaintiff's negligence is defined by the applicable standard for a defendant's negligence. Special ameliorative doctrines for defining plaintiff's negligence are abolished." Restatement (Third) of Torts Section 3 (1999).

[20]MAI 11.02.

Yet, the presumption of "comparable duties" is misplaced in professional negligence actions. Presuming that a client has a ***commensurate*** duty of self-care, which can be fairly enforced by comparing fault, ignores that a professional owes a higher duty to the client and that a client has often sought out the assistance of a professional to do what the client cannot do or to remediate a predicament of the client's creation. *See, generally,* Richard Scott Novak, *Attorney Malpractice: Restricting the Availability of the Client Contributory Negligence Defense*, 59 B.U.L. REV. 950, 958-963 (1979). Thus, commentators suggest that applying comparative fault in professional negligence cases, given the broad sweep of "fault," will "penalize a client for unreasonably failing to perform any of the [professional's] responsibilities, since the penalty can be exacted in the form of apportionment without completely barring recovery." *Id.* at 956. There is thus a concern that a professional's duty undertaken to a client cannot be:

> [e]ffectively enforced under comparative fault since the defendant-[professional] would at most be held partially liable and the plaintiff-client would never be fully compensated for his loss. Thus, the assumption that a plaintiff has a duty of self-care which is enforced by reducing his recovery renders impossible the enforcement of the [professional's] duty to ensure [sic] the adequate protection of the client's [professional] interests notwithstanding the client's failure to do so himself.

Id. at 962-63. Conversely, there is a risk that the broad sweep of "fault" implicit with comparative fault blurs the importance of adequately defining the outer limits of the duties undertaken by the professional to the client, resulting in a situation where a professional may receive only a reduction in the damages for which the professional is responsible when the professional should have been entitled to prevail because the duties

undertaken never included responsibility for preventing the economic loss suffered by the client. *Id.*

Comparative fault would thus permit, even encourage, juries to disregard what should instead be the primary focus--the scope of the duty undertaken by the professional pursuant to a higher standard of care. This was the same message expressed by this court in *Williams* and *Carr*. As noted in *Carr*:

> A lawyer is not liable in damages to his client for a mere error in judgment on a legal proposition concerning which enlightened legal minds may fairly differ. But the same degree of diligence is required of a lawyer that is required of other men employed to render services of a technical or scientific character; and if the error is such as to evince negligence he is liable.

70 Mo.App. at 247. As noted in *Williams* "[i]t would be the exception, and not the rule, where clients may be considered at fault for failing to properly supervise the very person they have hired as their expert." 911 S.W.2d at 304. The Restatement (Third) of Torts agrees that the proper focus in professional negligence economic loss cases should be on the scope of the duty undertaken by the professional. RESTATEMENT (THIRD) OF TORTS Section 7 cmt. m (1999).

We conclude that the UCFA's recommendation that comparative fault should not be extended to economic loss negligence cases is a sound and logical directive. We decline, therefore, to extend comparative fault to economic loss negligence cases. We further conclude that *Gustafson's* abrogation of contributory negligence was intended to extend only so far as the reach of comparative fault. As a result, we conclude that the

common law principle of contributory negligence remains a viable defense in negligence actions involving economic loss.[21] CWF's point one is denied.

Point II

In point two, CWF argues that should we conclude that contributory negligence remains an available defense in professional negligence actions involving economic loss, we should consider adopting the audit interference rule first recognized in *National Surety Corp v. Lybrand*, 9 N.Y.S.2d 554 (N.Y. App. Div. 1939), and subsequently adopted in *Lincoln Grain, Inc. v. Coopers & Lybrand*, 345 N.W.2d 300 (Neb. 1984). As previously noted, this issue was not preserved by CWF in the manner required by Rule 70.03. Relief, if any, afforded to CWF on this point must be pursuant to plain error review.

Rule 84.13(c) states that "[p]lain errors affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." In reviewing a claim under the plain error standard, this Court first asks "'whether there facially appear substantial grounds for believing that the trial court committed error that is evident, obvious and clear, which resulted in manifest injustice or a miscarriage of

[21]We have not set forth in this opinion an exhaustive analysis of the manner in which other states have addressed these same issues. Though nearly every state has adopted some form of comparative fault, most have done so by statute, not judicially, meaning that cases in those states addressing the continuing applicability of contributory negligence in economic loss actions are necessarily tied to interpretation of that state's peculiar legislative scheme. Further, the form of comparative fault adopted is not uniform from state to state, with the majority of states employing a modified version of comparative fault and not pure comparative fault as is endorsed in the UCFA and as was adopted in Missouri by *Gustafson*. Thus, though there are numerous states where the judiciary has concluded, as we do today, that comparative fault is not applicable to economic loss cases and that contributory negligence remains a viable defense in such cases, the variables herein described render those decisions of limited value to our discussion.

justice.'" *Wagner*, 261 S.W.3d at 633 (quoting *Cohen v. Express Fin. Servs., Inc.*, 145 S.W.3d 857, 864 (Mo. App. W.D. 2004)). If so, we can elect to exercise our discretion to conduct plain error review, which requires that we follow two steps.

> First, the court must determine whether the trial court actually committed evident, obvious and clear error that affected substantial rights . . . . [I]n the second step of reviewing for plain error, the court must determine whether the evident, obvious, and clear error found resulted in manifest injustice or a miscarriage of justice.

Cohen, 145 S.W.3d at 864-65. We begin, then, by reviewing CWF's request that we adopt the audit interference rule claim to determine whether there "facially appear substantial grounds for believing that the trial court committed error that is evident, obvious and clear, which resulted in manifest injustice or a miscarriage of justice." *Id.* at 864.

The audit interference rule limits the availability of contributory negligence to circumstances where the client "has contributed to the accountant's failure to perform the contract and to report the truth." *Lincoln Grain*, 345 N.W.2d at 307. Essentially, the audit interference rule prohibits an accountant who has assumed a particular duty toward a client from interposing "as a defense the very injurious negligence of the client that the accountant has assumed a duty to discover and correct." *Comeau v. Rupp*, 810 F.Supp. 1172, 1183 (D. Kan. 1992). *See also*, *Lincoln Grain*, 345 N.W.2d at 307 ("[A]ccountants are not to be rendered immune from the consequences of their own negligence merely because those who employ them may have conducted their own business negligently.

Allowing such a defense would render illusory the notion that an accountant is liable for the negligent performance of his duties.")

Only one case in Missouri has addressed the audit interference rule. In *Miller v. Ernst & Young*, 938 S.W.2d 313 (Mo. App. E.D. 1997) (*Miller II*), the plaintiff alleged negligence by an accounting firm in failing to timely discover fraudulent activity by some of its principals. *Id.* at 314. The defendant accounting firm contended the plaintiff corporation was contributorily negligent for mismanagement by its principals. *Id.* at 315. Summary judgment in favor of the accounting firm was affirmed. *Id.* at 316. The court acknowledged extensive briefing by the parties on "the applicability of the contributory negligence defense as it applies to accountants and whether Missouri should or should not adopt" the audit interference rule. *Id.* at 315. The Eastern District, in affirming the summary judgment, necessarily presumed, as it had espoused in *Miller I*, that contributory negligence remains an absolute defense in economic loss cases. However, the Eastern District did not decide whether Missouri should adopt the audit interference rule, as it distinguished the fraudulent activity of the corporation's principals in the case before it from the facts involved in *National Surety Corp. Miller I*, 938 S.W.2d at 315-16.

As the audit interference rule has not been adopted in Missouri, it might be difficult to conceive that the trial court's failure to *sua sponte* modify the contributory negligence instruction tendered by Mayer Hoffman and CBIZ to account for the limitations required by the audit interference rule could be viewed as "evident, obvious, and clear error." *Cohen*, 145 S.W.3d at 864-65. We note, however, that although

Missouri has neither adopted nor rejected the audit interference rule, Missouri has previously expressed concerns identical to those intended to be remediated by the audit interference rule. *Williams*, 911 S.W.2d at 304; *Carr*, 70 Mo. App. 242. In *Williams*, the concern was couched in the context of the scope of the duty undertaken by the professional. 911 S.W.2d at 304. The policy concern addressed in *Williams* is echoed in the Restatement (Third) of Torts. The Restatement notes:

> Sometimes a defendant has a legal obligation to protect the plaintiff from the plaintiff's own conduct . . . . Using the plaintiff's negligence to reduce the plaintiff's recovery against such a defendant may be inconsistent with the basis of the defendant's liability. ***That question, however, is one of the scope of defendant's legal obligations*** . . . . Similar issues can also arise in contexts of lawsuits not governed by this Restatement. ***For example, in other forms of professional malpractice not involving personal injury or physical damage to tangible property (such as legal malpractice) a client might be negligent in creating the problem the professional is employed to remedy.***

RESTATEMENT (THIRD) OF TORTS Section 7 cmt. m (1999) (emphasis added). Other courts have expressed similar concern with unfettered submission of contributory negligence in professional negligence cases where the client's recovery can be barred "solely because of their failure to themselves perform the very acts for which they employed [the professional]." *See Theobold v. Byers*, 13 Cal. Rptr. 864, 867 (Cal. Dist. Ct. App. 1961).

The audit interference rule thus represents nothing more than a narrow example of the broader judicial sensitivity we have already advised must be employed in professional negligence cases to avoid permitting contributory negligence to unfairly shift the duty undertaken by a professional back to the client. *See Williams*, 911 S.W.2d at 304. We

must determine, therefore, whether the contributory negligence instruction in this case unfairly shifted the duty undertaken by Mayer Hoffman back to CWF, and if so, whether this presented an error so evident, obvious, and clear as to warrant plain error review.[22]

Commentators on the subject of contributory negligence instructions in professional negligence cases have expressed that:

> [T]he defense of client contributory negligence should be unavailable as a matter of law when the alleged client negligence was a failure to discharge a responsibility within the scope of the [professional's] duty. That is, a client cannot, as a matter of law, be contributorily negligent for the same acts or omissions that constitute the [professional's] negligence.

Novak, 59 B.U.L. REV. at 951. Permitting a professional "to assert the very error he was obligated to anticipate and mitigate constituted contributory negligence negates the [professional's] responsibilities and severely undercuts client reliance." *Id.*

The principle "that a client can never be contributorily negligence for failure to perform the [professional's] function . . . . is simply the logical result of the interaction between contributory negligence analysis and the breadth of the [professional's] duty of care." *Id.* at 958. To conclude otherwise would discourage client's from relying on the professional assistance the client has sought, placing the client in the dilemma of having to worry about whether he will be later held contributorily negligent for relying on the professional to protect the client's interest. *See, e.g.*, *Id.* at 963. As the scope of the contributory negligence defense should turn on the duties the professional has undertaken to the client, it follows that the exact parameters of those duties must be defined in

[22]We have previously employed plain error review to remediate instructional error arising from a purported contributory negligence instruction submitted in a negligence case involving only economic loss. *Wagner*, 261 S.W.3d at 633.

professional negligence cases "in light of the particular circumstances of each case . . . through jury instructions." *Id.* at 951.

With this backdrop, we turn to an examination of the instructions in this case. Instruction No. 11 told the jury to find CWF contributorily negligent if CWF advised Mayer Hoffman that its accounting records accurately reflected the gifts in kind it had received, or if it provided Mayer Hoffman and CBIZ with erroneous records of shipments of gifts in kind to Ronald McDonald Houses. Conversely, Instruction No. 9 told the jury to find Mayer Hoffman negligent "if in its audit of Plaintiff's financial statements [Mayer Hoffman] failed to adhere to generally accepted auditing standards and, as a result, failed to detect material misstatements," or if Mayer Hoffman "failed to obtain sufficient evidential matter to support the amount of gifts made to Ronald McDonald Houses and, as a result, Plaintiff's schedule of gifts to Ronald McDonald Houses was overstated." The contributory negligence instruction necessarily presumed that CWF had a duty to deliver accurate records to Mayer Hoffman and/or CBIZ, while Mayer Hoffman's verdict director presumed that Mayer Hoffman had a duty to discover the mistakes in CWF's records. At first blush, these instructions appear to be inconsistent. However, to assess whether this apparent inconsistency constituted error, we must understand the purpose of an audit, as without that understanding, we are ill-equipped to determine whether these instructions unfairly shifted to CWF a duty to perform Mayer Hoffman's function.

We recognize that "[t]he accounting profession is quite sensitive about public and judicial perception of what the audit process actually accomplishes." Eric R. Dinallo,

Note, *The Peculiar Treatment of Contributory Negligence in Accountants' Liability Cases,* 65 N.Y.U.L. REV. 329, 332 (1990).

> The financial audit is central to the role of an accountant. Accountants perform audits to verify the financial statements of a corporation by examining and tracing its accounting records. . . . The audit constitutes an independent opinion of the fairness of the corporation's financial statements upon which creditors, investors, shareholders, managers, the government, and others may rely.

Id. at 333. The procedures used to perform audits render audits "subject to constraints which create some level of uncertainty in the final result. The sampling nature of the audit is one such constraint. . . . Time constraints also limit the comprehensiveness of audits. . . . Finally, inaccurate data from management reduces the accuracy of the audit." *Id*. at 334-35. An auditor's role is "limited to examining the corporation's compliance with, and consistent application of, GAAP, evaluating the internal controls of the corporation, and writing an opinion letter discussing the [auditor's] findings." *Id*. at 335 (footnote all numbers omitted). However:

> Good auditing . . . is neither passive nor superficial. . . . [I]t involves actively observing management, transactions, and inventory. Good auditors go to the heart of the business entity in that they constructively understand the accounting process of the company, ask necessary questions, and investigate loose ends.

Id.

In the end, the auditor exercises control over the scope of its audit opinion. An audit opinion letter can "fall into one of four sub-categories based on the level of the auditor's confidence in the veracity of the enterprise's internal financial records." David A. Jaffe, Comment, *The Allocation of Fault in Auditor Liability Lawsuits Brought By*

Sophisticated Third Party Users of Financial Statements--A Plea For Proportionate Liability, 54 U. PITT. L. REV., 1051, 1055-56 (1993). "The highest confidence level results in an "unqualified" opinion in which the auditor stipulates that the financial statements comply with GAAP 'and include all disclosures necessary to make the statements not misleading.'" *Id*. at 1056 (quoting T.J. Fiflis, *Current Problems of Accountants' Responsibilities to Third Parties*, 28 VAND. L. REV. 31, 41 (1975)). In a "qualified" opinion, "the auditor refrains from expressing an opinion on the veracity of specific transactions for one of two reasons: (1) fundamental disagreement with the enterprise's management on the proper accounting treatment of the transaction; or (2) ***lack of sufficient internal business records from which to reconstruct the actual transaction***." *Jaffe,* 54 U. PITT. L. REV. at 1056 (emphasis added). Finally, an auditor can issue an "adverse" opinion indicating the corporation's lack of compliance with GAAP and an inability to opine that the financial statements are materially free of error, or a "disclaimer of opinion" where the auditor cannot express an opinion because of "limitations of the scope of the examination." *Id.*

In this case, Mayer Hoffman issued an audit opinion letter that was unqualified. However, Zayas, the auditor hired by CWF to address the Pennsylvania Show Cause Order, testified at trial that CWF simply did not possess or maintain records that would permit reconstruction or verification of the quantity of gifts in kind actually ***received*** by CWF. This situation may well have warranted the issuance of a qualified audit opinion

by Mayer Hoffman. Instead of electing that route, Mayer Hoffman issued an unqualified audit opinion.

It is true that in the engagement letter CWF signed, Mayer Hoffman warned that its audit might not find every mistake in CWF's records. Of course, CWF bore the burden of proof on the issue of whether Mayer Hoffman's failure to find CWF's mistake in recording the quantity of gifts in kind it received (which resulted in the overvaluation of the gifts in kind contributed) fell below the applicable standard of care.[23] However, although Mayer Hoffman undertook no duty to insure that every mistake in CWF's records would be found, it was improper to permit Mayer Hoffman to defend its failure to discover a mistake in CWF's records on the basis that it had an absolute right (as evidenced by the contributory negligence instruction) to rely on CWF's representation that its gift in kind records were accurate. Commentators agree.

> [C]ourts should not allow a client's pre-audit activity to be used as evidence of contributory negligence. Pre-audit activity is analogous to types of conduct not allowed as evidence of contributory negligence in other malpractice cases. A doctor may not, for instance, claim that the patient's pre-treatment acts or physical condition constitute contributory negligence. . . . To allow the defense to be raised on the basis of such evidence would effectively relieve the physician of one of the very responsibilities for which she is engaged: diagnosis. Likewise, allowing an accountant to defend against a malpractice action with evidence of the client's pre-audit sloppiness would eviscerate the auditor's contractual responsibility to opine as to the fairness of the financial statements.

Dinallo, N.Y.U.L. REV. at 357; *See, e.g.,Van Vacter v. Hierholzer*, 865 S.W.2d 355, 358-59 (Mo. App. W.D. 1993) ("Courts have been reluctant to impose joint liability upon a patient in a malpractice lawsuit for the condition which caused him to seek the

[23]MAI 11.06.

physician's assistance, even if the patient negligently imposed the condition upon himself.") (citations omitted).

Here, Instruction No. 11 directed the jury to relieve Mayer Hoffman and CBIZ of liability if CWF provided inaccurate records which CWF believed to be accurate. CWF's alleged negligence related to the very condition for which it sought diagnosis--an opinion regarding the accuracy of its records. Permitting a contributory negligence instruction on this basis impermissibly affords an auditor absolution for all discovery failures in the audit process, as all discovery errors necessarily involve mistakes in the client's records. Instruction No. 11 was erroneous.

While we can conceive of circumstances where a client's conduct during an audit may warrant the submission of a contributory negligence defense, the conduct described in Instruction No. 11 would not have permitted such a submission had there been a proper and timely objection raised by CWF. In contrast, if a client has knowledge of issues relating to "the very problems the audit is designed to detect and yet keep[s] the knowledge or suspicions to" himself, thus ***preventing the auditor from discovering the problem,*** the submission of contributory negligence could be justified. *Dinallo*, 65 N.Y.U.L. REV. at 358. Further, where a client's damages result not from the auditor's negligence but from the client's disregard of the auditor's recommendations, contributory negligence may be appropriate. *Id*. at 359. Or if a client knows an audit is inaccurate but, nonetheless, relies on the audit to its damage, a contributory negligence instruction may be warranted. *Id*. at 360. Finally, if a client withholds "vital accounting materials or

. . . ***actively*** misleading the auditor, ***thereby preventing her from performing successfully***," contributory negligence may be an appropriate instruction.[24] *Id*. at 361 (emphasis added). None of these scenarios were submitted in Instruction No. 11.

Though Instruction No. 11 was erroneous, not all error is "plain error." Davolt v. Highland, 119 S.W.3d 118, 135-36 (Mo. App. W.D. 2003). "'Plain error review is rarely applied in civil cases, and may not be invoked to cure the mere failure to make proper and timely objections.'" *Atkinson v. Corson*, 289 S.W.3d 269, 276 (Mo. App. W.D. 2009) (quoting *Roy v. Mo. Pac. R.R. Co.*, 43 S.W.3d 351, 363-64 (Mo. App. W.D. 2001)). "We will reverse for plain error in civil cases only 'in those situations when the injustice of the error is so egregious as to weaken the very foundation of the process and seriously undermine confidence in the outcome of the case.'" *Id*. at 276-77 (quoting *Flood ex rel. Oakley v. Holzwarth*, 182 S.W.3d 673, 680 (Mo. App. S.D. 2005)). "'To establish that [an] instructional error rose to the level of plain error, appellant must demonstrate that the trial court so misdirected or failed to instruct the jury that it is evident that the instructional error affected the jury's verdict.'" *Hensley v. Jackson*

[24]We acknowledge that in their brief and during oral argument, Mayer Hoffman and CBIZ alleged that CWF failed to provide Mayer Hoffman with waybills, though CWF knew or should have known Mayer Hoffman needed the waybills to perform its audit. This allegation is similar to the fourth scenario described above. Mayer Hoffman's and CBIZ's allegation about the undelivered waybills might have supported a contributory negligence instruction if the evidence indicated that the undelivered waybills prevented Mayer Hoffman from discovering CWF's mistake in recording gifts in kind received. We express no opinion here about whether the evidence would have supported this submission given CWF's employee's testimony that the waybills showed only what was shipped (which would not necessarily have been what was ordered) and that she recalled no instances where her count of incoming gifts in kind revealed an error in the waybills. Regardless, the contributory negligence instruction Mayer Hoffman tendered did not submit CWF's failure to deliver the waybills or allege that said failure prevented Mayer Hoffman from discovering CWF's mistake. Instead, Instruction No. 11 improperly characterized CWF's delivery of erroneous records it believed to be accurate as contributory negligence.

County, 227 S.W.3d 491, 497-98 (Mo. banc. 2007) (quoting *State v. Baker*, 103 S.W.3d 711, 723 (Mo. banc 2003)).

We do not believe this standard has been met in this case. Having reviewed the entire record, we observe that had this particular contributory negligence instruction not been submitted, the evidence viewed in the light most favorable to the verdicts would have supported the jury's verdicts in favor of Mayer Hoffman and CBIZ. We thus cannot conclude that that the jury's verdict was influenced by the erroneous contributory negligence instruction.[25] The submission of the contributory negligence instruction, though erroneous, does not, therefore, weaken the very foundation of the process or seriously undermine confidence in the outcome of this case under these circumstances. Moreover, the error in the contributory negligence instruction was not, based on the evidence (including the expert witness testimony) submitted in this case, evident, obvious or clear, particularly given the uncertainty in the law with respect to contributory

[25]We note other unpreserved problems with the contributory negligence instruction which warrant mention. First, the affirmative defense tails on Instructions No. 9 and No. 10 state "unless you believe plaintiff is not entitled to recover by reason of Instruction No. 11." However, Instruction No. 11 begins "[y]ou must find plaintiff contributorily negligent if you believe." Instruction No. 11 does not state that finding plaintiff contributorily negligent means the plaintiff "is not entitled to recover" under Instructions No. 9 and No. 10. This disconnect is a direct result of remediating the prefatory language of the contributory negligence instruction per *Blackstock* without a corollary remediation of the affirmative defense tail to read "unless you believe plaintiff is contributorily negligent by reason of Instruction No. __." Second, the same contributory negligence instruction was referenced in the affirmative defense tail of the separate verdict directors for Mayer Hoffman and CBIZ. Yet, the contributory negligence instruction included disjunctive submissions, the first mentioning documents provided to Mayer Hoffman, and the second mentioning documents provided to Mayer Hoffman and CBIZ. The contributory negligence instruction could have relieved CBIZ of liability even if the jury believed only the first disjunctive submission. Finally, Instruction No. 11 submitted an undisputed fact--that CWF's records were inaccurate. This lends emphasis to the effect of erroneously submitting a contributory negligence instruction based on a claim that a client's records were inaccurate--a fact that cannot be disputed when a client is claiming a mistake in the records should have been discovered by the auditor.

negligence's remaining viability, and precise contours, in economic loss cases. Plain error review is not warranted in this case.[26] CWF's point two is denied.

Though we have not afforded plain error review to CWF for the erroneous contributory negligence instruction in this case, the principles herein discussed should be hereinafter adhered to by counsel and the courts in economic loss negligence cases, including professional negligence cases. Great care must be taken by the trial court in such cases to avoid submitting a contributory negligence instruction that presumes a duty a client has not undertaken, that shifts to the client a duty undertaken by the professional, and that effectively negates the professional's obligation to perform its duties by ignoring the very reason the client sought out the professional's assistance in the first place. We also emphasize the importance in professional negligence economic loss cases of carefully defining the scope of the duty undertaken by the professional. Professionals are not insurers against error and can only be liable for mistakes that arise out of a duty specifically undertaken to a client and a corresponding failure to perform within the applicable standard of care. Though we cannot anticipate every scenario which will present itself to trial courts in the future, we suggest that by virtue of the principles herein discussed, it will be, as we noted in *Williams*, "the exception, and not the rule, where

[26]Though we provided plain error review in *Wagner*, a case which also involved instructional error in an economic loss negligence case, that error was evident, obvious, and clear, as it involved a verdict director which cross referenced an affirmative defense by a mistaken instruction number, prejudicially elevating a mitigation defense to an absolute defense. 26 S.W.3d at 633.

clients may be considered at fault" for a professional's purported failure to perform duties undertaken to the client.[27] 911 S.W.2d at 304.

Conclusion

The judgment of the trial court is affirmed.

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Cynthia L. Martin, Judge

All concur.

[27]The principles herein described apply to all economic loss professional negligence cases and already encompass the rationale of the audit interference rule. We thus need not, and therefore do not, formally adopt the audit interference rule.