IN THE SUPREME COURT OF MISSOURI

ROBERT L. JOHNSON, Respondent/Cross-Appellant vs. AUTO HANDLING CORPORATION, Cross-Respondent and COTTRELL, INC., Appellant/Cross-Respondent.	))))))))))	No. SC95777

SUBSTITUTE BRIEF OF AUTO HANDLING CORPORATION

Appeal from the Circuit Court of St. Louis County
The Honorable Thomas J. Prebil, Circuit Judge

FOLAND, WICKENS, EISFELDER,
ROPER & HOFER, P.C.

BY: */s/ William F. Logan*
Paul L. Wickens Mo. Bar #23549
William F. Logan Mo. Bar #43965
1200 Main Street, Suite 2200
Kansas City, MO 64105
Phone: (816) 472-7474
Fax: (816) 472-6262
Email: pwickens@fwpclaw.com
Email: llogan@fwpclaw.com
Attorneys for Defendant/Respondent
Auto Handling Corporation

Table of Contents

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Jurisdictional Statement

This Court has jurisdiction pursuant to Article V, Section 10 of the Constitution, which allows this Court to transfer cases after opinion in the Court of Appeals pursuant to this Court's Rules. Rule 83.04 allows this Court to transfer cases after opinion in the Court of Appeals.

On September 19, 2013, the trial court directed a verdict in favor of Respondent Auto Handling Corporation (hereinafter "Auto Handling"). *LF 257*. On September 23, 2013, the trial court entered judgment in favor of Plaintiff/Respondent/Cross-Appellant Robert Johnson (hereinafter "Plaintiff" or "Johnson") and against Defendant/Appellant/Cross-Respondent Cottrell, Inc. *LF 317-318*. On that date, following a Plaintiff's verdict against Cottrell on Plaintiff's claims of negligence and strict liability failure to warn, the trial court stated it was entering judgment in accordance with the verdict for $1,150,332.40, the verdict on which Plaintiff had the greatest recovery. *Supplemental Transcript at 2*. On October 23, 2013, both Cottrell and Plaintiff filed written post-trial motions. *LF 388-457*. On January 16, 2014, those motions were denied. *LF 721-722*. On January 27, 2014, Cottrell's filed its notice of appeal. *LF 724-766*. On February 6, 2014, Plaintiff filed his notice of cross appeal. *LF 767*.

On April 12, 2016, the Court of Appeals issued its decision reversing the judgment of the circuit court and remanding for a new trial. On April 27, 2016, Plaintiff filed motions to transfer and for rehearing. On April 27, 2016, Respondent Auto Handling filed a motion for rehearing. On June 8, 2016, the Court of Appeals denied Auto Handling's motion for rehearing and denied Plaintiff's motions to transfer and for

rehearing. On June 23, 2016, Plaintiff filed an application for transfer to this Court pursuant to Rule 83.04. On August 23, 2016, this Court sustained Plaintiff's application.

On transfer, the Missouri Supreme Court reviews a case as though on original appeal. *Rule 83.09*; *Buchweiser v. Estate of Laberer*, 695 S.W.2d 125, 127 (Mo. banc 1985).

STATEMENT OF FACTS

Plaintiff's Pleadings

On May 6, 2010, plaintiffs Roberts and Brenda Johnson filed this action for personal injuries in St. Louis County Circuit Court against Auto Handling. *LF 15-21*. Plaintiff alleged he was injured on July 3, 2007 in the scope of his employment with Jack Cooper Transport Company ("Cooper Transport") while operating the chain and ratchet tie down system on Cooper Transport Rig No. 1397/1398. *LF 16-17*. Plaintiff alleged Auto Handling was negligent in its maintenance of an automobile transport trailer designed, manufactured and sold by Cottrell, Inc. *LF 16-19*.

On October 26, 2010, the trial court granted Plaintiffs leave to file an amended petition. *LF 46*. Plaintiff's Amended Petition removed Brenda Johnson as a plaintiff and added product liability claims against Cottrell, the designer, manufacturer, and seller of the rig. *LF 46*. Plaintiff alleged that the 2003 Cottrell rig was defective and not reasonably safe in that it relied on a manual chain and ratchet tie down system that required users to exert excessive force, which unreasonably endangered the users directly (from the excessive force) and indirectly (from sudden releases that occurred when components, such as chains, tie-down bars, and idlers, failed due to the cumulative effect of these forces). *Appendix A10, LF35*. Plaintiff alleged these design defects caused the injuries he sustained on July 3, 2007. *Appendix A9-11, LF 34-36*.

Count I of Plaintiff's Amended Petition alleged strict liability against Cottrell; Count II alleged negligence against Cottrell; Count III alleged breach of warranty against

Cottrell; and Count IV alleged punitive damages against Cottrell. *Appendix A10-15, LF 35-40.*

Plaintiff did not allege a strict liability claim against Auto Handling. *Appendix A16-19, LF 41-44.* Count V, Plaintiff's negligence claim against Auto Handling, alleged:

> 9. That in violation and/or in breach of the aforesaid duties, defendant:
>
> (a) failed to properly inspect the rig plaintiff was using to identify unsafe conditions with the ratchets thereon;
>
> (b) failed to properly maintain the rig plaintiff was using to make sure the ratchet systems thereon functioned properly and safely;
>
> (c) failed to properly repair the rig plaintiff was using to correct the ratchet system;
>
> (d) failed to properly train its employees to enable them to undertake inspection, repair and/or maintenance requirements in a reasonably safe fashion;
>
> (e) failed to employ sufficient numbers of qualified employees to perform the inspection, maintenance and/or repair requirements;
>
> (f) failed to warn plaintiff of the problems with the ratchet systems on the rigs;
>
> (g) failed to supply reasonably safe and/or proper tools and parts for the necessary and safe repair, maintenance and inspection process;
>
> (h) failed to notify plaintiff and its own employees of the numbers of persons injured by the ratchet systems in question when such information was known and/or available to defendant including its officers and/or directors.

Appendix A17-18, LF 42-43. Count VI of Plaintiff's Amended Petition alleged a claim for punitive damages against Auto Handling. *LF 44.*

Plaintiff's Evidence at Trial

Plaintiff was employed by Cooper Transport as a commercial truck driver known as a "car hauler." *LF 33-34*. Plaintiff began work as a car hauler in 1976. *Transcript 1140*. On July 3, 2007, Plaintiff was operating Cooper Transport Rig No. 1397/1398. *LF 34*. Rig No. 1397/1398 consisted of a tractor (Unit 1397) and an automobile transport trailer designed, manufactured and sold by Cottrell (Unit 1398). *LF 34*. Cottrell manufactured the automobile transport trailer in 2003. *Transcript 687, 837, 1150.*

The incident allegedly occurred in the early hours of July 3, 2007 in Greenville, Illinois, when a steel part welded to the rig known as an "idler" broke as Plaintiff was using the rig's chain and ratchet tie down system to secure cars for transport. *Transcript 1156-1160.*

Plaintiff had been using Rig No. 1397/1398 since he picked it up at Cooper Transport's terminal in Oklahoma City in March or April 2004. *Transcript 1155*. Plaintiff worked out of Cooper Transport's Fort Wayne, Indiana terminal. *Transcript 1361*. Since the Fort Wayne terminal does not have a maintenance facility, the maintenance was done at Cooper Transport's Fairfax, Kansas terminal. *Transcript 1361-1362.* The majority of the maintenance work on this rig was performed at Cooper Transport's Fairfax terminal, where the mechanics are employed by Cooper Transport. *Transcript 1159-1160; 1362-1363.*

Plaintiff testified that during the time he operated Rig No. 1397/1398, between 2004 and 2007, the rig was worked on at three terminals where the mechanics were employed by Auto Handling: Shreveport; Oklahoma City; and Wentzville. *Transcript*

1161. Plaintiff testified he did not ask the mechanics at the Wentzville terminal to inspect or repair the chain and ratchet system. *Transcript 1377*. Plaintiff testified about two repairs to the chain and ratchet system that occurred while he was operating this rig. Neither repair was performed at a terminal where the mechanics were employed by Auto Handling. *Transcript 1371-1374.*

Plaintiff testified that while Cooper Transport or Auto Handling worked on this rig almost all the time, if he broke down while on the road, the rig could be worked on elsewhere. *Transcript 1160.*

Plaintiff testified the July 3, 2007 incident was the only time in his career in which an idler needed to be repaired or replaced, and he could not recall any other time when he saw an idler that was bent or twisted. *Transcript 1217-1218*.

Plaintiff's liability expert, Dr. Gerald Micklow, testified the Cottrell chain and ratchet system, as originally designed, was unreasonably dangerous because it requires excessive forces, when alternative, safer systems, including cables, straps and power systems, have existed for at least 20 years. *Transcript 676-678, 685-688*. These forces either injure drivers directly or by causing components including but not limited to idlers to break. *Id.* These dangers occur during normal and foreseeable uses of the Cottrell system. *Transcript 688-689.*

Micklow testified the forces required to secure vehicles using Cottrell's chain and ratchet tie down system exceeded safe limits. *Transcript 585-590, 750-752*. Micklow testified the actual force on components from Cottrell's chain and ratchet system would have been 3,500 pounds; with Cottrell's idler system, the Cottrell idler, as designed,

could not withstand more than 1,086 pounds, leading to deformation and ultimately failure of the idlers. *Transcript 597-598.*

Micklow reviewed photographs of the broken idler. *Transcript 768-69*. Micklow testified the original weld was a MIG weld. *Transcript 774-779, 837-838.* Micklow testified Cottrell's original welds were MIG welds, which did not give sufficient penetration to secure the component. *Transcript 672-676.* Micklow testified the original Cottrell MIG weld became unattached, and it was not properly reattached. *Transcript 780-781*. Micklow also testified he saw evidence of repair along the sides and top of the idler, and the repair was done by an arc or stick weld. *Transcript 761; 763-64*. The weld was not repaired at the bottom. *Transcript 764.* Micklow testified he did not know when the repair weld was made. *Transcript 827*. Micklow testified he did not have any evidence that Auto Handling made the repair weld. *Transcript 781*. Micklow testified he did not know who made the repair weld. *Transcript 786.*

Plaintiff testified he did not know whether the idler had been repaired and, if it was repaired, who made the repair. *Transcript 1197-98*. Plaintiff testified he never asked the mechanics at the Wentzville terminal to inspect or repair the chain and ratchet system, including the idlers, on Rig No. 1397/1398. *Transcript 1377*. Plaintiff also testified he was not aware of any work done at the Wentzville terminal on the chain and ratchet system, including the idlers, on his rig. *Transcript 1376.*

Plaintiff testified that on two occasions in July 2006, he had the air conditioner on this rig checked at the Wentzville terminal. *Transcript at 1375-76.* Plaintiff was not

aware of any other repair item that was written up and taken care of in Wentzville. *Transcript 1377*.

Plaintiff testified he was aware of only one occasion when a mechanic employed by Auto Handling worked on this rig and did not create a paper trail. *Transcript 1160*. Plaintiff testified he never worked as a mechanic, did not know how Cooper Transport's maintenance records were prepared, did not receive copies of the maintenance records and never reviewed the maintenance records for Rig No. 1397/1398. *Transcript 1360; 1369-70*. Plaintiff testified he was not responsible for preparing the maintenance records, did not know how the records were kept by Cooper Transport and did not know how the records had been produced in this case. *Transcript 1430; 1433-34*. Plaintiff testified he could not tell the jury whether there were any pages missing from the maintenance records. *Transcript 1434*.

Directed Verdict in Favor of Auto Handling

On September 19, 2013, following the conclusion of Plaintiff's case in chief, the trial court entered a directed verdict in favor of Auto Handling finding Plaintiff failed to make a submissible case against Auto Handling. *LF 257; Transcript 1627-1628*.

Verdict and Judgment

On Plaintiff's claims for strict products liability design defect, the jury found Cottrell's fault to be 0% and Plaintiff's fault to be 100%. *LF 317, 320; Appendix A1, A3.* On Plaintiff's claims for negligence, the jury found Cottrell's fault to be 55% and Plaintiff's fault to be 45%. *LF, 317, 320-321; Appendix A1, A4.* On Plaintiff's claim for strict liability failure to warn, the jury found Cottrell's fault to be 49% and Plaintiff's

fault to be 51%. *LF 317, 321; Appendix A1, A4.* The jury found the total amount of Plaintiff's damages, disregarding Plaintiff's fault, to be $2,091,513.45. *LF 317, 321; Appendix A2, A4.* The jury found Cottrell was not liable for punitive damages. *LF 318, 323.*

On September 23, 2013, the trial court entered judgment in favor of Plaintiff and against Cottrell. *LF 318; Appendix A2*.

Post-Trial Motions

On October 23, 2013, Plaintiff and Cottrell filed post-trial motions. *LF 388, 412, 422*. On January 16, 2014, the trial court denied all post-trial motions. *LF 721*.

On January 27, 2014, Cottrell filed its notice of appeal. *LF 724-766*. On February 6, 2014, Plaintiff filed his notice of cross-appeal. *LF 767*.

Opinion of the Court of Appeals

On April 12, 2016, the Court of Appeals issued its Opinion. The Court of Appeals held the trial court submitted an improper verdict director on the negligence claim and improperly directed a verdict in favor of Auto Handling on Plaintiff's negligence claim. *Op. at 4-14.* It recognized the claims against Auto Handling sounded in negligence, not strict liability. *Op. at 11*.

POINTS RELIED ON

I. The trial court did not commit error in entering a directed verdict in favor of Auto Handling because Plaintiff failed to produce sufficient evidence to make a submissible case on Plaintiff's negligence claims against Auto Handling.

A. Plaintiff failed to introduce substantial evidence at trial to prove the essential facts of his negligent failure to warn claim.

B. Plaintiff failed to introduce substantial evidence at trial to prove the essential facts of his claim for negligent failure to inspect, maintain or repair.

C. Plaintiff failed to introduce substantial evidence at trial to prove the essential facts of his negligent repair claim.

ARGUMENT

Standard of Review

In reviewing a trial court's judgment granting a motion for directed verdict, the appellate court must determine whether the plaintiff has made a submissible case, i.e., "whether the plaintiff introduced substantial evidence at trial that tends to prove the essential facts for his or her recovery." *Intertel, Inc. v. Sedgwick Claims Mgmt. Servs., Inc.*, 204 S.W.3d 183, 199 (Mo.App.2006) (citation omitted). Whether the plaintiff made a submissible case is a question of law subject to de novo review. *D.R. Sherry Const., Ltd. v. Am. Family Mut. Ins. Co.*, 316 S.W.3d 899, 905 (Mo. *banc* 2010).

A case may not be submitted to a jury unless legal and substantial evidence supports each fact essential to liability. *Sanders v. Ahmed*, 364 S.W.3d 195, 208 (Mo.banc 2012). To make a submissible case, substantial evidence is required for every fact essential to liability. *Steward v. Goetz*, 945 S.W.2d 520, 528 (Mo. App. E.D. 1997). "Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of facts can reasonably decide a case." *Id.* at 528 (quoting, *Hurlock v. Park Lane Medical Center, Inc.*, 709 S.W.2d 872, 880 (Mo.App.1985). The question of whether evidence in a case is substantial and whether the inferences drawn are reasonable are questions of law. *Id.* at 528. While the court will view the evidence and reasonable inferences in the light most favorable to the plaintiff and disregard any contrary evidence and inferences, *Cabinet Distributors, Inc. v. Redmond*, 965 S.W.2d 309, 312 (Mo. App. 1998), the court does not supply missing evidence or give the plaintiff the benefit of unreasonable, speculative, or forced inferences. *Steward v. Goetz*, 945 S.W.2d 520, 528

(Mo.App. 1997). The evidence and inferences must establish every element and not leave any issue to speculation. *Id.* A submissible case is not made if it solely depends on evidence which equally supports two inconsistent and contradictory inferences constituting ultimate and determinative facts because liability is then left in the realm of speculation, conjecture and surmise. *Id.* at 528-29.

A directed verdict is proper if one or more of the elements of a cause of action are not supported by substantial evidence. *Mathis vs. Jones Store Co.*, 952 S.W.2d 360, 366 (Mo. App. W.D. 1997). To make a submissible case of negligence, a plaintiff must establish that the defendant had a duty to protect the plaintiff from injury, that the defendant failed to perform that duty, and that the defendant's failure proximately caused the injury to plaintiff. *Lopez v. Three Rivers Electric Co-op, Inc.*, 26 S.W.3d 151, 155 (Mo. banc 2000).

The trial court did not commit error in directing a verdict in favor of Auto Handling. Plaintiff failed to present substantial evidence at trial to prove the essential elements of his negligence claims against Auto Handling.

I. The trial court did not commit error in entering a directed verdict in favor of Auto Handling because Plaintiff failed to produce sufficient evidence to make a submissible case on Plaintiff's negligence claims against Auto Handling.

Plaintiff failed to present sufficient evidence on his claims that Auto Handling was negligent in failing to discover the allegedly defective original Cottrell MIG weld, failing to repair the allegedly defective original Cottrell MIG weld, and failing to warn Plaintiff about the dangers caused by the Cottrell chain and ratchet system.

Plaintiff argues he made a submissible case regardless of who made any negligent repair, because Plaintiff's evidence showed there was a defect with the original Cottrell MIG weld that was never correctly repaired by Auto Handling, and that Auto Handling did not warn Plaintiff of dangers with his rig. (Plaintiff's Substitute Brief p. 36-37). In other words, Plaintiff is arguing he made a submissible case on his claims of negligent inspection and failure to warn. The reasons why Plaintiff failed to make a submissible case on those two claims is set out below. In addition, Plaintiff did not allege Auto Handling failed to warn him of dangers with this particular rig. Plaintiff alleged Auto Handling failed to warn him of problems with the ratchet systems on the rigs and failed to notify Plaintiff of the number of persons injured by the ratchet systems. *LF 42-43*. Plaintiff did not allege Auto Handling had a duty to warn Plaintiff of an allegedly defective original Cottrell MIG weld.

1. Plaintiff failed to introduce substantial evidence at trial to prove the essential facts of his negligent failure to warn claim.

In Missouri, "suppliers" of products can be liable for failing to warn of a product's allegedly dangerous characteristics. *Menz v. New Holland N. Am. Inc.*, 440 F.3d 1002, 1004 (8th Cir. 2006) (citing *Hill v. Gen. Motors*, 637 S.W.2d 382, 384 (Mo. App. E.D. 1982). According to the Restatement (Second) of Torts, "suppliers" include "one who undertakes the repair of a chattel and who delivers it back with knowledge that it is defective because of the work which he is employed to do upon it." Restatement (Second) of Torts § 388 cmt. c (1985), quoted in *Menz*, 440 F.3d at 1004-5.

Auto Handling did not owe Plaintiff a duty to warn Plaintiff about dangers associated with use of automobile transport trailers as a whole. In order to establish a duty to warn on the part of Auto Handling, Plaintiff must establish that Auto Handling undertook ***repair*** of the rig and delivered it back with knowledge that the rig was defective because of the work which Auto Handling was employed to do on the rig. Auto Handling's duty to warn is limited to warning of defects related to any repairs performed by Auto Handling.

Plaintiff's argument, that Auto Handling had the same duties as Cottrell "under the rules stated in §§ 395-398" of the Restatement, misinterprets the case law and the Restatement.

Plaintiff cites *Central & Southern Truck Lines, Inc. v. Westfall GMC Truck, Inc.*, 317 S.W.2d 841 (Mo. App. 1958) in support of his position that Missouri has adopted Restatement § 404. In *Westfall*, a third-party, Lasater, took his tractor to the defendant to be repaired. The tractor was leased by Lasater to the plaintiff. Several weeks after its delivery by Lasater to defendant, the engine in another of Lasater's trucks became disabled. This was prior to the time the repair job was completed on Lasater's first mentioned tractor, and Lasater instructed defendant to exchange the engine in the tractor already with defendant for repair with the engine which needed repair. The defendant switched the engines, repaired the first mentioned tractor, and delivered possession of it to Lasater. The tractor was then joined with the plaintiff's trailer. As the plaintiff's driver was operating the tractor, it suddenly jackknifed and went off the road. The plaintiff

brought an action against the defendant to recover damage to its trailer as a result of the defendant's alleged negligent repair of the tractor.

The plaintiff alleged the defendant negligently repaired the tractor in either failing to connect or by defectively connecting the tie-rod end to the steering apparatus on the tractor, and that as a result the driver lost control of the unit. Lasater testified that while his tractor was with the defendant in its garage for the motor exchange and repair work he saw it there with the disconnected right end of the tie-rod on the floor of the garage, and saw that the tie-rod had been removed from its normal position on the vehicle. The court held the plaintiff made a submissible case under tort law principles, and that privity of contract between the plaintiff and the defendant was not a requisite to recovery. *Id.* at 846.

In reaching its conclusion, the court examined cases from other jurisdictions, including *Moody v. Martin Motor Co.*, 76 Ga. App. 456, 46 S.E.2d 197 (Ga. 1948). In *Moody*, the defendant, who operated a garage and repair shop, had contracted with plaintiff-employer to repair the steering gear, radiator and the brakes on the particular automobile in question. The defendant had negligently repaired the steering gear and brakes so as to leave the steering gear disconnected and the brakes inoperative. As a result, the plaintiff driver of the truck was injured when it swerved off the highway down an embankment. The court held that the petition did state a cause of action in tort and quoted with approval from Restatement of the Law of Torts, Secs. 403 and 404 as follows: “One who as an independent contractor makes, rebuilds, or repairs a chattel for another and turns it over to the other knowing that his work has made it dangerous for the

use for which it is turned over is subject to liability as stated in §§ 388 and 390." Section 404: "One who as an independent contractor negligently makes, rebuilds or repairs a chattel for another is subject to the same liability as that imposed on negligent manufacturers of chattels under the rules stated in §§ 395–398." *Id.* at 461.

In both *Westfall* and *Moody*, there was evidence the defendant had undertaken repairs on the specific component that failed. In *Westfall*, the defendant had repaired the tie-rod assembly. In *Moody*, the defendant had repaired the steering gear and brakes. In the present case, there is no evidence that Auto Handling had undertaken repair of the specific component that failed, the idler. *Westfall* and *Moody* do not support the position that an independent contractor who performs maintenance and inspection services is subject to the same liability as that imposed by a manufacturer.

This interpretation is consistent with Restatement Section 388 that "suppliers" include "one who undertakes the repair of a chattel and who delivers it back with knowledge that it is defective because of the work which he is employed to do upon it." Plaintiff failed to establish that Auto Handling undertook repair of the subject rig and delivered it back with knowledge that it was defective because of the work which Auto Handling was employed to do upon it.

Auto Handling did not have a duty to warn Plaintiff of problems with the ratchet systems and the number of persons injured by those systems. *LF 42-43.* Plaintiff argues Micklow and others testified this information was available to Auto Handling and others within the industry prior to Plaintiff's injury. However, Micklow did not testify this information was available to Auto Handling. When Micklow was testifying about a 1979

patent application that was submitted by Cottrell, Micklow stated that it was known in the industry and even to Cottrell that there were injuries associated with operation of the chain and ratchet system. *Transcript 679-80.* Micklow did not offer any testimony that Auto Handling knew of injuries associated with operation of the chain and ratchet system. Plaintiff did not develop any evidence that Micklow's reference to "known in the industry," included Auto Handling.

Plaintiff argues he presented evidence from and about drivers working at the Wentzville terminal where the Auto Handling mechanics were employed who testified those mechanics routinely fixed and replaced idlers. In support of this argument, Plaintiff is relying on the testimony of John Street and Larry Lockhart. However, Lockhart was employed as a driver by Cassens Transport. *Transcript 1511.* Lockhart was never employed by Cooper Transport. *Transcript 1549.* Lockhart did not offer any evidence about what mechanics employed by Auto Handling knew. John Street, who was employed as a driver by Cooper Transport, testified he was never employed as a mechanic. *Transcript 1012.* As a driver, Street could describe differences in appearance between replacement idlers and original idlers, or in what circumstances he may or may not be able to determine if an idler was broken. However, Street could not offer any testimony that mechanics employed by Auto Handling knew of injuries to drivers associated with use of the chain and ratchet system. Plaintiff did not present any evidence that employees of Auto Handling knew drivers were injured as a result of broken idlers. Plaintiff did not present any evidence from employees of Auto Handling.

Street's testimony that he observed an "enormous amount" of Cottrell idlers on trailers in Wentzville that were broken or repaired is too vague to allow the jury to draw any reasonable inference. Street offered no context for his observations. The jury does not know if Street's observations were over the course of a month, a year, his entire career as a car hauler or even if his observations were during the time when the mechanics at the Wentzville terminal were employed by Auto Handling.

Plaintiff also relies on the evidence that the operator's manual was not in the rig when he picked it up in 2004. However, this does not support a failure to warn claim against Auto Handling. There was no evidence Auto Handling was responsible for ensuring that operator's manuals were present in the rigs used by car haulers.

Plaintiff cites *Polovich v. Sayers,* 412 S.W.2d 436 (Mo. 1967) and *Parra v. Building Erection Services,* 982 S.W.2d 278 (Mo. App. 1998) in support of his argument that he made a submissible case on his negligent failure to warn theory. However, neither *Polovich* nor *Parra* support a negligent failure to warn claim against Auto Handling.

In *Polovich*, the plaintiff was injured when the brakes failed on the pickup truck in which he was riding. The case was submitted on the theory that the defendants breached their duty to use due care in keeping the truck in repair and failing to fix the brakes when they knew the brakes were defective. *Id.* at 438. The court held the evidence was sufficient to make a submissible case on Plaintiff's negligence theory. *Id.* at 438. However, the case was not submitted on a negligent failure to warn theory.

In *Parra*, the plaintiff was injured as a result of the operation of a construction crane that had been leased by the defendant to the plaintiff's employer. The appellate

court found that generally, the duty of a lessor as to the leased instrumentality does not extend past the time of its delivery, absent some agreement between the parties to provide continuing maintenance. *Id.* at 284 (citations omitted). In other words, absent some exception, the lessor has no duty as to a defect that arises through no fault of his or her own and of which he or she had no notice after the delivery of the instrumentality. *Id.* at 284 (citations omitted). However, there are exceptions, i.e., where a lessor furnishes a construction contractor with an instrumentality, the duty continues with respect to that instrumentality as "to such matters over which [the lessor] retains control, or undertakes to perform." *Id.* at 284 (citations omitted). As such, the duty would extend past the initial date of delivery where, as here, the lessor undertook during the lease to supervise the assembly and disassembly of the crane. *Id.* at 284.

The holding in *Parra* is limited to its unique facts. In particular, the duty imposed was limited to the lessor who supplied the crane to the lessee and, after delivery, the lessee continued to retain control or undertook to perform certain tasks related to the crane. In the present case, Auto Handling did not lease the automobile transport trailer to Plaintiff or Plaintiff's employer. Plaintiff's employer, Cooper Transport, purchased the automobile transport trailer from Cottrell. Cooper Transport provided the trailer to Plaintiff. Plaintiff has failed to establish that Auto Handling either leased the trailer to Plaintiff or retained control over operation of the trailer. The case law cited by Plaintiff does not support a failure to warn claim against Auto Handling.

2. Plaintiff failed to introduce substantial evidence at trial to prove the essential facts of his claim for negligent failure to inspect, maintain or repair.

Plaintiff failed to present sufficient evidence to make a submissible case on Plaintiff's claim that Auto Handling failed to exercise reasonable care in its inspection, maintenance or repair of the rig Plaintiff was operating on the day of his July 3, 2007 accident.

Plaintiff's position is that the original Cottrell MIG weld lacked adequate penetration. Plaintiff argues there was sufficient evidence that Auto Handling's mechanics failed to properly inspect the rig in order to discover the defect with the original weld, failed to inspect it to discover any negligent repair of that weld, and failed to repair the rig to correct the previous improper repair. (Plaintiff's Substitute Brief p. 46).

Plaintiff failed to present evidence that Auto Handling was negligent in failing to discover the allegedly defective original Cottrell MIG weld. A claimant in a negligence action must establish a (1) legal duty on the part of the defendant to conform to a certain standard of conduct to protect others against unreasonable risks; (2) breach of that duty; (3) a proximate cause between the conduct and the resulting injury; and (4) actual damages to the claimant's person or property. *Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc.*, 700 S.W.2d 426, 431 (Mo. banc 1985) (citations omitted).

It is generally stated that foreseeability that some injury might result from the act complained of normally serves as the paramount factor in determining the existence of a

duty. *Id.* at 431. When deciding if some injury was reasonably foreseeable, whether expressly or implicitly, courts examine what the actor knew or should have known. *Id.* at 431.

> The duty of a person to use care and his liability for negligence depend upon the tendency of his acts under the circumstances as they are known or should be known to him. The foundation of liability for negligence is knowledge—or what is deemed in law to be the same thing: opportunity by the exercise of reasonable diligence to acquire knowledge— of the peril which subsequently results in injury.

Id. at 431-32 (citing 57 Am.Jur.2d Negligence § 54 (1971)).

Plaintiff failed to produce evidence that Auto Handling knew or should have known, or that it was reasonably foreseeable to Auto Handling, that the original Cottrell MIG weld on the subject idler was defective.

Once it undertook to perform work on the rig, Auto Handling's duty was limited to the exercise of reasonable care in performing the work it undertook. The law imposes an obligation upon everyone who attempts to do anything, even gratuitously, for another to exercise some degree of care and skill in the performance of what he has undertaken. *Id.* at 432 (citations omitted). The Restatement (Second) of Torts § 323, titled "Negligent Performance of Undertaking to Render Services," provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

Id. at 432-33.

Plaintiff did not present evidence that Auto Handling undertook to perform work on the rig that would have included an inspection of the welds on the rig's idlers. The only evidence in the record as to the scope of work performed by Auto Handling is that Auto Handling performed work on the air conditioner in July 2006. Johnson failed to present evidence that the scope of work performed by Auto Handling included inspection of the original welds on the idlers. Street's testimony that the mechanics had pits below ground level and that car haulers relied on the mechanics to look underneath the trailer for dangerous conditions, does not support a reasonable inference that a mechanic who failed to identify an original Cottrell MIG weld that lacked adequate penetration was negligent.

The alleged defect with the original Cottrell MIG weld, causing inadequate weld penetration, was a manufacturing defect. It was not a defect that occurred over time. It existed at the time this trailer was manufactured. Plaintiff did not introduce any evidence that the alleged failure of a mechanic to discover inadequate weld penetration in a manufacturer's original weld was a breach of the standard of care.

Micklow testified the original Cottrell MIG weld became unattached, and it was not reattached. *Transcript 780-781*. The weld was not repaired at the bottom, such that any repair "left off the most important part," likely "because it was too difficult to access." *Transcript 764.*

Micklow's testimony is that, at some unknown time before July 3, 2007, the original allegedly defective original Cottrell MIG weld became unattached. In other words, the idler came off the trailer. Micklow's testimony is that the idler was reattached to the trailer with an allegedly defective arc weld.

The failure of the alleged defective MIG weld was not the proximate cause of Plaintiff's accident. As set forth above, according to Micklow, at some unknown time before July 3, 2007, the allegedly defective original Cottrell MIG weld had become unattached and the idler was reattached with an allegedly defective arc weld. On July 3, 2007, the allegedly defective arc weld failed. If Micklow's testimony is accurate, the allegedly defective original Cottrell MIG weld had been replaced before Plaintiff's accident. In other words, the allegedly defective original Cottrell MIG weld had nothing to do with the July 3, 2007 accident.

Plaintiff was not injured as a result of the failure of the allegedly defective original Cottrell MIG weld. The failure of the original Cottrell MIG weld was not the proximate cause of Plaintiff's July 3, 2007 accident. Plaintiff did not make a submissible case of negligence on his claim that Auto Handling should have discovered the allegedly defective original Cottrell MIG weld. The trial court did not commit error when it directed a verdict in favor of Auto Handling on Plaintiff's claim for negligent inspection.

In order to make a submissible case on his claim that Auto Handling failed to inspect the rig to discover the alleged negligent repair and failed to repair the rig to correct the alleged negligent repair, it is Plaintiff's burden to establish by direct or circumstantial evidence that this rig was inspected by Auto Handling's mechanics ***after***

the alleged defective repair was made, that Auto Handling's mechanics failed to discover the alleged defective repair, this was a breach of the standard of care and, as a result, Plaintiff sustained damages.

Plaintiff failed to present any direct or circumstantial evidence of ***who*** made the allegedly defective repair weld. Plaintiff also failed to present any direct or circumstantial evidence of ***when*** or ***where*** this weld was made. In addition, Plaintiff failed to introduce any evidence that Auto Handling inspected the rig ***after*** the alleged improper repair. Since Plaintiff failed to establish that Auto Handling inspected the rig ***after*** the alleged defective repair was made, Plaintiff failed to make a submissible case on his theory of negligent inspection.

3. Plaintiff failed to introduce substantial evidence at trial to prove the essential facts of his negligent repair claim.

Plaintiff failed to present any direct or circumstantial evidence from which a jury could reasonably conclude that Auto Handling made the weld that is alleged to have broken on July 3, 2007. Plaintiff testified he did not know if the idler had been repaired. Plaintiff also testified that if the idler was repaired, he did not know who made the repair. Micklow testified he did not know who made the repair weld. Micklow testified he had no evidence that Auto Handling made the repair weld. None of Plaintiff's witnesses testified that Auto Handling made the repair weld.

Plaintiff argues his testimony establishes only two companies could have made the repair – Cooper Transport or Auto Handling. However, Plaintiff's evidence does not create a reasonable inference that Auto Handling made the repair. The jury would be left

to speculate whether Cooper Transport, Auto Handling or some third party made the alleged repair.

Micklow testified he saw evidence of repair along the sides and top of the idler, and the repair was done by an arc or stick weld. Plaintiff did not present any evidence that Cooper Transport or Auto Handling use an arc or stick weld.

Cooper Transport and Auto Handling are not the only possible parties who could have made the repair weld. Plaintiff testified Cooper Transport or Auto Handling worked on the rig almost all the time. *Transcript 1159-1160.* Plaintiff also testified if a driver broke down while on the road, the rig could be worked on elsewhere. *Transcript 1159-1160*. While Plaintiff testified to his knowledge no one who was not affiliated with Cooper Transport worked on the idlers, *Transcript 1160*, Plaintiff's testimony does not exclude the possibility the repair weld was made by a third party who performed work on the rig while the rig was out on the road.

Contrary to the statement of the Court of Appeals, the evidence does not support the inference that Auto Handling provided primary maintenance on the rig over the course of three years. Plaintiff testified he picked up Rig No. 1397/1398 at Cooper Transport's terminal in Oklahoma City in March or April of 2004. *Transcript 1155.* Plaintiff testified the maintenance of this rig was done by mechanics employed by either Cooper Transport or Auto Handling, and the majority of maintenance work on this rig was performed at Cooper Transport's Fairfax, Kansas terminal, where the mechanics are employed by Cooper Transport. *Transcript 1159-60, 1362-63.*

Plaintiff testified that during the time he operated this rig, between 2004 and 2007, the rig was worked on at three terminals where the mechanics were employed by Auto Handling: Shreveport, Oklahoma City and Wentzville. *Transcript 1161*. However, Johnson did not testify concerning the number of times the rig was worked on at those terminals, or the type of work that was done at those terminals.

Plaintiff testified about two occasions in July 2006 when he had the air conditioner on this rig checked at the Wentzville terminal. *Transcript 1375-76.* This was the only work done at a terminal where the mechanics were employed by Auto Handling about which Plaintiff gave specific testimony. Plaintiff was not aware of any other repair item that was written up and taken care of in Wentzville. *Transcript 1377*.

Plaintiff also argues the maintenance records do not refer to repair of the subject idler. Plaintiff relies on his testimony that Auto Handling did work that was not documented and, if there was an undocumented repair, it was most likely done by Auto Handling. *Transcript 1160-1161*. However, Plaintiff testified he was aware of only one occasion when a mechanic employed by Auto Handling did not create a paper trail. *Transcript 1160.* Plaintiff did not testify about the type of work that was performed when a paper trail was not created. Plaintiff did not testify that a mechanic employed by Auto Handling made a ***repair*** to the rig and did not document the ***repair***. Plaintiff testified he never asked the mechanics in Wentzville to inspect or repair the chain and ratchet system or the idlers on his rig. *Transcript 1377.* Plaintiff also testified he was not aware of any work done at the Wentzville terminal on the chain and ratchet system or the idlers on his rig. *Transcript 1376.*

Plaintiff did not testify his employer always made records of repairs. Plaintiff could not testify to this because he does not have adequate knowledge to testify about how Cooper Transport's maintenance records are prepared or maintained. Plaintiff testified he never worked as a mechanic, did not know how Cooper Transport's maintenance records were prepared, did not receive copies of the maintenance records and had never reviewed the maintenance records for Rig No. 1397/1398. *Transcript 1360, 1369-1370.* Plaintiff did not testify to repairs made to Rig No. 1397/1398 that were not documented in the maintenance records.

Finally, Plaintiff argues there are pages missing from the maintenance records. Plaintiff's testimony does not establish there were any pages *missing* from the maintenance records that were produced by Auto Handling and introduced by Plaintiff as an exhibit at trial. Plaintiff's counsel attempted to use the way the pages were numbered when they were printed in October 2011 to suggest that Auto Handling did not produce all of the maintenance records. While Plaintiff testified the page numbers between the maintenance records for Unit 1397 and Unit 1398 were not sequential, his testimony did not support a conclusion that there were any pages *missing* from the records produced by Auto Handling. Plaintiff testified he did not know how the maintenance records were prepared, how they were kept in the regular course of Cooper Transport's business and how the records were produced in this case. Plaintiff ultimately testified he could not tell the jury whether there were any pages *missing* from the maintenance records. *Transcript 1434.* At best, Plaintiff's testimony established the maintenance records for Unit 1397 and Unit 1398 were not numbered sequentially. *Exhibit 35.* Plaintiff's testimony did not

establish that there were any pages *missing* from the maintenance records for Rig No. 1397/1398.

Plaintiff argues that because AHC was the only party that could produce evidence showing who did the repair, the jury was allowed to consider its failure to produce exonerative evidence. In support of this position, Plaintiff relies on *Zahner v. Director of Revenue*, 348 S.W.3d 97 (Mo.App. 2011). However, the burden is not on Auto Handling to produce evidence showing who made the alleged repair. The burden is on Plaintiff to establish Auto Handling made the repair. In *Zahner*, a videotape of the respondent's booking, which would have shown whether the respondent had been read the implied consent warning, had been "destroyed as part of the post arrest routine." The court held that while the spoliation doctrine is generally inapplicable against the Director, there is no rule of law that requires the trial court to ignore the destruction of evidence, even if the trial court finds no evidence of fraud, deceit, or bad faith, when the trial court is weighing the credibility of the witnesses in an evidentiary proceeding. *Id.* at 101. *Zahner* does not support Plaintiff's argument that because Auto Handling was the only party that could produce evidence showing who did the repair, the jury was allowed to consider its failure to produce exonerative evidence.

Plaintiff's argument that Auto Handling produced no witnesses who could explain the alleged gap is also without merit. Auto Handling did not produce a witness to explain how the pages of the maintenance records were numbered because Plaintiff's case against Auto Handling was dismissed at the close of Plaintiff's evidence.

While the court views the evidence and reasonable inferences in the light most favorable to the plaintiff and disregards any contrary evidence and inferences, *Cabinet Distributors, Inc. v. Redmond,* 965 S.W.2d 309, 312 (Mo. App. 1998), the court does not supply missing evidence or give the plaintiff the benefit of unreasonable, speculative or forced inferences. *Steward v. Goetz*, 945 S.W.2d 520, 528 (Mo. App. 1997). The evidence and inferences must establish every element and not leave any issue to speculation. *Id.* at 528. A submissible case is not made if it solely depends on evidence which supports two inconsistent and contradictory inferences constituting ultimate and determinative facts because liability is then left in the realm of speculation, conjecture and surmise. *Id.* at 528-529.

Plaintiff failed to present any direct or circumstantial evidence that Auto Handling made the weld that is alleged to have failed on July 3, 2007. Plaintiff's testimony does not support a reasonable inference from which the jury could conclude that Auto Handling made the subject weld. The jury would only be left to speculate as to whether the weld was made by Cooper Transport, Auto Handling or some third party. The trial court did not commit error when it directed a verdict for Auto Handling on Plaintiff's claim for negligent repair.

CONCLUSION

For the foregoing reasons, the circuit court's entry of a directed verdict in favor of Auto Handling should be affirmed.

Respectfully submitted,

Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

By: /s/ William F. Logan
Paul L. Wickens Mo. Bar #23549
William F. Logan Mo. Bar #43965
1200 Main Street, Suite 2200
Kansas City, MO 64105
Phone: (816) 472-7474
Fax: (816) 472-6262
Attorneys for Defendant/Respondent Auto Handling Corporation

Certificate of Compliance with Rule 84.06(c)

I hereby certify that this brief complies with the limitations contained in Rule 84.06(b), and that this brief contains 7,593 words according to the Microsoft Word software used to prepare the brief, not including those contained in the cover, table of contents, table of authorities and any appendix.

/s/ *William F. Logan*

Certificate of Service

I hereby certify that a copy of the foregoing brief was submitted through the Court's electronic filing system on October 20, 2016, which will send a copy of the foregoing to all counsel of record.

/s/ *William F. Logan*