IN THE SUPREME COURT OF MISSOURI

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

SUBSTITUTE BRIEF OF PLAINTIFF ROBERT L. JOHNSON

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

ARMBRUSTER, DRIPPS,
WINTERSCHEIDT & BLOTEVOGEL

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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. Here, Rule 83.04 confers jurisdiction. The Court of Appeals issued its decision reversing the judgment of the circuit court and remanding for a new trial on April 12, 2016. Plaintiff/Respondent/Cross-Appellant Robert Johnson (hereinafter "Plaintiff" or "Johnson") filed timely motions to transfer and for rehearing on April 27, 2016. Those motions were denied on June 8, 2016. Plaintiff filed a timely application for transfer to this Court pursuant to Rule 83.04 on June 23, 2016. This Court sustained Plaintiff's application on August 23, 2016.

The written judgment was filed September 23, 2013. LF317-318. On that date, following a Plaintiff's verdict on two separate theories (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. Cottrell moved for judgment notwithstanding the verdict. *Id.* at 3-4. The trial court denied Cottrell's motion. *Id.* at 4.

Both Cottrell and Johnson filed written post-trial motions on October 23, 2013. LF 388-457. Those motions were denied on January 16, 2014. LF 721-722. Cottrell's notice of appeal was filed January 27, 2014. LF 724-766. Johnson filed his notice of cross-appeal on February 6, 2014. LF 767.

Statement of Facts

A. The Incident

Plaintiff began working as a car hauler in 1976. Transcript 1140. He trained other drivers in correct tie-down procedures. Transcript 1141-1143.

On July 3, 2007, Plaintiff was loading and unloading passenger vehicles onto a 2003 Cottrell automobile transport trailer ("rig"). Transcript 489, 1150; LF 34. Plaintiff was tightening a chain with a bar when there was a sudden release of tension, causing him to fall to the ground and sustain injuries. Transcript 1141-1157. Plaintiff performed his tasks the same way that he had throughout his thirty-year career. *Id.*

Plaintiff determined that a steel part welded to the rig, known as an "idler" had broken. Transcript 1156-1160. Plaintiff had not previously seen an idler that 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 evidence showed there had been an attempt to repair the weld on the idler, but the repair had been inadequate, contributing to the failure of the idler. Transcript 673, 675, 761, 763-764, 781.

B. Plaintiff's Pleadings

Plaintiffs Robert and Brenda Johnson filed their petition on May 6, 2010 against Auto Handling Corporation ("AHC"), a company that performed maintenance on a Cottrell automobile transport trailer or "rig." LF 16.

On October 26, 2010, the trial court granted leave to file an amended petition that removed Brenda Johnson as a plaintiff and added claims against Cottrell, Inc., 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, the strict liability count directed at Cottrell, focused on "the rig," and was not limited to the idler:

(a) the rig lacked reasonably safe vehicle securement systems;

(b) the rig was supplied with idlers, hooks and ratchet systems incapable of preventing chain slippage and/or snagging inherent in the foreseeable use of the rig;

(c) the rig lacked adequate warnings to sufficiently warn plaintiff and others similarly situated that the ratchets, hooks, idlers and chains supplied with the rig would subject users to an unreasonable risk of injury during reasonably foreseeable use and/or expected use of the rig;

(d) the rig lacked adequate warnings to sufficiently warn plaintiff and others similarly situated of one or more of the defects herein;

(e) the rig was not accompanied by a non-manual vehicle securement system, reduced gear ratchet, cables straps, enclosed idlers, wheel chocks or wheel clamps;

(f) the rig was equipped with vehicle securement systems unreasonably prone to breakage and sudden releases, and/or which required excessive force to operate;

(g) the rig was not properly designed or manufactured so that the idlers would remain in place.

Appendix A-10, LF 35, par. 9

Count II, the negligence count directed at Cottrell, focused on Cottrell's conduct, and was not limited to "the rig" or to the idler:

9. That based upon the foregoing, defendant owed a duty to plaintiff and others similarly situated to design, lease, distribute, supply, test and manufacture rigs with due care for the safety of plaintiff and others similarly situated.

10. That in violation of the aforesaid duty, defendant, committed one or more of the following negligent acts or omissions, to-wit:

(a) failed to review and analyze available injury and testing data available to defendants and the industry;

(b) failed to adequately test the rig to ascertain whether the vehicle securement systems, hooks and idlers on the rig were reasonably safe for use during the foreseeable and/or intended use of the rig;

(c) failed to modify the design when defendant knew or should have known that the ratchets were causing excessive numbers of

injuries to users;

(d) failed to supply adequate warnings to sufficiently warn plaintiffs and others similarly situated;

(e) failed to supply the rig with alternative vehicle securement systems including hydraulic, straps, cables, gear reduction, enclosed idlers, wheel clamps, cables, electric or pneumatics;

(f) failed to test, or allow for the use of alternative securement systems including non-manual systems;

(g) failed to approve for use alternative vehicle securement systems;

(h) failed to supply the rig with a non-manual system, which would allow plaintiffs to perform the tie-down operation in a safe manner;

(i) failed to inspect and/or test the rig when defendant knew or should have known improperly designed or improperly installed idlers would likely lead to injury to users;

(j) failed to access or share industry reports and injury data;

(k) destroyed or allowed for the destruction of injury data and/or industry reports and patents;

(l) failed to advise those who repair or maintain the rigs regarding proper sources and/or methods of acquiring and installing replacement parts.

Appendix A12-13, LF 37-38

Count IV, which sought punitive damages against Cottrell, was also not limited to "the rig" or the specific idler that broke:

> 14. That defendant Cottrell, Inc. was aware that plaintiff and others similarly situated were exposed to unreasonable risks of severe bodily injury in the use of the vehicle securement systems owing to one or more of the unsafe conditions described in Counts I-III of this Complaint. In that regard, Cottrell was aware of many prior instances where others were injured during the use of said systems including incidents where others had sued defendant claiming severe injuries while performing tasks similar to the plaintiff herein.
>
> 15. That notwithstanding the above and in conscious disregard of the known risks to which plaintiff and others similarly situated were subjected, defendant Cottrell failed to modify the vehicle securement systems design, continued to provide unreasonably dangerous and defective vehicle securement systems and failed to provide good and sufficient warnings or instructions with regards to the dangers inherent in the use of the securement systems with the aforesaid conditions contained therein. Such actions and inactions by the defendant were motivated by defendant's cost savings attempts for the benefit of defendant and its affiliates and owners. As such defendant placed profits above the safety of the users of the above described vehicle securement system, including the plaintiff

Robert L. Johnson and therefore aggravated or punitive damages are warranted against the defendant in order to punish said defendant and/or to deter such conduct in the future.

Appendix A15, LF 40.

Plaintiff did not bring any strict liability counts against AHC. Appendix A16-19, LF41-44.

Count V, the negligence count against AHC, referred to but was not limited to "the rig," nor was it limited to the idler:

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, which sought punitive damages against AHC, was also not limited to "the rig" or the idler:

11. That at all times material hereto defendant knew of the dangers and considerable quantities of injuries to drivers associated with the use of the ratchet system in issue. Said knowledge was available to and known by defendant's officers and directors. Notwithstanding such knowledge, defendant engaged in the aforesaid behavior out of conscious disregard for safety and to increase the profits of defendant and its affiliated corporations/owners. Defendant thereby placed profits above safety.

Appendix A19, LF 44.

C. Evidence Presented at Trial

Cottrell manufactured the rig in 2003. Transcript 687, 837, 1150. Cottrell submitted the sales invoice. Transcript 1942.

1. The Chain and Ratchet System

Plaintiff's expert, Dr. Gerald Micklow, testified that his calculations and studies from 1968 through 1999 established that the forces required to secure vehicles using Cottrell's chain and ratchet system exceed safe limits. Transcript 585-590, 750-752.

Dr. Micklow relied on numerous studies from 1968 through 1999 evaluating chain and ratchet systems similar "from an engineering standpoint" to the system used here. Transcript 608-612, 621-622, 625-627, 632-633. These reports indicated these systems created a significant risk of injury to users because of the excessive forces they required, and strongly recommended alternative, safer systems that were technologically feasible long before 2003, including hydraulic systems. Transcript 623-625, 659-662, 689-690.

Dr. 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.

Peter Terzian testified during Cottrell's case that his company (Delavan) commissioned studies in the early 1990s to obtain injury and testing data regarding the chain and ratchet system, which indicated a need to improve the system's design to protect drivers and components. Transcript 1708-1709, 1712, 1716, 1720, 1763.

Cottrell applied for a patent for a strap system before Plaintiff was injured. Transcript 683. Straps are now widely used. *Id.* Strap systems are substantially safer and

require 50-70% less force because they do not require compressing the suspension system on the vehicle, but instead require putting a strap over the tire. Transcript 684.

Cottrell applied for a patent for a power securement system, which would require no exertion by the operator, before 2003. Transcript 684-685.

Cottrell applied for a patent for a worm gear tie-down system in 1979 due to the excessive forces required by the chain and ratchet system. Transcript 1060-1063.

John Street, a former car-hauler, testified that alternative systems, including straps, cables, and wheel clamps, were used at the Wentzville, Missouri terminal "[y]ears ago." Transcript 982. His son drives out of Wentzville and exclusively uses straps, which Street considers a much safer design. Transcript 1017-1019.

Jim Linley, a former car-hauler, testified hydraulic wheel chocks, pneumatic systems, and straps were in use before he retired in 2001. Transcript 877-880, 895-899.

Larry Lockhart, a car-hauler, began using Cottrell rigs in 1996. Transcript 1511, 1522. He testified that strap systems and other alternatives required significantly less force. Transcript 1522-1524.

Terzian acknowledged that by 1994, Delavan believed strap systems would become the industry norm within a few years. Transcript 1755-1757.

2. The Idler System

Dr. 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.

Dr. Micklow testified that Cottrell's open idler design, with attachments only on one side, would cause idler failure to begin on the bottom. Transcript 603-605. The idler failure here began on the bottom. Transcript 672-676.

Photographs indicated an attempt was made to repair Cottrell's idler with an arc welder; Cottrell's original welds were MIG welds, which did not give sufficient penetration to secure the component. *Id.* During Dr. Micklow's deposition, after viewing higher-quality photographs, Dr. Micklow realized the original weld was a MIG weld, not an arc weld. Transcript 774-779, 837-838.

Dr. Micklow testified that an enclosed idler design, with attachments on two sides, would allow the idlers to withstand up to eight times as much force. Transcript 605-607. He has never seen idler failure with this alternative design. Transcript 657. Cottrell could have used the alternative idler design in 2003; if it had, the chances of this accident occurring would have been nearly eliminated. Transcript 690-691.

Dr. Micklow cited the sale of 55,000 replacement idlers by Cottrell over five years as further evidence of the flaw with Cottrell's design. Transcript, 580, 622-623, 840-841. He has testified in three other idler failure cases, and he discussed ten other injury reports involving broken idlers prior to 2003. Transcript 754-759.

Prior to 2001, the trailers at Wentzville had enclosed idlers. Transcript 986, 1021. Street has never seen a broken enclosed idler. Transcript 986.

Mark Graham, a former car-hauler, was injured on two occasions where an idler on a Cottrell rig broke while he was exerting the typical amount of force required by the Cottrell system; it was "common" for the idlers to break. Transcript 1439-1444.

3. Causes of the Incident That Injured Plaintiff

Dr. Micklow testified the starting point for the idler failure and resulting injury was the excessive force required by Cottrell's system, as originally designed. Transcript 752-753, 760-761, 829-830, 834, 837, 839. Cottrell's improper design caused operator injuries and component failure. *Id.*

Dr. Micklow testified that Cottrell's improper design of the idler, and defects with the original Cottrell MIG weld, were contributing causes to the injury, in addition to the excessive forces required by the Cottrell chain and ratchet system. Transcript 761-763. He identified these as "visible engineering defects." *Id.*

Dr. 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. A better repair would have increased the forces the idler could withstand, but it would not have put the system within required force levels. *Id.*

Cottrell's expert contended there was no way anyone could tell what caused the idler to fail, and that Dr. Micklow's opinion that a negligent repair contributed to the accident was invalid because he was basing it solely on photographs, rather than an inspection of the broken idler. Transcript 1865-1867.

4. Cottrell's Review, Analysis and Sharing of Injury Reports and Data

Dr. Micklow testified that a responsible product manufacturer would attempt to learn about injuries caused by its products. Transcript 759-760.

Dr. Micklow testified that concerns with injuries caused by the chain and ratchet system were well-known within the industry. Transcript 679. All of the information on which he relied regarding the dangers of the system was available to Cottrell and others in the industry well before 2003. Transcript 688, 752.

The jury heard 1999 and 2004 testimony from and about Cottrell executives indicating Cottrell was aware of the various reports dating back to 1968 regarding the dangers of the chain and ratchet system, but did not analyze or share them; furthermore, Cottrell made no effort to obtain injury and testing data relating to this system. Transcript 1054-1056, 1085-1086, 1128-1130, 1138, 1569-1575, 1577-1581, 1713.

5. Evidence Regarding Plaintiff's Failure to Warn Theories

Plaintiff inspected the rig on July 3, 2007, before the incident, but he had no idea the idler was damaged. Transcript 1150-1151.

Plaintiff testified there was no warning from AHC or Cottrell advising him not to use idlers in the location of the idler on which he was injured. Transcript 1154. After his incident, once he realized the idler was broken, he was able to safely secure the vehicle using a different idler. Transcript 1161-1162.

Plaintiff did not realize the chain and ratchet system was dangerous until after he was injured. Transcript 1218. He had not seen an idler bent up or twisted prior to that date. *Id.* Before 2011, he was not aware of other persons being injured due to a broken idler. Transcript 1221.

Cottrell claimed the rig was supposed to have two warning decals, both referring the reader to the rig's owner's manual, and one warning not to over-tighten the chains

while loading. Transcript 1859-1861; Exhibit 169; Exhibit 170. Its expert testified she inspected the rig, and it contained two decals referring users to the owner's manual. Transcript 1859-1861.

But Plaintiff testified unequivocally that the owner's manual was not in his rig, and he was never given the owner's manual. Transcript 1147-1148, 1253-1254, 1256-1257. He testified that as a result, he did not read it. Transcript 1256 ("No, I did not.").

Plaintiff testified he was not sure whether decals were on this rig, or whether he had read them. "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." Transcript 1255. He added: "You know, I don't know. I can't say I did, I can't say I didn't." Transcript 1255-1256. Below, Cottrell claimed, "the plaintiff stated affirmatively that he did not read it," (Aplt. Br. 4), but the "it" he was referring to was the owner's manual, not the decal. Transcript 1256.

Elwood Feldman wrote the owner's manual, which contains the statement, "do not overtighten chains." Transcript 1121-1123. Feldman testified in 1994 that he could not explain what that phrase meant. Transcript 1124-1127.

Plaintiff testified he never overtightened the vehicles. Transcript 1145, 1148-1149. Plaintiff did not know what the authors meant by "overtighten," but he did not believe he overtightened on July 3, 2007. Transcript 1400-1401. Plaintiff testified he knew what he needed to know in order to drive auto transport trailers on the highways (as opposed to securing vehicles). Transcript 1400.

Larry Lockhart, who had worked on Cottrell rigs, testified there were no warnings on the Cottrell rigs. Transcript 1525. He was never provided a Cottrell manual. *Id.*

Dr. Sandra Metzler, Cottrell's expert, testified vehicle suspensions only needed to be compressed one and a half to two inches. Transcript 1840. She testified the force levels required to achieve that compression were 110 pounds, and were reasonably safe. Transcript 1850-1851. She testified that all of the other reports from 1968 to 1999, showing the required force levels exceeded 200 pounds, were caused by the test subjects "overtightening" beyond the suspension. Transcript 1915-1919.

Plaintiff testified he was never advised to compress no more than two inches, and that this was contrary to his training. Transcript 2015-2016. Metzler acknowledged a GM manual did not contain this recommendation. Transcript 1934.

Metzler agreed Cottrell should warn users of the risk of idlers breaking if breaking is reasonably foreseeable. Transcript 1906. She subsequently admitted warnings of idler failure should be given because idlers inevitably break, and that no warnings specific to idler failure were given. Transcript 1912-1913.

6. Additional Testimony Pertaining to AHC

In AHC's opening statement, its attorney admitted that AHC was the wholly-owned subsidiary of Plaintiff's employer, and that AHC employed the mechanics at the Wentzville, Missouri, Oklahoma City, Oklahoma, and Shreveport, Louisiana terminals. Transcript 549-550. *See also* Transcript 1161. Plaintiff obtained the rig from Oklahoma City in 2004. Transcript 1155. It was serviced by AHC mechanics at those terminals at least 18 times between 2004 and 2007. Cottrell's Trial Exhibit 35, bate-stamped pages JCT-RJ-163, 174, 175, 183, 200, 207, 209, 212, 215, 230, 232-236, 240-242.

John Street, who had the same employer as Plaintiff, and was thus familiar with the AHC mechanics, testified car-haulers relied on the AHC mechanics, who had pits underneath ground level, to inspect idlers on the bottom of rigs, to discover any defects. Transcript 1022-1024. The mechanics did regular inspections. *Id.* Lockhart testified the mechanics were relied on to properly maintain all components of the rig. Transcript 1558.

Street testified that car-haulers could not identify any defects with idlers on the bottom. *Id.* Plaintiff testified it was "impossible" to identify defects with such idlers. Transcript 1146-1147. Plaintiff testified that after he was injured and saw the idler was broken, he secured the pick-up truck differently. Transcript 1161-1162.

Street saw an "enormous amount" of Cottrell idlers on trailers in Wentzville that were broken or repaired. Transcript 971, 1020. Street was injured at Wentzville due to a broken idler, and he reported the injury to Plaintiff's employer. Transcript 972. This was one of several Cottrell idlers that broke on his rigs. *Id.*

Street testified that the AHC mechanics regularly replaced broken Cottrell idlers with shiny hydraulic cylinders that were put into a square housing. Transcript 974-981.

Dr. Micklow has testified in other cases involving injuries to other Jack Cooper drivers resulting from broken idlers. Transcript 828-829.

AHC or Plaintiff's employer did all maintenance on the rig. Transcript 1159-1160.

Dr. Micklow testified the maintenance records did not show any repair to the idler. Transcript 827. Plaintiff testified there were occasions where AHC did not create paperwork documenting its work. Transcript 1160-1161. He testified that if there were undocumented repairs, they would most likely have been done by AHC. *Id.*

Plaintiff described a 31-page gap in the maintenance records. Transcript 1426-1428; Exhibit 35.

D. Rulings During Trial

1. Directed Verdict for AHC

The trial court directed a verdict in favor of AHC, stating, "I don't think that the evidence presented by the plaintiff is sufficient in regard to defendant Auto Handling." Transcript 1627-1628.

2. Exclusion of Evidence Regarding Other Accidents Involving the Chain and Ratchet System That Did Not Involve a Broken Idler

The trial court precluded Plaintiff from putting in evidence of other accidents involving the chain and ratchet system that did not involve a broken idler. Transcript 733-735, 748. The trial court stated, "my ruling is that the accident reports of other incidents involving the idler the witness may talk about, but not all of the others." Transcript 734. As a result, the jury did not hear about "thousands" of these incidents (Transcript 740), but instead heard about ten (10) incidents involving idlers. Transcript 737.

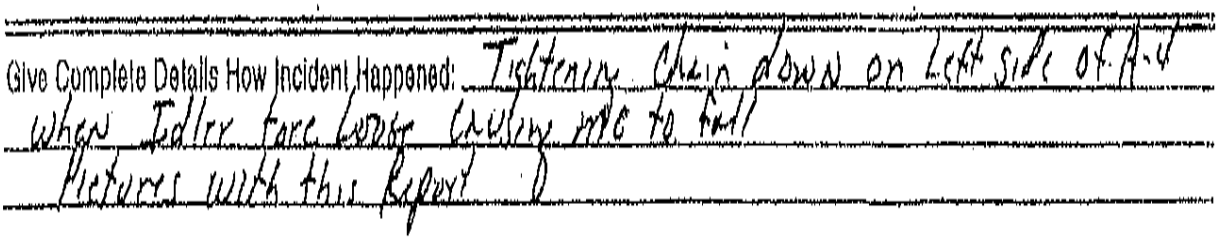
Plaintiff argued these rulings excluded evidence relevant to Plaintiff's allegations and prejudiced Plaintiff's ability to obtain punitive damages against Cottrell, and Plaintiff made a detailed offer of proof, which was overruled. Transcript 714-748.

In that offer, Dr. Micklow testified he found these reports to be reliable and useful in assessing the safety of Cottrell's chain and ratchet system, and that he and engineers such as himself typically relied on these reports. Transcript 742-743, 746-747. Dr. Micklow testified, "I have three or four or five boxes of injury reports filled completely,

and so I would have to say on the order of thousands." Transcript 740. He testified he found these records substantially similar to the instant occurrence. Transcript 740-743, 747. He testified the records supported allegations that the rig lacked reasonably safe vehicle securement systems, that these systems were were unreasonably prone to breakage and sudden releases, that they required excessive forces to operate, and that Cottrell knew or should have known the system was dangerous and causing excessive numbers of injuries. Transcript 743-746.

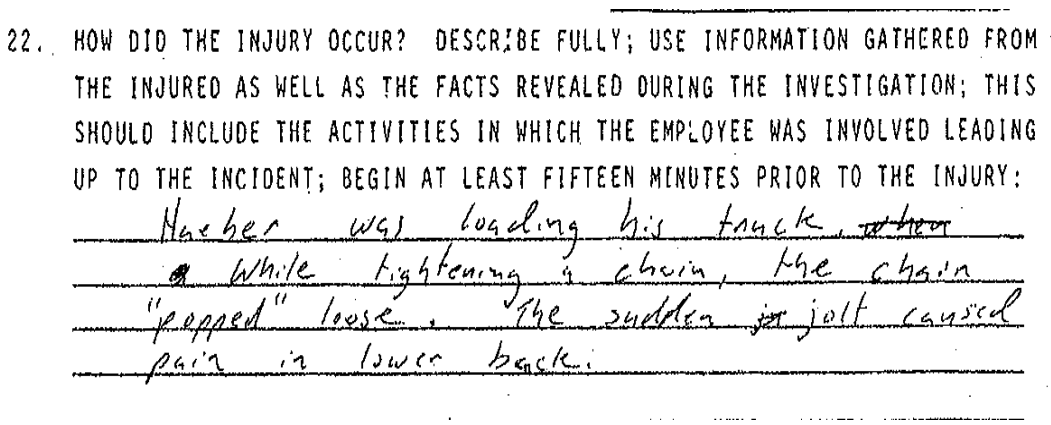
This offer included both legal argument explaining the testimony and exhibits that were being excluded, the relevance of the evidence, and extensive testimony by his expert opining that the excluded evidence referred to substantially similar incidents. Transcript 714-748. Dr. Micklow's testimony for the offer of proof is on transcript pages 739-748. In addition to testifying these records were substantially similar to the instant occurrence because they involved injuries to users caused by defects with similar chain and ratchet systems in similar products, Dr. Micklow testified he considered the excluded evidence reliable and useful, that he and other engineers typically relied on the excluded evidence, that the excluded evidence supported Plaintiff's allegations regarding the defects with Cottrell's system and Cottrell's negligence, and that the excluded evidence comprised "three or four or five boxes of injury reports," showing injuries from the Cottrell system were "on the order of thousands." *Id.*

Plaintiff's trial exhibits 43, 50, 51 & 53 are the electronic compilation of boxes of these injury reports. This is how Plaintiff described his incident in his injury report:

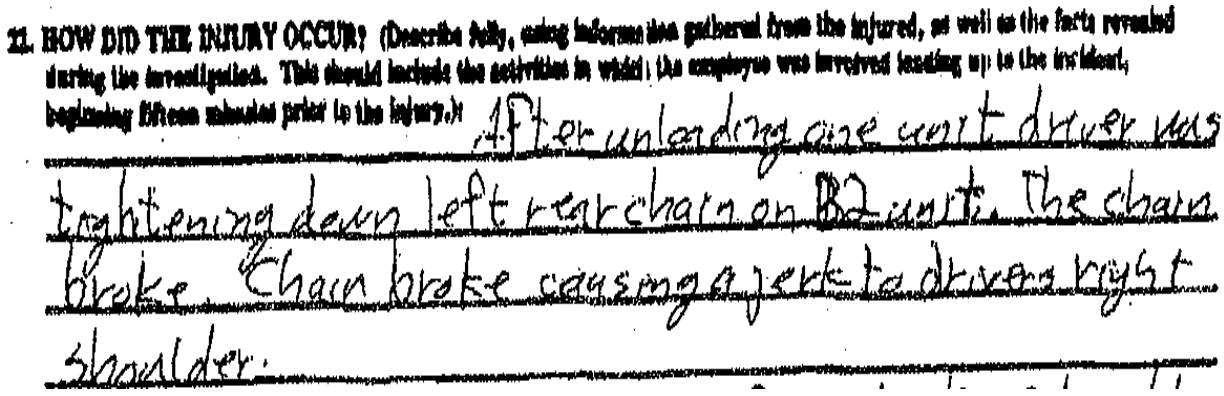

Give Complete Details How Incident Happened: Tightening Chain down on Left side of A-4 when Idler tore Loose causing me to fall
Pictures with this Report

Appendix A21, Plaintiff's Exhibit 43, JCT-RJ-0436 (page 194 of Adobe pdf file) ("Tightening chain down on left side of A-4 when idler tore loose, causing me to fall. …").

Examples of injury reports involving trailer components, other than the idler, that were excluded from the evidence, from exhibit 43 alone, that involve chains, R-hooks or tie-down bars, are bate-stamped JCT-RJ-0259, JCT-RJ-0263, JCT-RJ-0277, JCT-RJ-0295, JCT-RJ-0297, JCT-RJ-0315, JCT-RJ-0325, and JCT-RJ-0329. The following are excerpts from those pages:

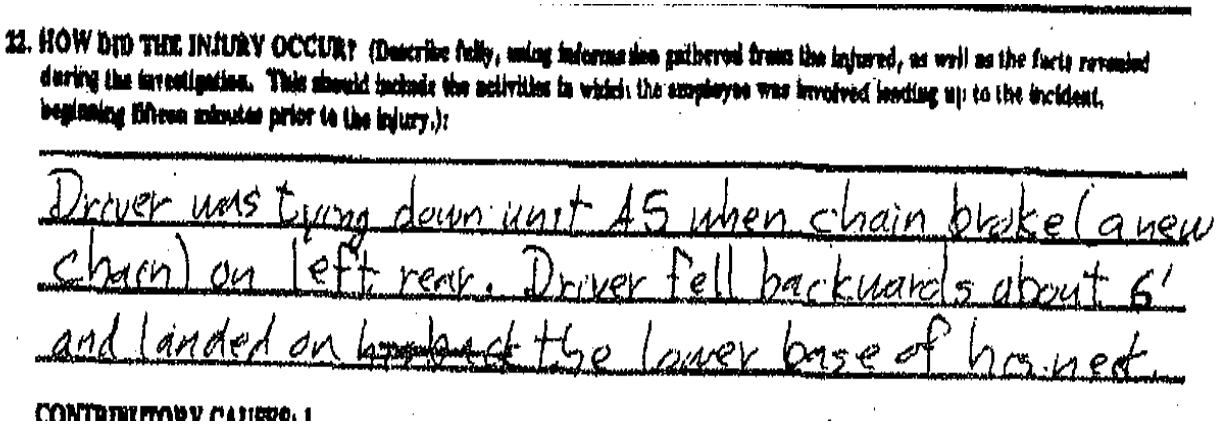

22. HOW DID THE INJURY OCCUR? DESCRIBE FULLY; USE INFORMATION GATHERED FROM THE INJURED AS WELL AS THE FACTS REVEALED DURING THE INVESTIGATION; THIS SHOULD INCLUDE THE ACTIVITIES IN WHICH THE EMPLOYEE WAS INVOLVED LEADING UP TO THE INCIDENT; BEGIN AT LEAST FIFTEEN MINUTES PRIOR TO THE INJURY:
Haeber was loading his truck, ~~when~~ a while tightening a chain, the chain "popped" loose. The sudden ~~in~~ jolt caused pain in lower back.

Appendix A23, Plaintiff's Exhibit 43, JCT-RJ-0259 (page 17 of Adobe pdf file) ("Haeber was loading his truck, while tightening a chain, the chain 'popped' loose. The shoulder jot caused pain in lower back.").



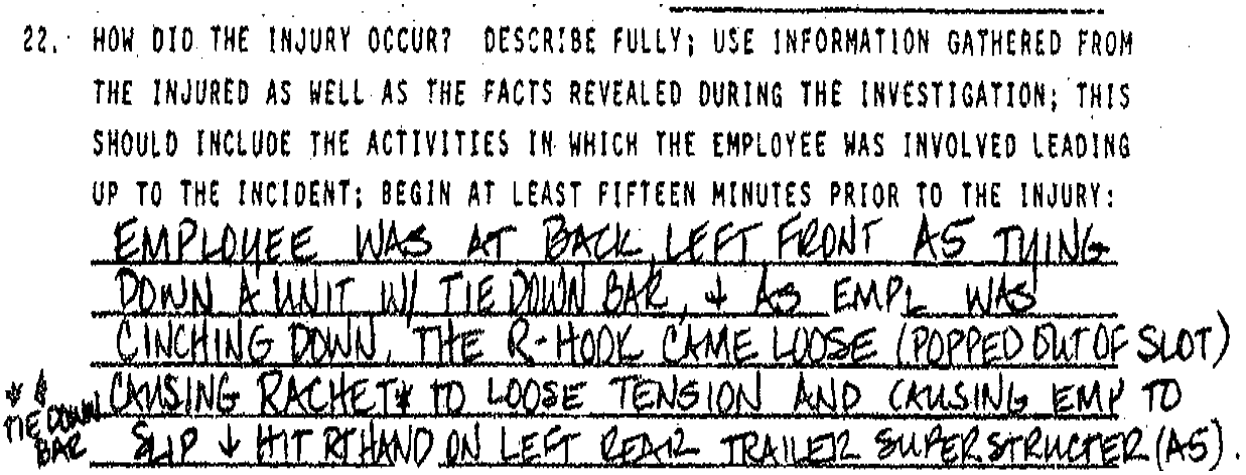
21. HOW DID THE INJURY OCCUR? (Describe fully, using information gathered from the injured, as well as the facts revealed during the investigation. This should include the activities in which the employee was involved leading up to the incident, beginning fifteen minutes prior to the injury.): After unloading one unit driver was tightening down left rear chain on B2 unit. The chain broke. Chain broke causing a jerk to drivers right shoulder.

Appendix A25, Plaintiff's Exhibit 43, JCT-RJ-0263 (page 21 of Adobe pdf file) ("After unloading one unit driver was tightening down left rear chain on B2 unit. The chain broke. Chain broke causing jerk to drivers right shoulder.").

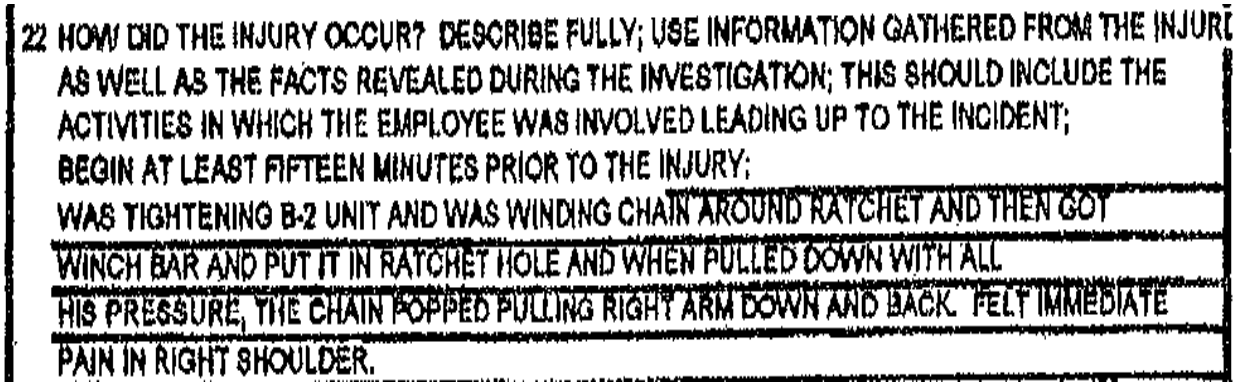


22. HOW DID THE INJURY OCCUR? (Describe fully, using information gathered from the injured, as well as the facts revealed during the investigation. This should include the activities in which the employee was involved leading up to the incident, beginning fifteen minutes prior to the injury.): Driver was tying down unit A5 when chain broke (a new chain) on left rear. Driver fell backwards about 6' and landed on [illegible] the lower base of his neck.

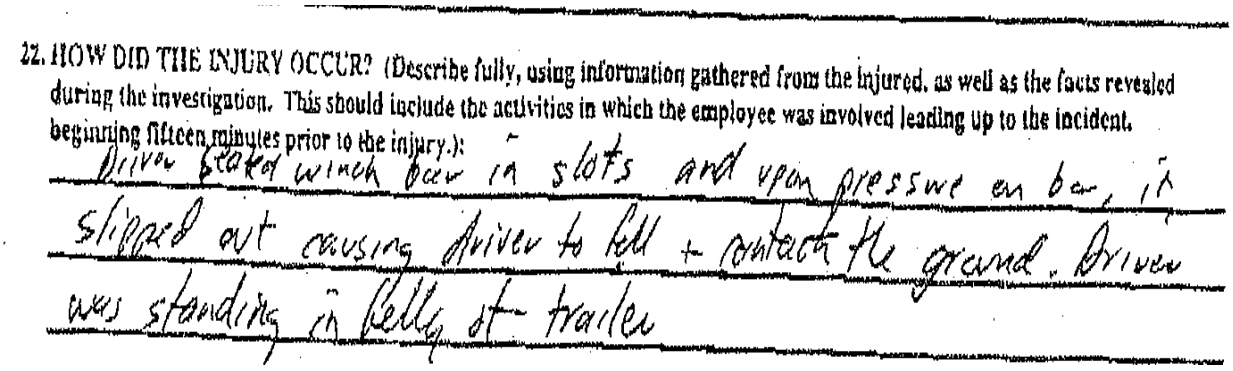
Appendix A27, Plaintiff's Exhibit 43, JCT-RJ-0277 (page 35 of Adobe pdf file) ("Driver was tying down unit A5 when chain broke (a new chain) on left rear. Driver fell backwards about 6' and landed on the lower base of his neck.").


22. HOW DID THE INJURY OCCUR? DESCRIBE FULLY; USE INFORMATION GATHERED FROM THE INJURED AS WELL AS THE FACTS REVEALED DURING THE INVESTIGATION; THIS SHOULD INCLUDE THE ACTIVITIES IN WHICH THE EMPLOYEE WAS INVOLVED LEADING UP TO THE INCIDENT; BEGIN AT LEAST FIFTEEN MINUTES PRIOR TO THE INJURY:
EMPLOYEE WAS AT BACK LEFT FRONT AS TYING DOWN A UNIT W/ TIE DOWN BAR, & AS EMPL WAS CINCHING DOWN, THE R-HOOK CAME LOOSE (POPPED OUT OF SLOT) CAUSING RACHET* TO LOOSE TENSION AND CAUSING EMP TO SLIP & HIT RT HAND ON LEFT REAR TRAILER SUPERSTRUCTER (A5).
* & TIE DOWN BAR

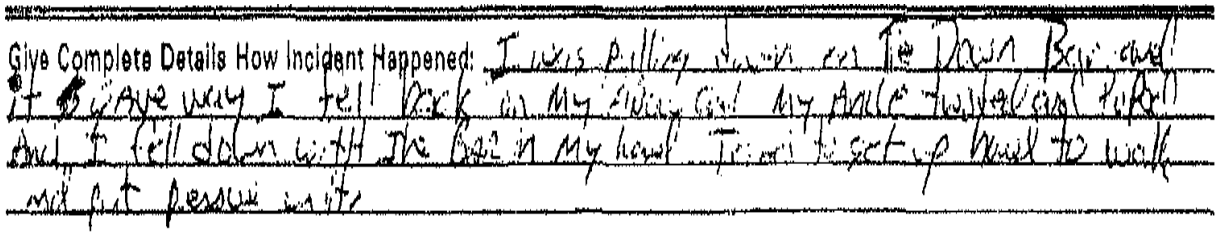
Appendix A29, Plaintiff's Exhibit 43, JCT-RJ-0295 (page 53 of Adobe pdf file) ("Employee as at back left front as tying down a unit w/ tie down bar, & as empl was cinching down, the R-hook came loose (popped out of slot) causing ratchet * (*tie down bar) to loose [sic] tension and causing emp to slip & hit rt hand on left rear trailer superstructer [sic] (A5).").


22 HOW DID THE INJURY OCCUR? DESCRIBE FULLY; USE INFORMATION GATHERED FROM THE INJURED AS WELL AS THE FACTS REVEALED DURING THE INVESTIGATION; THIS SHOULD INCLUDE THE ACTIVITIES IN WHICH THE EMPLOYEE WAS INVOLVED LEADING UP TO THE INCIDENT; BEGIN AT LEAST FIFTEEN MINUTES PRIOR TO THE INJURY:
WAS TIGHTENING B-2 UNIT AND WAS WINDING CHAIN AROUND RATCHET AND THEN GOT WINCH BAR AND PUT IT IN RATCHET HOLE AND WHEN PULLED DOWN WITH ALL HIS PRESSURE, THE CHAIN POPPED PULLING RIGHT ARM DOWN AND BACK. FELT IMMEDIATE PAIN IN RIGHT SHOULDER.

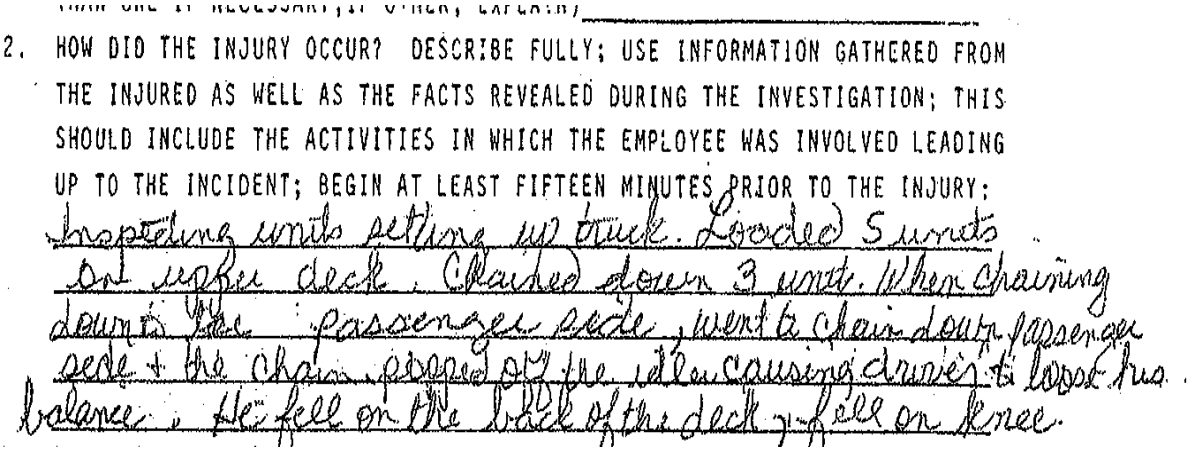
Appendix A31, Plaintiff's Exhibit 43, JCT-RJ-0297 (page 55 of Adobe pdf file) ("Was tightening B-2 unit and was winding chain around ratchet and then got winch bar and put it in ratchet hole and when pulled down with all his pressure, the chain popped pulling right arm down and back. Felt immediate pain in right shoulder.").


22. HOW DID THE INJURY OCCUR? (Describe fully, using information gathered from the injured, as well as the facts revealed during the investigation. This should include the activities in which the employee was involved leading up to the incident, beginning fifteen minutes prior to the injury.):
Driver seated winch bar in slots and upon pressure on bar, it slipped out causing driver to fall + contact the ground. Driven was standing in belly of trailer

Appendix A33, Plaintiff's Exhibit 43, JCT-RJ-0315 (page 73 of Adobe pdf file) ("Driver seated winch bar in slots and upon pressure on bar, it slipped out causing driver to fall & contact the ground. Driver was standing in belly of trailer.").


Give Complete Details How Incident Happened: I was pulling down on Tie Down Bar and it gave way I fell back on my ____ and my Ankle Twisted and Popped and I fell down with the Bar in My hand. To get up Hard to walk not put pressure on it

Appendix A35, Plaintiff's Exhibit 43, JCT-RJ-0325 (page 83 of Adobe pdf file) ("I was pulling down on tie down bar and it gave way. I fell back on my ____ and my ankle twisted and popped and I fell down with the bar in my hand. …").


22. HOW DID THE INJURY OCCUR? DESCRIBE FULLY; USE INFORMATION GATHERED FROM THE INJURED AS WELL AS THE FACTS REVEALED DURING THE INVESTIGATION; THIS SHOULD INCLUDE THE ACTIVITIES IN WHICH THE EMPLOYEE WAS INVOLVED LEADING UP TO THE INCIDENT; BEGIN AT LEAST FIFTEEN MINUTES PRIOR TO THE INJURY:
Inspecting units setting up truck. Loaded 5 units on upper deck. Chained down 3 units. When chaining down in the passenger side, went to chain down passenger side + the chain popped off the idler causing driver to lose his balance. He fell on the back of the deck + fell on knee.

Appendix A37, Plaintiff's Exhibit 43, JCT-RJ-0329 (page 87 of Adobe pdf file)

(“”Inspecting unit setting up truck. Loaded 5 units on upper deck. Chained down 3 units. When chaining down the passenger side, went to chain down passenger side & the chain popped off the idler, causing driver to loose [sic] his balance. He fell on the back on the deck, fell on knee.”).

This list is merely illustrative, and is by no means intended to be exhaustive.

Plaintiff’s counsel informed the court that in addition to excluding testimony by his expert regarding these incidents, the ruling would preclude Plaintiff from admitting any of the reports contained in trial exhibits 43, 50, 51 and 53, other than the few that involved idlers. Transcript 735.

E. Jury Instructions

The trial court applied Missouri law to all claims. Transcript 1993, 2279.

The trial court’s verdict form required the jury to make separate allocations of fault on the three claims at issue (strict liability product defect, negligence, and strict liability failure to warn), and the jury made different findings on each claim. LF 317-320; Appendix A1-A4. Cottrell’s proposed verdict form allowed the jury to make separate findings and allocations of fault on the strict liability product defect and negligence claims. LF199-202.

Cottrell’s verdict form listed Auto Handling in the allocation of fault only on the negligence claim. LF 199. It did not list Auto Handling in the allocation of fault on the strict liability claim. *Id.*

The trial court submitted separate verdict directors for strict liability product defect, negligence, and strict liability failure to warn. LF 294, 297, 300. Plaintiff had

submitted separate verdict directors for those claims; Cottrell had submitted separate verdict directors for strict liability product defect and negligence. LF154, 160, 271-273. Plaintiff's proposed verdict director as to Auto Handling only referred to a negligence claim, and not to strict liability. LF 73.

The verdict-directing instruction for strict liability product defect, based on MAI 25.04, referred to the chain and ratchet system, in addition to the idler:

> On plaintiff's claim of product liability with regard to the July 3, 2007 accident alleging a broken idler, you must assess a percentage of fault against defendant if you believe:
>
> First, defendant sold a car-hauling trailer with the chain and ratchet system and the idler in the course of defendant's business, and
>
> Second, the chain and ratchet system or the idler on the car hauling trailer was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use, and
>
> Third, the chain and ratchet system and the idler on the trailer were used in a manner reasonably anticipated, and
>
> Fourth, such defective condition as existed when the car-hauling trailer with the chain and ratchet system and the idler were sold directly caused or directly contributed to cause damage to plaintiff.

LF294.

Cottrell's proposed verdict director for negligence (Cottrell's No. 14), which cited MAI 25.09, referred to the chain and ratchet system, in addition to the idler:

On plaintiff Robert Johnson's claim of negligence with regard to the July 3, 2007 accident alleging a broken idler, you must assess a percentage of fault against defendant Cottrell if you believe:

First, defendant Cottrell designed the chain and ratchet system and idler on car hauling trailer, and

Second, the chain and ratchet system and idler on the car hauling trailer generated excessive force during operation, and

Third, Cottrell failed to use ordinary care to design the chain and ratchet system and idler on the car hauling trailer to be reasonably safe, and

Fourth, as a direct result of such failure, plaintiff sustained damage.

LF160.

Plaintiff made several objections. Transcript 2048-2069, 2120-2129. The trial court submitted a modified version of Plaintiff's proposed negligence instruction; like Cottrell's instruction, the court's instruction referred to the chain and ratchet system, in addition to the idler. LF 297.

The strict liability failure to warn claim was submitted with a verdict director based on MAI 25.05, and it referred to the chain and ratchet system, in addition to the idler:

On plaintiff's claim on failure to warn with regard to the July 3, 2007 accident alleging a broken idler, you must assess a percentage of fault against defendant if you believe:

First, defendant sold a car-hauling trailer with the chain and ratchet

system and the idler in the course of defendant's business, and

Second, the chain and ratchet system or the idler on the car hauling trailer was then unreasonably dangerous when put to a reasonably anticipated use without knowledge of its characteristics, and

Third, defendant Cottrell, Inc. did not give an adequate warning of the danger, and

Fourth, the product was used in a manner reasonably anticipated, and

Fifth, the car-hauling trailer with the chain and ratchet system and the idler being sold without an adequate warning directly caused or directly contributed to cause damage to plaintiff.

LF 300. This verdict director did not refer to any of the other verdict directors. *Id.*

F. Verdict and Judgment

On Plaintiff's claim 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 claim 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 that Cottrell was not liable for punitive damages. LF 318, 323.

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

G. Post-Trial Motions and Appellate Briefing

On September 23, 2013, the trial court stated it was entering judgment for Johnson for $1,150,332.40. Supplemental Transcript at 2. Cottrell moved for judgment notwithstanding the verdict. *Id.* at 3-4. The trial court denied Cottrell's motion. *Id.* On October 23, 2013, Cottrell and Plaintiff filed written post-trial motions. LF 388, 412, 422.

Cottrell did not claim it was entitled to a new trial on the failure to warn claim due to the errors it was alleging with the negligence instruction. Supplemental Transcript 3-4, LF 388-411. Cottrell's claim of error with the failure to warn claim was that it was entitled to judgment notwithstanding the verdict. *Id.*, LF 412-421.

On January 16, 2014, the trial court denied all post-trial motions. LF 721.

Cottrell's notice of appeal was filed January 27, 2014. LF 724-766. Johnson filed his notice of cross-appeal on February 6, 2014. LF 767.

In its appellate brief, Cottrell's Points Relied On did not claim it was entitled to a new trial on the strict liability failure to warn claim due to the errors it was alleging with the negligence instruction. Cottrell's (Initial) Brief, pp. 10-15. Cottrell's claims of error with the failure to warn claim asserted various reasons that it was entitled to judgment notwithstanding the verdict. *Id.* Cottrell's points relied on and briefing did not identify any error as to the strict liability failure to warn verdict director, the admission or refusal of any evidence that could have been considered for that claim, or in the damages

awarded by the jury on that claim.

H. Opinion of the Court of Appeals

The Court of Appeals held that the trial court submitted an improper verdict director for the negligence claim, where Plaintiff's recovery had been reduced by 45 percent, and improperly directed a verdict in favor of AHC on the negligence claim. Op. at 4-14. It recognized that the claims against AHC sounded in negligence, not strict liability. Op. at 11.

The Court of Appeals did not grant Cottrell's points that it was entitled to JNOV on the strict liability failure to warn claim, nor did it suggest there had been any error to Cottrell's prejudice in regard to the verdict director on the strict liability failure to warn claim, the evidence on that claim, or the damages awarded on that claim. Op. at 3-10.

The Court of Appeals held that a new trial was required on all issues because of the improper verdict director for the negligence claim, not just negligence. Op. at 10. It noted but did not resolve Cottrell's claim that the verdicts were inconsistent; instead, "we … note only that Johnson's claims were intertwined, much of the evidence related to both his strict liability and negligence claims, and the infirm Instruction 10 undoubtedly affected the jury's deliberations, potentially on both claims." Op. at 10, n.6.

The Court of Appeals held that the trial court erred in directing a verdict for AHC.

> However, viewing the evidence in the light most favorable to the plaintiff, Johnson presented evidence of two different points at which the idler was compromised. One was that the original weld on the idler was faulty, leading over time to the idler breaking. The other was that someone

> eventually replaced the weld on the idler, but did so in a faulty manner. Johnson was entitled to present these two theories and it was up to the jury to determine whether one or both contributed to cause his accident. *See Love v. Deere & Co.*, 684 S.W.2d 70, 75 (Mo. App. W.D. 1985) (evidence of repair as well as evidence of original product defect all presented to jury; "issue of proximate cause and intervening efficient cause [wa]s for the jury to decide").

Op. at 11-12.

The Court of Appeals noted Plaintiff had presented evidence that the original weld on the idler was faulty when the rig was purchased, and that AHC had provided maintenance on the rig for three years. Op. at 12. It noted Plaintiff's evidence that only mechanics could have observed the weld, from pits below the rigs. *Id.* "Thus, if this evidence was true, there was a defect in the original weld, and over the time that AHC provided maintenance for the rig, AHC failed to repair it." *Id.*

The Court of Appeals also noted the evidence showed the repair with the faulty weld could only have been done by Plaintiff's employer or AHC, that there were no maintenance records for the repair, that Plaintiff's employer always made records of its repairs, and that Plaintiff observed on at least one occasion AHC making a repair, but not making a record of it. *Id.* It held that the strength of the inference that AHC made the repair "relates to the weight of Johnson's case against AHC and not its submissibility." *Id.* at 12-13.

The Court of Appeals further held AHC had a duty to warn Johnson, but only to the extent the jury believed AHC was responsible for the faulty weld on the idler, and that AHC knew it had created a dangerous condition. *Id.* at 13.

> In summary, Johnson put forth substantial evidence from which the jury could have found either (1) that the weld was faulty from the beginning and AHC failed to inspect or repair it; or (2) that AHC negligently repaired the weld and failed to warn Johnson of a dangerous condition that AHC knew resulted from their faulty repair. Again, it is not for us to determine the strength of either claim when weighed against conflicting evidence; rather, it was the jury's responsibility to make this assessment. *See Hargis v. Lankford*, 372 S.W.3d 82, 89 (Mo. App. S.D. 2012) (quoting *Metzger v. Schemesser*, 687 S.W.2d 671,674 (Mo. App. E.D. 1985)) ("in this era of comparative negligence ... the respective degree of contribution of the negligence of multiple tortfeasors is generally [a) jury question").

Op. at 13-14.

The Court of Appeals "briefly address[ed]" Plaintiff's point regarding the exclusion of evidence of other accidents involving Cottrell's chain and ratchet system, "without ruling on it." Op. at 14. After discussing the law surrounding the admissibility of evidence of other accidents, it made the following statement, which concluded its discussion of the issue:

> Here, Johnson argues that because his petition alleged that Cottrell's chain and ratchet system was defective because it required excessive force to operate, he was entitled to introduce evidence consisting at least of other accidents involving Cottrell chain and ratchet systems occurring because the system required excessive force, such as accidents in which the chain broke rather than the idler. During Johnson's offer of proof, his counsel stated they had divided the injury reports into those resulting from the requirement of excessive force in the chain and ratchet system, and others unrelated to the force level required. However, on appeal, we have only the four exhibits filed on a CD, and the various accidents are so voluminous we decline to parse through them. At retrial, Johnson must clearly sort out and delineate the accident reports Johnson is arguing should have been admitted here: those involving Cottrell chain and ratchet systems resulting in accidents due to excessive force required to use the system, in order for the trial court to be able to properly determine their relevance and admissibility.

Op. at 15.

Points Relied On

I. The trial court erred in directing a verdict for AHC because Plaintiff produced sufficient evidence to support a judgment in that the evidence and permissible inferences, viewed most favorable to Plaintiff, supported Plaintiff's theories that AHC was negligent in failing to discover the defect

with the original Cottrell idler, failing to repair the defective Cottrell idler, and failing to warn Plaintiff about the dangers caused by the Cottrell chain and ratchet system, including the failed Cottrell idler

Lorimont Place, Inc. v. Jerry Lipps, Inc., 403 S.W.3d 104 (Mo. App. 2013)

Polovich v. Sayers, 412 S.W.2d 436 (Mo. 1967)

Parra v. Building Erection Services, 982 S.W.2d 278 (Mo. App. 1998)

Fancher v. Southwest Missouri Truck Center, Inc., 618 S.W.2d 271 (Mo. App. 1981)

II. The trial court erred in its categorical exclusion of evidence of accidents involving the chain and ratchet system that did not involve idler failure because such evidence was admissible to show the danger of Cottrell's product, to show notice to Cottrell of the danger of its product, and to support punitive damages, in that the Amended Petition alleged Cottrell's chain and ratchet system was dangerous because of the excessive forces it required and was not limited to idler failure, and at least some of the excluded accidents resulted from the excessive forces required by Cottrell's chain and ratchet system

Stokes v. Nat'l Presto Indus., Inc., 168 S.W.3d 481 (Mo. App. 2005)

Pierce v. Platte-Clay Electric Cooperative, Inc., 769 S.W.2d 769 (Mo.banc 1989)

Torbit v. Ryder Sys., Inc., 416 F.3d 898 (8th Cir. 2005)

Brdar v. Cottrell, 867 N.E.2d 1085 (Ill. App. 2007)

Argument

The directed verdict in favor of AHC must be reversed because Plaintiff had evidence that AHC failed to repair the defect with the original Cottrell weld, failed to inspect the rig properly, and failed to warn Plaintiff regarding the idler or the dangers of Cottrell's system.

Plaintiff is entitled to a new trial against Cottrell as to punitive damages and strict liability product defect because the trial court erred by making a blanket ruling excluding evidence of thousands of injuries caused by Cottrell's system simply because they did not involve a broken idler, when the pleadings, the other evidence, and the instructions implicated Cottrell's system, not just the idler.

Plaintiff will respond to Cottrell's points relied on, and the Court of Appeals' disposition of same, in his second brief, after Cottrell has submitted its substitute brief.

I. The trial court erred in directing a verdict for AHC because Plaintiff produced sufficient evidence to make a submissible case in that the evidence and permissible inferences, viewed most favorable to Plaintiff, supported Plaintiff's theories that AHC was negligent in failing to discover the defect with the original Cottrell idler, failing to repair the defective Cottrell idler, and failing to warn Plaintiff about the dangers caused by the Cottrell chain and ratchet system, including the failed Cottrell idler

Standard of Review

"In reviewing the grant of a motion for directed verdict … [a]n appellate court views the evidence in the light most favorable to the plaintiff to determine whether a

submissible case was made...." *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 756 (Mo. banc 2011), citing *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 13 (Mo. 1994). "The plaintiff may prove essential facts by circumstantial evidence as long as the facts proved and the conclusions to be drawn are of such a nature and are so related to each other that the conclusions may be fairly inferred." *Id.* (citation omitted). "Whether the plaintiff made a submissible case is a question of law subject to de novo review." *Id.* (citation omitted).

"Directing a verdict is a drastic measure, and the reviewing court makes a presumption in favor of reversing the trial court's judgment sustaining a motion for directed verdict." *Lorimont Place, Inc. v. Jerry Lipps, Inc.*, 403 S.W.3d 104, 107 (Mo. App. 2013). "We review the evidence and all reasonable inferences therefrom in the light most favorable to the plaintiff and disregard all evidence to the contrary." *Id.* "Whether evidence is substantial and whether inferences are reasonable are questions of law, which we review de novo." *Id.* Reversal is favored "unless the facts and any inferences from those facts are so strongly against the plaintiff as to leave no room for reasonable minds to differ as to the result." *Intertel, Inc. v. Sedgwick Claims Mgmt. Servs., Inc.*, 204 S.W.3d 183, 199 (Mo. App. 2006). "We view the evidence in the light most favorable to submissibility, presuming its truth and granting the plaintiff the benefit of all reasonable inferences." Op. at 11, citing *Steward v. Goetz*, 945 S.W.2d 520, 528 (Mo. App. 1997).

A. AHC Had a Duty to Plaintiff

AHC's mechanics were tasked with inspecting, maintaining, repairing or replacing equipment involved in a task (tying and untying vehicles by car-haulers) that has been

known to cause frequent and severe injuries to the operators for decades. The industry reports and injury records, the records showing more than 55,000 idler replacements in five years, the testimony regarding the frequency with which AHC mechanics replaced idlers at the Wentzville terminal, and the testimony regarding injuries to other drivers working out of the Wentzville terminal due to broken idlers all indicate it was foreseeable that idlers could break and cause injuries to users. As such, AHC had a duty of care.

"A duty of care arises out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury." *L.A.C. v. Ward Parkway Shopping Center Co.*, 75 S.W.3d 247, 257 (Mo. banc 2002). This duty of care "is generally measured by whether or not a reasonably prudent person would have anticipated danger and provided against it." *Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc.*, 700 S.W.2d 426, 431 (Mo. banc 1985) (citations omitted). Plaintiff was not required to prove that AHC would know this idler could fail. *Simonian v. Gevers Heating & Air Conditioning, Inc.*, 957 S.W.2d 472, 476 (Mo. App. 1997).

A duty can also be created by a voluntary undertaking. *See Hoover's Dairy*, 700 S.W.2d at 432-433; *Wolfmeyer v. Otis Elevator Co.,* 262 S.W.2d 18, 23 (Mo.1953). Here, AHC's mechanics inspected, maintained and repaired the rigs. Even if AHC would not ordinarily have a duty to perform such tasks, AHC voluntarily undertook them. Having done so, it had a duty to exercise ordinary care in doing so.

At the least, AHC's failure to exercise reasonable care in its inspections, maintenance, repairs and replacements increased the risk of harm. This alone creates a genuine issue of fact. *Polovich v. Sayers,* 412 S.W.2d 436 (Mo. 1967) affirmed a verdict

against a defendant who failed to fix defective brakes. 412 S.W.2d at 438. *Polovich* was submitted on a negligence theory, and the court repeatedly noted no one warned the plaintiff of the dangerous condition. *See id.* at 437 ("The evidence most favorable to plaintiff did not show that plaintiff heard this conversation or was made aware of the condition of the brakes …"); *id.* at 441 ("For purposes of submissibility, we must look to evidence most favorable to plaintiff, and that evidence was that this [warning] did not occur in the presence of plaintiff and that plaintiff did not know of the defective brakes on the truck …").

In *Parra v. Building Erection Services*, 982 S.W.2d 278 (Mo. App. 1998), the court held that even if the respondent could not be held liable for leasing a dangerous crane, it could be held liable because of its post-lease repair work. *See Parra*, 982 S.W.2d at 285 ("And, even if it could be argued somehow that the alleged defect occurred after delivery, as the respondent contends in its brief, the respondent's mechanic's supervisory role in assembling the crane would be sufficient to impose a duty as to the alleged danger of the unsecured cable.").

B. Plaintiff Had Sufficient Evidence for Multiple Theories

Plaintiff had a submissible case against AHC regardless of who attempted to repair the weld on the idler, assuming an attempt was made. In the trial court, AHC cited the statement in *Steward*, 945 S.W.2d at 528-29, that a case is not submissible if it solely depends on evidence which equally supports two inconsistent and contradictory inferences constituting ultimate and determinate facts. But here, Plaintiff's case did not "solely depend" on such evidence. Plaintiff had a submissible case regardless of who

made any negligent repair, because Plaintiff's evidence showed there was a defect with the **original** weld that was never correctly repaired by AHC or anyone else, **and** that AHC did not warn him of any dangers with his rig. Thus, Plaintiff had a submissible case on **two** theories that do not depend on knowing who attempted any incomplete repair; one is sufficient. This case is not the situation described in *Steward*.

Missouri courts have repeatedly rejected defense arguments that the statement from *Steward* requires judgment as a matter of law. *See Hickman v. Branson Ear, Nose & Throat, Inc.*, 256 S.W.3d 120 (Mo. banc 2008) (holding sufficient evidence supported plaintiff's verdict and reversing appellate court that held in *Hickman* (2007 WL 2429928, *8) that plaintiff's evidence failed under this *Steward* standard); *Washington by Washington v. Barnes Hosp.*, 897 S.W.2d 611, 618 (Mo. banc 1995) (trial court properly denied defendants' motions; "So long as plaintiffs' evidence is sufficient that reasonable minds may differ as to the conclusion, the weight to be accorded contested evidence lies within the jury's domain. It was the jury's role, not the court's, to weigh the testimony … , along with the other evidence admitted."); *Bland v. IMCO Recycling, Inc.*, 67 S.W.3d 673 (Mo. App. 2002) (plaintiff had submissible evidence, notwithstanding dissent's contention evidence equally supported opposing inferences); *Wright v. Barr*, 62 S.W.3d 509, 527 (Mo. App. 2001) ("Dr. Ehrlich's testimony did not support two inconsistent and contradictory factual inferences. He unequivocally testified that … it was incumbent upon the doctor to consider the likelihood of clotting before performing an elective cardioversion."). *Steward* itself acknowledged, "Facts necessary to sustain a recovery may be proved by circumstantial evidence." *Id.* at 528. And this Court has rejected the

suggestion that circumstantial evidence is insufficient: "We no longer need to hold circumstantial evidence cases to a higher standard than direct evidence cases." *State v. Grim*, 854 S.W.2d 403, 406 (Mo. 1993).

1. Failure to Warn

The Court of Appeals' suggestion that AHC only had a duty if it repaired the rig, and knew that its work had caused a defect with the rig, ignores several relevant sections of the Restatement. As the Court of Appeals noted, comment c to Restatement (Second) of Torts § 388 states, "The rules stated in this Section and throughout this Topic … apply to 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 (1965), cmt. c. That language does not mean the repairer only has a duty to warn if he causes the defect; it means the repairer also has a duty if, "because of the work which he is employed to do upon it," he obtains knowledge that the chattel is defective. Plaintiff's interpretation makes the most sense – for example, a car mechanic who performs an oil change and realizes during that work that the brakes on a car are about to fail ought to warn the driver, even if the mechanic did not cause the brakes' issue. And Section 388 is not the only section of the Restatement that is pertinent on this issue.

The premise that AHC's liability is different from that of a lessor or manufacturer is contrary to Missouri law. "One who as an independent contractor negligently makes, rebuilds, or repairs a chattel for another is subject to the same liability as that imposed upon negligent manufacturers of chattels." Restatement (Second) of Torts § 404. "The

rule stated in this Section requires an independent contractor who makes, rebuilds, or repairs a chattel for an employer to do everything which he undertakes with the same competence and skill which is required of a manufacturer in doing those things which are necessary to the turning out of a safe product, under the rules stated in §§ 395- 398." *Id.*, Cmt. a. Missouri has adopted Restatement § 404. *See Central & Southern Truck Lines, Inc. v. Westfall GMC Truck, Inc.*, 317 S.W.2d 841, 845-846 (Mo. App. 1958) (affirming overruling of motion for directed verdict).

A manufacturer can be held liable for a negligent failure to warn. *See, e.g., Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 98 (Mo. App. 2006) ("Missouri has long recognized that a manufacturer has the duty to warn ultimate users of its products or articles which are inherently dangerous or are dangerous because of the use to which they are put.") (citations omitted). Thus, AHC can also be held liable for a failure to warn.

Thus, AHC had the same duties Cottrell had, "under the rules stated in §§ 395-398" of the Restatement. Missouri has recognized that negligence in product liability derives from Restatement § 395, rather than Restatement § 402, the section for strict liability. *Ragland Mills, Inc. v. Gen. Motors Corp.*, 763 S.W.2d 357, 359 (Mo. App. 1989).

Further, Restatement (Second) of Torts § 403 (1965) states, "One who as an independent contractor makes, rebuilds, or repairs a chattel for another and turns it over to the other, knowing or having reason to know that his work has made it dangerous for the use for which it is turned over, is subject to the same liability as if he supplied the

chattel." But the comments add that liability can be imposed even if the contractor did not make the chattel worse; it is sufficient if the contractor knew or should have known the chattel was dangerous, and did not make the chattel reasonably safe.

> It is not, however, necessary that a contractor should know that the work which he has done in rebuilding or repairing an automobile or other chattel has made its condition worse than it was before the work was done. It is enough that the contractor knows that the rebuilding or repairs have not been sufficient to make the car or chattel as safe for use as care and competence would make it, and that it is used or permitted to be used in reliance upon his care and competence. The fact that an inadequately rebuilt or repaired automobile or other chattel is turned over by the contractor to the employer as rebuilt or repaired gives it a deceptive appearance of safety, even though its condition is in fact improved by the work which the contractor has done upon it.

Restatement (Second) of Torts § 403 (1965), cmt. b.

The Amended Petition claimed AHC failed to warn Plaintiff of the problems with the ratchet systems, and the number of persons injured by those systems, and further failed to warn him of any dangers with the idlers. Appendix A17-18, LF42-43. Plaintiff was unaware of these facts. Before he was injured, he had not observed broken idlers. By 2011, he was still not aware of other drivers being injured because of a broken idler.

Dr. Micklow testified that information regarding injuries associated with the chain and ratchet system was "readily available to anyone in the industry" well before 2003.

Transcript 688. AHC has claimed there was no evidence AHC was within the car-hauling industry. But the jury heard ample testimony that its mechanics were assigned to do inspection, repair and maintenance work on the car-hauling trailers used by JCT at certain facilities. *See, e.g.,* Transcript 1141 (Plaintiff describing his experience in the "car-hauling industry"); Transcript 1161 (describing the car-hauling terminals where AHC did this work).

And even if AHC did not know of the information to which Dr. Micklow testified, Street, who worked out of the Wentzville terminal, testified that the AHC mechanics at the Wentzville terminal regularly replaced broken Cottrell idlers with shiny hydraulic cylinders that were put into a square housing. Transcript 974-981. Street saw an "enormous amount" of Cottrell idlers on trailers in Wentzville that were broken or repaired. Transcript 971, 1020. Street was injured at Wentzville due to a broken idler, and he reported the injury to Plaintiff's employer. Transcript 972. This was one of several Cottrell idlers that broke on his rigs. *Id.* AHC mechanics were in charge of maintenance and repairs of the Cottrell rigs at the Wentzville terminal. Transcript 1161.

Street and Plaintiff testified the drivers could not discover idler defects on the bottom of the rigs; they relied on the AHC mechanics, who had underground pits, to discover them. Transcript 1022-1024, 1146-1147, 1150-1151.

AHC has argued Street was not a mechanic, but that does not mean he could not describe differences in appearance between replacement idlers and original idlers, or that he would not be able to determine if an idler visible to him was broken. All of the Street

testimony Plaintiff cites was admitted into evidence; it was either not objected to by AHC, or was offered after AHC's objections were overruled. Transcript 971-981, 1020.

AHC has argued there was no testimony AHC knew the drivers were injured as a result of the broken idlers, but the jury could reasonably infer that if the employer knew, and the employer was asking AHC to repair broken idlers after they were involved in incidents that injured drivers, that AHC knew or should have known the broken idlers could cause injuries to users. The jury heard that when an idler breaks during use, there will be a sudden release of tension. Transcript 1025. The jury also heard that driver injuries occur when components, including idlers, break. Transcript 829-830.

The jury heard from and about drivers working at the Wentzville terminal where the AHC mechanics were employed who testified those mechanics routinely fixed and replaced idlers, and who had experienced broken idlers and were injured as a result.

Street and Plaintiff testified the AHC mechanics regularly inspected the rigs, and that the drivers relied on them to discover any defects they could not see themselves, including with idlers at the bottom, because the mechanics had pits to inspect the vehicles.

It was undisputed this rig was obtained from and was serviced at AHC terminals, but the owner's manual was not provided, and no one from AHC warned Plaintiff of the problems with this idler or with the idlers in general, or other problems with the chain and ratchet system that had been known in the industry for decades.

The evidence showed AHC and Cottrell did not warn Plaintiff of any of the various defects identified in the evidence, such as the high failure rate of the idlers, other

accidents involving broken idlers, or other accidents involving the chain and ratchet system. Neither AHC nor Cottrell instructed Plaintiff that the suspension of vehicles only needed to be compressed one and a half to two inches, that he needed to look at the bottom of the weld for inadequate weld penetration, how Plaintiff could view that weld on the bottom, or what he should look for to determine if the weld was inadequate. Plaintiff's testimony was that he had not previously encountered broken idlers, and was not aware of other persons being injured by broken idlers. Lockhart testified there were no warnings on the rig. Cottrell's expert admitted idlers inevitably failed, and that some warning to that effect should have been included. Any of this evidence, combined with the presumption that a warning will be heeded, was sufficient. "If there is sufficient evidence from which a jury could find that the plaintiff did not already know the danger, there is a presumption that a warning will be heeded." *Tune*, 883 S.W.2d at 14. Where the testimony shows the plaintiff did not know of the danger, "the term 'presumption' is used to mean 'makes a prima facie case, *i.e.*, creates a submissible case that the warning would have been heeded.'" *Id.*

Cottrell claimed the owner's manual contained relevant information. AHC mechanics "exclusively" worked on Plaintiff's rigs at the Oklahoma City terminal (Transcript 1161), where he picked up the rig in 2004 (Transcript 1155), and there was no owner's manual in it when he picked it up. Transcript 1147-1148, 1253-1254. At trial, Cottrell claimed the owner's manual contained information that could have prevented Plaintiff's injury. AHC has argued there was no evidence it had a duty to ensure the manual was present, but in light of Cottrell's evidence that the manuals were in the rigs

when they were sold to the customers, a jury could reasonably find AHC's mechanics did not simply fail to ensure the manual was present between 2004 and 2007, but that they removed it.

In *Parra*, the court held the plaintiff had sufficient evidence, where the defendant's mechanic undertook maintenance but did not warn the plaintiff of an unsecured cable. 982 S.W.2d at 284-285."[T]he lessor is 'required to exercise ordinary care to determine whether the [instrumentality] was in fact safe at the time of its delivery to the employer's premises, and if not to either repair it or warn of the danger.'" *Id.*, quoting *Whitney v. Central Paper Stock Co.*, 446 S.W.2d 415, 418 (Mo.App.1969) and citing MAI 25.10(B) [1995 Revision].

In *Moore*, the Missouri Supreme Court held the warning claims were for the jury, and noted the heeding presumption is applied whenever there is a showing that adequate information was not available. 332 S.W.3d at 758, 762. It added, "'Numerous cases have held that when the defense is raised that the injured plaintiff had adequate knowledge of the risks so as to obviate the duty to warn, the question of the adequacy of the knowledge is a question for the jury.'" *Id.*, quoting *Duke v. Gulf & W. Mfg. Co*., 660 S.W.2d 404, 418 (Mo.App.1983). Because there was evidence the plaintiffs did not know of the risks, the heeding presumption was properly applied, and "Such a presumption would make a prima facie case that had Ford given the Moores an adequate warning, the Moores would have heeded it." *Id.* The court held that testimony regarding whether the plaintiff looked for warnings, or would have heeded them, created jury issues. *Id.* at 763. *See also Winter v. Novartis Pharm. Corp.*, 739 F.3d 405, 408 (8th Cir. 2014) ("Absolute certainty is not

required to prove a causal connection between a defendant's acts or omissions and the plaintiff's injuries.").

Plaintiff did not realize the chain and ratchet system was dangerous until after he was injured. Transcript 1218. He had not seen an idler bent up or twisted prior to that date. *Id.* Before 2011, he was not aware of other persons being injured due to a broken idler. Transcript 1221. Plaintiff testified that after he was injured and saw the idler was broken, he secured the pick-up truck differently. Transcript 1161-1162. Testimony regarding how a plaintiff would have altered their behavior before an incident had they been given specific warnings has been held to be improperly speculative, and unnecessary in light of the "heeding presumption." *See Moore*, 332 S.W.3d at 762-763.

Plaintiff's evidence was sufficient to support a failure to warn theory. *See Polovich v. Sayers,* 412 S.W.2d 436 (Mo. 1967) (plaintiff made submissible case against company in charge of maintenance and repair, where company did not warn of or repair bad brakes). The evidence that neither AHC nor Cottrell provided warnings to Plaintiff regarding the specific risks involved with the trailer was sufficient to create a "heeding presumption," and thus a prima facie case. *See, e.g., Moore*, 332 S.W.3d at 761-64 (plaintiffs had submissible claim of strict liability failure to warn; testimony about how a warning would have changed their behavior was unnecessary due to presumption warning would have been heeded).

Furthermore, even if all of the evidence suggesting AHC knew of the injuries is ignored, there was clearly evidence AHC knew these idlers could break. Plaintiff had more than sufficient evidence supporting his allegations that AHC failed to warn Plaintiff

of the problems with the ratchet systems (LF42-43), when it knew and should have known of these problems.

Plaintiff had evidence showing AHC knew or should have known that the rig and the idlers were dangerous and could fail, that the users would not realize this, and that AHC failed to provide any warning. This evidence alone compelled the submission of Plaintiff's claims against AHC.

2. Failure to Inspect, Maintain or Repair the Rig

The Amended Petition alleged AHC failed to properly inspect, maintain or repair the rig. Appendix A17-18, LF42-43. AHC either negligently attempted to repair the faulty weld, or it made no attempt to repair a faulty weld over the course of three years. Either way, Plaintiff had a submissible case.

Dr. Micklow testified there were defects with the original Cottrell weld, causing inadequate penetration. Thus, there was a defect with the rig when Plaintiff first obtained it from a terminal staffed by AHC mechanics in 2004. There are no maintenance records showing this idler was repaired. Dr. Micklow testified any repair was incomplete.

There was sufficient evidence that AHC'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. There was ample testimony that only the mechanics could discover the defects on the bottom of the idler, because they were the only ones who could go into pits to look at the bottom of the rigs.

If one accepts AHC's claim that no repair was made, then a defect with the original weld was left un-repaired for more than three years.

Plaintiff testified he had no idea this idler was defective on the date of his accident.

Plaintiff's evidence was sufficient. *See Love v. Deere & Co.*, 684 S.W.2d 70, 75 (Mo. App. W.D. 1985) (evidence of repair as well as evidence of original product defect all presented to jury; "issue of proximate cause and intervening efficient cause [wa]s for the jury to decide"); *Fancher v. Southwest Missouri Truck Center, Inc.*, 618 S.W.2d 271, 274 (Mo. App. 1981) (reversing JNOV; jury question whether defendant, through its mechanics, was negligent in inspecting old gears and installing improper gear ratio).

The record contradicted AHC's contention that Plaintiff failed to produce evidence of when and where the weld was made. AHC claimed Plaintiff was not injured as a result of the failure of the original idler. But Plaintiff had ample evidence that one of the causes of his injuries were defects with the **original** Cottrell weld, which had inadequate penetration. *See* Transcript 603-605, 672-676, 761-764, 774-781, 837-838.

Further, an injury can have more than one cause, and proximate cause is typically an issue for the jury. *See Green v. Kahn*, 391 S.W.2d 269, 277 (Mo. 1965) ("The negligence of the defendant need not be the sole cause of the injury. … A party is held liable if his negligence, combined with the negligence of others, results in injury to another."); *Robinson v. Missouri State Highway & Transp. Com'n*, 24 S.W.3d 67, 78 (Mo. App. 2000) (same); *Callahan v. Cardinal Glennon Hosp.,* 863 S.W.2d 852, 861 (Mo. 1993) (injuries can have multiple causes).

Contrary to AHC's suggestion, Plaintiff was not required to show the rig was inspected by AHC after a failed repair. The rig was manufactured by Cottrell in 2003. Transcript 687, 837, 1150. Plaintiff obtained it from the Oklahoma City terminal, where AHC employed the mechanics, in 2004. Transcript 1155, 1161. The rigs received regular inspections based on mileage intervals, beyond any repair work. Transcript 1023-1024.

Plaintiff's evidence showed there was a defect in the rig as of 2003, that the rig was inspected by AHC mechanics between 2003 and his injury in 2007, and that the kind of original defects described by Dr. Micklow are "visible engineering defects." Transcript 761-763; *see also* Transcript 763 ("Yes, there are visible weld defects with the weld itself.").

There are no records indicating when the repair was done. If no repair was made, then a defect with the original weld was left un-repaired for more than three years.

If it was the employer who made the incomplete repair, that still means that for more than three years, AHC did nothing to fully repair the original defect.

There was sufficient evidence that AHC's mechanics failed to properly inspect the rig in order to discover the defective original weld, failed to inspect it to discover any negligent repair of that weld, and failed to repair the original defect before or after any attempted repair. There was ample testimony that only the mechanics could discover the defects on the bottom of the idler, because they were the only ones who could go into pits to look at the bottom of the rigs. Transcript 1022-1024, 1146-1147. This evidence, by itself, created a submissible case. *See Fancher v. Southwest Missouri Truck Center, Inc.*, 618 S.W.2d 271 (Mo. App. 1981).

3. Negligent Repair

There was also evidence of a negligent repair. Plaintiff's testimony established only two companies could have done it - his employer or AHC. Dr. Micklow testified Cottrell uses a MIG weld, not the weld used for the repair. The maintenance records do not refer to any repair. Plaintiff testified AHC did work that was not documented, and that if there was an undocumented repair, it was most likely done by AHC.

Plaintiff obtained the rig from Oklahoma City, and AHC mechanics routinely worked on his rig. The maintenance records are missing 30 pages. A reasonable inference is that if the missing pages exonerated AHC by showing Jack Cooper did the repair, they would have been produced. Evidence indicating AHC's employees caused a dangerous condition eliminates the need for additional proof as to notice. *See, e.g., Alexander v. State*, 756 S.W.2d 539, 541 (Mo. 1988).

There was evidence that an incomplete repair of the defect with the original weld had been attempted, that only AHC or the employer could have done it, there were no documents suggesting the employer did it, and Plaintiff testified it was most likely done by AHC, because AHC, but not the employer, had done work on his rig without creating documentation. This created a jury issue on a third theory of negligence against AHC.

AHC has downplayed Plaintiff's testimony that AHC mechanics worked on his rig without documentation, claiming that happened on "only one occasion." That goes to the weight of the evidence, which is a jury issue. And Plaintiff testified that never happened when JCT worked on his rig, and that there may have been additional occasions where AHC did not document its work on his rig. Transcript 1160. Plaintiff testified, without

objection, that if a repair was done that was not documented, it was most likely done by AHC. Transcript 1160-1161.

AHC has argued Plaintiff never asked the Wentzville mechanics to inspect and repair the chain and ratchet system or the idlers, but Street testified the AHC mechanics regularly inspected the rigs at defined mileage intervals. Transcript 1023-1024.

Plaintiff identified a 31-page gap in the maintenance records. Transcript 1426-1428; Exhibit 35. That testimony was admitted without objection. *Id.* Accordingly, any arguments challenging Plaintiff's competence are waived and without merit. Plaintiff's testimony on cross-examination that he was not sure whether AHC had produced a complete set of maintenance records (Tr. 1434) does not undo his testimony about the 31-page gap. AHC produced no witnesses who could explain the gap.

A reasonable inference is that if the missing pages exonerated AHC by showing the employer, Jack Cooper Transport ("JCT") did the repair, they would have been produced.

There was sufficient evidence of an incomplete repair. AHC did not produce any evidence suggesting the repair was done by JCT. 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. *See Zahner v. Director of Revenue, State*, 348 S.W.3d 97, 101 (Mo.App. 2011) (trial court can consider destruction of evidence, even if there is no finding of fraud, deceit or bad faith). Here, it is unclear whether documentation of the repair existed and was then destroyed, or if it was simply never generated. In either case, the result should be the same.

> In summary, Johnson put forth substantial evidence from which the jury could have found either (1) that the weld was faulty from the beginning and AHC failed to inspect or repair it; or (2) that AHC negligently repaired the weld and failed to warn Johnson of a dangerous condition that AHC knew resulted from their faulty repair. Again, it is not for us to determine the strength of either claim when weighed against conflicting evidence; rather, it was the jury's responsibility to make this assessment. *See Hargis v. Lankford*, 372 S.W.3d 82, 89 (Mo. App. S.D. 2012) (quoting *Metzger v. Schemesser*, 687 S.W.2d 671,674 (Mo. App. E.D. 1985)) ("in this era of comparative negligence ... the respective degree of contribution of the negligence of multiple tortfeasors is generally [a) jury question").

Op. at 13-14.

Plaintiff accordingly asks that this Court reverse the Circuit Court and remand so that the jury can determine for the first time what percentage of fault can be attributed to AHC on Plaintiff's negligence claim.

Plaintiff is not seeking and has never sought a new trial on the strict liability failure to warn claims. AHC was never a party on the strict liability product defect or strict liability failure to warn claims. Cottrell has requested JNOV on the strict liability failure to warn claims, but has not claimed error in relation to the verdict director, instructions, or evidence pertaining to the strict liability failure to warn claim.

Thus, assuming this Court agrees that a new trial on Plaintiff's claim for

negligence is required in light of this error, and agrees with Plaintiff Cottrell was not entitled to JNOV on the strict liability failure to warn claim, Plaintiff requests this Court exercise its authority to modify the judgment as necessary to conform to the verdict reached by the jury on the strict liability failure to warn theory, and deem judgment for the reduced amount entered as of the date of judgment. *See, e.g.,* Rule 84.14 (stating "The appellate court shall … give such judgment as the court ought to give."); V.A.M.S. 512.160 ("Unless justice requires otherwise … no new trial shall be ordered as to issues in which no error appears."); *Audsley v. Allen*, 774 S.W.2d 142, 146 (Mo. banc 1989) ("We, however, stand fully possessed of the entire case, and are authorized by Rule 84.14 to enter the judgment the trial court should have entered."); *Walton v. U. S. Steel Corp.*, 378 S.W.2d 240, 242 (Mo.App. 1964) ("…a court has the power and authority to enter the new judgment as of the date of the original judgment."); *Host v. BNSF Ry. Co.*, 460 S.W.3d 87, 99 (Mo. App. W.D. 2015) (stating, "This apparent error does not, however, require reversal in this case. Where damages sought on multiple theories are the same, damage awards on the multiple theories merge," and noting, "it is common for our appellate courts to resolve error … by exercising our authority pursuant to Rule 84.14 to enter such judgment as is required."); *Brickner v. Normany Osteopathic Hosp., Inc.*, 687 S.W.2d 910, 913-14 (Mo.App. E.D. 1985) (remanding with an instruction to hold the verdict in abeyance until the cause is finally disposed); *Johnson v. Hyster Co.*, 777 S.W.2d 281, 286 (Mo.App. W.D. 1989) ("Thus, the Johnsons are each entitled to the greatest amount recoverable under any single theory of liability."); *Palmer v. Hobart Corp.*, 849 S.W.2d 135, 142 (Mo. App. 1993) (affirming plaintiff's verdict on failure to

warn, despite verdict for manufacturer on strict liability product defect: ("[I]n interpreting verdicts, the court should look at the entire record to ascertain the jury's intent, and should construe the verdict liberally so that it may be given effect where possible."); *Mathes v. Sher Express, L.L.C.*, 200 S.W.3d 97, 107 (Mo.App. W.D. 2006) (approving a verdict form requiring separate findings on strict liability and negligence because, "The verdict form used would also have the potentially salutary purpose of avoiding a retrial in the event that some error or insufficiency of evidence was found in only one of the verdict directing theories.").

II. The trial court erred in its categorical exclusion of evidence of accidents involving the chain and ratchet system that did not involve idler failure because such evidence was admissible to show the danger of Cottrell's product, to show notice to Cottrell of the danger of its product, and to support punitive damages, in that the Amended Petition alleged Cottrell's chain and ratchet system was dangerous because of the excessive forces it required and was not limited to idler failure, and at least some of the excluded accidents resulted from the excessive forces required by Cottrell's chain and ratchet system

Standard of Review

"Admissibility of evidence is a matter for the circuit court's discretion, and we will not disturb the circuit court's ruling unless we discern an abuse of discretion." *Stokes v. Nat'l Presto Indus., Inc.*, 168 S.W.3d 481, 483 (Mo. App. 2005). A trial court abuses its discretion when it applies the wrong legal standard. *Id.* at 484.

Argument

The trial court made a blanket evidentiary ruling, as a matter of law, that for other accidents to be deemed substantially similar to Plaintiff's accident, they had to involve a broken idler, and it did not allow Plaintiff to introduce evidence of other accidents involving the chain and ratchet system. The ruling was made in spite of an offer of proof in which Plaintiff's expert testified he considered reports of injuries that involved the Cottrell system and not just the idler to be reliable and as support for his opinions, and that they were substantially similar to Plaintiff's injury in that they showed injuries caused by the excessive forces required by the Cottrell system.

The trial court's proposed test for "substantial similarity" is overly restrictive.

Here, the defect was the chain and ratchet system, which caused excessive forces to be placed on users and components, causing users to be injured directly from the excessive force, and indirectly when the excessive forces caused component failure. The degree of similarity required to establish the defective condition of a product requires ascertainment of the defects in issue [here, the chain and the ratchet system as a whole] and the purpose of the evidence [to show the dangers of that system]. *Pierce v. Platte-Clay Electric Cooperative, Inc.*, 769 S.W.2d 769, 773-74 (Mo.banc 1989); *see also Vinyard v. Vinyard Funeral Home, Inc.*, 435 S.W.2d 392, 397 (Mo.App. 1968) (rejecting argument that to be admissible, it was necessary to show that all persons "slipped at precisely the same place on the ramp's surface.").

"Substantially similar" does not mean "identical," and the range between similar and identical is a matter to be addressed on cross-examination. *Mihailovich v. Laatsch*,

359 F.3d 892, 908 (7th Cir. 2004). "The particular defect or danger alleged by the plaintiff will serve to define the degree of commonality that there must be among the accidents in order for them to be considered substantially similar." *Id.*

Expert testimony can establish the requisite similarity foundation. *Torbit v. Ryder Sys., Inc.,* 416 F.3d 898, 903 (8th Cir. 2005). "Generally, the trial judge is expected to defer to the expert's assessment of what data is reasonably reliable." *Goddard v. State*, 144 S.W.3d 848, 854 (Mo. App. S.D. 2004).

This ruling was error because Plaintiff's Amended Petition clearly included allegations that the overall chain and ratchet system was defective, not just the idlers. Appendix A10, 12-13, LF35, 37-38. This ruling was error because the case was submitted on instructions pertaining to defects with the overall chain and ratchet system, not just the idlers. *See* Statement of Facts, *supra*. This ruling was also error in that the instructions that were submitted on the three separate theories of liability, and even the negligence instruction submitted by Cottrell, asked the jury to evaluate the overall chain and ratchet system, and not just the idlers. If the evidence was admissible on any theory (strict liability product defect, negligence, strict liability failure to warn), it should have been admitted, as these theories are distinct under Missouri law. *See Hopfer v. Neenah Foundry Company*, 477 S.W.3d 116, 128 (Mo.App. E.D. 2015), quoting *Aronson's Men's Stores, Inc. v. Potter Elec. Signal Co.*, 632 S.W.2d 472, 474 (Mo. banc 1982) ("Missouri courts have continually held that '[n]egligence and strict liability cases, though viewed similarly in some jurisdictions, are distinguished in our state.' "); *id.* at 129 ("pronounced distinction" between the claims in Missouri); *id.* at 130 (noting Missouri differs from

other jurisdictions in maintaining the distinction); *Blevins v. Cushman Motors*, 551 S.W.2d 602, 608 (Mo. banc 1977) ("… in strict liability we are talking about the condition (dangerousness) of an article …, while in negligence we are talking about the reasonableness of the manufacturer's actions …"); *Elmore v. Owens–Illinois, Inc.*, 673 S.W.2d 434, 438 (Mo. banc 1984), *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 96-97, 107 (Mo.App.W.D.2006), *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 375, 382-83 (Mo. banc 1986). In *Moore,* this Court reversed a directed verdict on failure to warn claims sounding in negligence and strict liability, even though the jury found for the manufacturer on strict liability product defect, because these were "distinct theories aimed at protecting consumers from dangers that arise in different ways." *Moore*, 332 S.W.3d at 757, 764-65. *See also Sapp v. Morrison Brothers Co*., 295 S.W.3d 470, 484 (Mo.App. W.D. 2009) (discussing failure to warn claims, noting, "Missouri courts have emphasized the distinctions between negligence and strict liability products liability claims."); *Thompson*, 207 S.W.3d at 107 (failure to warn claims in Missouri can be based on strict liability or negligence); *Spuhl v. Shiley, Inc*., 795 S.W.2d 573, 577-78 (Mo. App. E.D. 1990) (same).

The reports were excluded even though much of the trial was spent discussing the merits of the overall chain and ratchet system.

The evidence was also admissible to show Cottrell knew of dangers with its product, yet failed to share that information with purchasers of its product. A manufacturer has a duty to warn remote users of its products, a duty that, ***at a minimum***, requires a manufacturer to warn employers or other purchasers. *See Morris v. Shell Oil*

Co., 467 S.W.2d 39, 42 (Mo. banc 1971) ("The product was sold by Shell in carload lots. It was Shell's duty to warn Independent of the dangers involved, with the intention that such warning be given the ultimate consumer."); *Hunt v. Laclede Gas Company*, 406 S.W.2d 33, 38 (Mo.1966) (manufacturer only required to warn employer); *Budding v. Garland Floor Co.*, Inc., 939 S.W.2d 419, 425 (Mo. App. 1996) (manufacturer fulfilled duty to warn by providing warnings to employer); *Rinker*, 567 S.W.2d at 660 (affirming negligence verdict where evidence suggested manufacturer "failed to warn its dealers or its customers of such dangerous condition."); *Donahue v. Phillips Petroleum Co.*, 866 F.2d 1008, 1012 (8th Cir. 1989) (under Missouri law, " even a bulk supplier must provide adequate instructions to the distributor next in line … so that the ultimate consumer is apprised of the dangerous propensity of the product."); *Griggs v. Firestone Tire & Rubber Co.*, 513 F.2d 851, 860 (8th Cir. 1975) (Missouri law recognizes a "variable duty to warn" such that warning to immediate distributors may or may not be sufficient).

The injury reports were further admissible in showing Cottrell breached its duty to review, study and analyze information regarding its product. *See Braun v. Roux Distrib. Co.,* 312 S.W.2d 758, 763 (Mo. 1958)*; La Plant v. E. I. Du Pont De Nemours & Co.*, 346 S.W.2d 231, 240 (Mo. App. 1961); *Garnes v. Gulf & Western Mfg. Co.*, 789 F.2d 637, 640 (8th Cir. 1986); *Ross v. Philip Morris & Co.,* 328 F.2d 3, 13–14 n. 13 (8th Cir.1964); *Moore*, 332 S.W.3d at 761 n.7.

The ruling, by its blanket nature, was an error of law. In *Stokes*, the court held it was reversible error for the trial court to make a blanket ruling excluding evidence of other accidents caused by different product models. It held, "The circuit court abused its

discretion by applying the wrong standard of law." 168 S.W.3d at 484. It noted, "Evidence of accidents similar to that suffered by the plaintiff generally is admissible in negligence and products liability actions. The key element is the similarity of the incidents." *Id.* at 484. "To be sufficiently similar, the accidents must be (1) of like character, (2) occur under substantially the same circumstances, and (3) result from the same cause." *Id.* The court held the ruling hinged on an improper legal determination. "Rather than focusing on the similarity of the previous incidents, the circuit court imposed a ruling that it referred to as the 'single product rule' and restricted evidence of previous incidents to those involving Kitchen Kettle units." *Id.* "The circuit court did not disclose the source for the single product rule, and we have not been able to find any courts or experts enunciating such a rule. If indeed the prior incidents were similar to the one leading to Stokes' injuries, the circuit court should have been permitted Stokes to present evidence of them." It reversed, stating, "On retrial, the circuit court must determine whether or not the other pullover incidents involving Presto's other deep fryers were substantially similar to Stokes' accident." *Id.* at 485. "If the circuit court determines that the accidents were indeed substantially similar, the circuit court shall allow Stokes to introduce relevant evidence to substantiate the occurrence of the injuries in those substantially similar accidents." *Id.* *See also Gerow v. Mitch Crawford Holiday Motors*, 987 S.W.2d 359, 365 (Mo. App. 1999) (error to exclude accidents simply because they did not involve Chrysler vehicles).

Cottrell was allowed to introduce evidence, over Plaintiff's objection, that its design was "state of the art" and complied with industry standards. Transcript 1078, 2137, 2140-

2141. Plaintiff's evidence should therefore have been allowed to show accidents caused by any manufacturer using this design. *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 152 (Mo.banc 1998) ("The point of this evidence was to show that Ford's seat was just as safe as those of other manufacturers. The trial court did not abuse its discretion by allowing the other parties in the litigation to turn the argument around in rebuttal by attempting to show that other production seats were just as dangerous as they claimed Ford's were."); *Roth v. Black & Decker, U.S., Inc.*, 737 F.2d 779, 781, 783 (8th Cir. 1984) (affirming admission of reports regarding accident patterns, even though reports did not name manufacturer).

Cottrell's expert testified the chain and ratchet system was reasonably safe. Transcript 1825-1895. Even dissimilar accidents are relevant to impeach such testimony. *Hale v. Firestone Tire & Rubber Co.,* 820 F.2d 928, 934-35 (8th Cir. 1987); *Air Evac EMS, Inc. v. Aeronautical Accessories, Inc.*, 124 F.3d 207, 1997 WL 545304, *2 (8th Cir. 1997) (evidence of other failures admissible to rebut defense expert's testimony).

. Evidence of similar injuries is admissible to show actual or constructive notice or to establish the defective nature of the product; arguments as to dissimilarity go to weight, not admissibility. *Stacy v. Truman Medical Center*, 836 S.W.2d 911, 926-27 (Mo.banc 1992). The degree of similarity required is less when the prior accidents are offered to show actual or constructive notice:

> Where the theory of recovery is negligence, **any knowledge or warning that defendant had** of the type of accident in which plaintiff was injured **clearly aids the jury in determining whether a reasonably careful defendant would have**

taken further precautions under all the facts and circumstances, which include the knowledge of defendant of prior accidents. **Moreover, the degree of similarity required for evidence that constitutes notice to defendant of prior similar accidents is less demanding than the similarity required for a series of prior accidents offered to show that the same accident occurred on the occasion in issue.**

> The proponent probably will want to show directly that the defendant had knowledge of the prior accidents, but **the nature, frequency or notoriety of the incidents may well reveal that defendant knew of them or should have discovered the danger by due inspection. Since all that is required is that the previous injury or injuries be such as to call defendant's attention to the dangerous situation that resulted in the litigated accident, the similarity in the circumstances of the accidents can be considerably less than that which is demanded when the same evidence is used for one of the other valid purposes.**

Id. at 926, quoting *McCormick on Evidence,* § 200 at 848 (4th ed. 1992) (emphasis added).

See also Alcorn v. Union Pacific R.R. Co., 50 S.W.3d 226, 244 (Mo. banc 2001) ("Previous incidents need only be such as to call defendants' attention to the dangerous situation."); *Emery v. Wal-Mart Stores, Inc.*, 976 S.W.2d 439, 446 (Mo. banc 1998) (evidence of prior spills admissible to show notice, despite defendant's argument as to lack of substantial similarity; "The degree of similarity required for evidence being used

to show defendant's notice of prior similar incidents is less demanding than the degree of similarity required for a series of prior incidents being used to show the same incident occurred on the date at issue.") *Benoit v. Missouri Highway and Transp. Com'n*, 33 S.W.3d 663, 670-71 (Mo. App. 2000) (where evidence of prior accidents was offered to show notice, dissimilarities did not preclude admissibility; it was sufficient that previous incidents should have called defendant's attention to the dangerous situation). There is clearly sufficient similarity to create notice to Cottrell.

Any argument Cottrell may raise that certain injuries occurred too close before Plaintiff's injury to allow it to act goes to weight, not admissibility.

> We reject TMC's contention that this notice was meaningless and therefore inadmissible because no public hospital could, within the twelve day period between the two fires, have designed and installed a smoke detector system. **TMC's contention goes to the weight and not to the admissibility of this evidence.** The issue of what precautions, if any, TMC could have taken in the twelve days was for the jury.

Stacy, 836 S.W.2d at 926-27 (emphasis added).

Furthermore, any claim that previous injuries were "too remote in time" does not defeat admissibility. "A prior accident that meets the requirements of similarity, even though remote, may be highly material. Remoteness of time goes to the weight of the evidence in most circumstances, not to its admissibility." *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 160 (Mo. banc 2000).

This evidence was also relevant and admissible to support punitive damages. *Grothe*

v. St. Louis-San Francisco Ry. Co., 460 S.W.2d 711, 717 (Mo. 1970).

This kind of evidence has previously been deemed admissible. *See Torbit v. Ryder Sys., Inc.,* 416 F.3d 898, 903 (8th Cir. 2005) (charts summarizing more than 4,500 injuries caused by chain and ratchet system were admissible, based on expert's testimony); *Brdar v. Cottrell*, 867 N.E.2d 1085, 1097-98 (Ill. App. 2007) (18 reports describing injuries to drivers from using chain-and-ratchet system on rigs made by various manufacturers were admissible "for the nonhearssay purpose of showing that Cottrell had notice of the flaws in its chain-and-ratchet system. … "Cottrell's knowledge of the potential danger posed by the chain-and-ratchet system was relevant both to the punitive damages claim and to the Brdars' allegations that Cottrell was negligent.").

In *Torbit*, the Eighth Circuit rejected the argument that charts summarizing more than 4,500 injuries lacked sufficient similarity to injury at issue to be admissible: "In view of the expert's clear testimony, we credit the jury with the ability to distinguish between the tying/untying injuries and the other types of injuries listed on the charts." 416 F.3d at 903. *See also Ford v. GACS, Inc.*, 265 F.3d 670, 677 (8th Cir. 2001) (affirming jury verdict, where "There was also evidence that injuries from the force required to tie and untie vehicles were a concern in the industry and that the quick release ratchet would eliminate the high force levels needed to untie a vehicle, the same activity Ford was performing when he was injured."); *Pritchett v. Cottrell, Inc.*, 512 F.3d 1057, 1066 (8th Cir. 2008) (reversing summary judgment where plaintiffs, as in *Ford*, "offered evidence that the manufacturer was aware of the alternative design of a quick-release mechanism; that injuries from the force required to operate the manual system were a

concern in the industry; and that the quick-release mechanism would eliminate the high force levels in the untying process.").

In *Torbit*, the Eighth Circuit noted, "Evidence of other injuries or accidents attributable to an allegedly defective product must be substantially similar to the injury or accident in the case at bar in order to be admitted in a product-liability case." 416 F.3d at 903. However, the Eighth Circuit defined "substantially similar" much differently than Cottrell does. In *Torbit*, the plaintiff's expert "testified about injuries to drivers using a ratchet system similar to the ratchet system Torbit used." *Id.* at 902. "Over GACS's continuing objection, the expert offered two charts that not only summarized injuries from tying and untying the ratchet system but also summarized completely unrelated injuries such as slipping and falling on ice, foreign bodies in the driver's eye, etc. The expert used these charts in explaining her opinion that the GACS ratchet system was defective." *Id.* On appeal of a plaintiff's verdict, the defendant argued "there was no showing that those driver injuries were substantially similar to Torbit's injuries." *Id.* at 903. The Eighth Circuit rejected this argument, stating, "We hold that the District Court did not commit a clear and prejudicial abuse of its discretion when it allowed Torbit's expert to use the charts. *Id.* It noted, "The expert stated that 'a large percentage of the [total] injuries incurred by drivers were incurred during the tying and untying process.'" *Id.* The Eighth Circuit added, "She testified that the ratchet systems involved in the tying/untying injuries summarized by the charts were "substantially similar" to the GACS ratchet system Torbit was using when he suffered his injuries." *Id.* It noted, "She also testified that from the injury records she was able to 'call out those [injuries] that relate to

exerting force on a tiedown bar on a manual ratchet system." *Id.* "The charts summarized 3,459 injuries from tying/untying the ratchet systems between 1987 and 1995, and they summarized 1,184 injuries in 1990 from tightening or loosening chains. These injuries, respectively, amounted to 29% and 49.89% of the total injuries reported." *Id.* "When the charts were shown to the jury, the expert pointed out that the 'top category is really the only one that's relevant to this case. Everything below the top line has to do with something other than tying and untying injuries.'" *Id.* The Eighth Circuit concluded, "In view of the expert's clear testimony, we credit the jury with the ability to distinguish between the tying/untying injuries and the other types of injuries listed on the charts." *Id.*

Torbit shows it is enough if the injured drivers were using a ***system*** similar to the system Plaintiff used. There is no suggestion the other drivers in *Torbit* were using the same rig as Torbit, the same model of rig as the rig used by Torbit, or even rigs made by the same manufacturer of the rig used by Torbit. Pursuant to *Torbit*, it is sufficient if the other drivers were injured on car-hauling rigs that lacked the alternative securement methods advocated by Plaintiff's expert. *Torbit* further indicates it is enough if the drivers suffered the same type of injury. In *Torbit*, it was enough that the other drivers were injured during the tying down process. In fact, the primary rationale for affirming the admission of the charts was that the expert was distinguishing injuries that resulted from tying or untying vehicles from other kinds of injuries. 416 F.3d at 903. Here, it should be enough if the other drivers were injured while using the chain-and-ratchet system.

In *Ford*, the Eighth Circuit, in affirming a plaintiff's verdict, cited "evidence that injuries from the force required to tie and untie vehicles were a concern in the industry."

265 F.3d at 677. The Eighth Circuit did not require the plaintiff to show the injuries occurred on the same rig, the same model of rig, or on rigs made by the same manufacturer. It was enough to show that injuries "were a concern in the industry." In *Pritchett*, it was sufficient that the plaintiffs offered evidence "that injuries from the force required to operate the manual system were a concern in the industry." 512 F.3d at 1066. Pursuant to *Ford* and *Pritchett*, Plaintiff's evidence is admissible because it shows injuries from falls have been "a concern in the industry" for decades.

In *Brdar*, the court affirmed the admission of 18 reports describing injuries to drivers from using a specific chain-and-ratchet system on the rigs ***against Cottrell***, even though many of those reports pertained to injuries on rigs made by manufacturers other than Cottrell. 867 N.E.2d at 1097-98. Notably, many of the 18 reports deemed admissible in *Brdar* were cited by Plaintiff's expert in this case. As *Brdar* shows, it is sufficient to show Cottrell knew or could have known of flaws with the way it designed its rigs, even if that information is contained in reports showing how rigs made by other manufacturers that used a similar design (here, the chain and ratchet system) were causing injuries to drivers.

In *Gerow v. Mitch Crawford Holiday Motors*, 987 S.W.2d 359 (Mo. App. 1999), the court held evidence of prior accidents involving cars made by other manufacturers was admissible, where the defendant claimed the particular accident was rare and unforeseeable. "The evidence clearly demonstrates that other accidents have occurred in the same manner, and tends to prove that the accident was foreseeable and could be reasonably anticipated. It is relevant for the purpose of refuting a material part of

Chrysler's defense. The fact that the incident did not involve a Chrysler vehicle does not diminish its relevance." *Id.* at 365. *See also Roth v. Black & Decker, U.S., Inc.*, 737 F.2d 779, 781, 783 (1984) (affirming admission of Consumer Products Safety Commission reports regarding accident patterns known to exist with power saws, even though reports did not name manufacturer).

The trial court, in excluding an entire category of evidence based on an improper legal standard, abused its discretion. Further, Plaintiff's offer of proof was more than sufficient. *See Wilkerson v. Prelutsky,* 943 S.W.2d 643, 647 (Mo. banc 1997) (offer of proof sufficient, where doctor testified regarding the excluded evidence during the offer; "The trial court was given a sufficient opportunity to reconsider its ruling on the motion in limine and the plaintiff's offer of proof established an adequate record for appellate review. Thus, plaintiff adequately preserved the error below for review."); *Brown v. Hamid*, 856 S.W.2d 51, 55 (Mo. banc 1993) (offer of proof sufficient; "The trial court and opposing counsel clearly understood the evidence offered and its relevancy and materiality, resulting in an adequate record for appellate review."); *State v. Hefflinger*, 101 S.W.3d 296, 299 (Mo. App. 2003) (offer of proof sufficient).

Here, the trial court applied the wrong legal standard and excluded hundreds of injury reports, rather than setting valid guidelines as to what would and would not be considered substantially similar. This ruling clearly prejudiced the jury's allocation of fault on the strict liability product defect claim, and thus Plaintiff's ability to recover on that claim against Cottrell, as well as his punitive damages claim against Cottrell. Plaintiff therefore requests a new trial of his strict liability product defect and his punitive

damages claims against Cottrell. Plaintiff is not and has never requested a new trial of his strict liability failure to warn claim, as Plaintiff is satisfied with the verdict reached on that theory.

The trial court excluded entire boxes worth of incidents based on an improper legal standard, rather than holding particular incidents were inadmissible. Transcript 734. Because the trial court applied the wrong legal standard to exclude an entire category of evidence, without making any particularized determinations, this Court should remand and instruct the trial court to evaluate the excluded evidence under the proper standard. *See Stokes*, 168 S.W.3d at 485 (adopting this approach). Plaintiff respectfully suggests this Court instruct the trial court that it cannot limit the admission of evidence of previous incidents to those involving failed idlers, but instead must admit evidence of any previous incident in which it is alleged a user was injured while securing (which is often referred to as tightening or "tying down") a vehicle following the failure of any component on a rig, a sudden release of tension, or due to the need to exercise an excessive amount of force, unless there is a particular aspect of the incident suggesting it was still not substantially similar.

Conclusion

For the foregoing reasons, Plaintiff respectfully asks this Court to reverse the judgment in favor of Auto Handling Corporation, and reverse and remand for a new trial limited to Plaintiff's negligence claims against Auto Handling Corporation, and to the strict liability and punitive damages claims against Cottrell, Inc., with instructions to the trial court that it cannot limit the admission of evidence of previous incidents to those

involving failed idlers, but instead must admit evidence of any previous incident in which it is alleged a user was injured while securing (which is often referred to as tightening or "tying down") a vehicle following the failure of any component on a rig, a sudden release of tension, or due to the need to exercise an excessive amount of force, unless there is a particular aspect of the incident suggesting it was still not substantially similar. As stated in his briefing below, Plaintiff requests that the Court affirm the judgment and the findings of fault against Cottrell as to Plaintiff's claims for negligence and strict liability failure to warn. In the alternative, Plaintiff requests that the Court enter judgment in accordance with the jury's verdict on the strict liability failure to warn claim as of the date of the original judgment.

Respectfully submitted,

ARMBRUSTER, DRIPPS,
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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 17,327 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/ Michael T. Blotevogel

Certificate of Service

I hereby certify that a copy of the foregoing brief was submitted through the Court's electronic filing system on September 16, 2016, which will send a copy of the foregoing to all counsel of record.

/s/ Michael Blotevogel