

No. SC 88637
ED 88123

IN THE SUPREME COURT OF MISSOURI

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

Plaintiff-Respondent,

vs.

METROPOLITAN ST. LOUIS SEWER DISTRICT,

Defendant-Appellant.

Appeal From the Circuit Court for the City of St. Louis
The Honorable Philip D. Heagney, Circuit Judge, Division 10,
Cause No: 022CC-00889

**SUBSTITUTE REPLY BRIEF OF APPELLANT
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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	iii
Argument.....	1
I. THE TRIAL COURT ERRED IN DENYING MSD’S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE MSD IS NOT A “PERSON” SUBJECT TO THE PROVISIONS OF THE OPLSA. ..	1
II. THE TRIAL COURT ERRED IN DENYING MSD’S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE AMERENUE FAILED TO MAKE A SUBMISSIBLE CASE AGAINST MSD FOR CONTRIBUTION UNDER § 319.085 OF THE OPLSA.	10
III. THE TRIAL COURT ERRED IN REFUSING TO REDUCE THE AMOUNT OF THE JURY VERDICT AND JUDGMENT IN ACCORDANCE WITH THE DAMAGES CAP SET FORTH IN MO. REV. STAT. § 537.610.	16
IV. THE COURT OF APPEALS CORRECTLY ORDERED A NEW TRIAL UPON RULING THAT THE TRIAL COURT ERRED IN ADMITTING GRANSBERG’S EXPERT TESTIMONY CONCERNING THE CONSTRUCTION OF THE MSD-MULLIGAN CONTRACT AND MSD’S OBLIGATIONS THEREUNDER.....	19
CONCLUSION	32

Certificate of Compliance..... 33
Certificate of Service 34

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Ariz. Pub. Serv. Co. v. Shea</i> , 742 P.2d 851 (Ariz. Ct. App. 1987).....	3,4,7
<i>Burns v. Black & Veatch Architects, Inc.</i> , 854 S.W.2d 450 (Mo. Ct. App. 1993).....	19
<i>Cook v. Newman</i> , 142 S.W.3d 880 (Mo. Ct. App. 2004).....	10,11
<i>Crow v. Kansas City Power & Light Co.</i> , 174 S.W.3d 523 (Mo. Ct. App. 2005).....	5
<i>Greene County v. Pennel</i> , 992 S.W.2d 258 (Mo. Ct. App. 1999).....	17
<i>J.S. DeWeese Co. v. Hughes-Treitler Mfg. Corp.</i> , 881 S.W.2d 638 (Mo. Ct. App. 1994).....	19
<i>Marx & Co., Inc. v. Diners' Club, Inc.</i> , 550 F.2d 505 (2d Cir. 1977).....	19
<i>McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co.</i> 323 S.W.2d 788 (Mo. 1959)	12

<i>McNeill Trucking Co., Inc. v. Missouri State Hwy & Transp. Comm’n,</i> 35 S.W.3d 846 (Mo. 2001)	12
<i>Missouri Pac. R.R. Co. v. Whitehead & Kales Co.,</i> 566 S.W.2d 466 (Mo. 1978)	11
<i>Monsanto Co. v. Sygenta Seeds, Inc.,</i> 226 S.W.3d 227 (Mo. Ct. App. 2007).....	19
<i>Oldaker v. Peters,</i> 869 S.W.2d 94 (Mo. Ct. App. 1993).....	19
<i>Ozark Wholesale Beverage Co. v. Supervisor of Liquor Control,</i> 80 S.W.3d 491 (Mo. Ct. App. 2002).....	10
<i>Rowland v. Skaggs Co., Inc.,</i> 666 S.W.2d 770 (Mo. Ct. App. 1984).....	12
<i>Safeway Stores, Inc. v. City of Raytown,</i> 633 S.W.2d 727 (Mo. 1982)	11
<i>Smart v. Chrysler Corp.,</i> 991 S.W.2d 737 (Mo. Ct. App. 1999).....	7
<i>State ex rel. City of Jennings v. Riley,</i> --- S.W.3d ---, 2007 WL 3147313 (Mo. Oct. 30, 2007)	14

<i>State ex rel. MW Builders, Inc., v. Midkiff,</i>	
222 S.W.3d 267 (Mo. 2007)	2
<i>State ex rel. Safety Roofing Sys., Inc. v. Crawford,</i>	
86 S.W.3d 488 (Mo. Ct. App. 2002).....	<i>passim</i>
<i>Structural Sys., Inc. v. Hereford,</i>	
564 S.W.2d 62 (Mo. Ct. App. 1978).....	19
<i>White v. Am. Repub. Ins. Co.,</i>	
799 S.W.2d 183 (Mo. Ct. App. 1990).....	10
<i>Wollard v. City of Kansas City,</i>	
831 S.W.2d 200 (Mo. 1992)	17

Statutes

Mo. Rev. Stat. § 319.078(4)	<i>passim</i>
Mo. Rev. Stat. § 319.083	13
Mo. Rev. Stat. § 319.085	<i>passim</i>
Mo. Rev. Stat. § 537.060	11
Mo. Rev. Stat. § 537.600.1(2)	17
Mo. Rev. Stat. § 537.600.2	17

Mo. Rev. Stat. § 537.610..... 16,17

Other

The Restatement (Second) of Torts § 414 (1965) 5

ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING MSD'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE MSD IS NOT A "PERSON" SUBJECT TO THE PROVISIONS OF THE OPLSA.

AmerenUE violates the rules of statutory construction in contending that MSD is a "person" within the meaning of Missouri's OPLSA. The foregoing is shown by comparing the plain language of the statute as it now exists with the language of the statute as it would appear with AmerenUE's construction. Section 319.078(4) currently states:

(4) "Person," an individual, firm, joint venture, partnership, corporation, association, municipality, or governmental unit which performs or contracts to perform any function or activity upon any land, building, highway or other premises in proximity to an overhead line. (Mo. Rev. Stat. § 319.078(4)).

AmerenUE's construction, however, would change the statutory language to instead read:

(4) "Person," an individual, firm, joint venture, partnership, corporation, association, municipality, or governmental unit which performs any function or activity upon any land, building, highway or other premises in proximity to an overhead line **"or an entity that contracts to have the work**

performed by someone else". (AmerenUE Br., pp. 30, 31, 34).

AmerenUE's construction plainly rewrites the statutory language. A person who "contracts to perform" is a contractor, such as Mulligan, who contracted to perform the work for MSD. *See, State ex rel. MW Builders, Inc., v. Midkiff*, 222 S.W.3d 267, 270 (Mo. 2007) (an independent contractor is "one who contracts to perform.") The statute plainly does not define "person" as an entity who hires an independent contractor or, in AmerenUE's words, "an entity that contracts to have the work performed by someone else." (AmerenUE Br., p.30)

AmerenUE asserts that section 319.078(4), as plainly applied by MSD, is redundant and therefore this Court must change the statutory language "contracts to perform" to "an entity that contracts to have the work performed by someone else." (AmerenUE Br., pp. 29, 30) The assertion is meritless. The legislature intended that OPLSA apply to landowners/possessors of land who decide to do work themselves near an overhead line as well as contractors -- those who contract to perform such work. There is no redundancy in the language. Indeed, AmerenUE's entire argument is contrary to OPLSA's scheme. The focus of OPLSA is on those entities actually performing work near an overhead line, not on entities like MSD who hire independent contractors to perform that work. *State ex rel. Safety Roofing Sys., Inc. v. Crawford*, 86 S.W.3d 488, 493 (Mo. Ct. App. 2002) made the foregoing point when it observed:

[T]he legislature made the OPLSA provisions applicable to **any entity** who, *while working*, within 10 feet of any high

voltage line, fails to notify the owner and operator of the line and make appropriate arrangements so that the work can be safely performed. (Bold in original, bold italics supplied).

Mulligan, who contracted to and did perform the work for MSD was subject to the OPLSA -- not MSD, who hired Mulligan for this work.

Likewise unavailing is AmerenUE's attempt to avoid *Arizona Public Service Co. v. Shea*, 742 P.2d 851 (Ariz. Ct. App. 1987), discussed extensively in MSD's opening brief. AmerenUE wrongly asserts that the Arizona court was construing different statutory language than exists in Missouri. (AmerenUE Br., pp. 30-32) The Arizona court was construing the identical statutory language, to wit: "contracts to perform." *Arizona Public Service* rejected the very argument AmerenUE makes at bar -- that the statutory phrase "contracts to perform" refers to "the party who enters into a contract with [someone else] to have the work performed." 742 P.2d at 854. (AmerenUE Br., p. 30) Instead, the court enforced the plain language of the statute, holding:

The person who contracts to perform is the party who actually agrees to carry out the activity in proximity to the overhead power line; not the party, either a homeowner or a business, who contracts to have work performed on his premises.

Arizona Pub. Serv., 742 P. 2d at 854. This Court likewise should enforce the plain language of Missouri's OPLSA holding that a person who "contracts to perform" is the contractor -- not an entity which hires a contractor, as AmerenUE claims in its brief.

This Court likewise should reject AmerenUE's attempt to make landowners or possessors of land, such as MSD, or even ordinary Missouri homeowners, share in OPLSA's safety responsibilities, which are imposed upon those actually working within 10 feet of any high voltage line. The safety purpose behind OPLSA is best served by imposing the duty to notify and to make and pay for appropriate temporary electrical safety arrangements on those entities actually performing the work. These entities will have the expertise and knowledge to know whether any function or activity they plan to engage in would impair the 10-foot clearances required by statute. It is simply absurd to put this burden upon entities that hire contractors, such as MSD or ordinary Missouri homeowners, who may have no knowledge of the methods to be employed by the contractors. There is no evidence in this case that MSD possessed the same expertise as the independent contractor, Mulligan, regarding safety statutes, such as OPLSA or the operation of cranes near power lines. That is the reason the MSD-Mulligan contract specifically and unambiguously made only Mulligan responsible for all safety laws such as OPLSA. (Pl. Ex.1a, pp. 12-14, 37) Despite AmerenUE's attempt to broaden the statutory base from whom it may obtain contribution under OPLSA, the observations of *Arizona Public Service* should be persuasive to this Court on this point: "holding the homeowner or business that contracts to have work performed liable for violations of the statute does not serve the safety rationale." *Arizona Pub. Serv.*, 742 P.2d at 855.

AmerenUE also misses the point regarding MSD's citation to the overhead power line safety statutes in other states. (AmerenUE Br., pp. 32-33) MSD cited these statutes to show this Court that almost none of these statutes placed responsibility for compliance

with the statutory requirements on entities, like MSD, that hire contractors to perform work on their premises. Instead, as these various statutory provisions demonstrate, that statutory responsibility is placed upon the independent contractor hired to actually perform the work near the power line.

AmerenUE also confuses liability under OPLSA for common law liability in its attempt to retain its verdict over MSD. (AmerenUE Br., pp. 32-35) *Crawford* distinguished the basis for liability under common law and the additional basis provided by OPLSA. *Crawford*, 86 S.W.3d at 493. In this case, AmerenUE claims it is seeking contribution from MSD only for MSD's alleged violation of OPLSA. An OPLSA claim is based upon a party's failure to carry out its duties, under section 319.073.1, to notify and pay for appropriate temporary electrical safety arrangements with the public utility before proceeding with any function or activity which would impair the 10-foot clearances required by statute. *Crow v. Kansas City Power & Light Co.*, 174 S.W.3d 523, 532 (Mo. Ct. App. 2005). The Court of Appeals here noted that despite the fact that these duties were clearly set forth in OPLSA, AmerenUE's verdict director did not instruct the jury on the OPLSA duties to notify or pay. (A50) Instead, the Court of Appeals found that AmerenUE's verdict director instructed the jury on irrelevant matters, such as whether MSD "failed to use ordinary care to stop the crane's operation." (*Id.*) These common law issues are irrelevant here where AmerenUE abandoned its common law claim against MSD. AmerenUE, without saying so, however, improperly focuses its brief upon an irrelevant analysis under §414 of the Restatement (Second) of Torts (1965) on whether MSD controlled the means and method of Mulligan's work and had the

authority to stop the work if deemed unsafe. (AmerenUE Br., pp. 31-35) Indeed, this was the primary focus of the testimony of Gransberg -- AmerenUE's expert who was brought in to improperly opine about MSD's duties and the meaning of MSD's contract with Mulligan. In a nutshell, AmerenUE asks this Court to convert OPLSA liability into common law liability under §414 regardless whether a person "performs or contracts to perform" the work as is required by the plain language of OPLSA.

Moreover, there is no basis in the record for the various assertions AmerenUE makes in its brief, to-wit: that MSD should be liable under OPLSA because it could have prevented a statutory violation or had actual knowledge that OPLSA was being violated or that MSD was in a position to control the activity and thus performed the work in this case. (AmerenUE Br., pp. 32-35) The record evidence -- MSD's contract with Mulligan and the testimony of the various fact witnesses -- demonstrates that MSD's on-site representatives were interested solely in the result of Mulligan's work and its conformance with the plans for the construction of the sewer project. Both the contract and testimony demonstrate that the MSD representatives left the actual daily activities of constructing the sewer project to Mulligan, including the means and methods of construction. MSD's representatives were there to ensure that it was getting a quality product -- not to ensure and oversee the safety of Mulligan's employees. That was left to

Mulligan by virtue of both the MSD contract with Mulligan and confirmed by the testimony of the on-site witnesses.¹

Moreover, while MSD's Mr. Dillman testified that he considered himself to be an expert in the construction of drainage ditches and sewer systems (AmerenUE Br., p.32), there is no evidence that Mr. Dillman was an expert in the operation of OPLSA or that he was an expert with respect to performing work near overhead power lines. Indeed, MSD's Mr. Canpisi testified that he did not even know there was a law prohibiting operation of a crane within 10-feet of an overhead power line. (Tr. 224-25) No evidence was presented that any MSD representative determined to use a crane to deliver concrete to the ditch or specified the boom length of the crane, or directed the crane's location under the overhead wires, or instructed the crane operator on how to perform the concrete deliveries without infringing on the required 10-foot clearance with AmerenUE's high voltage lines, or gave hand signals that lead to the crane boom contacting the overhead wires. These were Mulligan's responsibilities and expertise. (Tr. 44-55, 74-75, 473-77, 496-500). Further, it was Mulligan's sole duty under Section 3(F)(3)(b) of the contract to notify AmerenUE: "[i]f the method of operation for the construction of the sewers or

¹ AmerenUE's assertions about control, even if true, do not support liability under the common law. *See Smart v. Chrysler Corp.*, 991 S.W.2d 737, 743-47 (Mo. Ct. App. 1999)(engaging in "limited safety activity" as well as having the right to stop work is insufficient as a matter of law to establish control over the work and thus common law liability).

channel requires the removal and replacement or protection of any overhead wires or poles, the contractor shall make satisfactory arrangements for such work with the Owner or Owners of such wires and poles.” (Pl’s Ex.1a p.37) The party responsible for fulfilling OPLSA’s duties in this case was Mulligan -- the party who contracted to perform the work for MSD, not MSD.

MSD asks this Court to enforce the plain language of OPLSA and hold that since it did not “perform or contract to perform” work, it could not be sued for contribution under OPLSA. AmerenUE sued Mulligan for OPLSA contribution and, via settlement, AmerenUE recovered contribution from Mulligan. (Tr. 516-19) Mulligan was the party responsible for fulfilling OPLSA requirements, as it contracted to perform the work. To adopt AmerenUE’s view that entities other than those who perform or contract to perform work can likewise be sued based upon common law principles arguing that those entities controlled an independent contractor’s work, will only sow confusion as to who must notify a utility at the beginning of any construction project and only spawn more future litigation like the case at bar, over who, besides the independent contractor, must fulfill the OPLSA requirements or be liable for contribution.

Finally, AmerenUE misses the point of MSD’s argument relative to the Court of Appeals’ ruling. MSD does not raise a new instructional issue before this Court. Instead, MSD asserts that even under the Court of Appeals’ rationale MSD is entitled to judgment notwithstanding the verdict. The Court of Appeals reasoned that that MSD could be considered a “person” within the meaning of Section 319.078(4) if AmerenUE proved an agency relationship between MSD and Mulligan. A48-49. AmerenUE concedes that no

such agency relationship exists. Thus, even under the Court of Appeals' analysis, MSD is entitled to judgment notwithstanding the verdict.

II.

THE TRIAL COURT ERRED IN DENYING MSD’S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE AMERENUE FAILED TO MAKE A SUBMISSIBLE CASE AGAINST MSD FOR CONTRIBUTION UNDER § 319.085 OF THE OPLSA.

Section 319.085 of OPLSA states in pertinent part:

Notwithstanding any law to the contrary, the public utility
shall have the right of contribution against any such violator.

Mo. Rev. Stat. § 319.085 (italics supplied). AmerenUE does not challenge MSD’s construction of the “notwithstanding” statutory language of section 319.085. As MSD argued in its briefs, this statutory language simply means that the OPLSA trumps an otherwise applicable law only to the extent that such other law or provision directly conflicts with it. *Ozark Wholesale Beverage Co. v. Supervisor of Liquor Control*, 80 S.W.3d 491 (Mo. Ct. App. 2002); *White v. Am. Repub. Ins. Co.*, 799 S.W.2d 183 (Mo. Ct. App. 1990).

AmerenUE also does not challenge MSD’s contention that the “contribution” right granted by Section 319.085 is undefined. It is well-settled that when the legislature uses terms holding an established judicial or legislative meaning, a presumption exists that the legislature acts with knowledge of that meaning. *Cook v. Newman*, 142 S.W.3d 880, 889-90 (Mo. Ct. App. 2004) (en banc). At the time the legislature enacted the OPLSA, “contribution” was already a distinct legal concept in Missouri as defined and developed

through its statutory scheme and common law. *See, e.g.,* Mo. Rev. Stat. § 537.060; *Missouri Pac. R.R. Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466 (Mo. 1978) (en banc) (adopting a third-party contribution scheme to impose liability on multiple tortfeasors for their proportionate share of negligence); *Safeway Stores, Inc. v. City of Raytown*, 633 S.W.2d 727 (Mo. 1982) (en banc) (recognizing a separate impleader cause of action in contribution). Under *Cook*, then, it must be presumed that by granting an undefined right of “contribution” under section 319.085, the legislature acted with knowledge of the requirements and limitations of Missouri contribution law. The legislature’s election to reference only an undefined “contribution” right without further articulation creates a presumption that it intended the existing parameters of Missouri contribution law to define, regulate and shape the enforcement of such a claim. The requirements and limitations of Missouri’s existing contribution scheme thus are necessarily implicated in an OPLSA contribution claim. The grant of an undefined “right of contribution” would otherwise be meaningless.

The rules regarding contribution in Missouri thus should apply to this claim. Inasmuch as AmerenUE does not dispute that it did not adhere to the rules and limitations regarding contribution actions in seeking contribution from MSD, judgment must be entered in favor of MSD and against AmerenUE on its contribution claim.

AmerenUE’s argument to the contrary rests upon two misplaced contentions: (1) that OPLSA establishes a separate, independent statutory duty from the “person” to the utility to satisfy the statute’s requirements; and (2) that any law or statute “that might limit” AmerenUE’s contribution right is contrary to that right. (AmerenUE Br. at pp. 37-

40). AmerenUE's first argument is derived from an overly broad reading of a single statement made in *State ex rel. Safety Roofing Sys., Inc. v. Crawford*, 86 S.W.3d 488, 493-94 (Mo. Ct. App. 2002):

An action [under OPLSA] ... holds the employer liable for the separate breach of the employer's independent duty that has been legislatively imposed by OPLSA.

As the *Crawford* Court noted, the significance of the independent duty in the context of that case is that the worker's compensation laws alleged to prevail over OPLSA were not intended to affect the rights between third parties. *Id.* at 493-94 (relying in part upon *McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co.* 323 S.W.2d 788 (Mo. 1959)). *Crawford* did not address whether the requirements and limitations of Missouri's established contribution laws apply to an OPLSA contribution claim, nor did it hold that such a claim is entirely divorced from the injury-plaintiff's claim, as suggested by AmerenUE. *Crawford* simply recognized that conduct in breach of an OPLSA duty provides an additional ground for imposing liability on a third-party for the injury-plaintiff's damages. But, as Missouri has long defined it, the fundamental basis of a "contribution" claim remains the same: a right of contribution must arise from an underlying action or common liability to an injured third-party. *McNeill Trucking Co., Inc. v. Missouri State Hwy & Transp. Comm'n*, 35 S.W.3d 846, 847 (Mo. 2001) (en banc); *Rowland v. Skaggs Co., Inc.*, 666 S.W.2d 770, 774 (Mo. Ct. App. 1984) (en banc). This is made plain by the fact that OPLSA imposes liability for placing the injury-

plaintiff in harm's way, i.e., "in closer proximity [than 10 feet] to any high voltage overhead line." Mo. Rev. Stat. § 319.083.

AmerenUE's own allegations further establish that its claim is firmly lodged in traditional contribution principles, albeit premised upon purported conduct in violation of an OPLSA imposed duty. In Count II of its cross-claim, entitled "Statutory Violation: MSD" (LF 86), AmerenUE sought contribution from MSD in an amount equal to MSD's "degree of fault" for the Pages' injuries "up to the amount" of AmerenUE's settlement with them. (LF 86) AmerenUE claimed no damages other than its liability to the prime plaintiffs, and further promised the prime plaintiffs a 17% cut of its recovery from MSD. (LF 86; Tr. 95) AmerenUE's contribution claim arising under OPLSA against MSD is inextricably linked to the injury-plaintiff's damages and represents simply an alternative basis to obtain contribution.

AmerenUE's second argument -- that any law "that might limit" AmerenUE's contribution right is contrary to that right -- is equally misplaced. In the instant case, Missouri's contribution laws do not directly conflict with "the right to contribution" granted by the OPLSA. Indeed, the plain language of section 319.085 does nothing more than what it says -- establish the *right* to pursue a claim in "contribution" in instances where one otherwise would not exist. This simply means that AmerenUE may invoke the subject matter jurisdiction of the trial court to pursue a third-party contribution claim against those "persons" subject to liability under OPLSA.

The instant case is vastly different from *Crawford*, in which the worker's compensation laws ("WCL") *were* in direct conflict with the right to pursue a

contribution claim. In *Crawford*, the court recognized that the exclusive remedy provisions of the WCL barred an employer from being named as a third-party defendant for contribution purposes and thus deprived the trial court of subject matter jurisdiction to adjudicate such a claim. 86 S.W.3d at 491. This directly conflicted with the contribution right authorized by OPLSA against “any entity.” *Id.* at 492-93. *Crawford* thus held that because OPLSA expressly applied to “any entity,” the statutory “notwithstanding” language evinced a legislative intent to create an exception to the WCL’s exclusive remedy provisions for third-party contribution claims based upon OPLSA violative conduct. *Id.*

Similarly, in *State ex rel. City of Jennings v. Riley*, --- S.W.3d ---, 2007 WL 3147313 (Mo. Oct. 30, 2007) (en banc), the venue statutes at issue in that case conflicted inasmuch as sections 508.050 and 508.010.4 of the Missouri Revised Statutes mandated mutually exclusive venues for suits against municipal corporations. However, this Court noted that section 508.050 is a general venue statute applicable to suits against municipalities, whereas 508.101.4 applied only to tort actions and further applied “notwithstanding any other provision of the law.” *Id.* at *2. This Court held that the “notwithstanding clause . . . eliminates the conflict that would have occurred in the absence of the clause.” *Id.* Thus, section 508.101.4 controlled venue only for *tort* actions brought against a municipal corporation. *Id.*

Unlike *Crawford* and *Riley*, Missouri’s contribution laws regulating contribution claims are, by definition, entirely consistent with the “right to contribution” granted by OPLSA. That is to say, it would be logically contradictory to state that an established

legislative and common law scheme directing the manner in which a contribution claim can be pursued directly conflicts with the general right to pursue such a claim. Indeed, these laws do not negate the right to invoke the trial court's subject matter jurisdiction in order to pursue and enforce a contribution claim; instead, they simply set forth the established requirements and parameters for exercising that right, as, for example, in the same way that a limitation period establishes the legislatively imposed time period for filing a claim. AmerenUE's logic thus suggests an unfettered, unregulated third-party claim not subject to even such basic substantive constraints created by the legislature as statutory limitations periods for filing contribution claims.

Accordingly, the rules regarding contribution in Missouri should apply to this claim. AmerenUE does not dispute that it failed to adhere to these rules and thus judgment must be entered in favor of MSD and against AmerenUE on its contribution claim.

III.

THE TRIAL COURT ERRED IN REFUSING TO REDUCE THE AMOUNT OF THE JURY VERDICT AND JUDGMENT IN ACCORDANCE WITH THE DAMAGES CAP SET FORTH IN MO. REV. STAT. § 537.610.

The trial court's refusal to apply the damage cap set forth in Section 537.610 of the Missouri statutes rests upon the same ground it cited in refusing to apply Missouri contribution law, to wit: the statutory "notwithstanding" language appearing in section 319.085 of OPLSA. Mo. Rev. Stat. § 319.085. As discussed in AmerenUE's opening brief and this brief, this statutory language does not trump other applicable laws unless that law directly conflicts with section 319.085. As has been stated herein, AmerenUE does not challenge MSD's construction of the statutory language.

The damages cap in Missouri statute section 537.610 does not directly conflict with section 319.085 and thus is applicable to AmerenUE's contribution claim. The cap does not defeat AmerenUE's "right" to pursue a contribution claim; it simply prescribes a limit to how much money can be recovered under it. Accordingly, AmerenUE's reliance upon *Crawford* is again misplaced. In *Crawford*, the workers compensation law barred the contribution claim that OPLSA granted, and thus the two laws were in direct conflict with each other. 86 S.W.3d at 490-92. Because the damage cap does not defeat the OPLSA claim, it does not directly conflict with OPLSA and thus must be applied in this case.

Moreover, AmerenUE's argument is premised upon its erroneous contention that section 537.610 does not apply "[b]ecause any sovereign immunity that MSD might have

enjoyed was waived pursuant to the OPLSA.” (AmerenUE Br. at p. 50). AmerenUE’s apparent distinction between a statutory waiver of sovereign immunity by OPLSA or by section 537.600.1(2) is meaningless. That application of section 537.610’s damages cap applies despite sovereign immunity being statutorily waived is well-established. In *Wollard v. City of Kansas City*, 831 S.W.2d 200 (Mo. 1992) (en banc), the Missouri Supreme Court held that plaintiff’s suit against the City for injuries caused when she slipped and fell on mud left on the sidewalk by employees of the City’s water department was subject to the damages cap established by § 537.610. In that case, the City’s sovereign immunity defense was statutorily waived pursuant to § 537.600.1(2), which waives immunity for injuries caused by the dangerous condition of city property. This Court affirmed the reduction of the jury’s \$908,333 verdicts to \$100,000 pursuant to the damages limitation contained in section 537.610. *Id.* at 206. *See also, Greene County v. Pennel*, 992 S.W.2d 258 (Mo. App. 1999) (recognizing that even where public entity’s sovereign immunity is waived, its liability “is not unlimited,” but, rather, subject to the damages cap under § 537.610).

Moreover, the record evidence belies AmerenUE’s suggestion that its third-party claim against MSD is not a “claim within the scope of sections 537.600 to 537.650.” (AmerenUE Br. at p. 48). Indeed, Count II of AmerenUE’s First Amended Cross-Claim against MSD, entitled “Statutory Violation: MSD,” alleges that its claim “falls within an exception to the sovereign immunity stated in § 537.600.2 [sic], because . . . MSD’s property was in a dangerous condition . . . [and] Plaintiff’s injuries directly resulted from the dangerous condition.” LF 89.

AmerenUE also cannot be heard to assert that application of a cap would “eliminate almost all” of its damages, i.e., its payment to the Pages. (AmerenUE Br. at pp. 51-52). This wholly ignores that AmerenUE also filed an OPLSA contribution claim against Mulligan. Tr. at 518-19. Rather than adjudicate that claim before a jury, AmerenUE chose instead to settle it, receiving \$1,500,000 from Mulligan to offset its settlement obligation to the Pages. *Id.* Moreover, under section 319.085 of OPLSA, AmerenUE had available to it, “in addition to any penalties [t]herein, liability under common law” against any violator. Having already received \$1.5 million from Mulligan and electing to proceed only on its OPLSA contribution claim against MSD, AmerenUE can recover from MSD only the amount the legislature held was an appropriate amount to recover from a public body.

AmerenUE’s argument essentially boils down to an attack on damage caps generally, by claiming that application of the cap would undermine OPLSA by reducing its recovery. Yet, under AmerenUE’s rationale, every damages cap would be contrary to every statute providing such a claim which would necessarily require the elimination of caps entirely. Certainly, the legislature could have exempted OPLSA claims from the cap but chose not to do so. Since the cap is not in direct conflict with OPLSA, it is applicable here and the judgment against MSD must accordingly be reduced to that amount.

IV.

THE COURT OF APPEALS CORRECTLY ORDERED A NEW TRIAL UPON RULING THAT THE TRIAL COURT ERRED IN ADMITTING GRANSBERG'S EXPERT TESTIMONY CONCERNING THE CONSTRUCTION OF THE MSD-MULLIGAN CONTRACT AND MSD'S OBLIGATIONS THEREUNDER

AmerenUE cannot dispute the following point of Missouri law, which establishes the trial court's error in allowing Gransberg to opine on MSD's alleged duties under its contract with Mulligan. That point is that "duty cannot be established by expert opinion." *Burns v. Black & Veatch Architects, Inc.*, 854 S.W.2d 450, 453 (Mo. Ct. App. 1993). Given Missouri law, Gransberg should not have been allowed to testify about the legal meaning of the MSD-Mulligan contract and about MSD's duties under it. (Tr. 282-83) Accordingly, AmerenUE's efforts at attempting to distinguish *Burns* and *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505 (2nd Cir. 1977), on their facts is unavailing. MSD cited these cases for the point that expert testimony could not be introduced to establish a defendant's duty -- a point which AmerenUE is unable to challenge with any contrary Missouri law holding that duty can be established by expert opinion. *J.S. DeWeese Co. v. Hughes-Treitler Mfg. Corp.*, 881 S.W.2d 638 (Mo. Ct. App. 1994); *Monsanto Co. v. Sygenta Seeds, Inc.*, 226 S.W.3d 227 (Mo. App. 2007); *Oldaker v. Peters*, 869 S.W.2d 94 (Mo. Ct. App. 1993); and *Structural Sys., Inc. v. Hereford*, 564 S.W.2d 62 (Mo. Ct. App. 1978) cited by AmerenUE are inapposite, as none of these cases would authorize the kind of expert testimony that Gransberg gave in this case, testifying about the legal meaning of the MSD-Mulligan contract and opining about MSD's independent duties under it.

AmerenUE concedes as much, as the major thrust of its brief on this point is devoted to argument that MSD “opened the door,” thereby allowing Gransberg to testify about the legal meaning of the MSD-Mulligan contract and MSD’s duties under it. As the Court of Appeals held, the record does not support this assertion.

AmerenUE wrongly states that MSD discussed the “contract’s meaning” in opening statement. (AmerenUE Br., p.57) MSD’s opening argument was, in part, devoted to telling the jury what the contract provisions said, not what they meant (Tr. 32-35) -- and this is dramatically different from AmerenUE’s insistence that Gransberg could properly opine before the jury what the contract **meant**. Moreover, AmerenUE is too modest about its own opening argument, which preceded MSD’s statement. Armed with the knowledge that the trial court had denied MSD’s motion *in limine* to bar Gransberg’s testimony,² AmerenUE devoted a major portion of its argument to telling the jury about the meaning of the MSD-Mulligan contract -- that MSD had a duty to abide by OPLSA and stop the work on the day of the accident:

Mr. Virtel: * * * MSD, Metropolitan St. Louis Sewer District, had a contract with the Mulligan Construction Company for the installation of that concrete drainage ditch and the sewer line that Bates was doing under a subcontract

² MSD filed a motion *in limine* to bar Gransberg’s opinions regarding the legal meaning of the MSD-Mulligan contract, as well as his opinions regarding MSD’s duties under it. (LF 109-113)

with Mulligan. Under the terms and specifications of that contractual agreement, Mulligan couldn't do anything if a MSD inspector was not on the site watching them do it unless they got permission in advance. That was the contract provision MSD required under their contract. That its contractor, Mulligan, obey all Federal, State, and Missouri laws. And in this case, I'm concentrating -- we are concentrating on the Missouri law. The Overhead Power Line Safety Act [OPLSA]. And we believe that -- the Court's instructions and the evidence will show that the Act was violated from sometime shortly after 1 o'clock when this concrete pour began. Two MSD management people were on the site. Mr. Dillman, who was the manager of all MSD construction was there. And Mr. Canpisi, an inspector who was -- whose job was to watch and follow the work of the contractor to see that it was doing its job in accordance with the plans and specifications, was also on site as he usually was.

* * *

Mr. Dillman did nothing. What Mr. Dillman said is well, that's not my job. That's up to Mulligan to take care of their own people. **Well, it was his job. We believe the contract will demonstrate it was his job. We believe the evidence**

will demonstrate that he had absolute knowledge that this dangerous activity was going on.

* * *

But we believe that consistent with the Overhead Power Line Safety Act, this accident should never have occurred because responsible and knowledgeable construction people were on hand and for two hours saw this irresponsible behavior going on that can only lead in the direction of a catastrophic injury. And that's exactly what happened. And so we -- if we prove what we have said and consistent with the Instructions that will be given to you by Judge Heagney, we are going to ask that you find in favor of Union Electric Company and award it up to six million dollars. Because what Mr. Dillman did and what Mr. Campise did, as management of MSD, was a violation of the Overhead Power Line Safety Act and it resulted in damaged to AmerenUE. (Tr. 27, 29-30) (emphasis supplied).

In the face of AmerenUE's opening argument, MSD certainly had the right to respond to tell the jury exactly what the contract actually said -- that it unambiguously stated that Mulligan had responsibility for the entire work, the means and methods of construction and -- significantly -- Mulligan was responsible for complying with all safety laws. (Tr. 32-35; Pl. Ex.1a, pp. 12-13)

AmerenUE is likewise wrong in asserting that MSD “opened the door” “by eliciting testimony on the contract’s meaning through its own employees.” (AmerenUE Br. 57) The record again reflects that MSD merely asked its witnesses what the contract **said** -- not what the contract **meant**:

Q. [By Mr. Buckley for MSD]

And under control of work, paragraph two, does that say contractor’s responsibility for the work as a whole?

A. Yes.

Q. And it says, the contractor shall be responsible for the entire work until its final acceptance by the district?

A. That’s correct.

* * *

Q. [By Mr. Buckley]

. . . Mr. Virtel directed your attention to paragraph seven on page seven, method and appliances. Which says, the method, labor, equipment and other facilities used by the contractor must be such as will assure performance of the work in accordance with the plans and specifications. And within the time specified for completion. Is that right?

A. That is correct.

* * *

Q. [By Mr. Buckley]

. . . and then under inspection of the work, paragraph eight, it says that the district is authorized to inspect for ascertaining that the material and workmanship are in accordance with the plans and specifications. Is that right? Is that what that says?

A. Yes.

Q. So it's to the plans and specifications, is what you're inspecting for. Is that what you're inspecting for?

A. Right.

* * *

Q. . . . [t]hen turning the page to page twelve. The responsibility of the contractor. . . . and it talks about the safety of the public. You know, the contractor keeping himself informed of all Federal, State and Municipal laws.

A. Yes.

Q. For safety, is that right?

A. Yes.

* * *

Q. [Mr. Buckley:] . . . page thirty-seven. And do you see paragraph three? It talks about utilities there.

A. Yes.

Q. And under subparagraph B, it says, if the method of operation for the contract of the sewer of the channel requires the removal and replacement or protection of any overhead wires or poles, the contractor shall make satisfactory arrangements for such work with the owner or owners of such wires and poles and no additional payment will be made.

A. That's correct.

Q. That's part of the contract with Mulligan, is that right?

A. That's correct.

Q. And under that contract, were they required to make notification to the utility, AmerenUE, if they felt that they were gonna be getting anywhere near electrical wires?

A. That's correct. (Tr. 172-78)

Such testimony merely confirms what the contract **actually says** -- it is not testimony, like Gransberg's testimony, involving **the meaning** of the various contractual provisions. Simply put, AmerenUE's "opened the door" assertion is a red herring, as the Court of Appeals correctly found.

Likewise belied by the record is AmerenUE's assertions that the trial testimony of MSD's employees justified Gransberg's improper expert testimony. AmerenUE makes

various assertions about the trial testimony, to-wit: that the “testimony by MSD and Mulligan was not ‘uniform’”; or that “MSD’s employees gave inherently conflicting testimony regarding their obligations under the contract,” or that the testimony of MSD’s employees was in accord with Gransberg. (AmerenUE Br. pp. 54, 57, 62) As support for these assertions, AmerenUE uses bits and pieces of testimony taken out of context. Some examples will suffice.

AmerenUE takes out of context the testimony of MSD’s Mr. Brooks. (AmerenUE Br. pp.54-55, 61) Mr. Brooks testified that if he thought an activity was unsafe, he would at least mention it to the contractor. (Tr. 192) However, Brooks acknowledged that this was his personal philosophy and not necessarily part of his job as an MSD construction inspector:

Q. . . . And if you, as an inspector, and when you were an inspector, thought that the project was dangerous, to not only you but the workers around you, was it your responsibility as an inspector for MSD to say something to the contractor; if you personally thought it was dangerous?

A. **Self-responsibility, I would have said something.**

Q. Okay.

A. I don’t know as an inspector if -- if it was my job to do so. But if I thought it was unsafe, I would at least

mention it to the contractor. (emphasis supplied. Tr.
192)

The fact that Mr. Brooks, as a “human being,” would have brought an unsafe practice to the attention of the contractor does not *ipso facto* mean that MSD had that independent duty under the unambiguous terms of the MSD-Mulligan contract when that unambiguous contract placed that responsibility directly upon Mulligan.

At page 55 of AmerenUE’s brief, it states that: “Mr. Dillman also admitted that it would be ‘absurd’ to suggest that MSD could not interfere with an unsafe work practice.” This summary is clearly taken out of context, as the record shows, and thus does not constitute a fair summary of the testimony. Put in context, the following are the questions asked of Mr. Dillman by Mr. Virtel:

Mr. Virtel: . . . So if -- for instance, if Mulligan is just losing
-- killing people on the job or seriously injuring them in
performance of the work, as long as the contractor’s job
is done right, that’s all you would care about?

A. I think you’re mischaracterizing the meaning of that
paragraph.

Q. [By Mr. Virtel:]
I’m trying to understand. You said that what this means
is -- where it’s talking about the method, labor and
equipment. Labor, that’s the workers. You’re saying as
long as it ends up meeting the plans and specifications,

it's up to the contractor as to how he does it. And if he's hurting people doing it, you don't interfere cause you tell us you don't have the right to do that?

A. I think that's absurd --

Q. Do you?

A. -- what you're saying. (Tr. 184-85)

The fact that Mr. Dillman thought Mr. Virtel's questioning was absurd does not *ipso facto* mean that MSD had an independent duty, as opined by Gransberg, to stop work if an MSD inspector felt an unsafe act was about to occur. (Tr. 273-82)

Likewise belied by the record is AmerenUE's assertion at page 62 of its brief that Gransberg's testimony that MSD had the right to coordinate with utilities was consistent with Mr. Dillman's testimony because Dillman had, "in fact, coordinated the construction activities with AmerenUE." AmerenUE cites to Mr. Dillman's testimony at Tr.134, but to truly understand Mr. Dillman's testimony and place it in proper context, one must begin reading the transcript at Tr. 131 through 139. A fair summary of this testimony reveals that Mulligan, by Mr. Kloepel, told Mr. Dillman that AmerenUE had told Mr. Kloepel that it could not get around to moving a utility pole that Mr. Kloepel wanted moved for 8 - 10 weeks and this would hinder the work because the sewer contractor was scheduled to work at that spot in 3 - 4 weeks. (Tr. 132) Mr. Dillman then received a message from Mr. Mike Toennies at AmerenUE, wanting a portion of the "drawings for this project" so that AmerenUE could move the pole. (Tr. 134-35) There was also another message from Mr. Toennies to Mr. Dillman, asking Mr. Dillman to identify the engineering firm, which was

Volz Engineering. (Tr. 136-37) Mr. Dillman's actions in providing this information to AmerenUE so that AmerenUE could abide by Mulligan's construction schedule, in no way supports AmerenUE's summary of Mr. Dillman's testimony that he had in fact coordinated construction activities with AmerenUE, and thus this is no justification for Gransberg's improper testimony.

Finally, the fact that MSD could enforce the contractual provisions against Mulligan or that Mulligan's failure to comply with OPLSA would violate the contract (AmerenUE Br. pp. 55, 57, 60) did not *ipso facto* mean that MSD had an independent duty itself under the contract to fulfill the OPLSA requirements. MSD did not have this independent duty because the unambiguous provisions of the contract placed this duty solely upon Mulligan. Section F(1) of the General Conditions states that Mulligan is responsible for compliance with all laws, ordinances and regulations affecting the conduct of the work. Section 3(F)(3)(b) of the Standard Specification further dictates that "[i]f the method of operation for the construction of the sewers or channel requires the removal and replacement or protection of any overhead wires or poles, the Contractor shall make satisfactory arrangements for such work with the Owner or Owners of such wires and poles." (Pl's Ex.1a, p.12, 37) Moreover, the testimony on this point was, in fact, uniform: only Mulligan had this OPLSA responsibility. Dillman testified that Mulligan was contractually responsible for notifying AmerenUE if they were going to be getting anywhere near the electrical wires and to make satisfactory arrangements with AmerenUE if protection of any overhead wires was requires. (Tr. 177-78) Mulligan's Kloeppeel agreed that it was Mulligan's responsibility to notify AmerenUE under the contract with

MSD. (Tr. 497) Because the contract was unambiguous and the trial testimony completely uniform, there was no reason for the trial court to allow AmerenUE to present Gransberg's contrary, personal opinions to the jury interpreting the MSD-Mulligan contract and to testify to the jury that MSD had an independent duty to fulfill the OPLSA requirements itself:

Q. Okay. And did Mr. Dillman/Mr. Canpisi have any obligation, in your opinion, under the contract to call AmerenUE?

* * *

A. I believe that the MSD representative had a responsibility to enforce the entire contract based on the -- the contract requirements of -- for instance, the requirement that required the contractor to notify the utility in writing. That -- that they could then enforce that particular clause. And through that clause could have contacted UE if they indeed, decided that there was no way that they could place this concrete without impacting those transmission lines by either de-energizing or covering them. (Tr. 282-83)

The foregoing testimony cannot be viewed as mere "custom and practice testimony" as AmerenUE contends. (AmerenUE Br. p.63) It, instead, was an improper interpretation of contractual provisions and improper testimony about MSD's independent duties under the

contract. Gransberg simply created duties for MSD out of whole cloth. As the Court of Appeals correctly ruled in this case, the admission of Granberg's testimony constituted "gross evidentiary error" requiring a new trial. (A.102)

CONCLUSION

WHEREFORE, defendant-appellant Metropolitan St. Louis Sewer District respectfully requests this Honorable Court to reverse the trial court's challenged rulings, vacate the judgments entered in favor of AmerenUE and enter judgment in favor of MSD; or in the alternative only, to reverse in part and remand for entry of judgment in favor of AmerenUE against MSD in the amount of the statutorily mandated damages cap; or, in the further alternative to affirm the Court of Appeals' reversal in part and remand for a new trial on all issues; and for such other and further relief as MSD may be entitled to on this appeal.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

Pursuant to Rule 84.06(c), the undersigned counsel for Appellant certifies that this brief includes the information required by Rule 55.03 and complies with the word limitations in Rule 84.06. There are 7,611 words in this brief, exclusive of the items listed in Rule 84.06(b). Counsel for Appellant relies on the word count of the word processing system used to prepare this brief in making this certification. The electronic copy of this brief filed pursuant to Rule 84.06(g) has been scanned for viruses and is virus free.

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