IN THE SUPREME COURT OF MISSOURI

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

SUBSTITUTE BRIEF OF RESPONDENT/CROSS-APPELLANT COTTRELL, INC.

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

William Ray Price, Jr. #29142
Thomas B. Weaver #29176
Jeffery T. McPherson #42825
ARMSTRONG TEASDALE LLP
7700 Forsyth Blvd., Suite 1800
St. Louis, Missouri 63105
314.621.5070
314.621.5065 FAX

ATTORNEYS FOR
RESPONDENT/CROSS-APPELLANT
COTTRELL, INC.

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JURISDICTIONAL STATEMENT

This appeal should be retransferred.

On May 6, 2010, this action for personal injuries was commenced in St. Louis County Circuit Court by Plaintiffs Robert and Brenda Johnson against Defendant Auto Handling Corporation.

On October 26, 2010, the circuit court granted leave for the filing of an amended petition removing Brenda Johnson as a plaintiff and adding claims against Cottrell, Inc., and General Motors Corporation. The amended petition did not set forth any claims against General Motors.

On September 19, 2013, the trial court entered a directed verdict in favor of Auto Handling.

On September 23, 2013, the trial court entered a money judgment in favor of the plaintiff and against Cottrell.

On October 23, 2013, the plaintiff and Cottrell filed authorized post-trial motions.

On January 16, 2014, the trial court denied all post-trial motions.

On January 27, 2014, Cottrell filed a notice of appeal.

On February 6, 2014, the plaintiff filed a notice of appeal.

Jurisdiction was proper in the Court of Appeals because this action does not involve any matters over which this Court has exclusive appellate jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution. The Circuit Court of St. Louis County is within the territorial jurisdiction of the Missouri Court of Appeals, Eastern District. § 477.050, RSMo.

On April 12, 2016, the Court of Appeals handed down an opinion reversing the judgment of the circuit court and remanding the action to the circuit court for retrial on all issues. On August 23, 2016, this Court sustained the plaintiff's application for transfer. This Court has jurisdiction to hear appeals on transfer from the Court of Appeals. Mo. Const. art V, § 10.

This case does not meet the requirements for transfer set forth in Rule 83.04 and Rule 83.02. The plaintiff's claims in this action all relate to one part of an auto transport trailer called an idler. The plaintiff had two alternative and inconsistent theories. He asserted that Defendant Auto Handling Corporation negligently repaired the idler so that a new weld broke when he was using it. Alternatively, the plaintiff asserted that when he was injured, the idler was in the same condition as when the trailer was manufactured by Defendant Cottrell, Inc. But these alternative and inconsistent theories were not submitted to the jury because the trial court granted a directed verdict to Auto Handling.

The Court of Appeals reversed the directed verdict for Auto Handling, reversed the verdict against Cottrell, and remanded the action to the trial court for retrial on all issues. This is the only appropriate resolution of this case in which the issues and evidence as to the one product at issue are completely intertwined.

Whether these claims against these defendants arising from this particular idler should be remanded for a new trial is not a question of general interest or importance, and it is not an issue calling for reexamination of existing law. The opinion of the Court of Appeals is not contrary to any previous decision. Indeed, the issues here are unique to this case and this record. The appeal should be retransferred.

STATEMENT OF FACTS

On May 6, 2010, plaintiffs Robert and Brenda Johnson filed this action for personal injuries in St. Louis County Circuit Court alleging that Defendant Auto Handling Corporation ("AHC") was negligent in its maintenance of a Cottrell automobile transport trailer or "rig." L.F. at 16. It was alleged that AHC's negligent maintenance of the Cottrell rig proximately caused Mr. Johnson's injuries in two separate incidents on July 3, 2007. L.F. at 33-34.

On October 26, 2010, the trial court granted leave to file an amended petition removing Brenda Johnson as a plaintiff and adding product liability claims against Cottrell, Inc., the designer, manufacturer, and seller of the rig sold to the plaintiff's employer in 2003, and claims against General Motors. L.F. at 46. The amended petition did not assert any claims as to General Motors, which never appeared in the case. L.F. at 33.

Plaintiff Robert Johnson alleged he was injured using a 2003 Cottrell trailer while securing automobiles for transit using the ratchet tie down systems in an intended and foreseeable manner. L.F. at 34. The plaintiff alleged that the Cottrell rig was defective and not reasonably safe in its idler design and chain and ratchet system. L.F. at 35.

The plaintiff alleged that at the time of his incidents in Kansas and Illinois he was an employee of Jack Cooper Transport ("JCT"), working as a commercial truck driver known as a "car hauler." L.F. at 33-34. He testified that he was a member of the Teamsters union, working pursuant to a collective bargaining agreement ("CBA") between his employer, JCT, and the Teamsters. Tr. at 1218, 1220.

On the date in question, he was using a 2003 Cottrell rig, purchased in 2004 by JCT from Cottrell, to load and unload new passenger vehicles for dealers to sell. Tr. at 489, 1150; L.F. at 34. The plaintiff had worked as a car hauler from 1976 through 2008 or 2009. Tr. at 1140.

The plaintiff alleged that he was injured in two separate accidents involving the Cottrell rig that he alleged AHC negligently maintained or repaired with a faulty weld. The trial court applied Missouri law to both incidents. Tr. at 1993, 2279.

The first 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 the plaintiff was using the rig's system to secure cars for transportation. Tr. at 1156-1160. The system is known as a chain and ratchet tie down system. Tr. at 1164.

The plaintiff testified that this 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. Tr. at 1217-1218.

The plaintiff's evidence showed that the idler had been repaired after Cottrell sold the rig in 2004 and that the weld used to repair the rig was inadequate, causing the idler to fail. Tr. at 673, 675, 761, 763-764, 781. The plaintiff claimed that AHC performed the repairs, including the allegedly inadequate weld, after Cottrell sold the rig in 2004. L.F. at 425-426.

The second incident occurred in the afternoon that same day in Fairfax, Kansas, when a hook attached to the chain used to secure the cars tore through the securement

hole in the bottom frame of the GM vehicle he was securing or "tying down." Tr. at 1163-1164, 1273-1274.

As to Cottrell, Count I claimed strict product liability design defect, Count II alleged negligent design defect, Count III claimed breach of warranty, and Count IV sought punitive damages. L.F. at 33-41. Counts V and VI were directed to Auto Handling, claiming negligence in failing to properly inspect, maintain, and repair the 2004 rig after Cottrell sold it to JCT, including performing the "inadequate" weld in repairing the rig. L.F. at 41-44.

The plaintiff's strict liability and negligent design defect counts claimed that Cottrell caused his injuries by failing to warn him. At trial, the evidence showed that, in addition to other warnings, the Cottrell rig had at least two warning decals on it when sold, both referring the reader to the rig's owner's manual, and one warning not to over-tighten the chains while loading. Tr. at 1859-1861; Exhibit 169; Exhibit 170. The warning stickers were in an area where the driver would be during the loading process, and the plaintiff "certainly had an opportunity to review" them. Tr. at 1860.

Initially, the plaintiff testified that he was not sure if there was a decal on the side of the rig, but he probably did not read it: "You know, I can't say that I haven't seen it. I mean, it might have been there, but it's a good possibility that I didn't read it." Tr. at 1255. The plaintiff stated: "You know, I don't know. I can't say I did, I can't say I didn't." Tr. at 1255-1256. Later, the plaintiff stated affirmatively that he did not read it: "No, I did not." Tr. at 1256. The plaintiff testified that he never read the owner's manual for the Cottrell rig. Tr. at 1256, 1257.

On September 19, 2013, the trial court entered a directed verdict in favor of AHC, finding that the plaintiff had not presented evidence that AHC was responsible for the allegedly inadequate weld performed in the repair. While the plaintiff's evidence established the weld was repaired via an inadequate weld after Cottrell sold the rig in 2004, the plaintiff was unable to present evidence establishing who did it. L.F. at 257; Tr. at 1627.

Prior to closing argument, Cottrell submitted proposed verdict directors on the negligent design-defect claim based on MAI 25.09 ("Product Liability - Negligent Manufacture, Design, or Failure to Warn"). L.F. at 109, 160. MAI 25.09 states that a jury should find for a plaintiff if it believes:

> First, defendant [manufactured] [designed] the (*describe product*), and
>
> Second, the (*describe product*) (*here describe alleged defect or hazard*), and
>
> Third, defendant failed to use ordinary care to [either] [[manufacture] [design] the (*describe product*) to be reasonably safe] [[or] adequately warn of the risk of harm from (*here describe alleged defect or hazard*)], and
>
> Fourth, as a direct result of such failure [, in one or more of the respects submitted in paragraph Third], plaintiff sustained damage.

MAI 25.09; App. at A9.

The plaintiff submitted a proposed verdict director on the negligent design defect claim against Cottrell based on MAI 17.02 (from the chapter "Verdict Directing - Motor Vehicles"). L.F. at 72. MAI 17.02 states that a jury should find for a plaintiff if it believes:

> First, either:
>
> defendant failed to keep a careful lookout, or
>
> defendant drove at an excessive speed, or
>
> defendant's automobile was on the wrong side of the road, and
>
> Second, defendant, in any one or more of the respects submitted in paragraph First, was thereby negligent, and
>
> Third, as a direct result of such negligence, plaintiff sustained damage.

MAI 17.02; App at A10.

The trial court inquired of the plaintiff's counsel, "[D]o you have cases of the 17.02 being used to submit products cases?" Tr. at 2056. Counsel responded, "I don't think I have one that's specific to a products case." Tr. at 2504.

Over Cottrell's objections, the trial court instructed the jury on the negligent product liability claim under the plaintiff's Instruction 10, based on MAI 17.02:

Jury Instruction No. 10

On the claim of plaintiff for personal injury based on negligence of the defendant with regard to the July 3, 2007 accident alleging a broken idler, you must assess a percentage of fault to defendant whether or not plaintiff was partly at fault if you believe:

First, either

(a) defendant failed to review and analyze injury and testing data; or

(b) defendant failed to supply the trailer with alternative vehicle securement systems including straps, wheel chocks, cables, enclosed idlers, a hydraulic tie-down system, a pneumatic tie-down system, or a worm gear tie-down system; or

(c) defendant failed to share industry reports and injury data with plaintiff's employer; or

(d) defendant designed a chain and ratchet system that required excessive force during operation; and

Second, defendant, in any one or more of the respects submitted in paragraph First, was thereby negligent; and

Third, such negligence directly caused or directly contributed to cause damage to plaintiff.

L.F. at 297; App. at A8.

The jury returned a 10-2 verdict. L.F. at 324. As to claims regarding an alleged deformed tie-down slot (the second alleged injury that day), the jury found zero fault as to both Cottrell and the plaintiff. L.F. at 317-318, 322-323; App. at A1-A2, A5-A6.

On the plaintiff's claim for strict products liability design defect, the jury found Cottrell's fault to be 0% and the plaintiff's fault to be 100%. L.F. at 317, 320; App. at A1, A3.

On the plaintiff's claim for negligent product liability, submitted under Instruction 10, the jury found Cottrell's fault to be 55% and the plaintiff's fault to be 45%. L.F. at 317, 320-321; App at. A1, A4.

On the plaintiff's claim for failure to warn, the jury found Cottrell's fault to be 49% and the plaintiff's fault to be 51%. L.F. at 317, 321; App. at A1, A4.

The jury found the total amount of the plaintiff's damages, disregarding the plaintiff's fault, to be $2,091,513.45. L.F. at 317, 321; App. at A2, A4.

The jury found that Cottrell was not liable for punitive damages. L.F. at 318, 323.

On September 23, 2013, the trial court entered judgment in favor of the plaintiff and against Cottrell: "Having considered the verdict of the jury finding Plaintiff's damages to be $2,091,513.45 and Plaintiff's fault to be 45%, it is the Order and Judgment of the Court that Plaintiff Robert Johnson have and recover of the Defendant Cottrell, Inc., the sum of $1,150,332.40." L.F. at 318; App. at A2.

On October 23, 2013, the plaintiff and Cottrell filed authorized post-trial motions. 388, 412, 422.

On January 16, 2014, the trial court denied all post-trial motions. L.F. at 721.

On January 27, 2014, Cottrell filed a notice of appeal. L.F. at 724.

On February 6, 2014, the plaintiff filed a notice of appeal. L.F. at 767.

On April 12, 2016, the Court of Appeals handed down an opinion reversing the judgment of the circuit court and remanding the action to the circuit court for retrial on all issues.

On August 23, 2016, this Court sustained the plaintiff's application for transfer.

POINTS RELIED ON

I. The trial court erred in entering judgment in favor of the plaintiff for negligent product liability and in denying judgment notwithstanding the verdict because the jury necessarily found that the product was not defective, in that the jury found that Cottrell was not liable on the plaintiff's claim for strict liability as to the same product, and a manufacturer cannot be negligent for the design of a product that the jury found not to have had a defect that caused the plaintiff any damage.

Ellison v. Fry, 437 S.W.3d 762 (Mo. banc 2014).

Jaurequi v. John Deere Co., 971 F. Supp. 416 (E.D. Mo. 1997).

Witt v. Norfe, Inc., 725 F.2d 1277 (11th Cir. 1984).

Miller v. Yazoo Mfg. Co., 26 F.3d 81 (8th Cir. 1994).

II. The trial court erred in denying Cottrell's motion for directed verdict, in entering judgment in favor of the plaintiff for failure to warn and in denying judgment notwithstanding the verdict because the plaintiff failed to present evidence that a warning would have altered his behavior, in that the undisputed evidence is that the plaintiff did not read the warning on the product and it is settled that, when the evidence shows that the plaintiff did not read the warning, the plaintiff cannot establish that any failure to warn caused the alleged injury.

Johnson v. Medtronic, Inc., 365 S.W.3d 226 (Mo. App. 2012).

Ellison v. Fry, 437 S.W.3d 762 (Mo. banc 2014).

Klugesherz v. American Honda Motor Co., Inc., 929 S.W.2d 811 (Mo. App. 1996).

III. The trial court erred in overruling Cottrell's objection to Instruction 10, in entering judgment in favor of the plaintiff for negligent product liability, and in denying a new trial because the trial court committed reversible instructional error in failing to use the required verdict director (MAI 25.09) and instead granting the plaintiff's request to use an improper verdict director (based on MAI 17.02) that misstated the law, in that the verdict director omitted required elements of the plaintiff's negligent design defect claim because it did not require the jury to find that Cottrell designed or manufactured the chain and ratchet system and idler, that the chain and ratchet system and idler had a defect, or that Cottrell negligently failed to warn about a defect or hazard in those products.

Chavez v. Cedar Fair, LP, 450 S.W.3d 291 (Mo. banc 2014).

MAI 25.09.

Syn, Inc. v. Beebe, 200 S.W.3d 122 (Mo. App. 2006).

Thomas v. McKeever's Enter. Inc., 388 S.W.3d 206 (Mo. App. 2012).

IV. The trial court erred in overruling Cottrell's objection to Instruction 10, in entering judgment in favor of the plaintiff for negligent product liability, and in denying a new trial because the trial court committed reversible instructional error in failing to use the required verdict director (MAI 25.09) and instead granting the plaintiff's request to use an improper verdict director (based on MAI 17.02) that constituted a roving commission in that the verdict director failed to adequately specify the conduct on which the jury could base a finding of liability, failed to set forth the specific conduct that would render the defendant liable, and failed to state a relevant time period, but rather made vague references to whether Cottrell "failed to review and analyze injury and testing data" or "failed to share industry reports and injury data."

Chavez v. Cedar Fair, LP, 450 S.W.3d 291 (Mo. banc 2014).

McNeill v. City of Kansas City, 372 S.W.3d 906 (Mo. App. 2012).

Gomez v. Constr. Design, Inc., 126 S.W.3d 366 (Mo. banc 2004) .

Centerre Bank of Kansas City v. Angle, 976 S.W.2d 608 (Mo. App. 1998).

V. The trial court erred in denying Cottrell's motion for directed verdict, in entering judgment in favor of the plaintiff, and in denying judgment notwithstanding the verdict for negligent product liability and failure to warn because the undisputed post-sale alteration of the product defeats the plaintiff's claims, in that the defectiveness of a product is measured as of the time the product enters the stream of commerce so that a manufacturer can only be liable for defective products if the product reaches the user or consumer without substantial change in the condition in which it is sold and the evidence in this case was undisputed that the product was materially altered after sale in the form of a repair with a weld that the plaintiff's evidence claimed was negligent and dangerous.

Ellison v. Fry, 437 S.W.3d 762 (Mo. banc 2014).

Gomez v. Clark Equipment Co., 743 S.W.2d 429 (Mo. App. 1987).

Hill v. General Motors Corp., 637 S.W.2d 382 (Mo. App. 1982).

Jasinski v. Ford Motor Co., 824 S.W.2d 454 (Mo. App. 1992).

ARGUMENT

The judgment against Cottrell should be reversed because the jury's finding of zero liability as to Cottrell and 100% fault as to the plaintiff on the claim for ***strict product liability*** for design defect precludes the award for alleged ***negligent*** design defect.

Further, the undisputed evidence was that the product had been modified in a negligent manner via an improper weld on a replacement part, so that, as a matter of law, the plaintiff could not recover from Cottrell.

The claim for alleged failure to warn is barred because the undisputed evidence was that the plaintiff did not read any warnings; thus, as a matter of law, any alleged defect in a warning could not have caused the plaintiff any damages. And there is no post-sale duty to warn as claimed by the plaintiff.

In light of the plaintiff's failure to submit substantial evidence in support of a cognizable claim, the trial court erred in denying judgment notwithstanding the verdict.

In the alternative, the judgment should be reversed and the cause remanded for a new trial due to instructional error. Instruction 10, the plaintiff's verdict director for negligence, was based on the wrong MAI instruction, misstated the law, and was a roving commission.

I. The trial court erred in entering judgment in favor of the plaintiff for negligent product liability and in denying judgment notwithstanding the verdict because the jury necessarily found that the product was not defective, in that the jury found that Cottrell was not liable on the plaintiff's claim for strict liability as to the same product and a manufacturer cannot be negligent for the design of a product that the jury found not to have had a defect that caused the plaintiff any damage.

The jury returned a finding of zero fault for Cottrell and 100 percent fault for the plaintiff on the design defect strict liability claim. L.F. at 317, 320-321. The jury's finding on the strict liability claim that no defect caused or contributed to cause any damages precludes, as a matter of law and logic, any other finding under a properly submitted negligent design defect claim. Both claims focus on a defect in the design of the product causing the injury. Negligent design defect, however, requires negligence in the design conduct, while strict liability does not.

A case may not be submitted unless each and every fact essential to liability is established by legal and substantial evidence. *Ellison v. Fry,* 437 S.W.3d 762, 768 (Mo. banc 2014). Whether the plaintiff made a submissible case is a question of law that is reviewed *de novo*. *Id.* To determine whether the evidence was sufficient to support the jury's verdict, an appellate court views the evidence in the light most favorable to the verdict. *Id.* A motion for JNOV should be granted if the defendant shows that at least one element of the plaintiff's case is not supported by the evidence. *Id.*

A. As the jury found, there was no defect.

In this case, the trial court erred in entering judgment for the plaintiff and in denying JNOV because, as the jury found, there was no defect to support the claim of negligence. There was no design defect in the product causing the plaintiff's alleged injuries to support the claim of negligence in the design of the product.

Under Missouri law, negligence claims have a higher threshold of proof than strict liability claims. *Jaurequi v. John Deere Co.,* 971 F. Supp. 416, 431-432 (E.D. Mo. 1997). A plaintiff who cannot prevail on strict liability claims for defective design or for failure to warn cannot prevail on claims of negligence for the design or failure to warn. *Id.* A plaintiff's failure to demonstrate a defect "will defeat a cause of action under either negligence, strict liability, or the implied warranty of merchantability." Restatement (Third) of Torts, Products Liability § 2 cmt. n (1998).

In an instructive Eighth Circuit case applying Missouri law, the jury found that user of a product was 100% at fault. *Miller v. Yazoo Mfg. Co.,* 26 F.3d 81, 84 (8th Cir. 1994). The Eighth Circuit held that this finding, under Missouri law, "establishes a complete defense to a strict liability action." *Id.*

A finding of liability based on negligent design defect is precluded if a jury finds no defect in design caused the plaintiff's alleged damages. Several courts, under the same reasoning applicable in Missouri, have held that it is improper for a jury to find that a product design defect did not cause the alleged injuries for strict liability purposes, and yet that the product was negligently designed, causing the alleged injuries. *See e.g., Witt v. Norfe, Inc.,* 725 F.2d 1277, 1279 (11th Cir. 1984).

In *Witt,* a plaintiff was injured when a shower door shattered after he struck it. He brought an action against the manufacturer on theories of negligence and strict liability, arguing that the manufacturer made the shower door with glass that was too easily breakable. *Id.* The jury found for the defendant on the strict liability claim, finding that the door was not defective in that it was not unreasonably dangerous to the user at the time it left the defendant's possession, but found for the plaintiff on a negligence theory, assigning 20 percent fault to the plaintiff and 80 percent to the defendant. *Id.* at 1277-1278.

The *Witt* court explained that, in a product liability case grounded in negligence, the plaintiff must establish that the product in question was defective, that the defendant manufacturer's act or omission with respect to the product was causally related to the harm, and that the defendant was actually connected with the product as the manufacturer or seller. *Id.* at 1278. Strict liability also requires the plaintiff to prove that the product was defective. *Id.* "Consequently, it must be deemed inconsistent for a jury to find that a product was not defective for purposes of strict liability, and yet that the product was negligently designed, i.e., was defective, for purposes of establishing liability under a theory of negligence." *Id.* at 1279.

Similarly, in a very recent case, some plaintiffs sued General Motors claiming that a defect in their Corvette caused the car to start a fire that burned down their house. *Boekamp v. General Motors, LLC,* No. D062390, 2013 WL 5807627, at *1 (Cal. Ct. App. Oct. 28, 2013) (unpublished). Throughout the trial, the plaintiffs' counsel indicated that their negligence and strict products liability counts were both based on a defect in the

Corvette's design. *Id.* at 4. The jury returned a verdict finding that General Motors was negligent but that the Corvette did not fail to perform as safely as an ordinary consumer would have expected when used or misused in an intended or reasonably foreseeable way. *Id.* at 2.

The *Boekamp* court held that the negligence and strict products liability theories both claimed the same defect in the design of the electrical system of the Corvette as the cause of the fire that destroyed their home. *Id.* The court held that the jury could not properly have concluded that General Motors negligently designed the Corvette and at the same time conclude that it was not defective under the strict liability claim. *Id.* A judgment based on such inconsistent findings must be reversed. *Id.; see Oxford v. Foster Wheeler LLC,* 99 Cal. Rptr. 3d 418, 435 (Cal. Ct. App. 2009) ("We conclude a finding of negligent failure to warn is logically and legally inconsistent with the jury's finding on plaintiffs' strict products liability failure to warn.")

To the same effect is *Oja v. Howmedica, Inc.,* 111 F.3d 782 (10th Cir. 1997), in which the jury found for the plaintiff on a negligent failure to warn claim and for the defendant on negligence and strict liability claims. The appellate court concluded that the similar elements between the failure to warn claim and the strict liability claim were essentially the only disputed elements at trial. *Id.* at 791. The court explained that in order to find for the plaintiff on the failure to warn claim, the jury had to find that the product was defective at the time of sale and caused her injuries, while in order to find for the defendant on the strict liability claim, the jury had to find that the product was either

not defective at the time of sale or did not cause her injuries. *Id.* As a result, the verdicts were facially inconsistent. *Id.*

B. The plaintiff did not even attempt to prove the required elements.

As noted below in Point III, in this case the plaintiff's failure to make a submissible case for negligent design defect is highlighted by the fact that he did not even submit the appropriate verdict director for negligent design defect, but rather the "multiple acts of negligence" instruction for ***motor vehicle accidents***. Missouri has two approved instructions, MAI 25.04 and MAI 25.09, that are required in a product liability case based on design defect. "The law is well settled that where an MAI instruction applies to the case, the use of such instruction is mandatory." *Syn, Inc. v. Beebe,* 200 S.W.3d 122, 128 (Mo. App. 2006).

MAI 25.09 is the required instruction for a negligent design defect product liability claim. *See* MAI 25.09, Committee Comment (1990 New) ("This instruction is for submission of a negligence theory of product liability."). Consistent with Missouri law, it requires a jury to find that the defendant manufactured or designed the product, that the product had a described defect or hazard, and that the defendant failed to use ordinary care to design or manufacture the product to be reasonably safe or failed to warn of an alleged defect or hazard, directly resulting in the plaintiff's injury. As to negligence claims, when a product is free of latent defects and concealed dangers, the manufacturer has satisfied the law's demands and is under no duty to make the product safer. *Sandage v. Bankhead Enterprises, Inc.,* 177 F.3d 670, 675 (8th Cir. 1999) (quoting *Stevens v. Durbin-Durco, Inc.,* 377 S.W.2d 343, 348 (Mo. 1964)).

Instruction 10 here, however, did not require the jury to find that Cottrell designed or manufactured the idler/chain/ratchet system, that it had a defect, or that Cottrell negligently failed to warn about a defect or hazard in the system. L.F. at 297; App. at A8. As noted below, the giving of an instruction that does not require a jury to find all the elements of a cause of action is reversible error. *See Williams v. Enochs,* 742 S.W.2d 165, 168 (Mo. banc 1987).

In addition to being clear instructional error, the result in this case is that the plaintiff did not prove or even submit the elements required by MAI 25.09. A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence. *Clevenger v. Oliver Ins. Agency, Inc.,* 237 S.W.3d 588, 590 (Mo. banc 2007). Accordingly, a motion for JNOV is properly granted when the motion identifies at least one element of the plaintiff's case that is not supported by the evidence. *Id.* The plaintiff's failure to make a submissible case, as shown by his failure to even submit the necessary elements to the jury, supports the entry of JNOV.

The plaintiff failed to make a submissible case for negligent design defect in that he failed to present evidence of any causative defect, and Instruction 10 erroneously contained no requirement that the product was defective. *See Stevens,* 377 S.W.2d at 346. The jury found the plaintiff 100 percent at fault regarding his damages and his use of the product for the strict liability design defect claim. The failure of evidence on this point means the plaintiff failed to make a submissible case.

Although the ordinary remedy for giving an erroneous instruction is a new trial, in this case the proper remedy should be reversal and entry of judgment Cottrell on the

plaintiff's negligent design defect product liability. The Court should evaluate submissibility based on the elements required for the claim that the plaintiff was asserting, not the elements contained in the erroneous instruction actually given. Had the plaintiff tendered an instruction properly based on MAI 25.09, Cottrell would have been entitled to a directed verdict, because the plaintiff failed to prove that he was injured as a result of Cottrell's alleged negligence in designing or manufacturing a defective product or failing to warn about a defect or hazard in that product.

C. The Court should consider whether to allow negligent design claims.

Missouri has long adhered to a fallacy in declaring that there is a difference between strict liability design defect claims and negligent design defect claims. Recent developments in product-liability jurisprudence, however, highlight the fallacy of this distinction because both claims inherently analyze the manufacturer's conduct and design choices in determining whether the design is "defective." As noted in a Missouri Law Review article, "challenging a product's design challenges the decision of the manufacturer's engineers and managers to develop and sell a product containing a particular type and level of danger. Thus, unlike a manufacturing defect claim, which implicates merely a single product unit, a design defect claim challenges the integrity of the entire product line and so pierces to the very core of the manufacturer's enterprise." David G. Owen, *Design Defects,* 73 Mo. L. Rev. 291, 296 (2008).

Thus, the Restatement (Third) of Torts: Products Liability rejects allowing plaintiffs to utilize both negligence and strict liability, indicating that plaintiffs must

choose only one of the approaches. Restatement (Third) of Torts: Products Liability § 2 cmt. n (1998).

The Court should consider whether to join other states, commentators, and the Restatement drafters and to eliminate this supposed distinction in Missouri. *See* Richard L. Cupp Jr. & Danielle Polage, *The Rhetoric of Strict Liability Versus Negligence: An Empirical Analysis,* 77 N.Y.U. L. Rev. 874, 877 (2002) ("Increasingly, however, scholars and commentators have questioned the distinction between strict liability and negligence in defective design and warning claims.").

The last time that this Court addressed substantively a product liability design-defect case was in January of 2011 in *Moore v. Ford Motor Co.,* 332 S.W.3d 749 (Mo. 2011). In that case, the Court stated: "Although negligence and strict liability theories are separate and distinct, the same operative facts may support recovery under either theory, particularly in a failure to warn case." *Id.* at 764 (citing *Hill v. Air Shields, Inc.,* 721 S.W.2d 112, 118 (Mo. App. 1986)).

In September of 2011, eight months later, the Illinois Supreme Court issued its opinion in *Jablonski v. Ford Motor Co.,* 955 NE 2d 1138 (Ill. 2011). The Illinois court explained that there is no real difference between claims for negligent design defect and strict liability design defect: "Numerous commentators have concurred that the balancing test developed for strict liability claims, which examines whether a product is unreasonably dangerous, is essentially identical to the test applied in determining whether a defendant's conduct in designing a product is unreasonable and that any distinction is mere semantics." *Id.* at 155 (citing Aaron D. Twerski, *Chasing the Illusory Pot of Gold*

at the End of the Rainbow: Negligence and Strict Liability in Design Defect Litigation, 90 Marq. L. Rev. 7, 12 (2006) ("There simply is no difference between reviewing the conduct of the manufacturer and the product design. Ultimately, products are neither reasonable nor unreasonable; they are deemed so only because a human fact-finder utilizing risk-utility tradeoffs decides one way or another on the issue.").

In *Hopfer v. Neenah Foundry, Inc.,* 477 S.W.3d 116 (Mo. App. 2015), the Court of Appeals continued the practice of recognizing a distinction in Missouri between negligent design defect and strict liability design defect. In *Hopfer,* a driver claimed injuries from driving over an open drainage inlet after a grate covering the inlet had become dislodged, and the driver filed an action against the grate manufacturer under a strict products liability theory. *Id.* at 118.

The driver attempted to introduce evidence of the manufacturer's design conduct, which the trial court excluded. The trial court ruled that the proffered evidence that the manufacturer failed to conduct testing when designing the grate system was inadmissible because it was not relevant to the jury's inquiry as to whether the grates were defective, but instead related to manufacturer's conduct in designing the grates, a consideration that is irrelevant to a strict product liability claim. The trial court concluded that "no amount of semantic legerdemain can change the obvious fact that it amounts in substance to safety-related conduct relative to the design-manufacturing process." *Id.* at 119.

In affirming the exclusion of this evidence, the Eastern District stated: "Missouri courts have continually held that negligence and strict liability cases, though viewed similarly in some jurisdictions, are distinguished in our state. To this end, Missouri

courts admonish that in strict liability claims, the sole subject of inquiry is the defective condition of the product and not the manufacturer's knowledge, negligence or fault. The manufacturer's standard of care in strict liability claims is irrelevant because that standard relates to the reasonableness of the manufacturer's design choice. Consequently, under strict tort liability, the defendant may be found liable without regard to his knowledge or conduct." *Id.* at 128 (citations and internal quotations omitted).

In reality, because there is no "standard" for design defect (unlike manufacturing defects, where the product can be compared to others), the jury is looking at the designer's design decisions and conduct all along in analyzing the design for whether it is defective. Both the defendant and the plaintiff must introduce reasons (e.g., "conduct") for why the design is the way it is. Cases like *Hopfer* rely on a fiction in excluding evidence of conduct when it comes to the design.

The continued recognition of this false distinction also results in unnecessary gamesmanship. In the *Moore* case, the last time this Court addressed design defect, it noted that the plaintiff s "dismissed their negligent design claim, leaving only their claim for strict liability design defect to be submitted to the jury." *Moore,* 332 S.W.3d at 755. The plaintiffs did that after the trial court directed a verdict for Ford on the plaintiffs' failure to warn claim.

Moore thus highlighted a common strategy in Missouri, which is based on the fallacy that there is a difference between negligent design defect and strict liability design defect. Because "conduct" is traditionally relevant only to negligence, and strict liability focuses on the product regardless of the defendant's conduct, plaintiffs will often present

all the "conduct" evidence to support negligent design defect and then dismiss that claim, in favor of proceeding on strict liability design defect, which has one less element than the former, and is thus easier to prove.

In practice, Missouri courts have already recognized the need to analyze conduct and choices in design defect cases. For example, under the contract specifications doctrine in Missouri, compliance with a customer's plans and specifications is a complete defense to strict liability and negligence claims based on defective design. *See Bloemer v. Art Welding Co.,* 884 S.W.2d 55, 56 (Mo. App. 1994). This is because, to hold a contractor liable for defective design "would amount to holding a non-designer liable for design defect." *Id.* at 59. But of course the ***reason*** that a product is the way it is has no bearing on whether the product is or is not defective. The contract specifications defense is just another way of saying the design conduct was not negligent. If Missouri considers that conduct of the manufacturer regarding the design, even in strict liability, it is illogical to continue to recognize a distinction based on other conduct.

The fiction that design defect is independent of the designer's conduct represents an illogical approach to evaluating designs of products in Missouri. The Court should consider whether to continue to indulge this fiction. The Court should consider whether to allow claims only for negligent design.

II. The trial court erred in denying Cottrell's motion for directed verdict, in entering judgment in favor of the plaintiff for failure to warn, and in denying judgment notwithstanding the verdict because the plaintiff failed to present evidence that a warning would have altered his behavior, in that the undisputed evidence is that the plaintiff did not read the warning on the product and it is settled that, when the evidence shows that the plaintiff did not read the warning, the plaintiff cannot establish that any failure to warn caused the alleged injury.

The trial court erred in denying a directed verdict and JNOV on the failure to warn claim because the evidence affirmatively showed that the plaintiff did not read the warning on the product. To prevail on a claim of failure to warn, a plaintiff must establish proximate cause. *Johnson v. Medtronic, Inc.,* 365 S.W.3d 226, 232 (Mo. App. 2012). To do so, a plaintiff must show that a warning would have altered his or her behavior. *Id.* It is settled that, when the evidence shows that the plaintiff did not read the warning, the plaintiff cannot establish that any failure to warn caused the alleged injury. *Id.* at 233.

Whether the plaintiff made a submissible case is a question of law that is reviewed *de novo*. *Ellison v. Fry,* 437 S.W.3d 762, 768 (Mo. banc 2014). To determine whether the evidence was sufficient to support the jury's verdict, an appellate court views the evidence in the light most favorable to the verdict. *Id.*

The evidence in this case precludes any recovery on a theory of failure to warn. At trial, the evidence showed that the rig had at least two warning decals on it, both referring the reader to the rig's owner's manual, and one warning not to over-tighten the

chains while loading. Tr. at 1859-1861; Exhibit 169; Exhibit 170. The warning stickers were in an area where the driver would be during the loading process, and the plaintiff "certainly had an opportunity to review" them. Tr. at 1860. After equivocating initially, the plaintiff testified that he did not read the warnings: "No, I did not." Tr. at 1256. The plaintiff testified that he also never read the owner's manual mentioned in the warnings. Tr. at 1256, 1257.

In *Johnson,* the plaintiffs claimed strict liability for failure to warn in connection with a medical device. They were required to show, in part, that the manufacturer did not give adequate warning of the danger and that injury resulted. *Id.* at 232. The evidence showed that the doctor who used the medical device did not read either the instruction manual for the device or the label on it. *Id.*

In light of these facts, the court held that the plaintiffs in *Johnson* could not show causation: "With this backdrop, then, it is undisputed that Dr. Hahn used the LifePak 9P without regard to the instruction manual and the instruction label on the machine and, thus, Medtronic's alleged failure to warn or alleged inadequate warning was not the proximate cause of Jeffrey Johnson's injuries." *Id.* at 233.

In ruling on the basis of this settled principle of law, the court relied on numerous prior cases to the same effect. *See Peters v. Judd Drugs, Inc.,* 602 N.E.2d 162, 163 (Ind. Ct. App. 1992); *Smith v. Sears Roebuck and Co.,* 232 Fed. App'x. 780, 784 (10th Cir. 2007); *Motus v. Pfizer Inc.,* 358 F.3d 659, 661 (9th Cir. 2004).

As a matter of law, an unread warning cannot cause or contribute to cause a plaintiff's alleged damage. *Johnson,* 365 S.W.3d at 232-233. JNOV should have been entered in this case because the plaintiff never read the warning that was provided.

Further, as noted, even if the plaintiff had read the warnings, the jury concluded that in this case the plaintiff was 100 percent at fault regarding whether the product caused his injuries. He presented no evidence that a warning would have altered his conduct in the accident sequence. Thus, Cottrell was entitled to JNOV on this claim. *See Klugesherz v. American Honda Motor Co., Inc.,* 929 S.W.2d 811, 813 (Mo. App. 1996) (JNOV proper where there is no evidentiary support for an inference that additional warnings would have altered plaintiff's conduct).

III. The trial court erred in overruling Cottrell's objection to Instruction 10, in entering judgment in favor of the plaintiff for negligent product liability, and in denying a new trial because the trial court committed reversible instructional error in failing to use the required verdict director (MAI 25.09) and instead granting the plaintiff's request to use an improper verdict director (based on MAI 17.02) that misstated the law, in that the verdict director omitted required elements of the plaintiff's negligent design defect claim because it did not require the jury to find that Cottrell designed or manufactured the chain and ratchet system and idler, that the chain and ratchet system and idler had a defect, or that Cottrell negligently failed to warn about a defect or hazard in those products.

At the plaintiff's request, and over Cottrell's objection, the Court used Instruction 10 to submit the plaintiff's product liability design defect negligence claim. L.F. at 297; App. at A8. Instruction 10 (based on an MAI instruction for auto accident cases) should not have been given for several reasons. This improper verdict director was not the mandated MAI to submit the plaintiff's product design defect negligence claim. The instruction given improperly relieved the plaintiff of the burden of proving necessary elements of a product defect negligence claim and it imposed duties on Cottrell not recognized under Missouri law. (Further, as noted in the following point relied on, the instruction was a roving commission.)

Any one of these instructional errors alone would require a new trial. Instruction 10 is plagued by all of them. If the judgment against Cottrell is not reversed outright

under Points I, II, V, or VI, the judgment should be reversed for a new trial under proper instructions.

Whether the jury was properly instructed is a question of law that is reviewed *de novo*. *Chavez v. Cedar Fair, LP,* 450 S.W.3d 291, 294 (Mo. banc 2014). The Court will vacate a judgment on the basis of an instructional error if that error materially affected the merits of the action. *Id.*

A. MAI 25.09 was the mandatory verdict director.

This is a product liability case with regard to the plaintiff's claims against Cottrell. The plaintiff claims that he was injured as a result of an unreasonably dangerous product designed, manufactured, and sold by Cottrell. Cottrell's only potential duty to the plaintiff existed as a result of its role in the design and manufacture of the trailer that the plaintiff was working with on July 3, 2007. Under Missouri law, this role imposes a duty on Cottrell only with regard to the condition of the product at the time of sale. *See* § 537.760(3)(a), RSMo. The duty regarding the product's condition at the time of sale is contained in and limited by the applicable MAI instructions for product liability claims.

As to Cottrell, the plaintiff pleaded a claim for strict liability design defect, negligent design, and strict liability failure to warn. Missouri law thus required the plaintiff to submit his claims using the approved MAI instruction for those claims, and the correct MAI instructions were used for his two strict liability claims, MAI 25.04 (for his strict liability - product defect claim) and MAI 25.05 (for his strict liability - failure to warn claim). For his negligent design defect product liability claim, however, the plaintiff and the trial court disregarded the requirements of the Missouri Approved

Instructions, and did not use the mandatory MAI instruction for that claim. The trial court's submission of an instruction other than the mandatory MAI instruction for a negligent design defect claim imposed duties on Cottrell beyond those relating to the condition of the product at the time of sale, and requires reversal of the judgment.

MAI 25.09 is the mandatory instruction for a claim of product liability - negligent manufacture, design, or failure to warn as alleged in Count II of the plaintiff's petition. The Committee Comment states, "This instruction is for submission of a negligence theory of product liability."

Instead of proposing an appropriate instruction based on MAI 25.09, the plaintiff improperly submitted an instruction based on MAI 17.02, which appears in the MAI section titled "Verdict Directing - Motor Vehicles." App. at A10. Here is the verdict director used by the trial court at the request of the plaintiff:

Jury Instruction No. 10

> On the claim of plaintiff for personal injury based on negligence of the defendant with regard to the July 3, 2007 accident alleging a broken idler, you must assess a percentage of fault to defendant whether or not plaintiff was partly at fault if you believe:
>
> First, either
>
> (a) defendant failed to review and analyze injury and testing data; or

(b) defendant failed to supply the trailer with alternative vehicle securement systems including straps, wheel chocks, cables, enclosed idlers, a hydraulic tie-down system, a pneumatic tie-down system, or a worm drive tie-down system; or

(c) defendant failed to share industry reports and injury data with plaintiff's employer; or

(d) defendant designed a chain and ratchet system that required excessive force during operation; and

Second, defendant, in any one or more of the respects submitted in paragraph First, was thereby negligent; and

Third, such negligence directly caused or directly contributed to cause damage to plaintiff.

L.F. at 297; App. at A8.

The basis of Instruction 10 is MAI 17.02, which is to be used in a motor vehicle case involving multiple acts of negligence (i.e. "failure to keep a careful lookout," "excessive speed," and driving "on the wrong side of the road") and has no applicability to a product liability negligence case. App. at A10.

Failing to use MAI 25.09 is reversible error. "The law is well-settled that where an MAI instruction applies to the case, the use of such instruction is mandatory." *Syn, Inc. v. Beebe,* 200 S.W.3d 122, 128 (Mo. App. 2006). When an applicable MAI instruction is not used to submit a claim to the jury, prejudicial error will be presumed

unless the instruction's proponent makes it "perfectly clear" that "no prejudice could have resulted from such deviation." *Thomas v. McKeever's Enter. Inc.,* 388 S.W.3d 206, 216 (Mo. App. 2012) (quoting *Abbott v. Mo. Gas Energy,* 375 S.W.3d 104, 109 (Mo. App. 2012)).

The plaintiff's counsel knew the appropriate instruction. This is not an inadvertent selection of the wrong MAI but an apparently calculated decision to avoid the burden of proof under MAI 25.09 and the interplay between a strict liability claim under MAI 25.04 and a negligence claim under MAI 25.09. In a similar recent case against Cottrell under Missouri law, with similar allegations, the plaintiff's counsel appropriately requested MAI 25.09 to submit a product defect negligence claim, and the jury returned a verdict in Cottrell's favor on all counts. *See* L.F. at 410-411. Seeking to avoid a similar result in this case, and with a co-defendant that allegedly altered the product dismissed, the plaintiff's counsel ignored the mandate of MAI. They abandoned MAI 25.09, with its insurmountable burden of proof in this case, in favor of MAI 17.02, which has never been approved for use in a product liability case.

B. Cottrell was prejudiced by the instructional error.

It is impossible for the plaintiff to overcome the presumption of prejudicial error arising from the failure to use MAI 25.09 to submit the plaintiff's product defect negligence claim. Indeed, though it is not Cottrell's burden to prove prejudice, a comparison of MAI 25.09 to MAI 17.02 makes the prejudice from giving the wrong instruction "perfectly clear."

On its face, MAI 25.09 requires a jury to find that the defendant manufactured or designed the product, that the product had a described defect or hazard, and the defendant failed to use ordinary care to design or manufacture the product to be reasonably safe or failed to warn of an alleged defect or hazard. Instruction 10, however, did not require the jury to find that Cottrell designed or manufactured the chain and ratchet system and idler, and did not require that the chain and ratchet system and idler had a defect, or that Cottrell negligently failed to warn about a defect or hazard in those products. L.F. at 297; App. at A8. The giving of an instruction that does not require a jury to find all the elements of a cause of action is obviously prejudicial error. *See Williams,* 742 S.W.2d at 168.

The prejudicial effect of using MAI 17.02 instead of MAI 25.09 is vividly reflected in the verdicts. The plaintiff submitted his product defect strict liability claim using MAI 25.04, the applicable MAI for that claim. The jury ruled against the plaintiff on that claim, assigning zero fault to Cottrell and 100% fault to the plaintiff. As discussed in Point I, negligence claims under Missouri law have a higher threshold of proof than strict liability claims. *Jaurequi v. John Deere Co.,* 971 F. Supp. 416, 431-432 (E.D. Mo. 1997). A product defect negligence claim requires proof of the same elements as a product defect strict liability claim, except with the additional element that the plaintiff must also prove that the defendant was negligent in the design conduct. *Compare* MAI 25.04 and MAI 25.09. A plaintiff who cannot prevail on strict liability claims for defective design or for failure to warn cannot prevail on claims of negligence.

If the jury found that Cottrell was not liable on the plaintiff's product defect strict liability claim, Cottrell could not have been liable on a product defect negligence claim. It found the plaintiff 100% at fault regarding his use of the product for the strict liability design defect claim. Had the jury been properly instructed on the product defect negligence claim using the mandated MAI 25.09, setting out all the elements required by Missouri law, then the verdict for Cottrell on the strict liability count would have necessarily resulted in a verdict for Cottrell on the plaintiff's product defect negligence count, which has the same elements as strict liability plus one more: the defendant's negligence in the design of the product. If one claim requires a plaintiff to prove A, B, and C, and a second claim requires A, B, C, ***and*** D, as is the case here, then if a plaintiff cannot satisfy the first, he or she cannot satisfy the second.

Indeed, had the jury been properly instructed using both MAI 25.04 and MAI 25.09 and returned the same verdicts it did here – for Cottrell on strict liability and for plaintiff on product-defect negligence – the verdicts would have been facially inconsistent, and the jury would have been required to reconcile those verdicts.

By relieving the plaintiff of his burden of proving negligent design or manufacture at the time of sale, or a sale at all, the failure to use MAI 25.09 also obscured the inconsistency between plaintiff's claim against Auto Handling and his claim against Cottrell. As to Cottrell, the plaintiff had to prove that a design or manufacturing defect existed ***at the time Cottrell sold the rig***. But, as the plaintiff highlighted in his motion for new trial as to Auto Handling, he presented evidence that Auto Handling's mechanics had improperly repaired a MIG weld on the rig and in doing so had created, ***after the***

sale, the condition that allegedly caused the plaintiff's injury. L.F. at 425, 430 (arguing "a reasonable inference is that AHC mechanics caused the condition that injured Plaintiff"). Had the jury been properly instructed using MAI 25.09, the plaintiff's evidence in support of his claim against Auto Handling would necessarily negate his claim against Cottrell by proving that Auto Handling's alleged conduct, not Cottrell's alleged negligence, caused the plaintiff's injuries. No reported decisions have been located finding that both a design defect at the time of sale caused an injury ***and*** that a negligent modification or maintenance by someone else after the sale caused the injury.

Although a plaintiff may plead inconsistent theories, he or she cannot submit to the jury two theories, like those against Auto Handling and Cottrell here, that are so inconsistent that proof on one necessarily negates, repudiates, and disproves the other. *Wallace v. Bounds,* 369 S.W.2d 138, 141 (Mo. 1963); *see also Briner v. General Motors Corp.,* 461 S.W.2d 99 (Ky. 1970). Even though the trial court granted a directed verdict as to Auto Handling, the plaintiff presented evidence of a negligent, causative modification post-sale and sought to submit his claims against both Auto Handling and Cottrell, and he continued to argue in his motion for new trial that he proved that Auto Handling's negligence created the condition in the product that caused the plaintiff's injuries. The plaintiff cannot avoid the prohibition against submitting inconsistent claims by ignoring the mandated MAI 25.09 and substituting an improper instruction that relieved plaintiff of the burden of proving all the elements of his claim required by Missouri law.

Because MAI 17.02 was used instead of MAI 25.09, the jury was permitted to return a verdict for the plaintiff on the negligence claim after returning a defense verdict on strict liability, when strict liability is easier to prove. The prejudice resulting from the failure to use MAI 25.09 to instruct the jury could not be clearer. If the judgment against Cottrell is not reversed outright, the judgment should be reversed for a new trial with proper instructions.

C. Instruction 10 misstated the law.

The verdict director submitted for negligent product liability design defect allowed the jury to impose liability on Cottrell for breach of duties that are not recognized under Missouri law, and were not pleaded or proven. Omitting required elements for a product defect negligence claim is enough to set aside the jury verdict, but Instruction 10 compounded the prejudice by also erroneously imposing on Cottrell duties not recognized under Missouri law. Instruction 10 permitted the jury to find Cottrell liable for failing "to review and analyze injury and testing data" or failing "to share industry reports and injury data with" the plaintiff's employer, not limited to the product at issue, not requiring a finding of defect in the product, and not limited as to time. L.F. at 297; App. at A8.

Under Missouri law, the only tort duties recognized for manufacturers to users relate to the product at the time of sale and conduct at or before the time of sale. *See Stevens v. Durbin-Durco, Inc.,* 377 S.W.2d 343, 346 (Mo. App. 1964); *Peters v. General Motors Corp.,* 200 S.W.3d 1 (Mo. App. 2006). But Instruction 10 erroneously failed to require that Cottrell's allegedly negligent conduct relate to the allegedly defective chain

and ratchet system and idler at issue, or even to the rig at issue. Subparagraphs (a) and (c) do not refer to any product at all. This is contrary to Missouri law.

In addition, by failing to require that any alleged failure to "share" or "analyze" data occurred before the product was sold, Instruction 10 improperly imposed duties on Cottrell after the date of sale. Except in narrow contexts not present here, such as pharmaceutical products, Missouri law does not impose post-manufacture or post-sale duties on a defendant, as Instruction 10 allowed the jury to do. *See Horstmyer v. Black & Decker, (U.S.), Inc.,* 151 F.3d 765 (8th Cir. 1998) (applying Missouri law); *Morrison v. Kubota Tractor Corp.,* 891 S.W.2d 422, 429 (Mo. App. 1994).

The trial court sustained Cottrell's objection when the plaintiff asked his expert, Dr. Micklow, whether manufacturers' providing "end users" injury information was "reasonable." Tr. 760. Notwithstanding the court properly sustaining this objection, Instruction 10 then erroneously imposed an amorphous duty to "share" information with the plaintiff's employer (a non-party), *after the sale,* a duty that the plaintiff never pleaded, on which the plaintiff did not introduce evidence, and which Missouri law does not recognize.

It was prejudicial error to give an instruction submitting a claim that the plaintiff did not plead. *See In re Estate of Schwartze,* 998 S.W.2d 596, 599 (Mo. App. 1999); *Bradley v. Waste Mgmt. of Mo., Inc.,* 810 S.W.2d 525, 528 (Mo. App. 1991). And it also was prejudicial error to allow the jury to find Cottrell liable for failing to share information with the plaintiff's employer, without any requirement that the information be related to the product at issue and that the conduct resulted in a defective product.

Durbin-Durco, 377 S.W.2d at 346. It obviously is prejudicial error to give an instruction that imposes on the defendant a duty not recognized by Missouri law. The instruction thus places post-sale duties on manufacturers, contrary to Missouri law, to "share" unidentified "injury data" with customers and others for eternity. Ford, for example, would be required in 2015 to provide "injury data," regardless of the cause of the injuries in the data or when or how they occurred, to an employer using a fleet of 1975 F-150 pickups.

In addition to misstating the law and imposing duties not recognized, Instruction 10 was also erroneous because it was not supported by the record. For example, there was no evidence supporting any claim that Cottrell breached a duty by failing to analyze or share any relevant information regarding the products at issue or that any such alleged failure caused the plaintiff's injury. It is prejudicial error to give an instruction that was not supported by the evidence. *See First Bank v. Fischer & Frichtel, Inc.,* 364 S.W.3d 216, 219 (Mo. banc 2012) (court reviews instruction to determine whether it follows the substantive law and is supported by the evidence); *Newell Rubbermaid, Inc. v. Efficient Solutions, Inc.,* 252 S.W.3d 164, 174 (Mo. App. 2007) (same).

To any extent that the plaintiff may argue that an instruction based on MAI 17.02 was appropriate because he was claiming that Cottrell was negligent both in its design and/or manufacture of the product and in its failure to provide necessary information about risks or hazards associated with the product, nothing precludes using MAI 25.09 to submit a claim based on multiple acts of negligence. On its face, MAI 25.09 contemplates exactly that possibility. The problem that MAI 25.09 posed for the plaintiff

was not that it prohibited him from submitting multiple acts of negligence, but that it required him to prove elements that he could not prove, as the strict liability verdict attests. Instruction 10 relieved the plaintiff of the burden of proving all the elements of a product defect negligent design and manufacture claim and failure to warn claim, substituting instead vague duties not related to the product and not imposed by Missouri law. It was error to give the instruction, and that error was prejudicial.

IV. The trial court erred in overruling Cottrell's objection to Instruction 10, in entering judgment in favor of the plaintiff for negligent product liability, and in denying a new trial because the trial court committed reversible instructional error in failing to use the required verdict director (MAI 25.09) and instead granting the plaintiff's request to use an improper verdict director (based on MAI 17.02) that constituted a roving commission, in that the verdict director failed to adequately specify the conduct on which the jury could base a finding of liability, failed to set forth the specific conduct that would render the defendant liable, and failed to identify a relevant time period, but rather made vague references to whether Cottrell "failed to review and analyze injury and testing data" or "failed to share industry reports and injury data."

In addition to being an improper deviation from MAI mandatory requirements and misstating Missouri law, Instruction 10 also was a roving commission because it failed to adequately specify the conduct on which the jury could base a finding of liability, and because it failed to specify a time period during which any allegedly negligent conduct occurred.

Whether the jury was properly instructed is a question of law that is reviewed de novo. *Chavez v. Cedar Fair, LP,* 450 S.W.3d 291, 294 (Mo. banc 2014). The Court will vacate a judgment on the basis of an instructional error if that error materially affected the merits of the action. *Id.*

Prejudicial and reversible error occurs when an instruction gives the jury a roving commission. *McNeill v. City of Kansas City,* 372 S.W.3d 906, 909 (Mo. App. 2012).

"To avoid a roving commission, the trial court must instruct the jurors regarding the specific conduct that renders the defendant liable." *Id.* at 910; *Mast v. Surgical Servs. of Sedalia, L.L.C.,* 107 S.W.3d 360, 366 (Mo. App. 2003) (*overruled on other grounds by Marion v. Marcus,* 199 S.W.3d 887 (Mo. App. 2006))); *Gomez v. Constr. Design, Inc.,* 126 S.W.3d 366, 371 (Mo. banc 2004) (*overruled on other grounds by Badahman v. Catering St. Louis*, 395 S.W.3d 29 (Mo. banc 2013); *Centerre Bank of Kansas City v. Angle,* 976 S.W.2d 608, 617 (Mo. App. 1998). An instruction may also be considered a roving commission when it is too general or it is submitted in a broad, abstract way without any limitation to the facts and the law developed in the case. *Angle,* 976 S.W.2d at 617. The instruction must not leave the jury to "roam freely through the evidence and choose any facts which suit its fancy or its perception of logic to impose liability." *Klotz v. St. Anthony's Medical Ctr.,* 311 S.W.3d 752, 766 (Mo. banc 2010).

Here, Instruction 10 permitted the jury to impose liability if it found Cottrell "failed to review and analyze injury and testing data" or "failed to share industry reports and injury data." L.F. at 297. The instruction does not tell the jury what any such "reports" and "data" must relate to (much less require that they relate to the idler, ratchet or the rig in question).

Even if Cottrell had a duty to "analyze" and "share" data and reports, the instruction needed to contain language that defined or explained more specifically the data and reports to which the instruction referred, at least to ensure that the jury knew it was limited to considering information relating to the product at issue. Without the necessary specificity and guidance, the jurors were free to roam freely through the

evidence and decide what they thought might be the type of "reports" or "data" that Cottrell owed a duty to share, whether or not it related to the idler, ratchet, or the rig, over an impermissibly undefined period of time. Instruction 10 is the epitome of a roving commission requiring reversal.

V. The trial court erred in denying Cottrell's motion for directed verdict, in entering judgment in favor of the plaintiff, and in denying judgment notwithstanding the verdict for negligent product liability and failure to warn because the undisputed post-sale alteration of the product defeats the plaintiff's claims, in that the defectiveness of a product is measured as of the time the product enters the stream of commerce so that a manufacturer can only be liable for defective products if the product reaches the user or consumer without substantial change in the condition in which it is sold and the evidence in this case was undisputed that the product was materially altered after sale in the form of a repair with a weld that the plaintiff's evidence claimed was negligent and dangerous.

The plaintiff's entire theory in this case is that he was injured because a weld broke, releasing tension. The undisputed evidence shows that the weld at issue was not part of the rig when Cottrell sold it. The allegations and evidence, including testimony from the plaintiff's expert, Dr. Micklow, show that the defective weld was done by someone else, not by Cottrell. This product alteration by a party other than Cottrell makes it improper to enter judgment against Cottrell on the plaintiff's negligence and failure-to-warn claims.

Whether the plaintiff made a submissible case is a question of law that is reviewed de novo. *Ellison v. Fry,* 437 S.W.3d 762, 768 (Mo. banc 2014). To determine whether the evidence was sufficient to support the jury's verdict, an appellate court views the evidence in the light most favorable to the verdict. *Id.*

The plaintiff failed to make a submissible case against Cottrell on the negligent design defect and failure to warn claims because the product was admittedly modified with a defective weld after Cottrell sold it. The plaintiff admitted that the modification made the product dangerous and caused his accident. ***Indeed, this was the entire basis of his claim against Auto Handling*** (as to which the trial court granted a directed verdict). This case highlights a fatal inconsistency in suing both a manufacturer for design defect at the time of sale that allegedly caused the injury and a separate maintenance company for negligently modifying the product after the sale, allegedly causing the same injury.

The defectiveness of a product is measured as of the time the product enters the stream of commerce. *Gomez v. Clark Equipment Co.,* 743 S.W.2d 429, 432 (Mo. App. 1987). When a plaintiff seeks recovery for strict liability in tort, a manufacturer can only be liable for defective products if the product reaches the user or consumer without substantial change in the condition in which it is sold. *Hill v. General Motors Corp.,* 637 S.W.2d 382, 384 (Mo. App. 1982). The defect must have existed at the time of manufacture. *Id.* Missouri does not impose a duty on the part of a manufacturer to anticipate or warn of dangerous alterations to its product. *Id.* at 385. A plaintiff must produce evidence that neither he nor any third person has made alterations to the product that would create a defect that could be the proximate cause of the damages incurred. *Jasinski v. Ford Motor Co.,* 824 S.W.2d 454, 455 (Mo. App. 1992).

Similarly, as to the negligence claim, MAI 25.09 permits liability only for negligence in the design, manufacture, or warnings of the product. These must occur prior to sale, as the design and manufacture are complete by that time, and there is no

post-sale duty to warn as to an industrial product such as this. *See Horstmyer v. Black & Decker, (U.S.), Inc.,* 151 F.3d 765 (8th Cir. 1998); *Morrison v. Kubota Tractor Corp.,* 891 S.W.2d 422, 429 (Mo. App. 1994).

The plaintiff's negligent design-defect claim and failure to warn claim must fail in this case because his own pleading and his own expert testimony demonstrated affirmatively that the product was modified with a bad weld or repair after it left Cottrell's hands. Dr. Micklow, the plaintiff's expert, conceded that the repaired idler lacked a weld on the bottom, which he testified was the "worst thing" you could do because "that's where idlers can fail." Tr. 781. Dr. Micklow acknowledged that "the force an idler can withstand is greatly deteriorated if you have poor weld quality." The plaintiff's evidence thus showed that the idler had been repaired after Cottrell sold the rig in 2004, that the weld used to repair the rig had the "worst thing" a weld repair can have, and it caused the idler to fail. Tr. at 673, 675, 761, 763-764, 781. Tr. 795. Dr. Micklow also could not state that the repaired idler that failed was even a Cottrell idler. Tr. 786. ("Q: and you can't say with any degree of reasonable degree of engineering certainty who made that idler on the Johnson rig, right. A: Correct.").

This Court has explained that a fundamental principle of strict liability under Missouri law is that "strict tort liability is not, nor was it ever intended to be, an enveloping net of absolute liability." *Nesselrode v. Executive Beechcraft, Inc.,* 707 S.W.2d 371, 375 (Mo. banc 1986). A manufacturer "is not intended to be an insurer for any and all injuries caused by its products." *Id.* A manufacturer should not be held

absolutely and automatically liable in every instance in which its product causes an injury. *Hopfer v. Neenah Foundry, Inc.,* 477 S.W.3d 116, 125 (Mo. App. 2015).

Thus, for example, a manufacturer that makes a product under contract pursuant to the design of another party cannot be held liable for any defect in the design -- to hold a contractor liable for defective design "would amount to holding a non-designer liable for design defect. Logic forbids any such result." *Bloemer v. Art Welding Co., Inc.,* 884 S.W.2d 55, 59 (Mo. App. 1994).

This case is not logically distinguishable. The plaintiff claimed that AHC performed the repairs, including the allegedly inadequate weld, after Cottrell sold the rig in 2004. L.F. at 425-426. His claim and his evidence were that this bad weld or repair caused his injury. Indeed, this is the basis of his motion for a new trial as to Auto Handling as well as his appeal in this Court.

The plaintiff did not attempt to prove that Cottrell was responsible for the repair or the defective weld. These facts preclude recovery against Cottrell under any theory. Thus, Cottrell was entitled to JNOV on both the negligence and failure to warn claims.

The trial court granted a directed verdict to Auto Handling because, while the plaintiff's own evidence and theory of the case was that his injury was caused by a defective weld after the rig was sold, the plaintiff presented no proof of who was responsible for the defective weld that he blamed for causing his injuries. It is undisputed that Cottrell was not responsible for the weld. The plaintiff's failure of proof warranted JNOV for Cottrell.

VI. The plaintiff's cross appeal Point II should be denied.

Without pointing to any particular evidentiary ruling, and without explaining which particular evidence he believes was improperly excluded, the plaintiff claims that the trial court abused its broad discretion in excluding some unspecified evidence of purportedly similar accidents that did not involve a broken idler like the one at issue in this case. This point should be rejected.

The decision of the trial court to admit or exclude evidence is reviewed for an abuse of its discretion. *Peters v. General Motors Corp.,* 200 S.W.3d 1, 9 (Mo. App. 2006). A trial court only abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration. *Id.* The trial court's evidentiary ruling will be affirmed unless there is a substantial or glaring injustice. *Id.* In order to warrant reversal, the trial court's erroneous admission or exclusion of evidence must have been prejudicial and materially affected the merits of the action. *Id.*

In products liability cases, evidence of an accident similar in nature to that which injured the plaintiff can be admissible, provided the evidence is relevant and sufficiently similar to the injury-causing accident so as to outweigh concerns of undue prejudice and confusion of the issues. *Id.* at 9-10. To be sufficiently similar, each occurrence must: (1) be of like character; (2) occur under substantially the same circumstances; and (3) result from the same cause as that alleged to have caused the accident in question. *Id.* at 10. Substantial similarity must include similarity of products, similarity of accident

circumstances, and similarity of alleged failure mode. *See Hess v. Chicago Rock Island & Pac. R.R.,* 479 S.W.2d 425, 431 (Mo. 1972); *Thornton v. Gray Automotive Parts Co.,* 62 S.W.3d 575, 583 (Mo. App. 2001).

Under this standard, references to or evidence of other incidents not substantially similar to the subject accident or injuries at issue are properly excluded. *See Peters,* 200 S.W.3d at 9-10.

The plaintiff declares that the trial court "excluded hundreds of injury reports." Appellant's Substitute Brief at 66. According to the plaintiff, this amounted to "entire boxes worth of incidents." Appellant's Substitute Brief at 67.

The plaintiff does not point to any particular incident that was excluded by the trial court, and he does not make any showing that any excluded incidents were substantially similar to the alleged incident in this case. He does not point to any offer of proof showing the required similarity of products, similarity of accident circumstances, and similarity of alleged failure mode. There is certainly no showing of the specificity required to claim an abuse of discretion by the trial court.

The plaintiff's cross appeal Point II should be denied.

CONCLUSION

For the foregoing reasons, the judgment against Cottrell should be reversed. In the alternative, the judgment should be reversed and the cause remanded to the circuit court.

Respectfully submitted,

/s/ Jeffery T. McPherson

William Ray Price, Jr. #29142
Thomas B. Weaver #29176
Jeffery T. McPherson #42825
ARMSTRONG TEASDALE LLP
7700 Forsyth Blvd., Suite 1800
St. Louis, Missouri 63105
314.621.5070 FAX 314.621.5065
wprice@armstrongteasdale.com
tweaver@armstrongteasdale.com
jmcpherson@armstrongteasdale.com

ATTORNEYS FOR
RESPONDENT/CROSS-APPELLANT
COTTRELL, INC.

CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice system on November 10, 2016.

This brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 13,108, except the cover, the signature block, the appendix, and this certificate.

The electronic copies of this brief were scanned for viruses and found virus-free through the Symantec anti-virus program.

/s/ Jeffery T. McPherson