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 BRIEF OF APPELLANT METROPOLITAN ST. LOUIS SEWER DISTRICT

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JURISDICTIONAL STATEMENT

This case involves a utility's claim for contribution against a governmental entity under § 319.085 of the Overhead Power Line Safety Act ("OPLSA"), Mo. Rev. Stat. § 319.075, *et seq*. Judgment was entered on the jury verdict in favor of plaintiff, Union Electric Company d/b/a AmerenUE ("AmerenUE") on January 10, 2006 (LF272-74); an amended judgment was entered on January 17, 2006 imposing post-judgment interest pursuant to Mo. Rev. Stat. § 408.040.2. (LF283-85) Defendant, Metropolitan St. Louis Sewer District ("MSD") filed a timely post-trial motion seeking judgment notwithstanding the verdict or a new trial on February 9, 2006 (LF286-304), which motion was denied on May 19, 2006. (LF329-38) MSD filed a notice of appeal on May 22, 2006, within 10 days after the judgments appealed from became final in accordance with Rules 81.04(a) and 81.05(a) of the Missouri Rules of Civil Procedure.

The Court of Appeals had jurisdiction over this timely filed appeal because this case does not involve any of the five areas subject to the exclusive jurisdiction of this Supreme Court. Mo. Const. Art. V, § 3. The Court of Appeals, Eastern District, had jurisdiction because this case was litigated in the Circuit Court for the City of St. Louis. Mo. Rev. Stat. § 477.050. The Eastern District issued its Opinion on May 9, 2007, reversing and remanding the matter for a new trial. (Slip Op.; A42-52).

On May 24, 2007, pursuant to Rule 84.17 of the Missouri Rules of Civil Procedure, AmerenUE moved the Eastern District for rehearing, or, alternatively, for transfer to this Supreme Court under Rule 83.02. (A80). Both motions were denied on June 19, 2007. (A108) Pursuant to Rule 83.04 of the Missouri Rules of Civil Procedure,

AmerenUE filed its application for transfer to this Supreme Court and transfer was ordered on August 21, 2007. (A53) Article V, § 10 of the Missouri Constitution vests jurisdiction in this Supreme Court to finally determine all causes coming to it upon order of transfer the same as if the case were heard on original appeal.

STATEMENT OF FACTS

Overview Of The Lawsuit

AmerenUE is a Missouri utility. (LF82) MSD is a political subdivision of the State of Missouri. (LF97; TR.464) AmerenUE and MSD were joint holders in the ownership, use, maintenance and upgrade of an easement located near Radiom Drive and Antonette Hills Drive in St. Louis County, Missouri. (LF63, 72; Pl's Ex. 2) AmerenUE owned, operated and maintained high voltage power lines on the easement. (LF37; Pl's Exs. 5B and 5E)

MSD hired Mulligan Construction Company ("Mulligan"), an independent general contractor, to construct sewers and a storm water drainage channel on the easement. (LF64, 72, 84) Mulligan employed Anthony Page ("Page") as a laborer on the project. (Id.) On December 27, 1999, Page was working in the drainage ditch receiving and releasing concrete from a bucket attached by cable to a crane operated by another Mulligan employee. (LF38, 132) Page sustained a severe electrical shock when the cable and bucket became energized with electricity from AmerenUE's 34.5kV overhead power transmission line. (Id.)

Page sued the crane's manufacturer, FMC Corporation, AmerenUE and MSD. (LF36-50) Page's wife brought a loss of consortium claim against these defendants.

(LF48) AmerenUE filed a third-party petition against Mulligan alleging violation of the OPLSA and a cross-claim against MSD. (LF11; TR.518-19)

The Pages And Other Litigants Settle Out, Leaving Only AmerenUE's Cross-Claim Against MSD

As AmerenUE stated in its brief before the Court of Appeals, the Pages settled with AmerenUE for $6,000,000 (Pl's Br. at p. 6)(Pl's Ex.11) The Pages also settled with FMC for $3,000,000 (LF269) and dismissed both of these defendants. (LF51, 54) AmerenUE then settled with Mulligan for $1.5 million, which was also paid to the Pages, and dismissed its third-party petition. (LF22; TR.94) The Pages filed a Fourth Amended Petition against MSD and its employees, Robert Butchko, Robert Dillman and Joseph Campisi. (LF63-71) AmerenUE filed a first amended cross-claim against MSD, Dillman and Campisi. (LF82-96) MSD, Dillman and Campisi subsequently settled with the Pages for $6,000,000 (LF106–107H), leaving only AmerenUE's cross-claim pending. (LF82-96) AmerenUE agreed to pay the Pages 17% of any recovery obtained from MSD, after expenses, as part of its settlement. (TR.95)

THE FACTS RE: THE OVERHEAD POWER LINE SAFETY ACT

The Overhead Power Line Safety Act (the "OPLSA" or "Act"), R.S.Mo. §§319.075 to 319.090, was enacted in 1991.

The Act Applies To "Persons" Who Perform Or Contract To Perform Work In Close Proximity To Overhead Power Lines

The OPLSA defines a "person" subject to the Act's requirements as an individual or entity "which performs or contracts to perform" any function or activity upon premises in proximity to an overhead line:

> **§ 319.078. Definitions**
>
> As used in sections 319.075 to 319.090, the following terms mean:
>
> ***
>
> (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; (§ 319.078 R.S. Mo. emphasis in original)

The Ten-Foot Rule

The OPLSA prohibits performance of specified activities within ten feet of high voltage overhead power lines unless certain precautions have been undertaken:

§319.080. Activities within ten feet of power lines prohibited, exceptions

Unless danger against contact with high voltage overhead power lines has been guarded against as provided by section 319.083, no person, individually or through an agent or employee, shall store, operate, erect, maintain, move or transport any tools, machinery, equipment, supplies or materials or any other device that conducts electricity, within ten feet of any high voltage overhead line, or perform or require any other person to perform any function or activity upon any land, building, highway or other premises, if at any time during the performance thereof it could reasonably be expected that the person performing the function or activity could move or be placed within ten feet of any high voltage overhead line. (§ 319.080 R.S. Mo.)

Notice And Safety Requirements Imposed

Under §319.083, the "person or persons responsible" for performing a function or activity within ten feet of a high voltage overhead power line must notify the public utility which owns or operates the high voltage overhead line and make appropriate arrangements for temporary mechanical barriers, de-energizing of conductors, rerouting

of electric current or relocation of conductors before proceeding with any work that would impair the required ten foot clearance:

> **§ 319.083. Special devices and precautions required—costs**
>
> 1. When any person desires to temporarily carry out any function or activity in closer proximity to any high voltage overhead line than is permitted by sections 319.075 to 319.090, the person or persons responsible for the function or activity shall notify the public utility which owns or operates the high voltage overhead line of the function or activity, and shall make appropriate arrangements with the public utility for temporary mechanical barriers, temporary de-energization and grounding of the conductors, temporary rerouting of electric current or temporary relocating of the conductors, before proceeding with any function or activity which would impair the clearances required by sections 319.075 to 319.090. (§ 319.083 R.S. Mo.)

Section 319.083(2) provides that the person requesting a public utility to provide temporary clearances or other safety precautions is responsible for paying the utility's costs and requires the utility to begin work on these items within seven working days after payment:

2. A person requesting a public utility to provide temporary clearances or other safety precautions shall be responsible for payment of those costs incurred by such utility in the temporary rerouting of electric current or the temporary relocating of the conductors. Upon request, a public utility shall provide a written cost estimate for the work needed to provide temporary clearances or other safety precautions. A public utility is not required to provide such clearances or other safety precautions until payment of the estimated amount has been made. Unless otherwise agreed to, a public utility shall commence work on such clearances or other safety precautions within seven working days after payment has been made. (§ 319.083(2) R.S. Mo.)

Utilities Afforded A Right Of Contribution Against Violators

Any person who violates the OPLSA is guilty of a class B misdemeanor. (§319.090 R.S.Mo.) The OPLSA also provides a rebuttable presumption of negligence against any person whose violation of the Act results in physical or electrical contact with a high voltage overhead line causing injury, loss or damage and affords public utilities a right of contribution against such violators:

§ 319.085. Presumption of negligence, when, rebuttable

> If a violation of any of the provisions of sections 319.075 to 319.090 results in physical or electrical contact with any high voltage overhead line such violation shall be a rebuttable presumption of negligence on the part of the violator in the event such violation shall cause injury, loss or damage, and, notwithstanding any other law to the contrary, the public utility shall have the right of contribution against any such violator. In addition to any penalties provided herein, liability under common law may apply. (§ 319.085 R.S. Mo.)

THE FACTS RE: THE MSD-MULLIGAN CONTRACT

MSD Contracted With Mulligan For Construction Of Sewers, A Channel And Appurtenances For The St. George Creek Project

On October 14, 1999, MSD contracted with Mulligan for construction of a sanitary sewer, a storm sewer, a vertical wall channel and appurtenances to be built in an area along St. George Creek from the end of Tiber Drive to Antonette Hills Drive in unincorporated St. Louis County, Missouri. (Pl's Ex. 1, Contract Agreement, p.1, Art.1) St. George Creek is a tributary to Gravois Creek, which is a tributary to the Mississippi River. (Id., p.72)

The contract documents included the Notice to Contractors, General Project Specifications, Technical Project Specifications, Standard Construction Specifications

(1992), the Plans and Drawings, the Proposal, the Contract Bond and the Contract Agreement. (Id., Art. 2) MSD was to provide all rights-of-way and easements upon which work was to be done. (Pl's Ex. 1, General Project Specifications, p.4, Art. 13)

Mulligan Agreed To Furnish All Necessary Materials, Labor, Tools, Equipment And Supervision For The Construction Project

The contract work consisted of "furnishing all material, labor, tools, equipment and supervision necessary for the construction of the sanitary sewer, storm channel, and appurtenances" in accordance with the project specifications and drawings. (Pl's Ex. 1, Revised Technical Project Specifications, p.2, Art. 1(B)) Mulligan's total bid price for the project work was $1,641,388.60. (Pl's Ex. 1, Proposal, p.4)

Mulligan's Control Of The Work

The 1992 Standard Construction Specifications for Sewers and Drainage Facilities (the "Standard Specifications") delineate the contractor (Mulligan)'s and MSD's roles and responsibilities regarding the work. (Pl's Ex.1a) Section D of the General Conditions addresses control of the work. (Id., pp.5-8) Section D(2) provides that Mulligan shall be responsible for the entire work until final acceptance by MSD:

> **Section D CONTROL OF WORK**
>
> *2. Contractor's Responsibility for Work as a Whole.* The Contractor shall be responsible for the entire work until its final acceptance by the District. The Contractor will not be released from any responsibility for any part of the work until

the entire work embraced in this contract is finally accepted.

(Pl's Ex. 1a, pp.5-6)

Section D(7) provides that the means and methods employed by Mulligan must be such as will ensure compliance with the project plans and specifications:

> *7. Methods and Appliances.* The methods, labor, equipment and other facilities used by the Contractor must be such as will assure the performance of the work in accordance with the plans and specifications, and within the time specified for completion. (Id., p.7)

Sections D(3) and D(8) afford MSD a right of inspection to enforce compliance with the project plans and specifications, ensure quality of materials and workmanship, and assess the progress of the work:

> *3. Authority of the District Representative.* … Within the scope of the contract, the Director and his inspection representatives are authorized to enforce compliance with plans and specifications, to determine the acceptability of materials and workmanship, and to prepare and process progress and final payment estimates. In the event of a dispute between the Contractor and the inspection representative, the latter is authorized to reject materials or

stop the work until questions at issue can be referred to and decided by the Director. (Id., p.6)

***

8. Inspection of the Work.

a. The District and its authorized representative shall be given free access to the work, storage sites, and all material-producing facilities. Every reasonable aid shall be provided for ascertaining that the materials and workmanship are in accordance with the plans and specifications. The inspection of all work, unless otherwise specified, will be under the jurisdiction of the Director.

b. All work shall be done only in the presence of a District inspector unless otherwise specifically authorized, and any work that is performed during the absence of said inspector without such permission having been granted, will be subject to rejection.

c. Any work not constructed in accordance with plans and specifications, whether or not constructed in the presence of a District inspector, shall be subject to rejection at any time prior to formal acceptance. (Id., pp.7-8)

Mulligan Responsible For Complying With All Applicable Safety Laws And Providing All Required Notices

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 and the safety of those performing it, and obligates Mulligan to indemnify MSD against any claim or liability arising from Mulligan's violation thereof:

1. *Observance of Laws and Regulations.*

    a. The contractor shall keep himself fully informed of all federal, state and municipal laws, ordinances and regulations which may affect the conduct of the work, the safety of the public and those engaged or employed, and the materials used; and of all orders and decrees of bodies having jurisdiction or authority over the work. The contractor shall observe and comply therewith, and shall cause his agents and employees to observe and comply therewith. The Contractor shall protect and indemnify the District and all its officers, agents, and employees against any claim or liability arising from or based on the violation thereof by himself or his employees.

***

e. The Contractor shall procure all permits and licenses, pay all charges and fees, and give all notices necessary and incident to the due and lawful prosecution of the work and submit copies to the District prior to the first project payment.… (Id., p.12)

Section F(3) obligates Mulligan to retain only competent employees to perform the work and requires discharge of any employee deemed incompetent or undesirable by the MSD's Director, or who fails to perform the work in accordance with the specifications:

3. Labor Competency. The Contractor shall retain in his employment only competent superintendents, foremen, mechanics, and laborers. Any person employed on the work who, in the opinion of the Director, is intemperate, incompetent, troublesome, or otherwise undesirable, or who fails or refuses to perform the work in the manner specified herein, shall be discharged immediately from employment on the work. Such person shall not again be employed on the work without the consent of the Director. (Id., p.13)

Mulligan Required To Notify Utility Owners If Safety Protection Required And To Make Arrangements With Utilities For Protection Of Overhead Wires

Section F(5) of the General Conditions requires Mulligan to adhere to all applicable safety requirements and to notify all owners of utilities which may be affected by the work and which may require protection or adjustment:

> *5. Public Convenience and Safety.* The Contractor shall observe and adhere to the safety requirements of all federal, state and local authorities having jurisdiction…The Contractor shall give adequate notice in writing to all owners or occupants of property, buildings, structures, or utilities which may be affected by this work and which may require protection or adjustment…. (Id., p.14)

Section 3(F)(3)(b) of the Standard Specifications 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." (Id., p.37) Mulligan notified AmerenUE to cover or de-energize the wires but it declined to do so. (TR.481, 485-87)

THE FACTS RE: AMERENUE'S CONTRIBUTION CLAIMS AGAINST MSD

AmerenUE's First Amended Cross-Claim

AmerenUE's operative first amended cross-claim asserted contribution claims against MSD, Dillman and Campisi (collectively "defendants")[1] under Missouri common law (Count I) and based upon alleged "statutory violations" of the OPLSA (Counts II-IV). (LF82-96) Count I alleged defendants "had a duty to direct Mulligan to use a different piece of equipment to avoid the electrical hazard" and negligently breached that duty "by failing to require Mulligan to use a different piece of equipment to lay the concrete at the accident site." (LF85, ¶¶13-14)

Counts II-IV alleged that defendants violated §§319.080 and 319.083 of the OPLSA by requiring Mulligan to perform work that defendants "could have reasonably expected would require Mulligan's activities to move or be placed within ten feet of the overhead power lines" and failing to notify AmerenUE of Mulligan's activities and make appropriate arrangements for temporary barriers, de-energization/relocating of conductors or rerouting of electric current before allowing Mulligan to proceed with crane operation at the site. (LF88, ¶¶23-27; LF91, ¶¶36-40; LF94, ¶¶48-52) AmerenUE claimed a rebuttable presumption of negligence and right of contribution against defendants under §319.085. (LF88, ¶30; LF92, ¶42; LF95, ¶54) AmerenUE further alleged that its

[1] AmerenUE sued Dillman in his capacity as a construction manager for MSD and Campisi in his capacity as an MSD inspector. (LF83, ¶¶4, 5)

statutory claim against MSD fell within the § 537.600(2) exception to sovereign immunity because a dangerous condition existed on MSD's property. (LF89, ¶28)

Defendants' Answer And Motion For Judgment On The Pleadings

Defendants' answer denied the material allegations of AmerenUE's amended cross-claim and raised a number of affirmative defenses, including failure to state a claim; sovereign immunity for MSD under R.S.Mo. § 537.600 et seq.; the settlement bar under R.S.Mo. § 537.060 et seq.; AmerenUE's failure to extinguish defendants' potential liability to the Pages in its settlement; and defendants' entitlement to a setoff and credit for the amount of their settlement with the Pages and any amounts paid by other settling defendants. (LF97-104, 106-07)

Defendants then moved for judgment on the pleadings on AmerenUE's contribution claims. (LF27) AmerenUE subsequently dismissed its common law contribution claim (LF108) leaving only its OPLSA-based contribution claims pending. (Id.) The court denied defendants' motion for judgment on the pleadings as to these OPLSA-based claims. (LF29, 131-37) The court ruled, as a matter of first impression, that MSD falls within the statutory definition of "person" found in § 319.078(4). (LF136) However, the court found it unclear from the pleadings whether Mulligan or MSD and its two employees were the person(s) "responsible for the function or activity" under § 319.083 and thus a fact question existed as to which entity bore the duty to notify AmerenUE of the potential breach of clearance, and to arrange and finance the required safety measures. (LF136-37)

THE FACTS RE: THE TRIAL PROCEEDINGS

AmerenUE's OPLSA-based contribution claims were tried to a jury on January 4-6, 2006. (LF32-33; TR. Vols. I-IV)

The Trial Evidence

The St. George Sewer Project – Phase II

The St. George Sewer Project was initiated by MSD to help drainage in the Affton area. (TR.31) MSD hired an engineering company to design the project. (TR.137) MSD then put the construction work out for bid. (Id.) MSD hired Mulligan as the general contractor to oversee and perform the entire Phase II project. (Id.) Mulligan subcontracted with other companies to do portions of the project work. (Id.; Pl's Ex. 1, Proposal, p.6) Mulligan had previously done work for MSD and had a good reputation. (TR.32**)** MSD did not perform any construction work on the project or supply any equipment. (Id.; 180)

MSD's Quality Inspectors

Robert Dillman, a civil engineer who worked for MSD for 19 years, in 1999 was a manager of construction. (TR.110-12) At that time, he had been involved in 10-20 concrete drainage ditch projects built by outside contractors for MSD. (Id.) Dillman administered construction contracts and did some personnel supervision. (TR.113) On-site construction project inspectors reported to inspection supervisor Al Brooks, who reported to Dillman. (TR.113-14) Brooks was in charge of the inspectors on the St. George Creek Sewer Project. (TR.115-16)

Dillman testified that MSD inspection representatives were authorized to enforce compliance with the project plans and specifications, to determine the acceptability of materials and workmanship, and to prepare and process progress and final payment estimates. (TR.147, 174) The MSD inspectors would visit job sites periodically throughout the day and then prepare weekly inspection reports for each project. (TR.126; Pl's Ex. 6)

Joseph Campisi, an MSD construction inspector with over 20 years experience, observed materials being brought on the job, made sure they complied with the specifications, and kept track of the work in progress and pay estimates. (TR.303-05) He did not know there was a law prohibiting operation of cranes within 10 feet of overhead power lines. (TR.324-25) Campisi testified that MSD inspectors were not authorized to suspend work for safety reasons but could only report and reject inferior work. (TR.326-28)

Mulligan Responsible For The Means And Methods Of Performing Its Work

Dillman was responsible for administering the MSD-Mulligan contract. (TR.119) He testified that Mulligan selected the means and methods of performing its work. (TR.157) As long as the end product met the plans and specifications, Mulligan was allowed to use whatever method, labor and equipment it wanted. (TR.173, 184) While MSD had the right to change out materials or equipment under the "force account" provision, there was no "force account" in effect at the time of Page's accident. (TR.171) Instead, regular bid work was being performed. (Id.)

Campisi likewise testified that only the contractor had the right to select means and methods to do the work. (TR.329)

Mulligan's superintendent, Jerry Kloeppel, agreed that the means and methods of how to do the job were left up to Mulligan. (TR.494) The MSD inspectors were not at the site to tell Mulligan how to do its job but only to check on the progress of the work and make sure it was being done in accordance with the specifications. (TR.495)

Page confirmed that his work was directed by Mulligan – not MSD. (TR.71) Page took direction from Mulligan only; he never took direction from anyone at MSD. (Id.)

Mulligan Responsible For Observing All Safety Laws And Notifying Utilities If Removal, Replacement Or Protection Of Overhead Wires Required

Dillman testified that Mulligan had the contractual obligation to follow all federal, state and municipal laws and to look out for the safety of its employees on the job site. (TR.153, 160, 166) As Dillman explained, the contractor is assigned responsibility for job safety because they are the experts at performing the work:

> Q. Is the safety the responsibility of the contractor on his job?
>
> A. Yes, it is.
>
> ***
>
> Q. …he's been given a contract, is that right? Mulligan is given a contract to do the job, is that right?

A. That's correct.

Q. …Part of that job is to do it safely according to—to—to—to their own best judgment, is that correct?

A. That's correct.

Q. They're the experts at doing this kind of work. It's their job. We don't interfere other than to make sure they're doing the job in accordance with the plans and specification, is that accurate?

A. That's correct. (TR.176-77)

Dillman further 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 required. (TR.177-78) Kloeppel agreed that it was Mulligan's responsibility to notify utilities under the contract with MSD. (TR.497)

Retired MSD inspector supervisor Alfred 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. (Id.) Brooks had complete confidence in Mulligan's abilities and a great working relationship with Kloeppel. (TR.196) Brooks confirmed that MSD did not tell Mulligan what means and methods they should use to

get the job done and that MSD had no authority to independently contact AmerenUE and ask for their help if an MSD inspector thought Mulligan was coming too close to the overhead wires. (TR.197) "That would be the contractor's decision." (Id.)

Kloeppel concurred that Mulligan did not look to MSD for advice on safety and that MSD did not give Mulligan advice about how to do their job safely. (TR.496)

Gransberg's Contrary Expert Testimony Concerning The MSD-Mulligan Contract And MSD's Duties Thereunder

AmerenUE's expert, Douglas Gransberg, is a civil engineer. (TR.212, 216, 218) Gransberg is presently a professor at the University of Oklahoma and was previously an officer in the Army Corps of Engineers. (TR.219, 232, 235) He is not licensed in Missouri and has never supervised a construction project in Missouri. (TR.220, 223, 227, 291) Prior to this case, he had never testified about overhead power lines or construction custom and practice or construction specifications in the St. Louis area. (TR.211, 215)

The court admitted, over objection, Gransberg's opinion testimony concerning construction of the MSD-Mulligan contract and MSD's obligations thereunder. (LF109-13**;** TR.253, 255-56) Gransberg was allowed to opine that (1) the contract reserved the right to coordinate utilities to MSD; (2) the contract gave MSD the right to direct the contractor's means and methods in performing the work; and (3) MSD had a duty to enforce the contract's safety clause including stopping work if an MSD inspector felt an unsafe act was about to occur. (TR.254-55, 256-83)

Each of these opinions was founded on Gransberg's own interpretation of the MSD-Mulligan contract terms. (TR.258-83) Gransberg testified that MSD reserved the

right to coordinate utilities themselves based on Section F(12)(A) of the contract specifications. (TR.259-61) According to Gransberg, the contract language stating that "utility owners and public agencies responsible for facilities located within the right of way will be required to complete any installation, relocation, repair or replacement prior to commencement of work by the contractor" required MSD to send the project plans and specifications to various utilities and get all utility conflicts resolved before the contractor commenced work under the contract. (TR.260-61)

Gransberg opined that MSD had the right to control the means and methods Mulligan used to perform its work based on the "Scope of Work" provision stating all work will be done in accordance with the detailed drawings and directives which will be given from time to time during the progress of the work; the "Order of Work" provision stating that work shall be performed in such order of precedence as the MSD director may require; the Section D(8)(B) "Inspection of Work" provision stating that the contractor cannot work unless an MSD inspector is present or they have been authorized to work without the presence of an inspector; and the Section F provision requiring the contractor to maintain an authorized representative on site. (TR.263-68, 272)

Gransberg also testified that MSD had a contract right and duty to interfere with or stop the contractor's work for safety issues based on the contract clause stating that the MSD director has authority to issue directives; the provisions requiring the contractor to observe and adhere to all safety laws and to give notice to all utilities which may be affected by the work and require protection; and the contract provision giving MSD the

right to tell the contractor to discharge personnel MSD deemed incompetent. (TR.273-82)

Gransberg was also permitted to opine, over objection, that the MSD inspectors had a contract right and responsibility to notify AmerenUE about the overhead lines:

> Q. Okay. And did Mr. Dillman/Mr. Campise 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 a utility in writing. That – that they could then enforce that particular clause. And through that clause, could have contracted UE if they indeed, decided that there was no way that they could place this concrete without impacting those transmission line by either de-energizing or covering them. (TR.282-83)

Mulligan Notifies AmerenUE But AmerenUE Refuses To Cover Or De-Energize The Overhead Wires

AmerenUE's 34,000 volt overhead power lines at the construction site were 42 feet above ground at their lowest point. (TR.387) Kloeppel felt that the work could be

performed without coming within 10 to 15 feet of the power lines but wanted them protected as a safety precaution. (TR.481-82) Kloeppel testified that he called AmerenUE on November 16, 1999 and asked if they could cover or de-energize the wires while Mulligan was working there. (TR.481) AmerenUE told Kloeppel that was not possible. (TR.482) Kloeppel made three additional calls to AmerenUE in November 1999 regarding covering and de-energizing the overhead wires. (TR.485-87) AmerenUE told Kloeppel they could not cover or de-energize the wires:

> A. The purpose for the calls, the purpose for the calls was to de-energize or cover the overhead power lines at Gravois Creek.
>
> Q. All right. And what was the substance of the response you got over the four calls?
>
> A. They said they could not cover because they didn't make covers to cover such wires, and the outage, to put an outage on those – I don't recall.
>
> Q. Okay. So, what they said about the outage, you don't recall?
>
> A. They said they could not do it, could not give me an outage. (TR.487)

Kloeppel was very upset about AmerenUE's response and told all his workers on the project about it, including Page. (TR.490-92)

Three AmerenUE employees testified that they did not personally receive a call from Kloeppel requesting AmerenUE to cover or de-energize the overhead lines. (TR.346, 373, 376, 386, 467-68) AmerenUE employee Jeffrey Hartenberger also testified that he could not find a record of Kloeppel's call. (TR.392-95) However, none of the AmerenUE employees could definitively state that Kloeppel did not make such a call. (TR. 346, 391-95)

Hartenberger acknowledged that AmerenUE had denied contractors' requests for AmerenUE to de-energize overhead lines in the past and said there would have been no problem if Mulligan had complied with the OPLSA's ten foot rule. (TR.390-91) Hartenberger did not think operating the crane under the power lines was a potentially dangerous situation and would not criticize AmerenUE for refusing to de-energize the lines:

> Q. And you saw the crane underneath the power lines?
>
> A. Yes, sir.
>
> Q. Did you think that was a potentially dangerous situation?
>
> A. Not if they complied with the overhead – Missouri Overhead Safety Act where they maintain ten foot clearance from the conductor. It shouldn't have been no problem at all.

Q. Okay. And so you wouldn't be critical of Ameren if they told the contractor we're not – not going to de-energize it.

A. Correct. (TR.391)

Tom Castro, AmerenUE's district manager, likewise testified that he did not think use of the crane at the site warranted covering or de-energizing the power lines and that the work could be performed safely without doing so. (TR.505-06) Consequently, Castro might have refused a contractor's request to cover or de-energize those lines. (TR.506)

Page And The Other Mulligan Employees Know That AmerenUE Refused To Cover Or De-Energize The Overhead Lines Prior To Page's Accident

Page testified he and the other Mulligan workers were aware AmerenUE failed to cover or de-energize its overhead wires despite Mulligan's request:

Q. And did you have a meeting with Jerry – all the workers met with Jerry that day about the overhead wires?

A. Yes.

Q. Okay. Everybody knew – from Mulligan knew that the wires were there?

A. Yes, sir, we did.

Q. And that the wires were live?

A. Yes, sir.

***

Q. Mr. Kloeppel had told you that he tried to contact AmerenUE about the issue of the wires, didn't he?

A. Yes, he did.

Q. Okay. But nonetheless, Ameren didn't do anything about it. Didn't de-energize it or cover it?

A. No, sir. (TR.62-63)

Indeed, Page had complained about the overhead wires not being protected prior to his accident:

Q. Mr. Page, if anybody was in a position to know that those lines were not covered and not de-energized, it was you all at Mulligan Construction Company, correct?

A. Yes.

Q. You had complained about that to Jerry Kloeppel?

A. Yes, I did.

Q. Is that right?

A. Yes, sir.

Q. And that had been ongoing for some time. You were having these meetings everyday with Mr. Kloeppel and you and other employees of Mulligan were complaining to him about this situation, is that right?

A. Yes, sir.

Q. And that's when he advised you that he had tried to contact UE but they weren't doing anything?

A. Yes, sir. (TR.70-71)

Mulligan's Concrete Pouring Work

On December 27, 1999, Mulligan began its concrete pouring work. (TR.44) Mulligan used a crane with a large metal concrete bucket to move concrete from a parked truck down to the ditch. (TR.48, 49) The crane was positioned on the south side of the ditch underneath the overhead power lines and had a 60 foot boom. (TR.47, 49, 475) The crane was operated by Mulligan employee Jeff Higginbotham. (TR.473)

Kloeppel instructed Higginbotham to boom in and out and not to boom up because of the power lines. (TR.471-74) The boom was to remain extended throughout the operation. (TR.476) Kloeppel tested this procedure by having Higginbotham swing the boom back and forth several times. (TR.476-77, 500) There was always at least 15 feet of clearance between the boom and the power line so Kloeppel felt satisfied there was no

danger. (Id.) Mulligan workers poured concrete into the bucket, then the crane would swing out over the ditch and lower the bucket down into the ditch. (TR.49, 475) Other Mulligan workers standing in the ditch would place the bucket where they wanted the concrete and then pull down the bucket's handle opening doors in the bottom of the bucket and allowing the concrete to dump out. (Id.)

Alvin Harmon of Bates Utility was installing a sanitary sewer line on the project approximately 1000 feet from where the crane was set up. (TR.80-81) Harmon could see the crane operator fill concrete bucket, swing underneath the power lines, raise the boom up and deliver the bucket to the ditch. (TR.82-83) Harmon saw that the crane operator "was getting pretty close to the wires" but "didn't know how close he was to them" (TR.83) and did not know whether the crane's boom came within ten feet of the wires prior to the accident. (TR.88) Harmon did not say anything because it was Mulligan's business and Mulligan's job how to handle the concrete pour. (TR.85-86)

Mulligan employee Robert Smith was operating a high lift at the site and also observed the crane's boom come near the overhead wires. (TR.103) Smith thought the boom came within ten feet of the wires and was concerned for his safety. (TR.103-04) A few minutes before the accident, Smith spoke to an "MSD inspector" and told him the crane's boom was getting close to the wires. (TR.105-06, 310) Smith warned the MSD inspector to stay away from there. (TR.105, 310) Smith did not say anything to the crane operator or Kloeppel because Kloeppel was in charge of the job site and it was up to Kloeppel to do the job his way. (TR.107-08)

After the concrete pouring started, Harmon told MSD inspector Campisi that the crane was getting close to the wires. (TR.309) Campisi and Harmon were 500 to 1000 feet away at the time. (TR.310, 312) Campisi went down to the ditch and spoke to one of Mulligan's crew (the high lift operator) about it "as a matter of common courtesy" -- it was not part of his job as an inspector to do so. (TR.312-17, 329) The high lift operator told Campisi the Mulligan workers knew what they were doing. (TR.330) Campisi did not notify Kloeppel because he had no right to tell Mulligan the method, means or equipment they should use to do their work safely. (TR.316, 325) That was Mulligan's job. (Id.)

When Dillman arrived at the job site, Campisi told him to watch out if he went down to the ditch because Mulligan was hoisting concrete and there were live wires down there. (TR.159, 318-19) Dillman walked down to the ditch but did not see the crane boom coming close to any wires. (TR.166) Dillman did not do anything further because hoisting concrete is a potentially dangerous situation whether there are live wires or not and Mulligan was responsible for conducting the activity safely. (TR.166-67, 188) The accident happened a few minutes later. (TR.168)

Page's Accident

Page began working for Mulligan in the summer of 1999 as a general laborer setting grade gravel, laying storm drains, pouring concrete and placing backfill. (TR.42) He started working on the St. George Sewer Project in the fall of 1999. (Id.) Page was well aware of AmerenUE's live overhead power lines when the concrete pouring began at approximately 1:00p.m. on December 27th. (TR.46, 62-63, 70-71)

Page's job was to receive the bucket, place the concrete and make sure it was distributed uniformly throughout the ditch. (TR47-50) Page would direct Mulligan's crane operator using hand signals as to where he wanted the bucket placed so that Page could drop the concrete in that area without taking it across the ditch. (TR.55, 74-75)

By 3:00p.m, more than 25 buckets of concrete had been lowered into the ditch, received and placed by Page. (TR.51) Shortly after 3:00p.m, Page saw a flash of light and heard a loud boom while reaching for the bucket to pour a load of concrete. (TR.52-53) Page sustained a serious electrical shock when, in Page's words, "apparently, the crane became energized somehow off the power lines and the electricity transferred down to the cable into the bucket and through me and to the ground." (TR.53) The electrical shock caused severe burns, resulting in subsequent amputation of Page's hands and lower left leg. (TR.56)[2]

Immediately after the accident, Dillman saw the crane boom raised close to the overhead wires. (TR.167) Kloeppel was still sure the job could be done safely in the manner he had instructed and finished the last two loads in the same way. (TR.496)

The next day, AmerenUE de-energized the overhead lines so the rest of the project could be completed safely. (TR.395-96, 398)

MSD's Motions For Directed Verdict

Defendants moved for directed verdict at the close of AmerenUE's evidence and again at the close of all the evidence on a number of grounds, including the following:

[2] Page now uses computerized prosthetics. (TR.57-59)

MSD is not a person subject to the OPLSA; Mulligan -- not MSD -- was the responsible person under the OPLSA and Mulligan provided any required notice to AmerenUE prior to Page's accident; AmerenUE failed to make a submissible case against MSD for any alleged violation of the OPLSA; MSD is entitled to sovereign immunity under R.S. Mo. § 537.600 *et seq*. and AmerenUE failed to prove the "dangerous condition of property" exception to sovereign immunity; MSD's potential liability is limited by the statutory damages cap and claims for amounts in excess of the cap fail as a matter of law; AmerenUE's contribution claim also fails as a matter of law because AmerenUE denied joint liability, failed to discharge MSD's liability through settlement, and failed to establish payment of more than its pro rata share of Page's damages, and because MSD reached a separate good faith settlement with the Pages thereby discharging its contribution liability pursuant to R. S. Mo. § 537.060. (LF216-25, 228, 229, 232-41; TR.417-62; 531-33)

Applying a broad interpretation of the OPLSA, the court denied defendants' motion for directed verdict at the close of plaintiff's evidence. (LF228; TR.422-24, 426-27, 431-33, 436, 437-41, 446-48, 450-51, 455-57, 460, 461-62) The court granted defendants' motion for directed verdict as to Dillman and Campisi at the close of all the evidence, but again denied the motion as to MSD. (LF267; TR.527, 532-33)

The Jury Instructions

Plaintiff's verdict directing instruction (Instruction No. 5) states:

> Your verdict must be for plaintiff Union Electric Company d/b/a AmerenUE if you believe:

> First, there was a crane transporting concrete whose operation could bring the crane's boom within 10 feet of high voltage overhead lines; and
>
> Second, defendant Metropolitan St. Louis Sewer District knew or could have known of this operation; and
>
> Third, defendant Metropolitan St. Louis Sewer District failed to use ordinary care to stop the crane's operation; and
>
> Fourth, the crane's boom came into contact with a high voltage overhead line and Anthony Page was injured; and
>
> Fifth, AmerenUE's settlement of the claims of Anthony and Donna Page was reasonable.
>
> As used in this Instruction, the phrase "ordinary care" means that degree of care that an ordinarily careful person would use under the same or similar circumstances. (LF258; TR.520-21)

The court gave this instruction over MSD's objection that it did not comport with the OPLSA because it does not require a finding that MSD is a "person" within the meaning of the Act and that AmerenUE failed to make a submissible case against MSD under the Act. (LF258; TR.521) MSD proposed adding a first element requiring a

finding that MSD contracted to perform any function or activity on land in proximity to an overhead line. (TR.520-21) The court rejected MSD's proposed alternative language based upon the court's prior ruling that, as a matter of law, OPLSA's Section 319.078(4) definition of "person" includes both entities which directly perform work and entities which enter into contracts with other persons to perform work. (TR.522-23)

The Jury Verdict

The jury returned a verdict in favor of AmerenUE and against MSD, assessing 25% fault to AmerenUE and 75% fault to MSD. (LF265-66; TR.596-98)

MSD's Motion To Reduce The Amount Of The Jury Verdict

MSD moved the court to reduce the amount of the jury's $4,500,000 net verdict ($6,000,000 less 25%) by affording MSD a setoff or credit for MSD's $6,000,000 settlement and FMC's $3,000,000 settlement with the Pages pursuant to R.S. Mo. § 537.060 -- thereby reducing the verdict to $0 -- or alternatively to reduce the amount of the verdict in accordance with the statutory damages cap set forth in R.S. Mo. §537.610. (LF268-71) The court denied MSD's motion finding that the statutory damages cap and contribution law requirements were "contrary laws" which did not apply to AmerenUE's contribution claim under the OPLSA. (LF34, 275-76; Supp. LF400)

The Original And Amended Judgments

On January 10, 2006, the court entered a judgment in favor of AmerenUE against MSD in the amount of $4,500,000.00. (LF272-74). On January 17, 2006, the court entered an amended judgment adding that post-judgment interest will accrue pursuant to §408.040.2 R. S. Mo. (LF283-85)

MSD's Motions For Judgment Notwithstanding The Verdict Or A New Trial

MSD moved for judgment notwithstanding the verdict reasserting the same grounds raised in its prior motions for directed verdict and its motion to reduce the amount of the jury verdict. (LF286-98) Alternatively, MSD moved for a new trial based upon instructional and evidentiary errors. (LF298-302) MSD argued, inter alia, that the verdict directing instruction (Instruction No. 5) was prejudicially erroneous because it materially misstated the law with regard to MSD's duty and was unsupported by the evidence and that the court erred prejudicially in admitting Gransberg's testimony interpreting the MSD-Mulligan contract and MSD's duties thereunder. (Id.)

The trial court denied both motions. (LF329-38)

POINTS RELIED ON

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. Mo. Rev. Stat. § 319.078(4) defines a "person" as an individual or entity "which performs or contracts to perform" a function or activity upon land in proximity to a high voltage overhead line; MSD neither performed nor contracted "to perform" any such function or activity but instead hired independent general contractor Mulligan to perform the work.

Ariz. Pub. Serv. Co. v. Shea, 742 P.2d 851 (Ariz. Ct. App. 1987).

Green v. Moreland, 407 S.E.2d 119 (Ga. Ct. App. 1991).

Coastal Mart, Inc. v. Dep't of Natural Res. of the State of Mo., 933 S.W.2d 947 (Mo. Ct. App. 1996).

Mo. Rev. Stat. § 319.078(4).

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 insofar as AmerenUE failed to discharge MSD's liability or prove that it paid more than its pro rata share of Page's total damages, and because MSD entered into a good faith settlement with the injury plaintiffs for $6 million.

White v. Am. Repub. Ins. Co., 799 S.W.2d 183 (Mo. Ct. App. 1990).

Ozark Wholesale Bev. Co. v. Supervisor of Liquor Control, 80 S.W.3d 491 (Mo. Ct. App. 2002).

Mo. Rev. Stat. § 319.085.

Mo. Rev. Stat. § 537.060.

In the alternative only

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 because the damages cap is not a "contrary law" under § 319.085 as it does not negate the right of contribution afforded AmerenUE under the OPLSA but merely limits the amount of recovery available against governmental entities such as MSD.

Wollard v. City of Kan. City, 831 S.W.2d 200 (Mo. 1992) (en banc).

Jones v. St. Louis Housing Auth., 726 S.W.2d 766 (Mo. Ct. App. 1987).

Mo. Rev. Stat. § 319.085.

Mo. Rev. Stat. § 537.610(2).

In the further alternative only

IV. The Court of Appeals correctly reversed and remanded for a new trial because the trial court erroneously admitted Gransberg's expert testimony concerning the construction of the MSD–Mulligan contract and MSD's obligations thereunder, as contract construction is a matter of law for the court as to which expert testimony is irrelevant and inadmissible; parole evidence is inadmissible to alter the contract's clear and unambiguous allocation of responsibility for compliance with all safety laws to Mulligan; and to the extent parole evidence is admissible to resolve any ambiguity, MSD's and Mulligan's uniform construction of their contract as placing responsibility for OPLSA compliance on Mulligan cannot be contradicted by a non-contracting party's expert. The admission of Gransberg's testimony constituted prejudicial error requiring a new trial as it led the jury to believe MSD bore responsibility for ensuring compliance with the OPLSA and could also have greatly impacted the fault allocation.

Burns v. Black & Veatch Architects, Inc., 854 S.W.2d 450 (Mo. Ct. App. 1993).

Marx & Co., Inc. v. Diners' Club, Inc., 550 F.2d 505 (2d Cir. 1977).

Landau v. Laughren, 357 S.W.2d 74 (Mo. 1962).

MLPGA v. Weems, 838 S.W.2d 7 (Mo. Ct. App. 1992).

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. MO. REV. STAT. § 319.078(4) DEFINES A "PERSON" AS AN INDIVIDUAL OR ENTITY "WHICH PERFORMS OR CONTRACTS TO PERFORM" A FUNCTION OR ACTIVITY UPON LAND IN PROXIMITY TO A HIGH VOLTAGE OVERHEAD LINE; MSD NEITHER PERFORMED NOR CONTRACTED "TO PERFORM" ANY SUCH FUNCTION OR ACTIVITY BUT INSTEAD HIRED INDEPENDENT GENERAL CONTRACTOR MULLIGAN TO PERFORM THE WORK

A.

Standard Of Review

The construction of a statute is a question of law, not judicial discretion. *In re Dunn*, 181 S.W.3d 601, 604 (Mo. Ct. App. 2006). Thus, it falls within this Court's province of independent review and correction, and no deference is given to the trial court's determination of the law. *Id.* Where, as here, the trial court's conclusions regarding judgment notwithstanding the verdict involve a question of law, review is likewise *de novo*. *Jungerman v. City of Raytown*, 925 S.W.2d 202, 204 (Mo. 1996) (en banc).

B.

The Statutory Definition Of "Person" Encompasses Only Two Types Of Entities: Those Who Perform The Work Themselves And Those Who Contractually Agree To Perform The Activities For Others. Landowners/Possessors Who Contract To Have Work Performed On Their Premises Are Not Included

"The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. 1988) (en banc). A court may not add provisions under the guise of construction if they are not plainly written or necessarily implied. *Coastal Mart, Inc. v. Dep't of Natural Res. of the State of Mo.*, 933 S.W.2d 947, 955-56 (Mo. Ct. App. 1996); *Billings v. State Farm Mut. Auto. Ins. Co.*, 741 S.W.2d 886, 888 (Mo. Ct. App. 1987).

Section 319.078(4) defines a "person" subject to the OPLSA's requirements as an individual or entity "which performs or contracts to perform" any function or activity upon premises in proximity to an overhead line:

> **§ 319.078. Definitions**
>
> As used in sections 319.075 to 319.090, the following terms mean:
>
> ***

> (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))(italicized bolding supplied)

Under this express statutory definition, two types of entities are subject to the Act: (1) those landowners/possessors who decide to perform the referenced function or activity themselves; and (2) those, such as general contractors, who contractually agree to perform or carry out such function or activity for others. Mo. Rev. Stat. § 319.078(4). Landowners and/or possessors that contract with third parties to have those third parties perform the subject function or activity do not fall within either of these categories because such an entity neither "performs" nor "contracts *to perform*" that function or activity. *Id* (italics supplied). *See also Ariz. Pub. Serv. Co. v. Shea*, 742 P.2d 851, 854 (Ariz. Ct. App. 1987) (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 who contracts to have work performed on their premises).

Contrary to the statute's plain language, the trial court here held, as a matter of first impression in Missouri, that § 319.078(4) defines "person" to include those landowners/possessors who contract *to have others perform* the subject function or activity. (LF333) The court stated:

> …the law applies to MSD in this case because Section 319.078(4) defines the term "person" as including a "government unit" "which performs or contracts to perform any function or activity upon land…in proximity to an overhead line". In this case, MSD, a governmental entity, contracted with Mulligan Construction Company to build an open concrete storm water drainage channel directly below overhead power lines owned by UE. MSD contracted with Mulligan to perform one of MSD's primary functions, namely the building of storm water drainage systems. (*Id.*)[3]

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[3] Based on its holding that MSD constituted a "person" as a matter of law, the court gave plaintiff's verdict directing instruction (No. 5):

> Your verdict must be for plaintiff Union Electric Company d/b/a AmerenUE if you believe:
>
> First, there was a crane transporting concrete whose operation could bring the crane's boom within 10 feet of high voltage overhead lines; and
>
> Second, defendant Metropolitan St. Louis Sewer District knew or could have known of this operation; and

This construction impermissibly expands the statutory definition by essentially adding the words "have third parties" or "have others" between the words "contracts to" and "perform," in derogation of the "performs or contracts to perform" language actually used by the Missouri legislature. Mo. Rev. Stat. § 319.078(4). *See also Coastal Mart*, 933 S.W.2d at 955-56; *Billings*, 741 S.W.2d at 888.

An identical attempt to alter the same definitional language used in another overhead power line safety statute was considered and soundly rejected in *Arizona Public Service*, 742 P.2d at 854. In that case, a landowner (Shea) hired a third party (Trevizo Hay Company) to deliver hay to his ranch. One of Trevizo's employees (Ruelas) was

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> Third, defendant Metropolitan St. Louis Sewer District failed to use ordinary care to stop the crane's operation; and
>
> Fourth, the crane's boom came into contact with a high voltage overhead line and Anthony Page was injured; and
>
> Fifth, AmerenUE's settlement of the claims of Anthony and Donna Page was reasonable.
>
> As used in this Instruction, the phrase "ordinary care" means that degree of care that an ordinarily careful person would use under the same or similar circumstances. (LF258; TR.520-21)

seriously injured when he came into contact with a high voltage overhead power line while delivering hay. *Id.* at 852-53. The owner of the overhead power line (Arizona Public Service Company or "APS") sought indemnification from Shea under the power line statute for its liability to Ruelas. *Id.* at 853-54.

Section 40-360.41 of the Arizona overhead power line statute defines a "person" or "business entity" subject to the statute's six-foot clearance rule as those parties who "contract to perform" any function or activity upon any land, building, highway or other premises. *Id.* at 854. Like the trial court herein, APS maintained that the words "contracts to perform" include not only those who perform the work but also parties who contract *to have work performed* on their premises. *Id.* The appellate court rejected this construction as a distortion of the plain statutory language:

> Section 40-360.42 is directed to those "persons" who contract to perform work which may bring a person, tool, or material used by the person within six feet of an overhead line. 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. In this case, Shea is not a "person" who contracted to perform within the meaning of A.R.S. § 40-360.41. Rather, Shea simply contracted to have Trevizo Hay Company deliver hay to his property.

> APS would have this court include in the words "contract to perform" not only the employer who carries out work in close proximity to an overhead power line, but also the party who enters into a contract with that employer to have the work performed. Such a reading of § 40-360.41 distorts the plain language of that statute. (*Id.*)

The court also found such a construction in derogation of the legislative intent behind the power line safety statute to make those actually performing the work primarily responsible for safety :

> The statute promotes safety by prohibiting work within six feet of a power line. The legislature has thus established, as a matter of public policy, that persons or businesses actually performing work in close proximity to power lines have the primary responsibility for safety. (*Id.)*

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> Holding the party who contracts to perform an activity near an overhead line liable for violations of the statute serves the legislative intent of promoting safety. The party who agrees to perform the activity should have sufficient knowledge of the work habits and equipment of his employees and agents to

> properly assess the danger of violating the six-foot prohibition. The performing party will likewise have control over the employee or agent who is in close proximity to the overhead line, and can order the employee not to violate the statutory prohibition. When an employer is involved in work that frequently brings his employees or agents into close proximity to overhead power lines, the statutory prohibition should encourage that employer to establish routine safety procedures that will minimize the risk of accidental contact. (*Id.* at 855)

The *Arizona Public Service* analysis applies with equal force here as the same statutory language is at issue. By limiting the definition of "person" in § 319.078(4) to one who "performs or contracts to perform" a function or activity in proximity to an overhead line, the Missouri legislature, like the Arizona legislature, chose to make those actually performing the work responsible for safety under the OPLSA and eliminated from the Act's reach those who merely contract to have others perform the work. Landowners/possessors, such as MSD, homeowners, and business owners who hire third parties, such as independent general contractor Mulligan, to perform work on their premises do not qualify as a "person" under the OPLSA and thus are not required to comply with its provisions. Mo. Rev. Stat. § 319.078(4). *See also Ariz. Pub. Serv.*, 742 P.2d at 854-55.

C.

The OPLSA's Definition Of "Person" To Include Only Those Actually Performing Or Contracting To Perform The Work Is Consistent With Other Overhead Power Line Safety Statutes Nationwide Which Limit Their Application To Those Directly Responsible For Performing The Work

More than 25 states have overhead power line safety statutes similar to the OPLSA. Yet almost none of these statutes place responsibility for compliance with the statutory requirements on entities that hire third parties to perform work on their premises, as the trial court has done here in construing § 319.078(4). Rather, these statutes overwhelmingly apply only to those directly responsible for performing the work personally or through their own employees or agents. *See, e.g.*, Ala. Code § 37-8-52(a) (no person shall "either personally or through an agent or employee" impinge six-foot clearance rule); Alaska Stat. § 18.60.670 (person "individually or through an employee or agent" may not impinge ten-foot clearance requirement); Ariz. Rev. Stat. Ann. § 40.360.41(4) ("Person" or "business entity" means "those parties who contract to perform any function upon any land, building, highway or other premises"); Ark. Code Ann. § 11-5-308 (no "person, firm, corporation, or association shall individually or through an agent or employee, and no person as an agent or employee of any person, firm, corporation or association, shall" infringe ten-foot clearance); Cal. Penal Code § 385(b) (any person "who either personally or through an employee or agent, or as an employee or agent of another" violates six-foot rule is guilty of a misdemeanor); Colo. Rev. Stat. § 9-2.5-

101(4) (“person” or “business entity” means a “party contracting to perform any function or activity upon any land, building, highway or other premises”); Ga. Code. Ann. § 46-3-32(3) (“Person responsible for the work” means the person actually doing the work as well as any person, firm or corporation who employs and carries on his payroll any person actually doing the work or who employs a subcontractor who actually does the work”); Idaho Code §§ 55-2401, 55-2402 (“a contractor, individually or through an agent or employee or as an agent or employee” shall not impinge specified clearances; “contractor” means one who “contracts, subcontracts or otherwise agrees or undertakes to perform any function or activity upon any land, building, highway, waterway or other premises”); Kan Stat. Ann. § 66-1710(d) (“person” means an individual firm, joint venture, partnership, corporation, association, municipality or governmental unit which contracts to perform any function or activity upon any land, building, highway or other premises in proximity to an overhead line”); La. Rev. Stat. Ann. § 45:143 (“person or persons responsible for the work to be done” must ensure compliance with statutory requirements); Me. Rev. Stat. Ann. tit. 35, § 752(4) (“Person responsible” means the person performing or controlling the job or activity that necessitates the precautionary safety measures required by this chapter”); Md. Code Ann., Lab. & Empl. § 6-106 (a person shall comply with statutory requirements “before the person may perform, or require or allow an employee to perform” specified activities); M.G.L.A. 166 § 21A (no person “shall require or permit any employee” to operate equipment or engage in construction work within six feet of high voltage lines absent compliance with statutory requirements); Neb. Rev. Stat. § 48-437 (“No person, firm or corporation, or agent of

same, shall require or permit any employee…to perform and no person…shall perform any function within prohibited distances); Nev. Rev. Stat. § 455.220 (a person "shall not perform any act" reasonably likely to violate specified clearances); N.J. Stat. Ann. § 34:6-47.5 ("employer, contractor or other person responsible for the activity" shall comply with statutory requirements); N.Y. Labor Law § 202-h(3)(a) ("No employer or supervising agent of employer shall require or permit an employee to, and no self-employed individual, independent contractor having no employees or homeowner" shall participate in any activity which would cause "the employee, self-employed individual, independent contractor or homeowner" to come within dangerous proximity of a high voltage line); Okla. Stat. Ann. tit. 63, § 981 ("No person, firm, corporation or association shall, individually or through an agent or employee and no person as an agent or employee of any person, firm, corporation or association, shall perform" any function in violation of statutory requirements); Or. Rev. Stat. § 757.800(4) ("Person" or "business entity" means "those parties who contract to perform any function or activity upon any land, building, highway or other premises"); 43 Pa. Cons. Stat. Ann. § 26-2 ("No employer or supervising agent of an employer shall require or permit an employee to, and no employee shall participate" in prohibited activity); Tenn. Code Ann. § 68-103-102 ("No person, firm or corporation, or agent [of same], shall require or permit any employee to perform any function in proximity to high-voltage lines" absent compliance with statutory requirements); Va. Code Ann. § 59.1-407 ("Person responsible for the work" means "the person performing or controlling the work"); Wyo. Stat. Ann. § 37-3-302(iv) ("Person" or "business entity" means "those parties who contract to perform any

function upon any land, building, highway or other premises, excluding those parties providing emergency services…").

The only exception to this virtually uniform approach appears to be the North Carolina Overhead High-Voltage Line Safety Act, which expressly defines the "person responsible for the work to be done" in cases involving government contracts as the governmental entity rather than the contractor:

> (4) "Person responsible for the work to be done" means the person performing or controlling the work that necessitates the precautionary safety measures required by this Article, unless the person performing or controlling the work is under contract or agreement with a governmental entity, in which case "person responsible for the work to be done" means that governmental entity. (N.C. Gen. Stat. § 95-229.6(4))

Obviously, § 319.078(4) of the OPLSA is nothing like the North Carolina statutory definition but is instead consistent with the overwhelming majority of overhead power line statutes which apply only to those individuals and entities directly responsible for performing the work. MSD is not such an entity and thus is not subject to the OPLSA's requirements. Mo. Rev. Stat. § 319.078(4). *See also Green v. Moreland*, 407 S.E.2d 119, 121 (Ga. Ct. App. 1991) (county which hired independent contractor to perform bridge replacement project was not "person responsible for the work to be done" under overhead power line safety statute; rather, contractor who was "immediately

responsible for the operation of machinery within eight feet of a high-voltage line" was responsible for complying with the statute).

D.

The Trial Court's Expanded Construction Of § 319.078(4) Undermines The OPLSA's Safety Purpose By Creating Confusion As To Who Is Responsible For Complying With The Statute And By Removing Exclusive Responsibility From Those Directly Performing The Work — And Thus In The Best Position To Ensure Compliance With The Act's Safety Requirements — In Favor Of Burdening Less Knowledgeable Landowners/Possessors Who Have Entrusted The Work To Others

Although the trial court professed to have adopted a "broad construction" of the term "person" under § 319.078(4) as including those who contract to have others perform work on their premises in order to promote the OPLSA's safety purpose (LF333), its ruling in effect does just the opposite. By shifting the Act's focus from those actually performing the work to those hiring others to do the work, the court's construction creates confusion as to who is primarily responsible for compliance with the statutory requirements and shifts responsibility from those most knowledgeable about the particulars of the work to those far less knowledgeable. That does not promote but instead hinders safety.

Arizona Public Service makes the point:

> Holding the homeowner or business that contracts to have work performed liable for violations of the statute does not

> serve the safety rationale….In the usual case, a homeowner who contracts to have work performed on his premises will not be sufficiently familiar with the work or the procedures of the employer to know how the job will be carried out or what equipment will be used, and will therefore be unable to properly assess the danger of a statutory violation. Furthermore, a homeowner is not likely to be able to control the conduct of the employee who is working near the overhead line, and thus may not be able to prevent a statutory violation. Finally, because the homeowner will often be unfamiliar with the regular course of activity of the employee, the homeowner cannot be said to have "required" the employee to come within six feet of an overhead line within the meaning of [the safety statute]. (742 P.2d at 855.)

The concerns expressed in *Arizona Public Service* are manifest here. MSD did not determine that a crane would be used to deliver the concrete to the ditch; did not provide the crane itself or specify its boom length; did not direct the crane's location under the overhead wires; did not instruct the crane operator on how to perform the concrete deliveries without infringing on the required ten-foot clearance; and did not give the hand signals that led to the crane's boom contacting the overhead wires. (TR.44-56, 74-75, 473-77, 496, 500) All of these functions and activities were performed exclusively by

Mulligan and its employees, who were the experts on crane operation and concrete delivery. (*Id.*) Thus Mulligan — not MSD — was in the best position to comply with OPLSA and ensure job site safety.[4] *See generally, e.g., Werdehausen v. Union Elec. Co.*, 801 S.W.2d 358, 366 (Mo. Ct. App. 1990) (noting that "[t]he best way to ensure that safety precautions are taken is to make the general contractor responsible for them").

In sum, MSD is not a "person" subject to the OPLSA and thus is entitled to judgment notwithstanding the verdict on AmerenUE's OPLSA contribution claim.

[4] That "MSD had inspectors on the scene at the time Anthony Page was electrocuted" (LF333) does not alter this fact as the MSD personnel were quality — not safety — inspectors (TR.147, 174, 303-05, 326-28). *Morgan v. U.S.*, 413 F. Supp. 72, 73-74 (E.D. Tenn. 1976), *aff'd w/o Op.*, 564 F.2d 99 (6th Cir. 1977) (where government inspector on premises during road construction project was a quality control inspector "responsible for seeing that work was performed properly and according to specifications," not safety inspector, government did not assume duty of supervising power lines and was not responsible for independent contractor's violation of statutes).

E.

Even Under The Court Of Appeals' Reasoning That MSD Could Be Considered A "Person" Under § 319.078(4) If AmerenUE Proved A Master/Servant Relationship Between MSD And Mulligan, MSD Is Entitled To Judgment Notwithstanding The Verdict Because AmerenUE Did Not Submit Its Case Upon A *Respondeat Superior* Theory Of Vicarious Liability And Admits -- Indeed *Argues* -- That No Agent/Servant Issue Exists In This Case.

The Eastern District "note[d] that . . . MSD could be considered a 'person' under Section 319.078(4) -- if -- Ameren/UE proved that MSD had control over Mulligan." (Slip Op. at p. 7; A48). The court held that such control equates to that of a master/servant relationship:

> The control relationship is suitably described in Madsen v. Lawrence: [a] master is a principal who employs another to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service. A servant is a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or subject to the right of control by the master.

(Slip Op. at pp. 7-8; A48-49) (internal citations and quotations omitted). Based upon this reasoning, the court held that the question of whether Mulligan was an "agent/servant" of

MSD or merely an independent contractor should have been submitted to the jury under M.A.I. 13.06. (Slip Op. at p. 8, fn. 8; A48-49). For this conclusion, the court relied on *Jefferson County Bank & Trust Co. v. Dennis*, 523 S.W.2d 165, 168 (Mo. Ct. App. 1975), which held that M.A.I. 13.06 "normally is given when it is contested whether a person is an independent contractor or a mere agent or servant."

Here, however, AmerenUE did not submit its case upon a *respondeat superior* theory of vicarious liability. As AmerenUE itself argued in its application for transfer to this Supreme Court: "there was no issue in the case as to whether Mulligan was MSD's agent." (A63). Instead, AmerenUE attempted (without directly saying so) to place a Restatement (Second) of Torts § 414 (1965)[5] gloss on the OPLSA by asserting that MSD qualifies as a "person" because it purportedly controlled the work of its independent contractor, Mulligan, and breached its "independent duty to exercise due care" in so controlling Mulligan's work. (LF311, 313). The Court of Appeals properly rejected AmerenUE's attempt to convert OPLSA liability into common law liability under § 414 of the Restatement (Second) of Torts. After all, AmerenUE abandoned its common law claim before trial and chose to proceed only on its statutory claim. (LF108).

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[5] The Restatement (Second) of Torts § 414 states: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."

The Court of Appeals' reasoning -- that MSD can be considered a "person" under Mo. Rev. Stat. § 319.078(4) only if a master/servant or principal/agency relationship is established -- thus entitles MSD to judgment notwithstanding the verdict, as AmerenUE's case was not submitted on such a *respondeat superior* theory and AmerenUE has conceded that no such agent/servant relationship exists.

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 INSOFAR AS AMERENUE FAILED TO DISCHARGE MSD'S LIABILITY OR PROVE THAT IT PAID MORE THAN ITS PRO RATA SHARE OF PAGE'S TOTAL DAMAGES, AND BECAUSE MSD ENTERED INTO A GOOD FAITH SETTLEMENT WITH THE INJURY PLAINTIFFS FOR $6 MILLION

A.

Standard Of Review

The trial court's determination that § 319.085 of the OPLSA "sets aside" other statutory and common law requirements and limitations otherwise applicable to AmerenUE's contribution claim is a matter of statutory construction subject to *de novo* review. *In re Dunn*, 181 S.W.3d at 604. The denial of judgment notwithstanding the

verdict based on this issue of law is likewise reviewed *de novo*. *Jungerman*, 925 S.W.2d at 204.

B.

AmerenUE's Contribution Claim Against MSD Under The OPLSA Is Subject To All Requirements And Limitations Of Missouri Contribution Law Which Do Not Negate The Right Of Contribution Afforded By § 319.085 But Only Impact The Manner And Amount Of Recovery Available Thereunder

Section § 319.085 affords public utilities such as AmerenUE an undefined "right of contribution" against violators whose acts result in damages-producing contact with overhead power lines. Mo. Rev. Stat. § 319.085. This right of contribution exists "notwithstanding any other law to the contrary." *Id.* While the trial court construed this language to mean that the OPLSA trumps any law adversely impacting AmerenUE's ability to obtain a 100% contribution recovery (*i.e.*, AmerenUE's total damages less its percentage of fault) (LF333-35), such construction is unsupported by § 319.085's reference to a general "right of contribution" only and contrary to established Missouri precedent interpreting the "notwithstanding any other law to the contrary" language. *Ozark Wholesale Bev. 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).

White examined a provision of the Uniform Individual Accident and Sickness Insurance Law containing nearly identical "notwithstanding any other law to the contrary" language. There, an insurer sought to bar plaintiff's policy claim under a

statutory provision (Mo. Rev. Stat. § 376.783.3) barring claims where the claimant made misrepresentations that "materially affected either the acceptance of the risk or the hazard assumed by the insurer" in its insurance application. 799 S.W.2d at 187. Plaintiff, in turn, relied upon a subsequently enacted provision (Mo. Rev. Stat. § 376.800) mandating that "*[a]nything in the law to the contrary notwithstanding*," no policy is void due to a misrepresentation unless the misrepresentation actually contributed to the event upon which the claim is based. *Id*. at 188. In addressing the effect of this later statutory language upon other law, the court stated:

> The words "anything in the law to the contrary notwithstanding" simply means that the [statutory provision] . . . is not to be affected by any law or provision *at variance with it*. (*Id*. at 189-90; italics supplied)

The court thus held that § 376.800 does not negate or render meaningless an otherwise applicable law such as § 376.783.3, so long as the two do not directly conflict. *Id*. at 189. The former operates to repeal that portion of the latter only to the extent of such a conflict. *Id*. Under the appropriate facts, both sections combined "would be available as a defense to the insurance company if it met its burden of proof" under the two sections. *Id*. at 190, n.6.

Similarly, *Ozark Wholesale Beverage* held that a provision of the Liquor Control Law regulating the sale of liquor on Sundays "[n]otwithstanding . . . any other law to the contrary" did not operate to the exclusion of all other law. 80 S.W.3d at 497-98. Ozark

was cited for unlawfully selling liquor with an alcohol content in excess of 5% to retailer Tobacco Hill in violation of a law limiting a wholesaler's sales to that which the retailer is licensed to sell to the public. *Id*. at 493-94. Tobacco Hill possessed two licenses — a "5% Original Package" license issued pursuant to § 311.200.2, which limited Tobacco Hill's sales to liquor with alcohol content between 3.2% and 5% from Monday through Friday, and a "Sunday" license issued pursuant to § 311.293.1. *Id*. The provision authorizing issuance of the Sunday license states:

> *Notwithstanding the provisions of section 311.290 or any other law to the contrary*, any person . . . who is licensed to sell intoxicating liquor . . . may apply . . . for a special license to sell intoxicating liquor . . . between the hours of 11:00 a.m. and midnight on Sundays. *Id.* at 497 (italics supplied)

Ozark argued the Sunday license provision does not limit "intoxicating liquor" in any way, and further that it applies "notwithstanding . . . any other law." *Id*. Ozark thus contended that Tobacco Hill was permitted to sell <u>any</u> intoxicating liquor on Sundays and, therefore, Ozark's sale to Tobacco Hill was lawful. The appellate court disagreed, holding that the Sunday license provision must be read in conjunction with § 311.200.2. The court reasoned that the two provisions operate together to permit Tobacco Hill to sell on Sundays only that which it was otherwise licensed to sell Monday through Saturday. Accordingly, Ozarks's sale to Tobacco Hill was unlawful. *Id.*

Under *White* and *Ozark*, the "right of contribution" provided in § 319.085 does not operate to exclude other applicable law unless such other law directly conflicts with it. This means that the OPLSA prevails over other laws, such as the exclusivity provisions of the Workers' Compensation Law, which would negate at the outset a utility's § 319.085 right of contribution against an injured party's employer. *State ex rel. Safety Roofing Sys., Inc. v. Crawford*, 86 S.W.3d 488, 493 (Mo. Ct. App. 2002). It does not override other Missouri statutory and common law that may operate to limit or set the parameters for a § 319.085 contribution claim, such as those discussed below and in Point III, *infra.*

Unlike the worker's compensation exclusivity bar, the Missouri common law contribution requirements and limitations relied upon by MSD do not negate the "right of contribution" afforded by the OPLSA but merely define the parameters for pursuing its enforcement. For example, the "settlor-barred" doctrine provides that a settling defendant is barred from seeking contribution against another defendant unless the settling defendant has discharged the liability of that defendant. *Fetick v. Am. Cyanamid Co.*, 38 S.W.3d 415, 417-18 (Mo. 2001) (en banc). Under this doctrine, AmerenUE was required to discharge MSD's liability when it settled with the Pages in order to continue pursuing its OPLSA right of contribution against MSD. *Id.* AmerenUE admittedly failed to do so (Pl's Ex. 11), thereby precluding further pursuit of its OPLSA contribution claim in much the same way a failure to file within the statute of limitations would extinguish an otherwise valid OPLSA contribution claim. In neither case does a "direct conflict" exist such that the other law must be disregarded, as the trial court did here. (LF335)

Also, contribution applies only where one party is compelled to pay more than its share of a common obligation that several persons are obligated to discharge. *State ex rel. McCubbin v. McMillian*, 349 S.W.2d 453, 460 (Mo. Ct. App. 1961). AmerenUE was accordingly required to establish the total settlement of Page's injury in order to permit the jury to determine whether AmerenUE paid more than its proportionate share and, if so, by how much. *Id.* Yet AmerenUE offered evidence only as to the amount of its own settlement with the Pages, thereby failing to establish the total common obligation and the amount of its overpayment, if any. Absent proof supporting its entitlement to a specific amount of contribution damages under § 319.085, AmerenUE's contribution claim fails as a matter of law.

Under § 537.060, one who settles in good faith is discharged from further contribution liability. Mo. Rev. Stat. § 537.060. *See also Lowe v. Norfolk & W. Ry. Co.*, 753 S.W.2d 891, 894-95 (Mo. 1988) (en banc). While this statute may at first blush appear to directly conflict with § 319.085, it too can be harmonized with the right of contribution afforded therein and thus not cast aside. Under § 537.060, a utility such as AmerenUE can settle with the injured party and preserve its statutory contribution claim by discharging the liability of purported violators such as MSD or proceed to trial and receive a setoff or credit for any other settlements received by the Pages, which effectively compensates the utility for its "right of contribution" against the settling party. Either way, the utility recovers on its "right of contribution" under OPLSA and there is no direct conflict. That AmerenUE chose to settle with the Pages without discharging MSD's liability and thus limit the benefits available to it under § 537.060 does not alter

this conclusion. AmerenUE's attempt to circumvent § 537.060 by agreeing to pay the Pages 17% of any recovery obtained from MSD as part of its settlement (TR.95) underscores the need to harmonize this statute with OPLSA § 319.085. *AG Processing, Inc. v. S. St. Joseph Indus. Sewer Dist.*, 937 S.W.2d 319, 324 (Mo. Ct. App. 1996) (appellate court should harmonize statutory enactments where possible).

Section 537.060 also entitles defendants to a credit or setoff for amounts paid in settlement by joint tortfeasors. Mo. Rev. Stat. § 537.060. Here, MSD's $6 million settlement with the Pages equals the amount of AmerenUE's contribution claim against MSD, reducing AmerenUE's potential recoverable damages to $0. *Id.* *See also Estate of Sandefur v. Greenway*, 898 S.W.2d 667, 669 (Mo. Ct. App. 1995) ("if a set-off was allowed, there would be no more damages to be recovered" where $149,200 arbitration award was less than $150,000 settlement received from joint tortfeasor).

Applying the foregoing Missouri contribution law requirements and limitations, individually or collectively, AmerenUE's OPLSA contribution claim fails and MSD is entitled to judgment as a matter of law thereon.

In The Alternative Only

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 BECAUSE THE DAMAGES CAP IS NOT A "CONTRARY LAW" UNDER § 319.085 AS IT DOES NOT NEGATE THE RIGHT OF CONTRIBUTION AFFORDED AMERENUE UNDER THE OPLSA BUT MERELY LIMITS THE AMOUNT OF RECOVERY AVAILABLE AGAINST GOVERNMENTAL ENTITIES SUCH AS MSD

A.

Standard Of Review

The trial court's determination that § 319.085 of the OPLSA "sets aside" the otherwise applicable statutory damages cap mandated by Mo. Rev. Stat. § 537.610.2 involves a matter of statutory construction subject to *de novo* review. *In re Dunn*, 181 S.W.3d at 604. Denial of judgment notwithstanding the verdict or reduction of the verdict/judgment based on this issue of law is likewise reviewed *de novo*. *Jungerman*, 925 S.W.2d at 204.

B.

Section 319.085 Of The OPLSA Affords AmerenUE A Right Of Contribution Only — It Does Not Require Full Indemnification For All Losses AmerenUE May Have Sustained As A Result Of Page's Accident

Unlike many other overhead power line safety statutes, the OPLSA does not hold violators liable for "all damage" and "all liability" incurred by the utility as a result of contact with an overhead power line.[6] Section 319.085 instead affords public utilities an undefined "right of contribution" against violators whose conduct results in contact with overhead lines. Mo. Rev. Stat. § 319.085.

This distinction is significant in construing the effect of § 319.085's "notwithstanding any other law to the contrary" language on the otherwise applicable statutory damages cap contained in Mo. Rev. Stat. § 537.610.2. While the trial court construed this language to mean that the OPLSA "sets aside" any law adversely impacting AmerenUE's ability to obtain 100% contribution recovery (*i.e.*, AmerenUE's

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[6] *See, e.g.*, Alaska Stat. § 18.60.685 (violator is liable to the owner or operator of the high voltage line or conductor for "all damage to the facilities and for all liability incurred by the owner or operator" as a result of the unlawful activities); Ga. Code Ann. § 46-3-40(b) (violator shall also "indemnify the owner or operator of such high-voltage lines against all claims, if any, for personal injury, including death, property damage, or service interruptions…resulting from work in violation of Code Section 46-3-33.").

total damages less its percentage of fault) — including the damages cap[7] — such construction is unsupported by § 319.085's reference to a general "right of contribution" only (as opposed to "full" or "complete" or "total" or "100%" recovery) and contrary to *White* and *Ozark.* The damages cap *does not* directly conflict with § 319.085's general right of contribution because it does not eliminate that right but merely limits the total amount of damages recoverable pursuant thereto. *Ozark*, 80 S.W.3d at 491; *White*, 799 S.W.2d at 189. Because § 319.085 does not provide for recovery of "all damages" or "all liability" incurred by utilities such as AmerenUE, § 537.610.2's damages cap can clearly be harmonized with the OPLSA and should not have been "set aside" by the trial court. *AG Processing, Inc.*, 937 S.W.2d at 324. 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 applies here.

This is so regardless of whether MSD's sovereign immunity[8] was waived under the "dangerous condition" exception in § 537.600(2), as AmerenUE claimed (LF89, ¶28), or whether the OPLSA overrides sovereign immunity, as the trial court found. (LF335) *Wollard*, 831 S.W.2d at 201, 206 (statutory damages cap applies where sovereign immunity waived under § 537.600.1(2); $908,333 jury verdict reduced to $100,000);

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[7] (LF333-35)

[8] It is undisputed that MSD is a governmental entity afforded sovereign immunity from tort actions. *Page v. Metro. St. Louis Sewer Dist.*, 377 S.W.2d 348, 352 (Mo. 1964); *Trumbo v. Metro. St. Louis Sewer Dist.*, 877 S.W.2d 198, 201 (Mo. Ct. App. 1994).

Cottey v. Schmitter, 24 S.W.3d 126, 128 (Mo. Ct. App. 2000) (damages cap applied despite statutory waiver of Missouri Highway and Transportation of Commission's sovereign immunity); *Greene County v. Pennel*, 992 S.W.2d 258, 262 (Mo. Ct. App. 1999) (even where public entity's sovereign immunity is waived, its liability "is not unlimited," but, rather, subject to damages cap under § 537.610).

Under § 537.610.2 (1999) in effect at the time of Page's accident, MSD's maximum contribution liability to AmerenUE is limited to $100,000:

> 2. The liability of the state and its public entities on claims within the scope of sections 537.600 to 537.650, shall not exceed one million dollars for all claims arising out of a single accident or occurrence and shall not exceed one hundred thousand dollars for any one person in a single accident or occurrence, except for those claims governed by the provisions of the Missouri workers' compensation law, chapter 287, RSMo. (Mo. Rev. Stat. § 537.610(2)(1999))[9]

The judgment entered against MSD must accordingly be reduced to that amount. *Wollard*, 831 S.W.2d at 206; *Jones v. St. Louis Housing Auth.*, 726 S.W.2d 766, 775 (Mo. Ct. App. 1987) ("We do not find that the legislature intended principles of contribution,

[9] The legislature increased the single person and per accident/occurrence limits to $300,000/$2,000,000 for causes of action accruing on or after January 1, 2000. Mo. Rev. Stat. § 537.610(2).

indemnity or comparative fault to be applied to expand the per person limitation in § 537.610 beyond the limit of $100,000;" judgment against Housing Authority must be reduced from $250,000 to $100,000).

In The Further Alternative Only

IV.

THE COURT OF APPEALS CORRECTLY REVERSED AND REMANDED FOR A NEW TRIAL BECAUSE THE TRIAL COURT ERRONEOUSLY ADMITTED GRANSBERG'S EXPERT TESTIMONY CONCERNING THE CONSTRUCTION OF THE MSD —MULLIGAN CONTRACT AND MSD'S OBLIGATIONS THEREUNDER AS CONTRACT CONSTRUCTION IS A MATTER OF LAW FOR THE COURT AS TO WHICH EXPERT TESTIMONY IS IRRELEVANT AND INADMISSIBLE; PAROLE EVIDENCE IS INADMISSIBLE TO ALTER THE CONTRACT'S CLEAR AND UNAMBIGUOUS ALLOCATION OF RESPONSIBILITY FOR COMPLIANCE WITH ALL SAFETY LAWS TO MULLIGAN; AND TO THE EXTENT PAROLE EVIDENCE IS ADMISSIBLE TO RESOLVE ANY AMBIGUITY, MSD'S AND MULLIGAN'S UNIFORM CONSTRUCTION OF THEIR CONTRACT AS PLACING RESPONSIBILITY FOR OPLSA COMPLIANCE ON MULLIGAN CANNOT BE CONTRADICTED BY A NON-CONTRACTING PARTY'S EXPERT. THE ADMISSION OF GRANSBERG'S TESTIMONY CONSTITUTES PREJUDICIAL ERROR REQUIRING A NEW TRIAL AS IT LED THE JURY TO BELIEVE MSD BORE RESPONSIBILITY FOR ENSURING COMPLIANCE WITH THE OPLSA AND COULD ALSO HAVE GREATLY IMPACTED THE FAULT ALLOCATION

A.

Standard Of Review

The trial court's admission of evidence is reviewed for an abuse of discretion. *Redel v. Capital Region Med. Ctr.*, 165 S.W.3d 168, 175 (Mo. Ct. App. 2005). Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Id.*

B.

Contract Construction Is A Matter Of Law For The Court As To Which Expert Testimony Is Irrelevant And Inadmissible

The principles here controlling are fundamental. Contract construction is a matter of law for the court. *Nodaway Valley Bank v. E.L. Crawford Constr., Inc.*, 126 S.W.3d 820, 825 (Mo. Ct. App. 2004). Hence, expert testimony concerning the legal effect of a contract is not allowed. *TCP Indus., Inc. v. Uniroyal, Inc.*, 661 F.2d 542, 549 (6th Cir. 1981); *Burns v. Black & Veatch Architects, Inc.*, 854 S.W.2d 450, 453 (Mo. Ct. App. 1993).

Duty is likewise a matter of law to be determined by the court. *Burns*, 854 S.W.2d at 453. Expert opinion deals only with fact — "whether there was a breach of a legally existing duty." *Burns*, 854 S.W.2d at 453. *See also* Mo. Rev. Stat. § 490.065. Thus, "although expert testimony might be relevant to help establish some underlying fact on

which duty may ultimately rest, whether a duty exists is not a question for expert testimony." *Parra v. Bldg. Erection Servs.*, 982 S.W.2d 278, 284 (Mo. Ct. App. 1998).

Gransberg's expert testimony was admitted in direct contravention of these fundamental principles and thus the Court of Appeals correctly held that the trial court's admission of Gransberg's testimony required a new trial:

> The Parties did not ask the Circuit Court to find that the Mulligan-MSD contract was ambiguous, and thus we assume they did not believe it to be so -- nor did the Circuit Court make any finding of ambiguity. When a contract is unambiguous, we assume a jury will apply common sense to common words -- "expert" explanation is unnecessary and unwarranted. Dr. Gransberg was permitted to mislead the jury by construing a contract that in the first instance was a matter of law for the Court, and in the second instance was a matter of fact for the jury.
>
> * * *
>
> We find that, due to this gross evidentiary error, this case must be re-tried. (Slip Op. at pp. 6-7; A47-48).

Indeed, Gransberg was allowed to testify as to the legal effect of the MSD-Mulligan contract and to MSD's duties thereunder. Gransberg specifically opined that

the contract language: reserved the right to coordinate utilities to MSD and required MSD to send the project plans and specifications to various utilities and get all utility conflicts resolved before the contractor commenced work under the contract; gave MSD the right to direct the contractor's means and methods in performing the work; obligated MSD to comply with the OPLSA by notifying AmerenUE about the overhead lines; and required MSD to stop work if an MSD inspector felt an unsafe act was about to occur. (TR.254-55, 256-83) These were clearly impermissible legal opinions on matters for the court's determination. *Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505, 508-11 (2d Cir. 1977); *Burns*, 854 S.W.2d at 452-55.

In *Burns*, the Missouri Court of Appeals disregarded plaintiff's expert's opinion that the architect of a construction project where plaintiff was injured had the duty to prepare and provide the contractor with drawings of a trench protective system where the contract language did not so provide. 854 S.W.2d at 454-55. In affirming summary judgment for the architect, the court stated that "duty is a matter of law. . .[that] cannot be established by expert opinion" because "[e]xpert opinion testimony deals only with whether there was a breach of a legally existing duty." *Id*. at 453. The court held that the contract provisions expressly assigning responsibility for safety precautions to the contractor meant that the architect owed no duty to protect the injury plaintiff — despite the expert's contrary "opinion" that the architect should have provided means and methods and should have prepared drawings of a trench protection system. *Id.* at 454.

In *Marx*, the expert was erroneously allowed to opine as to what various securities contract provisions meant and what was required of the defendant to fulfill its contractual

obligations. 550 F.2d at 508-10. Admission of this expert testimony constituted reversible error. *Id.* As the court explained:

> The basis of expert capacity, according to Wigmore (s 555), may "be summed up in the term 'experience.'" But experience is hardly a qualification for construing a document for its legal effect when there is a knowledgeable gentleman in a robe whose exclusive province is to instruct the jury on the law. (*Id.* at 512.)

In short, as the Court of Appeals held, Gransberg's expert opinions on the legal effect of the MSD-Mulligan contract and MSD's duties thereunder were plainly inadmissible and should never have been presented to the jury.

C.

Parole Evidence Is Inadmissible To Alter The Contract's Clear And Unambiguous Allocation Of Responsibility For Compliance With All Safety Laws And Notice Requirements To Mulligan

The primary rule in interpreting a contract is to ascertain the parties' intent and effectuate that intent. *Nodaway*, 126 S.W.3d at 825. "When the contract language is unambiguous, the intent of the parties is to be gathered from the contract alone." *Id*. n.2. The court uses the natural, plain, ordinary and usual meaning of a contract's words and considers the document as a whole. *State ex rel. Mo. Hwy. & Transp. Comm'n*, 62

S.W.3d 485, 491-92 (Mo. Ct. App. 2001); *Burns v. Plaza W. Assoc*., 979 S.W.2d 540, 546-47 (Mo. Ct. App. 1998).

Missouri law prohibits the use of extrinsic evidence to interpret an otherwise unambiguous contract. *Peterson v. Cont'l Boiler Works, Inc.*, 783 S.W.2d 896, 901 (Mo. 1990) (en banc). Whether an ambiguity exists is a question of law. *Vandever v. Jr. Coll. Dist. of Metro. Kan. City*, 708 S.W.2d 711, 717 (Mo. Ct. App. 1986). Here, AmerenUE did not identify — and the trial court did not find — any ambiguity in the MSD-Mulligan contract. Indeed, the contract's allocation of responsibility to Mulligan for complying with all safety laws and notifying utilities concerning protection of overhead lines could not be clearer:

> [Section F(1)]
>
> 2. *Observance of Laws and Regulations.*
>
> a. **The contractor** shall keep himself fully informed of all federal, state and municipal laws, ordinances and regulations which may affect the conduct of the work, the safety of the public and those engaged or employed, and the materials used…. **The contractor** shall observe and comply therewith, and shall cause his agents and employees to observe and comply therewith…..
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f. **The Contractor** shall procure all permits and licenses, pay all charges and fees, and give all notices necessary and incident to the due and lawful prosecution of the work and submit copies to the District prior to the first project payment.… (Pl's Ex. 1a, p.12) (emphasis supplied)

[Section F(5)]

5. Public Convenience and Safety. **The Contractor** shall observe and adhere to the safety requirements of all federal, state and local authorities having jurisdiction…**The Contractor** shall give adequate notice in writing to all owners or occupants of property, buildings, structures, or utilities which may be affected by this work and which may require protection or adjustment…. (*Id.*, p.14) (emphasis supplied)

[Section 3(F)(3)(b)]

3. Utilities

b. ...If 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." (*Id.*, p.37) (emphasis supplied)

The admission of extrinsic evidence such as Gransberg's expert opinions as to the meaning of the contract was clearly improper on these facts. *Marshall v. Pyramid Dev. Corp.*, 855 S.W.2d 403, 406 (Mo. Ct. App. 1993) (if contract is not ambiguous, parties' intent should be determined from the contract alone); *City of Fulton v. Cent. Elec. Power Co-Op.*, 810 S.W.2d 349, 351 (Mo. Ct. App. 1991) (before extrinsic evidence can be used to show the correct meaning of a term, the contract must first be shown to be ambiguous). The error is particularly egregious insofar as Gransberg's testimony *directly contradicts* the contract's clear and unambiguous allocation of responsibility for safety, OPLSA compliance, and notification of utilities to Mulligan. *State ex rel. Mo. Hwy. & Transp. Comm'n*, 62 S.W.3d at 489 (parole evidence rule prohibits use of extrinsic evidence "to vary, alter or contradict the terms of a binding, unambiguous and integrated written contract"). The wrongful admission of this testimony was indeed a "gross evidentiary error" as the Court of Appeals found, requiring a new trial. (Slip Op. at p. 7; A48).

D.

To The Extent Parole Evidence Is Admissible To Resolve Any Ambiguity, MSD'S And Mulligan's Uniform Construction Of Their Contract As Placing Responsibility For OPLSA Compliance On Mulligan Cannot Be Contradicted By A Non-Contracting Party's Expert

In construing an ambiguous or disputed contract, the interpretation the parties themselves placed on it by their conduct is of great weight in determining what the agreement actually was. *Landau v. Laughren*, 357 S.W.2d 74, 80 (Mo. 1962). "Where a party by his performance construes the contract in a manner that is against his interest, his actions are generally considered conclusive against him." *Id.*

Here, MSD and Mulligan both construed the contract as placing responsibility for notifying AmerenUE to request protection or de-energization of the overhead power lines in compliance with the OPLSA on Mulligan. Thus, Mulligan superintendent Kloeppel repeatedly contacted AmerenUE to request protection of the overhead lines prior to Page's accident. (TR.481, 485-87, 490-92) MSD was not involved with these requests. (*Id.*) MSD and Mulligan likewise both testified at trial that Mulligan was responsible for statutory compliance and notifying AmerenUE under the contract. (TR.153, 160, 166, 177-78, 497)

Under such circumstances, the parties' own interpretation of the contract terms "is entitled to the greatest weight upon the issue of the term's meaning." *MLPGA, Inc. v. Weems*, 838 S.W.2d 7, 9 (Mo. Ct. App. 1992). Where, as here, Mulligan construed the

contract in a manner against its own interest, its conduct is conclusive. *Id*. AmerenUE — a non-party to the MSD-Mulligan contract — simply cannot contradict this conclusive evidence via Gransberg's expert opinions. *Id.*

E.

The Erroneous Admission Of Gransberg's Testimony Was Decidedly Prejudicial As This Was The Only Evidence Controverting MSD's And Mulligan's Uniform Acknowledgment That Mulligan Bore Sole Contractual Responsibility For Selecting Means, Methods And Equipment, Ensuring Job Site Safety, Complying With The OPLSA, And Notifying AmerenUE Regarding The Overhead Wires

The prejudicial impact of Gransberg's opinions cannot seriously be debated. Foremost, this was the only evidence adduced in support of AmerenUE's contention that MSD, rather than Mulligan, was responsible for selecting means, methods and equipment, ensuring job site safety, complying with the OPLSA, and notifying AmerenUE regarding the overhead wires. (TR.256-83) Likewise, this was the only evidence adduced to controvert the otherwise plain and unambiguous contract language and to contradict MSD's and Mulligan's uniform testimony that Mulligan alone bore responsibility for these activities. (TR.153, 157, 160, 166, 173, 176-78, 184, 197, 329, 494-97) Gransberg's opinions accordingly became a focal point of the trial and were repeatedly referenced and greatly emphasized by AmerenUE's counsel during closing argument. (TR.544-46, 585-86)

These erroneously admitted opinions not only led the jury to believe that MSD bore contractual responsibility for complying with the OPLSA, but could also have

greatly impacted the fault allocation between AmerenUE and MSD. A new trial is accordingly warranted, as the Court of Appeals held.

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 of $100,000; 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(b). There are 18,245 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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Subscribed and sworn to before me this

27th day of September, 2007

_____
Notary Public
My commission expires: